

INTRODUCTION TO U VISAS - By Zulma Lopez

Congress created the U nonimmigrant visa by enacting the Victims of Trafficking and Violence Protection Act in 2000. This legislation intended to enhance the ability of law enforcement officers to investigate and prosecute certain crimes including domestic violence, sexual assault, and trafficking when the victim was a foreign national. By providing the opportunity to file for immigration protection to the victim, it encourages victims to come forward and assist law enforcement without fear of not having permanent legal status in the United States. The nature of this symbiotic relationship makes the U Visa an interesting immigration remedy because the potential U Visa applicant is required to obtain a certification signed by the appropriate law enforcement officer attesting that the victim cooperated with the criminal investigation.

The Immigration and Nationality Act provides the framework for the filing and adjudication of U-visas. In general, U visas are available to an alien who:

- (1) has suffered substantial physical or mental abuse, as a result of having been the victim of certain criminal activity;
- (2) possesses information concerning such criminal activity;
- (3) has been helpful, is being helpful or it is likely to be helpful to an enforcement official investigating or prosecuting such criminal activity; and,
- (4) the criminal activity violated the laws of the United States or occurred in the United States.

INA §101 (a)(15)(U), 8 C.F.R. §214.14(b).

Furthermore, the INA specifies the qualifying criminal activity that could constitute the basis of a U-visa petition as one or more of the following or similar activity: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, stalking, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, fraud in foreign labor contracting, or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. INA §101 (a)(15)(U)(iii).

Who can sign the certification?

All applicants must include a Form I-918, Supplement B, “U Nonimmigrant Status Certification,” signed by the appropriate certifying official with their original U Visa filing. 8 C.F.R. §214.14 (c)(2)(i). This means that once it has been verified that a qualifying crime occurred, the next step is to identify who the certifying official is as it relates to the particular case. Thus, before even considering preparing a U Visa application, the victim needs to engage the corresponding official in reviewing and agreeing to sign this certification on his or her behalf.

The immigration regulations define the “certifying agency” as a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity, and the “certifying

official” as the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications of behalf of that agency or a Federal, State, or local judge. 8 C.F.R. §214.14 (a)(2), (a)(3)(i), and (a)(3)(ii).

Moreover, the certification must state that: (1) the person signing the certificate is the head of the certifying agency, or any person (s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency, or is a Federal, State, or local judge or other authority that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of a qualifying criminal activity; (2) the applicant has been a victim of qualifying criminal activity that the certifying official’s agency is investigating or prosecuting; (3) the petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; (4) the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity; and (5) the qualifying criminal activity violated the U.S. law, or occurred in the United States. 8 C.F.R. §214.14 (c)(2)(i).

The answer to ‘who’s the qualifying official’ is then a case by case query. It will depend primarily on where did the crime occur and who’s in charge of its investigation or prosecution. Typically the intervening agencies on the investigative side are police departments, sheriff’s offices, statewide and federal law enforcement agencies. Once an arrest has been made, the prosecutor’s office such as district attorney’s office, solicitor’s office, or statewide attorney general may be potential signers of Form I-918B. When a criminal case is in court and pending trial, the presiding judge is authorized to sign the certification. However, it is the office of the prosecutor who typically gets involved.

A law enforcement certification is discretionary in the sense that an agency cannot be compelled to grant a certificate. *Ordonez Orosco v. Napolitano*, 598 F. 3d 222, 225-27 (5th Cir. 2010). It is therefore crucial not only to identify who the qualifying official is but also whether they would be amenable to signing the certification. Some large metropolitan cities have established parameters of when they would sign the Form I-918B, and some even have a designated person assigned to review U visa certification requests. This makes it easier for the practitioner and applicant to understand the likeability of getting the certification signed. If the crime occurred in a rural area or in a county in which there are no such guidelines, obtaining a signed Form I-918B can become a lengthy and difficult process. The practitioner is then tasked with educating the certifying official about the meaning of a U visa certification. Some certifying officials have never heard of a U visa, and others may think that by signing the certification they are conferring an immigration benefit to the victim. It is therefore important to approach these officials with supporting legal materials that can provide context and a legal basis for the need of the certification. Once signed, Form I-918B has a validity of six months.

How do I prove substantial harm?

Once the form I-918B has been signed by the appropriate officer, the victim must gather the necessary evidence to prove substantial harm. Physical or mental abuse means injury or harm to

the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim. 8 C.F.R. §214.14 (a)(8); 72 FR at 53018. Evidence to prove abuse may include "reports and affidavits from police, judges, or other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel." "A combination of documents such as photograph of the visibly injured applicants supported by affidavits of individuals who have personal knowledge of the facts regarding the criminal activity may be relevant as well." Ombudsman, USCIS Teleconference, "U Visa: One Year After the Interim Final Rule, #9 (Aug. 26, 2008), published on AILA InfoNet at Doc. No. 08090567 (citing to 72 FR).

The victim must also include a signed statement describing the facts of the victimization. 8 C.F.R. §214.14(c)(2)(iii). This statement may also include a personal recollection of how the crime occurred and how it has impacted the victim's life. Affidavits from family, friend, and co-workers attesting to their knowledge of how the crime has affected the life of the victim may also be included to prove substantial harm.

How long does it take to get a U-visa?

There is a congressional mandated annual limit of 10,000 U visas per year. 8 C.F.R. §214.14 (d)(1). Derivative family members such as spouses, children, or parents are not subject to the cap. The United States Citizenship and Immigration Services (USCIS), a component of the U.S. Department of Homeland Security, has exclusive jurisdiction to receive, adjudicate, and implement regulation regarding U Visas. 8 C.F.R. § 214.14 (c)(1). Due to the significant increase in the U visa applications that have been filed in recent years, there is considerable backlog in the review and adjudication of U visa pending petitions. *See* USCIS Report, Data Set I-918 Application for U Nonimmigrant Status, available at <http://www.uscis.gov>. Not long ago the USCIS Vermont Service Center (VSC) was the only administrative center receiving and adjudicating U visas petitions. Since Fiscal Year 2017, the VSC started transferring some of the pending U visas applications to the Nebraska Service Center in the hopes of shortening the reviewing waiting time. However, according to current USCIS processing times, both centers are now reviewing applications that were filed in August 2014. This translates to an almost three year wait for review for an application that is filed today. Now once reviewed, if the application is recommended for approval, the applicant would still have to wait for a visa number to be available as per the numeric annual limitation.

The time from filing the U visa application to when it is reviewed confers no immigration benefit to the applicant. Therefore, an applicant that is out of status has no right to work authorization or driver's license while his U visa is pending review. Moreover, he or she could even be the subject of deportation proceedings. To alleviate this extraordinary wait, eligible petitioners are added to a waiting list when their cases have been reviewed and recommended for approval but for the annual cap a visa cannot be issued. 8 C.F.R. §214.14(d)(2). Applicants that are added to this waiting list are eligible for deferred action according to 8 C.F.R. §274a.12(c)(14). Having deferred action while continuing to wait for a U visa is beneficial because it allows the petitioner to obtain work authorization and a driver's license while the U visa is granted and issued.