National Family Justice Center Alliance
Webinar Training
CEU Accreditation
Provider # PCE 5095
MCLE Accreditation
Provider # 15493

**Webinar Course Description**

**Title:** U-Visa Discoverability, What to Do?

This webinar will start with a brief discussion by law enforcement of how it uses the U visa to work with immigrant communities and an update on the "conditional grant" period for U visas now that the 10,000 cap has been met. We will then delve into an interactive conversation among law enforcement, the judiciary and defense counsel about how to address due process concerns raised by defense in criminal proceedings while preserving survivor privilege, confidentiality and confidence in the criminal system.

This session is approved for 1 Minimum Continuing Legal Education (MCLE) credit. The Family Justice Center Alliance is a California approved provider of MCLE for attorneys (Provider #15493). Professionals in states outside of California should check with their own state bar to determine whether these credits are approved in their jurisdiction. Information on how to obtain credit will be provided during the webinar and within the course materials.

**Presenters:**
**Susan Breall**, JD, Judge, Superior Court for the City and County of San Francisco
**Wanda Lucibello**, JD, Chief, Special Victims Division
**Mike Agnew**, Ret Det, Fresno Police Department
**Jonathan Moore**, Immigrant Specialist, Washington Defender Association’s Immigration Project
**Gail Pendleton**, JD, Co-Director, ASISTA Immigration Assistance.
Moderator: **Casey Gwinn**, JD, President , National Family Justice Center Alliance

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  - Type your comments & send to presenter
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# Your host today:

Casey Gwinn, JD
President, Family Justice Center Alliance

# Family Justice Center Alliance

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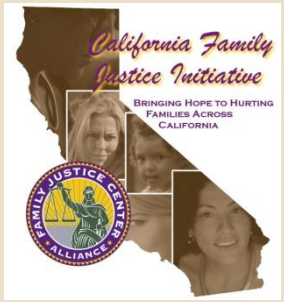


# Thank You to Our Sponsor

## Thank you to the US Department of Justice, Office on Violence Against Women for making this training possible!

This project is supported all or in part by Grant No. 2012-TA-AX-K017 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

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- Professionals in states outside of California should check with their own state bar to determine whether these credits are approved in their jurisdiction.
- A checklist detailing how to obtain the credit will be included in the course materials and available for download.
- The checklist will also be emailed after the webinar training.

# Today's Presenters:

- **Susan Breall**, JD, Judge, Superior Court for the City and County of San Francisco
- **Wanda Lucibello**, JD, Chief, Special Victims Division
- **Mike Agnew**, Ret. Detective, Fresno Police Department
- **Jonathan Moore**, Board of Immigration Appeals Accredited Representative, Immigrant Specialist, Washington Defender Association's Immigration Project
- **Gail Pendleton**, JD, Co-Director, ASISTA Immigration Assistance.

# U Visa Discoverability: What to Do?

# U Visa Eligibility Requirements

- Victim of a Qualifying Crime (next slide)
- Helpful in Investigation or Prosecution
- Substantial Harm from crime
- “Admissible” or can public interest in waiving “inadmissibility”

# U Visa Crimes

- Rape
- Torture
- Trafficking
- Incest
- Domestic violence
- Sexual assault
- Abusive sexual contact
- Prostitution
- Sexual exploitation
- 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

or attempt, conspiracy, or solicitation, to commit any of the above mentioned crimes

# POLL QUESTIONS

# What about the cap? Are they still granting?

- “Conditional grants” =
- “Deferred Action” and work authorization
- New 10,000 available in October, 2014
- Make sure they don’t get into trouble before then!

# Reasons for Law Enforcement Role in signing a U Visa

- Allows victims of crime to feel safe reporting to LE without fear of their legal status
- Identifies crimes and criminals within our community which would go undetected if not reported
- Builds trust between the community and LE
- May play a role in getting the victim connected with the prosecutors office and services
- May allow a victim to escape an abusive relationship

# Majority of U Visa Requests not pending in court

- If case is pending in Criminal Court prosecutor should be notified of a U Visa request.
- Occasionally the prosecutor cannot locate the victim and this would be an opportunity to ask the applicant to contact the prosecutors office.
- Threats by the perpetrator of deportation or taking the children are common tactics used by batterers.
- Documenting history of DV can assist in refuting the claim that the new case is made up to obtain a U Visa. (see Chronology)

# Chronology:

- 05/23/11 Misdemeanor DV Assault -During an argument the suspect grabbed the victim's hair and slapped her in the face with no visible injury. He pulled her out of the bedroom and threw her outside. Suspect fled and was served the DV RO 2 days later. Misdemeanor case suspended by detective.
- 12/02/11 Felony DV Assault- Victim and suspect back together. During an argument the victim tries to stop the suspect from throwing her clothing around and he throws her down holding his arm across her throat. Suspect then slapped her causing injuries. The victim tried to call 911 but the suspect stopped her. The suspect fled. Felony Warrant issued.
- 11/27/12 Misdemeanor DV Assault- Victim and suspect back together while suspect has a felony arrest warrant. During an argument the suspect grabbed the victim by the throat. Suspect let go and punched her in the leg with no injury. Suspect arrested. U visa requested.

# What Law Enforcement is certifying

- Must be the victim of “qualifying criminal activity.”
- “is being, has been, or is likely to be helpful” to
- Investigation OR prosecution
- What would you say about case just described?

# What Law Enforcement is NOT certifying

- That person will get immigration status
  - CIS decides this because there are other eligibility requirements that are NOT certified by LE
  - “Substantial harm” unless you want to provide some information
  - Whether “inadmissible” (often crimes or immigration violations) and
  - Whether merits a waiver of those inadmissibility problems

# Law Enforcement signing a I-918B application

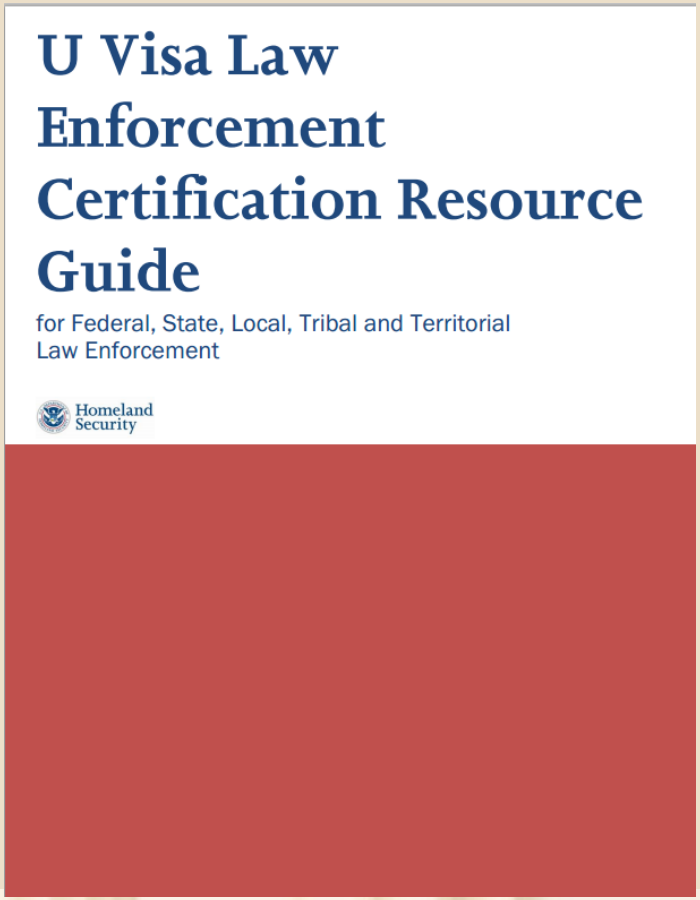
- Research the victim and suspect's history within your systems to include:
  - Prior and subsequent cases
  - Police calls to their address with no reports
  - Suspects criminal history may show prior cases against other victims

# "The LE certification also acts as a check against fraud and abuse" *Homeland Security LE Guide*

- Signing agency must have jurisdiction over the case
- No requirement to sign the I-918B form
- Designated by head of the agency with a letter
- Sign in blue ink
- Keep a computer file of cases signed and denied
- Signature good for only 6 months
- Applicants working on their own should be referred for help
- No statute of limitations; no prosecution needed; closed cases OK

# How is the DHS Guide useful for LE?

- http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf




***All resources mentioned in this presentation will be provided in the Course Materials file and will be available for download 48 hours after this presentation.*

# For criminal cases in court:

- How has the U visa useful in your work?
- How have you changed your practice over the years, what have you learned about filling out the form?

# Visas in Criminal Court: Discoverable?

- Why is this an issue?
  - Credibility of Victim/Witness
  - Discrepancies between immigration case and criminal case

- How does defense raise this?

# POLL QUESTIONS

# What are concerns for District Attorneys and survivors?

- What strategies have you tried for avoiding problems with Brady, or to deal with Brady issues?
- Relevance v. “prejudice” or harm to victim
  - Is it relevant?
  - Is ALL of it relevant?
  - What is prejudicial or harmful
  - How do you argue this?

- How to allay fears of survivors?

# Judicial perspective?

- Suggestions for parties involved = defense, DAs, police, advocates?

- What strategies have you used as a judge to balance the interests?

# Suggestions for police?

- Anything they can do to help avoid some of these problems?

# POLL QUESTIONS

# Immigration Status in Court

- What other issues, if any, have you seen come up with immigrant survivors in court and what strategies have you developed for handling them?

- Voir Dire?  Other strategies?

# Systems Strategies?

- Training?
- Protocols?
- Other suggestions?

# What strategies have you used?

- Emerging area, please share what works and doesn't work

- Arises in other contexts as well, such as civil court and workplace investigations

# Resources for you:

- All materials presented will be available for download 48 hours after this presentation. You will receive an email with instructions on download.
- Questionnaires for judges, DAs, police and advocates
- Technical assistance on your immigration cases on how to respond to requests for them in court
- questions@asistahelp.org
  - (free for all OVW and STOP grantees)
- Join free listserves = VAWA Updates & VAWA Experts

# Questions?

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# Thank You

Thank you for joining today's presentation

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# U Visa Law Enforcement Certification Resource Guide

for Federal, State, Local, Tribal and Territorial Law Enforcement

# U Visa Resource Guide

**Table of Contents**



# Introduction

The Department of Homeland Security (DHS) provides this guidance to federal, state, local, tribal and territorial law enforcement officers. This public guidance primarily concerns law enforcement certifications for U nonimmigrant status, also known as U visas. The U visa is an immigration benefit that can be sought by victims of certain crimes who are currently assisting or have previously assisted law enforcement in the investigation or prosecution of a crime, or who are likely to be helpful in the investigation or prosecution of criminal activity. The law enforcement certification USCIS Form I-918, Supplement B, U Nonimmigrant Status Certification (Form I-918B) is a required element for U visa eligibility. Included in this resource is information about U visa requirements, the certification process, best practices, frequently asked questions from law enforcement agencies, and contact information for DHS personnel on U visa issues.

# U Visa Basics

The Victims of Trafficking and Violence Prevention Act (VTVPA) of 2000[1], passed with bipartisan support in Congress, encourages victims to report crimes and contribute to investigations and prosecutions regardless of immigration status, and supports law enforcement efforts to investigate and prosecute crimes committed against immigrant victims.

The U visa is an immigration benefit that can be sought by victims of certain crimes who are currently assisting or have previously assisted law enforcement in the investigation or prosecution of a crime, or

[1] (VTVPA), Pub. L. No. 106-386, 114 Stat. 1464-1548 (2000).

who are likely to be helpful in the investigation or prosecution of criminal activity. The U visa provides eligible victims with nonimmigrant status in order to temporarily remain in the United States (U.S.) while assisting law enforcement. If certain conditions are met, an individual with U nonimmigrant status may adjust to lawful permanent resident status. Congress capped the number of available U visas to 10,000 per fiscal year.

Immigrants, especially women and children, can be particularly vulnerable to crimes like human trafficking, domestic violence, sexual assault, and other abuse due to a variety of factors. These include, but are not limited to, language barriers, separation from family and friends, lack of understanding of U.S. laws, fear of deportation, and cultural differences. Congress recognized that victims who do not have legal status may be reluctant to help in the investigation or prosecution of criminal activity for fear of removal from the United States. The VTVPA was enacted to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of persons and other crimes while offering protection to victims of such crimes without the immediate risk of being removed from the country. Congress also sought to encourage law enforcement officials to serve immigrant crime victims.[2]

If an individual believes he or she may qualify for a U visa, then that individual or his or her representative will complete the USCIS Form I-918, Petition for U Nonimmigrant Status (Form I-918), and submit it to U.S. Citizenship and Immigration Services (USCIS) with all relevant documentation, including Form I-918B, the U visa law enforcement certification. Given the complexity of U visa petitions, petitioners often work with a legal representative or victim advocate.

**What Is a U Visa Certification and Which Agencies Can Certify?**

USCIS Form I-918, Supplement B is the U visa certification document that a law enforcement agency can complete for a victim who is petitioning USCIS for a U visa. USCIS is the federal component of DHS with the responsibility to determine whether immigration benefits and immigration status should be granted or denied. Form I-918B is a required piece of evidence to confirm to USCIS that a qualifying crime has occurred and that the victim was helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of criminal activity.

Form I-918B and its instructions are available on the USCIS website at www.uscis.gov with the Form I-918 for the U visa. In order to be eligible for a U visa, the victim must submit a law enforcement certification completed by a certifying agency. Certifying agencies include all authorities responsible for the investigation, prosecution, conviction or sentencing of the qualifying criminal activity, including but not limited to:

- Federal, State and Local law enforcement agencies;
- Federal, State and Local prosecutors' offices;

[2] VTVPA, Pub.L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464, 1533-34 (2000). *See also* New Classification for Victims of Criminal Activity; Eligibility for ''U'' Nonimmigrant Status, 72 Fed. Reg. 53014 (Sept. 17, 2007) (amending 8 C.F.R. §§ 103, 212, 214, 248, 274a and 299).

- Federal, State and Local Judges;
- Federal, State, and Local Family Protective Services;
- Equal Employment Opportunity Commission;
- Federal and State Departments of Labor; and
- Other investigative agencies.

The law enforcement certification, Form-918B, is a required piece of evidence to confirm that a qualifying crime has occurred and that that the victim was helpful, is being helpful, or is likely to be helpful in the detection, investigation or prosecution of criminal activity. Although a law enforcement certification is a required part of a victim's petition for a U visa, law enforcement officers cannot be compelled to complete a certification. Whether a certifying law enforcement agency signs a certification is at the discretion of that law enforcement agency and the policies and procedures it has established regarding U visa certifications. The law enforcement certification validates the role the victim had, has, or will have in being helpful to the investigation or prosecution of the case; therefore, it is important that the law enforcement agency complete certifications on a case-by-case basis. Without a completed U visa certification, the victim will not be eligible for a U visa.

**What Constitutes a Qualifying Crime?**

| | | |
|---|---|---|
| • Abduction<br>• Abusive Sexual Contact<br>• Blackmail<br>• Domestic Violence<br>• Extortion<br>• False Imprisonment<br>• Felonious Assault<br>• Female Genital Mutilation<br>• Felonious Assault<br>• Being Held Hostage | • Incest<br>• Involuntary Servitude<br>• Kidnapping<br>• Manslaughter<br>• Murder<br>• Obstruction of Justice<br>• Peonage<br>• Perjury<br>• Prostitution<br>• Rape | • Sexual Assault<br>• Sexual Exploitation<br>• Slave Trade<br>• Torture<br>• Trafficking<br>• Witness Tampering<br>• Unlawful Criminal Restraint<br>• Other Related Crimes*†<br>*****Includes any similar activity where the elements of the crime are substantially similar.<br>†Also includes attempt, conspiracy, or solicitation to commit any of the above, and other related, crimes. |

**What Does "Helpful" In the Investigation or Prosecution Mean?**

Helpfulness means the victim was, is, or is likely to be assisting law enforcement in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim. This includes being helpful and providing assistance when reasonably requested. This also includes an ongoing responsibility on the part of the victim to be helpful. Those who unreasonably refuse to assist after

reporting a crime will not be eligible for a U visa. The duty to remain helpful to law enforcement remains even after a U visa is granted, and those victims who unreasonably refuse to provide assistance after the U visa has been granted may have the visa revoked by USCIS. Law enforcement agencies should contact and inform USCIS of the victim's unreasonable refusal to provide assistance in the investigation or prosecution should this occur.

A current investigation, the filing of charges, a prosecution or conviction are not required to sign the law enforcement certification. Many instances may occur where the victim has reported a crime, but an arrest or prosecution cannot take place due to evidentiary or other circumstances. Examples of this include, but are not limited to, when the perpetrator has fled or is otherwise no longer in the jurisdiction, the perpetrator cannot be identified, or the perpetrator has been deported by federal law enforcement officials. There is no statute of limitations on signing the law enforcement certification. A law enforcement certification can even be submitted for a victim in a closed case.

### USCIS Review of U Visa Law Enforcement Certifications

USCIS is the federal component of DHS responsible for approving and denying immigration benefits and status, including the U visa. Federal, State and local law enforcement agencies **do not** grant or guarantee a U visa or any other immigration status by signing a U visa certification (Form I-918B). Only USCIS may grant or deny a U visa after a full review of the petition to determine whether all the eligibility requirements have been met and a thorough background investigation. An individual may be eligible for a U visa if:

- He/she is the victim of qualifying criminal activity.
- He/she has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity.
- He/she has information about the criminal activity. If under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may possess the information about the crime on the individual's behalf.
- He/she was helpful, is being helpful, or is likely to be helpful to law enforcement in the investigation or prosecution of the crime. If under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may assist law enforcement on behalf of the individual.
- The crime occurred in the United States or violated U.S. laws
- He/she is admissible to the United States. If not admissible, an individual may apply for a waiver on a Form I-192, Application for Advance Permission to Enter as a Non-Immigrant.

By signing a law enforcement certification, the law enforcement agency is stating that a qualifying criminal activity occurred, that the victim had information concerning the criminal activity, and that the victim was helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying crime. In addition, law enforcement may report information about any harm sustained by the victim that law enforcement has knowledge of or observed.

While a U visa petition will not be granted without the required law enforcement certification, the fact that a certification has been signed does not automatically grant the victim a U visa. The certification is only one of the required pieces of evidence needed to be eligible for a U visa.

For all U visa petitioners, USCIS conducts a thorough background investigation which includes a Federal Bureau of Investigation (FBI) fingerprint check and name check. USCIS will also review the petitioners' immigration records to assess whether any inadmissibility issues exist, such as the petitioner's criminal history, immigration violations, or security concerns. Any evidence that law enforcement and immigration authorities possess may be used when determining eligibility for a U visa. This evidence includes, but is not limited to, the person's criminal history, immigration records, and other background information. USCIS may contact the certifying law enforcement agency if there are any issues or questions arise during the adjudication based on information provided in the law enforcement certification.

**Benefits of the U Visa to the Recipient**

If found eligible and a petition is approved, a U visa recipient receives nonimmigrant status to live and work in the United States for no longer than 4 years. Qualified recipients may apply to adjust status to become a lawful permanent resident (green card) after three years of continuous presence in the U.S. while having a U visa. The petitioner will have to meet other eligibility requirements for a green card as well, including the ongoing duty to cooperate with law enforcement and not unreasonably refuse to assist with the investigation or prosecution of the qualifying crime. Additionally, certain immediate family members of U visa recipients may also be eligible to live and work in the United States as derivative U visa recipients based on their relationship with the principal recipient. These family members include:

- Unmarried children under the age of 21 of principal U visa recipients;
- Spouses of principal U visa recipients;
- Parents of principal U visa recipients under age 21; and
- Unmarried siblings under 18 years old of principal U visa recipients under age 21.

# U Visa Certification Form (Form I-918B)

**Tips for Filling Out the Form I-918B**

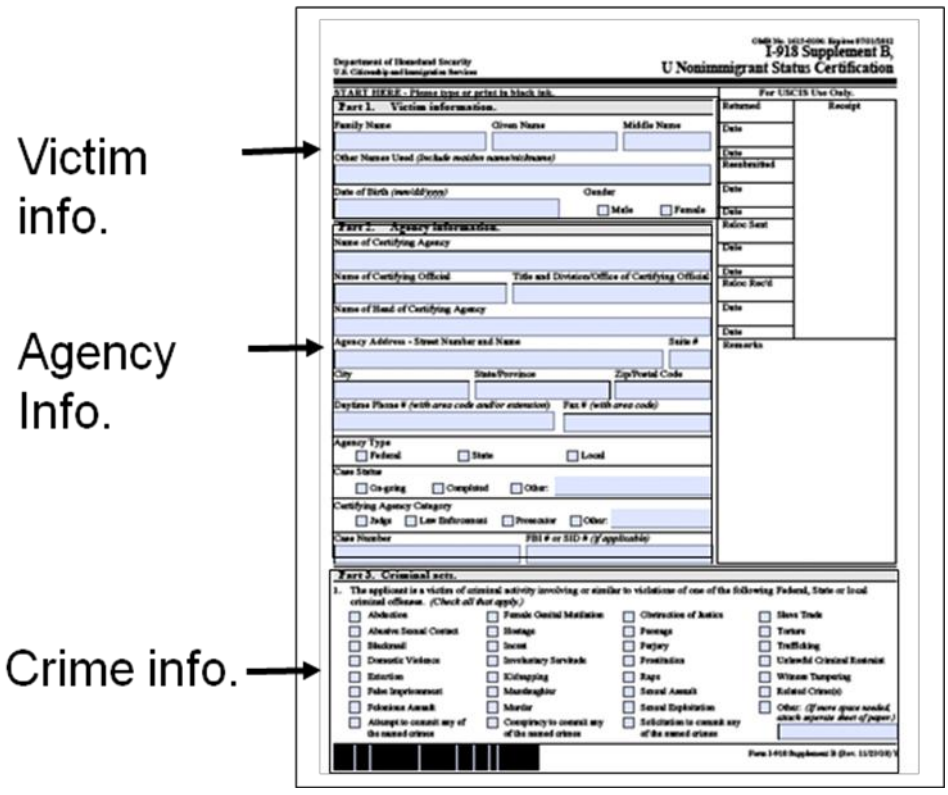
The U visa certification can be initiated by the law enforcement agency itself or by the crime victim. If initiated by the crime victim, this is usually done with the assistance of an advocate or an attorney. By signing a certification, the law enforcement agency attests that the information is true and correct to the best of the certifying official's knowledge. The head of the agency has the authority to sign certifications or to delegate authority to other agency officials in a supervisory role to sign certifications. An agency's decision to sign a certification is completely discretionary and under the authority of that agency. Neither DHS nor any other federal agency have the authority to request or demand that any law enforcement agency sign the certification. There is also no legal obligation to

complete and sign Form I-918B. However, without a certification signed by law enforcement, the individual will not be eligible to be granted a U visa.

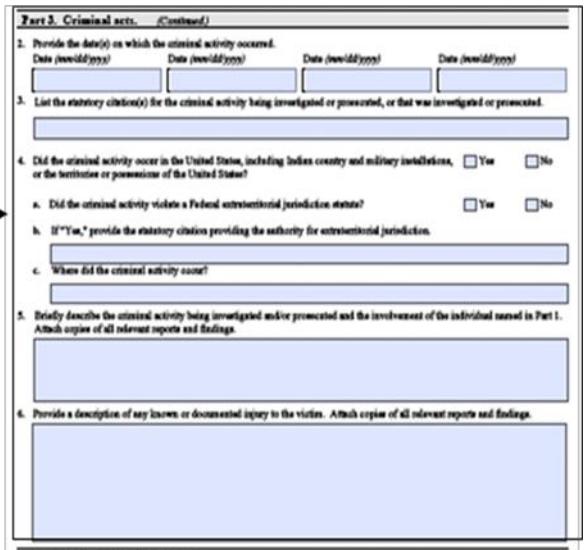
By signing a certification, the law enforcement agency attests that the information is true and correct to the best of the certifying official's knowledge. The law enforcement certification essentially states to USCIS that:

- The petitioner was a victim of a qualifying crime;
- The petitioner has specific knowledge and details of crime; and
- The petitioner has been, is being, or is likely to be helpful to law enforcement in the detection, investigation, or prosecution of the qualifying crime.

If a law enforcement agency signs a Form I-918B, the certification must be returned to the victim (or the victim's attorney, representative, etc.). The law enforcement agency does not need to send the signed certification separately to USCIS. The victim is required to send the original signed certification form along with his or her complete U visa petition to USCIS. If the law enforcement official is providing additional documents (e.g., a copy of the police report, additional statements, photos, etc.) along with the certification, law enforcement should indicate on Form I-918B a note of "see attachment" or "see addendum". Question 5 of Part 4 on Form I-918B, the certifying official may document the helpfulness of the victim and if that victim refused to be helpful at any time throughout the investigation/prosecution at the point. The certification form must contain an original signature and should be signed in a color of ink other than black for verification purposes. Photocopies, faxes, or scans of the certification form cannot be accepted by USCIS as an official certification.



Date, location and other crime info.



Part 3. Criminal acts. (Continued)

2. Provide the date(s) on which the criminal activity occurred.

Date (mm/dd/yyyy) | Date (mm/dd/yyyy) | Date (mm/dd/yyyy) | Date (mm/dd/yyyy)

3. List the statutory citation(s) for the criminal activity being investigated or prosecuted, or that was investigated or prosecuted.

4. Did the criminal activity occur in the United States, including Indian country and military installations, or the territories or possessions of the United States? ☐ Yes ☐ No

a. Did the criminal activity violate a Federal extraterritorial jurisdiction statute? ☐ Yes ☐ No

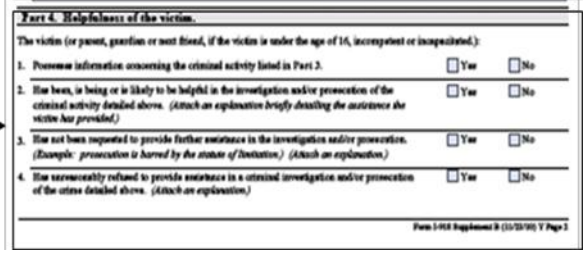
b. If "Yes," provide the statutory citation providing the authority for extraterritorial jurisdiction.

c. Where did the criminal activity occur?

5. Briefly describe the criminal activity being investigated and/or prosecuted and the involvement of the individual named in Part 1. Attach copies of all relevant reports and findings.

6. Provide a description of any known or documented injury to the victim. Attach copies of all relevant reports and findings.

Helpfulness statement



Part 4. Helpfulness of the victim.

The victim (or parent, guardian or next friend, if the victim is under the age of 16, incompetent or incapacitated):

1. Possesses information concerning the criminal activity listed in Part 3. ☐ Yes ☐ No

2. Has been, is being or is likely to be helpful in the investigation and/or prosecution of the criminal activity detailed above. *(Attach an explanation briefly detailing the assistance the victim has provided.)* ☐ Yes ☐ No

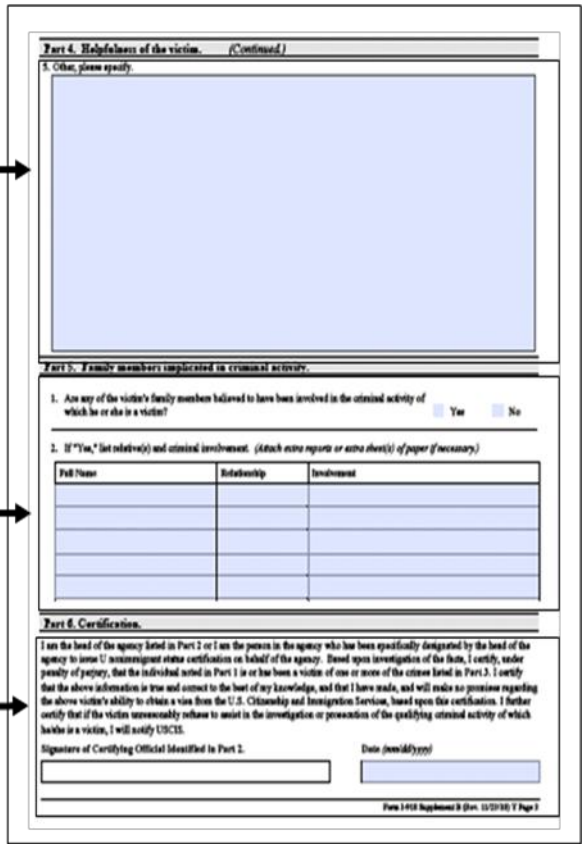
3. Has not been requested to provide further assistance in the investigation and/or prosecution. *(Example: prosecution is barred by the statute of limitation.)* *(Attach an explanation.)* ☐ Yes ☐ No

4. Has unreasonably refused to provide assistance in a criminal investigation and/or prosecution of the crime detailed above. *(Attach an explanation.)* ☐ Yes ☐ No

Additional helpfulness info.

Culpable family members

Certification



Part 4. Helpfulness of the victim. (Continued)

5. Other, please specify.

Part 5. Family members implicated in criminal activity.

1. Are any of the victim's family members believed to have been involved in the criminal activity of which he or she is a victim? ☐ Yes ☐ No

2. If "Yes," list relative(s) and criminal involvement. *(Attach extra reports or extra sheet(s) of paper if necessary.)*

| Full Name | Relationship | Involvement |
|---|---|---|
| | | |
| | | |
| | | |
| | | |
| | | |

Part 6. Certification.

I am the head of the agency listed in Part 2 or I am the person in the agency who has been specifically designated by the head of the agency to issue U nonimmigrant status certification on behalf of the agency. Based upon investigation of the facts, I certify, under penalty of perjury, that the individual noted in Part 1 is or has been a victim of one or more of the crimes listed in Part 3. I certify that the above information is true and correct to the best of my knowledge, and that I have made, and will make no promises regarding the above victim's ability to obtain a visa from the U.S. Citizenship and Immigration Services, based upon this certification. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he/she is a victim, I will notify USCIS.

Signature of Certifying Official Identified in Part 2. Date (mm/dd/yyyy)

**Best Practices in U Visa Certifications (Form I-918B)**

Across the United States, law enforcement agencies have taken different procedural approaches to U visa certifications. DHS does not endorse or recommend any particular practice, as the certifying agency has the sole authority on the policies and procedures it will use in signing law enforcement certifications. Some examples of how various law enforcement agencies educate their officers about U visa certifications and how they designate a certifier or certifiers in their agencies include:

- Department policy or general order on the process and use of the U visa certification written and distributed;
- A Letter or Memorandum designating a process and authority to certify has been sent from the Chief to the Lieutenant(s) or supervisor(s) in charge of certifying U visas;
- Chief designates the head of the Victim-Witness Assistance Program as the certifier;
- Teletype message or similar written notification sent out from the Chief to the entire department explaining the purpose of the U visa, the certification process, and who is/are designated as the certifier(s); and
- The Investigations Bureau Chief, assigned as certifier, delegates an officer or supervisor to review requests made by both law enforcement officers and the community and makes a recommendation on the certification to the Bureau Chief.

# Frequently Asked Questions

**What do I do with a completed certification?**
Once the law enforcement official completes and signs Form I-918B, the original should be given to the victim or the victim's legal representative or victim advocate, so that he or she can add the certification to the original U visa petition packet before submission to USCIS.

Please also note that only a law enforcement official may complete and sign the Form I-918B. The victim, victim's attorney, or advocate may not sign the Form I-918B.

**If I certify a petition, does the victim automatically get a U visa or lawful immigration status?**
No. There are many additional eligibility requirements that USCIS evaluates based on a victim's U visa petition, including whether the victim suffered "substantial physical or mental abuse." Moreover, upon receiving a U visa petition, including Form I-918B, USCIS will conduct a full review of the petition and a thorough background check of the petitioner before approving or denying the petition. The background check will include an FBI fingerprint check, name and date of birth (DOB) check, and a review of immigration inadmissibility issues, including security-based and criminal inadmissibility grounds. A victim may be found inadmissible if they do not meet required criteria in the Immigration and Nationality Act to gain admission or legal status in the U.S. Generally, USCIS does not initiate removal proceedings. However, if there are serious inadmissibility issues, such as security related concerns, multiple or violent criminal arrests, or multiple immigration violations, USCIS may find the victim to be inadmissible and may also initiate removal proceedings. If USCIS finds the victim

to be inadmissible after a removal proceeding was stayed or terminated to pursue the U visa application, the proceedings may be reinitiated or DHS may file a new Notice to Appear (NTA) for that individual.

If USCIS needs further information, evidence, or clarification of an issue, USCIS officers may request additional evidence from the petitioner. USCIS may also contact the certifying law enforcement agency for further information if necessary.

**Which law enforcement agencies are eligible to make certifications?**
A federal, state, local law enforcement agency, prosecutor, judge, or other authority that has the responsibility for the investigation or prosecution of a qualifying crime or criminal activity is eligible to sign Form I-918B. This includes agencies with criminal investigative jurisdiction in their respective areas of expertise, including but not limited to child and adult protective services, the Equal Employment Opportunity Commission, and Federal and State Departments of Labor.

**Who in the law enforcement agency can sign Form I-918B?**
A certifying official(s) can sign Form I-918B. The U visa regulation defines a certifying official as: "[t]he 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." 8 C.F.R. § 214.14(a)(3).

Although not required with each certification, it is helpful to include a letter showing the designation of the signing official(s). The letter would be signed by the agency head and would reflect that person with a particular rank or title within the agency is to be the signing official(s).

**If my law enforcement agency has a Memorandum of Understanding (MOU) with DHS under the 287(g) program, are we still able to sign U visa certifications?**
Yes, Form I-918B can be signed regardless of such an MOU with DHS. DHS encourages all jurisdictions to implement U visa certification practices and policies.

**What if the victim or witness in my case has been detained or ordered removed for an immigration violation?**
Individuals currently in removal proceedings or with final orders of removal may still apply for a U visa. Absent special circumstances or aggravating factors, it is against U.S. Immigration and Customs Enforcement (ICE) policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime. To avoid deterring individuals from reporting crimes, ICE has issued guidance to remind ICE officers, special agents, and attorneys to exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints. Particular attention should be paid to victims of domestic violence, human trafficking, or other serious crimes, and witnesses involved in pending criminal investigations or prosecutions.

If a law enforcement official is aware of a victim or witness against whom a detainer has been lodged, who has been detained, who has been placed in removal proceedings for an immigration violation, or who has been ordered removed, the official should promptly contact their local ICE Enforcement and Removal Operations (ERO) contact or the local Office of the Chief Counsel to make ICE aware of the situation. Specifically with regard to a lodged detainer, the law enforcement official may notify the ICE Law Enforcement Support Center at (802) 872-6020, if the individual may be the victim of a crime, or if the officials want this individual to remain in the United States for prosecution or other law enforcement purposes, including acting as a witness.

**Will a certifying law enforcement agency be liable for any future conduct of someone who is granted a U visa? What if I signed a certification for someone who later commits a crime?**
A certifying law enforcement agency/official cannot be held liable for the future actions of a victim for whom the agency signed a certification or to whom DHS granted a U visa. The U visa certification simply states that the person was a victim of a qualifying crime, possessed information relating to the crime, and was helpful in the investigation or prosecution of that crime. The certification does not guarantee the future conduct of the victim or grant a U visa. USCIS is the only agency that can grant a U visa.

If a victim is granted a U visa and is later arrested or commits immigration violations, federal immigration authorities will respond to those issues.

If a law enforcement agency later discovers information regarding the victim, crime, or certification that the agency believes USCIS should be aware of, or if the agency wishes to withdraw the certification, the law enforcement agency should contact USCIS.

**If an investigation or case is closed, can law enforcement still complete Form I-918B? Is there a statute of limitations?**
Yes, law enforcement can still complete Form I-918B for an investigation or case that is closed. There is no statute of limitations regarding the time frame in which the crime must have occurred. Federal legislation specifically provides that a victim may be eligible for a U visa based on having been helpful *in the past* to investigate or prosecute a crime. A crime victim could be eligible to receive U visa certification when, for example, the case is closed because the perpetrator could not be identified; a warrant was issued for the perpetrator but no arrest could be made due to the perpetrator fleeing the jurisdiction or fleeing the United States, or has been deported; before or after the case has been referred to prosecutors, as well as before or after trial whether or not the prosecution resulted in a conviction. The petitioner must still meet all the eligibility requirements for a U visa to be approved.

**Can I complete a U visa certification for a victim who is no longer in the United States?**
Yes. While the crime must have occurred in the United States, its territories, or possessions, or have violated U.S. law, victims do not need to be present in the U.S. in order to be eligible for a U visa and may apply from outside the United States.

**Who determines if the "substantial physical or mental abuse" requirement has been met?**

USCIS will make the determination as to whether the victim has met the "substantial physical or mental" standard on a case-by-case basis during its adjudication of the U visa petition. Certifying law enforcement agencies do not make this determination. Certifying agencies may, however, provide any information the agency deems relevant regarding injuries or abuse on Form I-918B. The U visa certification signed by law enforcement states that the person was a victim of a qualifying crime, possessed information relating to the crime, and was helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of that crime. Question 6 of Part 3 on Form I-918B asks that law enforcement provide information about any injuries the law enforcement agency knows about or has documented. While this provides some of the evidence USCIS will use to make the substantial physical or mental abuse determination, the U visa petitioner has the burden of proving the substantial physical or emotional abuse.

USCIS adjudication officers receive extensive training in statutory and regulatory requirements in determining whether a victim has suffered substantial physical or mental abuse. Factors that USCIS uses to make this determination are: the nature of the injury inflicted; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim.

The existence of one or more of the factors does not automatically signify that the abuse suffered was substantial. The victim will have to provide evidence to USCIS showing that the victim meets the standard of substantial physical or mental abuse.

**Can I still certify if the perpetrator is no longer in the jurisdiction or prosecution is unlikely for some reason?**

Yes. There is no statutory or regulatory requirement that an arrest, prosecution, or conviction occur for someone to be eligible to apply for a U visa. Instances may occur where the perpetrator has fled the jurisdiction, left the United States, or been arrested for unrelated offenses by another agency in another jurisdiction. An arrest, prosecution, or conviction may not be possible in these situations. The petitioner will still have to meet the helpfulness requirement by reasonably assisting the certifying law enforcement agency, and will also have to meet all other eligibility requirements in order to qualify for a U visa.

**Does the victim have to testify to be eligible for certification?**

As mentioned above, there is no requirement that an arrest, prosecution, or conviction occur for someone to be eligible for a U visa. While there is no requirement for the victim to testify at a trial to be eligible for a U visa, if the victim is requested to testify, he or she cannot unreasonably refuse to cooperate with law enforcement. If the victim unreasonably refuses to testify, the law enforcement agency should notify USCIS and may withdraw the previously signed Form I-918B.

**Can a victim's petition still be approved if the defendant is acquitted or accepted a plea to a lesser charge, or if the case was dismissed?**

Yes. As mentioned above, a conviction is not required for someone to be eligible for a U visa. Plea agreements and dismissals do not negatively impact the victim's eligibility. As long as the victim has been helpful in the investigation or prosecution of the qualifying criminal activity and meets all other eligibility requirements, the victim may petition for a U visa.

If the victim unreasonably refuses to assist the investigation or prosecution and harms the criminal case, that will negatively impact the victim's ability to receive an approval. The certifying law enforcement agency should notify USCIS if the victim has unreasonably refused to cooperate in the investigation or prosecution of the crime.

**What constitutes "helpfulness" or "enough cooperation"?**
USCIS regulation requires that the victim has been, is being, or is likely to be helpful in the investigation or prosecution of the criminal activity. This means that since the initiation of cooperation, the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement.
USCIS will not provide a U visa to those petitioners who, after initially cooperating with law enforcement, refuse to provide continuing assistance when reasonably requested. USCIS also will not approve the petitions of those who are culpable for the qualifying criminal activity.

**What if the victim stops cooperating after I sign his/her certification?**
At its discretion, a certifying agency may withdraw or disavow a Form I-918B at any time if a victim stops cooperating. To do so, the certifying agency must notify the USCIS Vermont Service Center in writing (see below).

Written notification regarding withdrawal or disavowal should include:

- The agency's name and contact information (if not included in the letterhead);
- The name and date of birth of the individual certified;
- The name of the individual who signed the certification and the date it was signed;
- The reason the agency is withdrawing/disavowing the certification including information describing how the victim's refusal to cooperate in the case is unreasonable;
- The signature and title of the official who is withdrawing/ disavowing the certification; and
- A copy of the certification the agency signed (if a copy was retained by the agency).

The letter should be either scanned and emailed to the Vermont Service Center at LawEnforcement_UTVAWA.vsc@uscis.dhs.gov, or mailed to:

USCIS—Vermont Service Center
ATTN: Division 6
75 Lower Welden Street
St. Albans, VT 05479

**If one crime is initially investigated but a different crime is eventually prosecuted, does that have an impact on the certification?**

A law enforcement certification is valid regardless of whether the initial crime being investigated is different from the crime that is eventually prosecuted. As long as the person is a victim of a qualifying criminal activity, that person may be eligible for a U visa. Examples include:

- An initial investigation of rape eventually leads to a charge and prosecution of sexual assault. Both rape and sexual assault are qualifying crimes.

- An initial investigation of embezzlement leads to a charge and prosecution of extortion. While embezzlement is not a qualifying crime, the investigation eventually led to a charge of extortion, which is a qualifying crime. If the person assisting in the investigation or prosecution is a victim of extortion, that person may qualify for a U visa.

- In the process of investigating drug trafficking allegations, police determine that the drug trafficker's wife is a victim of domestic violence. The victim reported the domestic abuse. The state brings a prosecution against the husband for drug offenses but not domestic violence crimes. The wife is cooperating in the drug prosecution. Law enforcement may complete a Form I-918B certification for reporting the domestic abuse case that is not being prosecuted.

Form I-918B certifications may also be submitted for crimes similar to the list of qualifying criminal offenses. An investigation or prosecution into a charge of video voyeurism may fall under the qualifying crime of sexual exploitation. This may be determined by state or local criminal law and the facts and evidence in that specific case. Please note that while video voyeurism is not specifically listed as a qualifying crime, it may be considered a type of sexual exploitation, which is a qualifying crime. The victim would need to show how these crimes are related and present this evidence to USCIS, along with Form I-918B certification form signed by a certifying law enforcement agency.

**If the victim is a child, why would a non-citizen parent ask for a certification stating that the parent was the victim?**

In many cases where a child is the victim of a crime, the child may not be able to provide law enforcement with adequate assistance. This may be due to the child's age or trauma suffered, among various other reasons. Parents of a child victim play a crucial role in detecting and reporting crimes, providing information and assisting law enforcement in the investigation or prosecution of the crime committed against the child. Recognizing this, an alien parent can apply to be recognized as an "indirect victim" if the principal victim is a child under 21 years of age and is incompetent or incapacitated to provide assistance to law enforcement in the investigation or prosecution of the crime committed against the child or if the child is deceased due to murder or manslaughter. The immigration status of the child victim is not relevant to this determination; Form I-918B can be submitted for an alien parent whether or not the child is a U.S. citizen or a non-citizen.

The parent(s), in order to qualify as an "indirect victim", must meet the remaining eligibility requirements for a U visa to receive an approval. Therefore, the "indirect victim" parents must have information about the crime, and must be helpful to law enforcement in the investigation or

prosecution of the crime and the crime must have occurred in the United States or violated U.S. law. The parents will also be subject to the standard background checks (FBI fingerprint and name/DOB check) and immigration records review as well. .

**What constitutes "possesses information"?**
To be eligible for a U visa, the victim of the crime must possess credible and reliable information establishing that the victim has knowledge of the details of the criminal activity or events leading up to the criminal activity, including specific facts about the crime/victimization leading law enforcement to determine that the victim has assisted, is assisting, or is likely to provide assistance in the investigation or prosecution of the crime.

If the victim was under 16 years of age or incompetent or incapacitated at the time the qualifying crime occurred, a parent, guardian, or next friend may possess the information. A "next friend" is defined as a person who appears in a lawsuit to act for the benefit of an alien who is under 16 or incompetent or incapacitated. The next friend is someone dedicated to the best interests of the individual who cannot appear on his or her own behalf because of inaccessibility, mental incompetence, or other disability. A next friend cannot be a party to a legal proceeding involving the victim and cannot be a court appointed guardian. A next friend also does not qualify for a U visa or any immigration benefit simply by acting as a next friend for the victim, but he or she may possess information about the criminal activity and may provide the required assistance.

**Will USCIS approve a victim with a criminal history?**
USCIS may deny a U visa petition for a variety of reasons including if the victim's criminal history warrants such a decision. Denials may occur in cases where a victim has multiple arrests, convictions, or has a serious or violent criminal arrest record. USCIS will also deny a petition if the victim was complicit or culpable in the qualifying criminal activity of which he or she claims the victimization occurred. USCIS conducts background and security checks (FBI fingerprint check, name/DOB check, check of immigration records) on U visa petitioners and reviews all available information concerning arrests, immigration violations, and security issues before making a final decision.

The fact that a victim has a criminal history does not automatically preclude approval of U status. USCIS has broad authority to waive most inadmissibility issues, including criminal issues. Each U visa petition is evaluated on a case-by-case basis.

If law enforcement believes USCIS should know something particular about a victim's criminal history, that information can be cited on the certification or with an attached report or statement detailing the victim's criminal history with that law enforcement agency or his or her involvement in the crime.

**What are the safeguards for protecting the U visa program against fraud?**
Congress and USCIS recognize that law enforcement agencies that investigate and prosecute the qualifying criminal activities are in the best position to determine if a qualifying crime has taken place. If, in the normal course of duties, a law enforcement agency has determined that a qualifying crime

has taken place, the victim possessed information related to the crime, and the victim has been helpful, law enforcement may sign the U visa certification. Whether a law enforcement agency signs the certification is under the authority of the agency conducting the investigation or prosecution. The law enforcement certification also acts as a check against fraud and abuse, as the certification is required in order to be eligible for a U visa.

USCIS takes fraud and abuse of the U visa program seriously. If USCIS suspects fraud in a U visa petition, USCIS may request further evidence from the petitioner and may also reach out to the law enforcement agency for further information. USCIS also has a dedicated unit whose sole purpose is to target and identify fraudulent immigration applications. The Fraud Detection and National Security (FDNS) unit of USCIS conducts investigations of cases that appear fraudulent and works with other Federal, State, and local law enforcement agencies when fraud or abuse is discovered.

As an additional check against fraud, a U visa recipient cannot obtain a green card unless the victim proves that he or she cooperated, when requested, with law enforcement or prosecutors. In order to obtain a green card, if the U visa victim did not cooperate, he or she must prove to DHS' satisfaction that his or her refusal to cooperate was not unreasonable.

**Where can my agency get additional training on U visa certifications?**
Law enforcement agencies may request additional training and information by emailing USCIS at: T-U-VAWATraining@dhs.gov.

# Other Forms of Relief for Victims

Federal law provides additional options to assist law enforcement with providing immigration status to victims and witnesses of crime that may or may not be eligible for the U visa. The following are some of these resources:

**T Visa**
The T nonimmigrant status (or T visa) provides immigration protection to victims of severe forms of trafficking in persons who comply with reasonable requests for assistance from law enforcement in the investigation or prosecution of human trafficking cases. The T nonimmigrant visa allows victims to remain in the United States to assist in the investigation or prosecution of human traffickers. Unlike the U visa, the T visa does not require a law enforcement certification. Once T nonimmigrant status is granted, a victim can apply for permanent residence after three years. A petitioner for a T visa must send a completed petition (Form I-914) to USCIS. A signed I-914 Supplement B may be submitted with the petition to verify that he or she has complied with any reasonable request by law enforcement in the investigation or prosecution of the trafficking crime, but is not required. The certification is one of the pieces of evidence that USCIS will consider to grant or deny a T visa.

**VAWA**
Recognizing that immigrant victims of domestic violence may remain in an abusive relationship because his or her immigration status is often tied to the abuser, the Violence Against Women Act

(VAWA) in 1994 created a self-petitioning process that removes control from the abuser and allows the victim to submit his or her own petition for permanent residence without the abuser's knowledge or consent. Those eligible for VAWA relief include the abused spouse or former spouse of a U.S. citizen or Lawful Permanent Resident, the abused child of a U.S. citizen or Lawful Permanent Resident, or the abused parent of a U.S. citizen. VAWA immigration relief applies equally to women and men. To file for VAWA immigration relief the self-petitioner must send a completed Form I-360 along with corroborating evidence to USCIS. A law enforcement certification is not needed in these cases.

**Continued Presence**

Continued Presence (CP) is a temporary immigration status provided to individuals identified by law enforcement as victims of human trafficking who are potential witnesses in an investigation or prosecution. Federal law enforcement officials are authorized to submit a CP application, which should be initiated upon identification of a victim of human trafficking. CP allows victims of human trafficking to remain in the United States during an ongoing investigation into human trafficking-related crimes committed against them. CP is initially granted for one year and may be renewed in one-year increments. Recipients of CP also receive work authorization. CP is authorized by ICE Homeland Security Investigations (HSI) Law Enforcement Parole Unit and can only be sponsored by a federal law enforcement agent.

State, local, tribal and territorial law enforcement officials who would like to request CP for human trafficking victims are encouraged to work with the local HSI office in their area. In addition, Victim Assistance Coordinators can assist law enforcement officials in obtaining referrals to non-governmental victim services providers who can offer a variety of services to assist crime victims, such as immigration legal assistance, crisis intervention, counseling, medical care, housing, job skills training, and case management.

CP is an important tool for federal, state, and local law enforcement in their investigation of human trafficking-related crimes. Victims of human trafficking often play a central role in building a case against a trafficker. CP affords victims a legal means to temporarily live and work in the United States, providing them a sense of stability and protection. These conditions improve victim cooperation with law enforcement, which leads to more successful prosecutions and the potential to identify and rescue more victims. Although cooperation with law enforcement is not an eligibility criterion for CP, victims who are cooperating do receive eligibility for social service benefits through the Department of Health and Human Services Office of Refugee Resettlement. Victims may qualify for other forms of immigration benefits depending on their unique circumstances.

**Significant Public Benefit Parole**

Significant Public Benefit Parole (SPBP) may be utilized to bring an individual to serve as a witness, defendant, or cooperating source, and if necessary in extremely limited cases, the individual's immediate family members, into the United States for up to one year. It must be emphasized that SPBP will only be granted for the minimum period of time required to accomplish the requested purpose, e.g., if a trial is 3 months long, parole will be granted for 3 months. SPBP is a temporary measure used to allow an individual who is otherwise inadmissible to be present in the United States. SPBP does not

constitute a formal admission to the United States and confers only temporary authorization to be present in the United States without having been admitted. Employment authorization may be granted.

**Deferred Action**
Deferred Action (DA) is a discretionary decision-making authority that allows DHS to determine which cases merit the commitment of limited resources. It is exercised on a case-by-case basis that focus on the priorities of DHS, by targeting serious criminals and those who are a threat to public safety, and potentially deferring action on cases with a lower priority. There is no statutory definition of DA, but federal regulations provide a description: "[D]eferred action [is] "an act of administrative convenience to the government which gives some cases lower priority…." See 8 C.F.R. § 274a.12(c)(14). DHS officers, special agents, and attorneys consider every DA request individually to decide whether; based on the totality of the circumstances, a favorable grant of deferred action is appropriate. DA requests may, among other things, be based on humanitarian facts and a low-enforcement priority or may be based on an individual's status as an important witness in an investigation or prosecution. It does not provide a pathway to permanent residency.

# DHS Contact Information

**For more information about the U visa program and law enforcement certifications, please see:**

**U.S. Citizenship and Immigration Services**
www.uscis.gov
www.uscis.gov/humantrafficking

To ask a question about a specific case or to rescind a signed certification:
LawEnforcement_UTVAWA.VSC@uscis.dhs.gov. *Please note that this e-mail address is for law enforcement personnel only. Any e-mail sent by any person or entity that is not law enforcement to this specific e-mail address will not be answered.*

To request U visa training for your agency:
T-U-VAWATraining@dhs.gov

To ask specific policy questions about T and U visa certifications, call USCIS at (202) 272-1470.

Petitioners and their representatives may submit an inquiry regarding a specific case by emailing:
hotlinefollowupI918I914.vsc@dhs.gov

**Citizenship and Immigration Services Ombudsman**
To refer U visa petitioners who are experiencing problems that have not been able to be resolved through DHS customer assistance avenues:

www.dhs.gov/cisombudsman
Toll Free: (855) 882-8100
Phone: (202) 357-8100
Email: cisombudsman@dhs.gov

**Immigration and Customs Enforcement**
If a law enforcement official is aware of a victim or witness against whom a detainer has been lodged, who has been detained, who has been placed in removal proceedings for an immigration violation, or who has been ordered removed, the official should promptly contact their local ICE Enforcement and Removal Operations (ERO) contact or the local Office of the Principal Legal Advisor (OPLA) to make ICE aware of the situation.

To contact your local ICE ERO office, please see the list of contact information here:
http://www.ice.gov/contact/ero/

To contact your local ICE OPLA office, please see the list of contact information here:
http://www.ice.gov/contact/opla/

Specifically with regard to a lodged detainer, the law enforcement official should notify the ICE Law Enforcement Support Center:

www.ice.gov/contact/lesc/
Phone: (802) 872-6050
Email: ice.osltc@dhs.gov

LESC Computer Services Division
188 Harvest Lane
Williston, Vermont 05495

**Office of Civil Rights and Civil Liberties**
To refer individuals who would like to file a complaint concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by employees and officials of the Department of Homeland Security:

By mail or phone:
Office for Civil Rights and Civil Liberties
U.S. Department of Homeland Security
Building 410, Mail Stop #0190
Washington, D.C. 20528

Phone: (202) 401-1474
Toll Free: (866) 644-8360
TTY: (202) 401-0470
Toll Free TTY: (866) 644-8361
Fax: (202) 401-4708

E-mail: crcl@dhs.gov

**Office for State and Local Law Enforcement**
For information about DHS coordination with federal, state, local, territorial, and tribal law enforcement, please contact the DHS Headquarters Office for State and Local Law Enforcement.

Phone: (202) 282-9545

Email: oslle@hq.dhs.gov

**More Federal Government Resources Available:**
DHS Blue Campaign, which includes links to help locate local service providers with experience with immigrant victims of crime.
USCIS Victims of Criminal Activity: U Nonimmigrant Status
USCIS Questions and Answers: Victims of Criminal Activity, U Nonimmigrant Status
DHS Ombudsman Teleconference Recap: U Visas
October 2009 FBI Law Enforcement Bulletin: The U Visa
Immigration and Customs Enforcement Toolkit for Prosecutors

**E-FILED on 9/29/2008**

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MARK HAWKE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP AND IMMIGRATION SERVICES,

Respondent.

No. C-07-03456 RMW

ORDER DENYING FIRST AMENDED PETITION

**[Re Docket No. 16]**

Mark Hawke petitions this court to review the Department of Homeland Security's (DHS) denial of his request to produce his wife's immigration records. DHS opposes the petition. Mr. Hawke's wife has been apprised of these proceedings, but has not filed any opposition. *See* Docket No. 18. The court has reviewed the moving and responding papers and considered the arguments of counsel. For the following reasons, the court denies the petition.

## I. BACKGROUND

Mr. Hawke married Lucia Herrera Hawke in April 2005. *See* Docket No. 16, First Amended Petition (FAP) ¶ 3. Because Mrs. Hawke's visa had almost expired, Mr. Hawke sponsored her

application for a K-1 visa.[1] *Id.* Mrs. Hawke appears to have used the K-1 visa and her marriage to Mr. Hawke to apply to become a lawful permanent resident on August 10, 2006, and she became a lawful permanent resident on September 21, 2006. *See id.* ¶ 6 & Ex. 2.

Unknown to Mr. Hawke, Mrs. Hawke had also applied for lawful permanent resident status pursuant to the Violence Against Women Act (VAWA) sometime in March or April of 2006.[2] *Id.* ¶ 6 & Exs. 2, 3. This petition was allegedly based on domestic violence Mrs. Hawke suffered "before immigration." *Id.* ¶ 7. The court cannot determine what Mrs. Hawke meant by this testimony. She may have meant that she had suffered domestic violence prior to coming to the United States or during her marriage to Mr. Hawke but prior to obtaining lawful permanent resident status. Anyway, Mrs. Hawke concealed this application from Mr. Hawke (hence her second application based on her marriage) because she did not want to tell him about it, though again, it is unclear whether she meant to conceal the application or that she may have been previously abused by another. *See id.* DHS denied Mrs. Hawke's first petition under VAWA in December 2006 because she had already become a lawful permanent resident thanks to her second petition based on her marriage to Mr. Hawke. *Id.* ¶ 6 & Ex. 2.

Petitioner Mark Hawke is now awaiting trial on a single count of misdemeanor battery against his wife. *Id.* ¶¶ 4-6 & Ex. 1. The alleged battery occurred on September 26, 2006. *Id.* ¶ 4 & Ex. 1. During divorce proceedings in early 2007,[3] Mr. Hawke became aware of Mrs. Hawke's other petition and the possibility that she had previously complained of domestic abuse. *Id.* ¶ 7. Mr. Hawke now seeks Mrs. Hawke's prior immigration application because he believes it may contain sworn testimony by Mrs. Hawke regarding the scope of any domestic abuse by Mr. Hawke. This is relevant because the district attorney has informed Mr. Hawke that the state will present evidence of

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[1] "A K-1 visa is issued for the sole purpose of facilitating a valid marriage between an alien and a United States citizen[.]" *Kalal v. Gonzales*, 402 F.3d 948, 949 (9th Cir. 2005).

[2] The immigration laws define a variety of petitioners as "VAWA self-petitioners." *See* 8 U.S.C. § 1101(a)(51). It is unclear what basis Mrs. Hawke claimed for being a VAWA self-petitioner. One possible basis is that she believed she qualified as an alien who in good faith married or intended to marry a citizen but was then subjected to domestic violence. *See* 8 U.S.C. § 1154(a)(1)(A)(iii).

[3] The record is silent as to the resolution of any divorce proceedings. As the parties all refer to Mr. Hawke's wife as Lucia Herrera Hawke, the court refers to her as Mrs. Hawke.

other acts of domestic violence in its criminal case against him. *See* FAP Ex. 2. Mr. Hawke hopes to use any material in Mrs. Hawke's application to impeach or contradict testimony of other acts of domestic violence. He therefore subpoenaed the Department of Homeland Security's Citizenship and Immigration Services division ("DHS") on April 26, 2007 to produce all of Mrs. Hawke's records and applications. *See id.* ¶¶ 8, 9 & Ex. 4.

DHS responded to the subpoena by letter noting that it would not disclose any information to Mr. Hawke because he had not complied with DHS's administrative procedures for requesting information. *See id.* Ex. 5. DHS outlined a number of reasons why it might not produce any information and suggested to Mr. Hawke that he could make a request under the Freedom of Information Act ("FOIA") and enclosed materials to enable him to make such a request. *See id.*

Mr. Hawke's attorneys corresponded with the district attorney expressing frustration that a FOIA request would take over a year to pursue and requesting his help in obtaining Mrs. Hawke's consent to enable DHS to disclose her records. *Id.* ¶ 11 & Ex. 6. The district attorney declined to help. *Id.* ¶ 12.

At this point, Mr. Hawke's counsel made a request for Mrs. Hawke's records, but not pursuant to FOIA. *Id.* ¶ 12. Mr. Hawke's counsel appears to have believed that a FOIA request would have been futile without Mrs. Hawke's consent. *See id.* Presumably, this belief stemmed from FOIA's exception for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *See* 5. U.S.C. § 552(b)(6). That aside, Mr. Hawke sought disclosure of Mrs. Hawke's records from DHS pursuant to its *Touhy* regulations[4] via an "informal request" on October 31, 2007. FAP ¶ 13 & Ex. 7.

On December 7, 2007, DHS denied the "informal request" and suggested that such a request must comply with DHS's *Touhy* procedures for responding to requests for information or be submitted under FOIA. *See id.* Ex. 8. Mr. Hawke filed an administrative appeal of the denial of his request (which he no longer referred to as "informal") a week later. *Id.* ¶ 15 & Ex. 9. DHS

[4] Federal agencies have regulations implementing policies for disclosing information, for example, in response to a subpoena. *See Mak v. FBI*, 252 F.3d 1089, 1092 (9th Cir. 2001). These regulations generally followed the Supreme Court's decision in *Touhy v. Ragen*, 340 U.S. 462 (1951) discussing how the government should respond to requests for information. DHS's *Touhy* regulations are codified beginning at 6 C.F.R. § 5.45.

responded to the appeal on January 30, 2008 by noting that its *Touhy* regulations do not permit appeals and that "[a]t this stage, the only viable course of action remaining to you on this issue is to seek judicial review of the agency's December 7, 2007, decision in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 101 *et seq.*" *Id.* ¶ 16 & Ex. 10.

Following DHS's parting advice, Mr. Hawke filed the pending petition pursuant to the Administrative Procedure Act to obtain an order from this court requiring DHS to produce any documents responsive to Mr. Hawke's original subpoena for this court's *in camera* review and, if appropriate, production of the documents to Mr. Hawke and the district attorney.

## II. ANALYSIS

The parties agree that this court's review is governed by the Administrative Procedure Act (APA), specifically 5 U.S.C. § 706. More precisely, Mr. Hawke invokes the district court's authority to set aside an agency action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). While Mr. Hawke's argument is sometimes difficult to follow, he expressly disclaims any argument that DHS's regulations are arbitrary and capricious or that DHS abused its discretion in denying his request for information. Reply at 1-2. Instead, Mr. Hawke argues only that DHS's refusal to provide him Mrs. Hawke's immigrations records denies him his constitutional rights, specifically his right to confrontation and right to due process.

### A. Ripeness

DHS first points out that Mr. Hawke has not yet gone to trial, suggesting that his alleged constitutional harms have not yet occurred. DHS cites to *Mak v. FBI*, 252 F.3d 1089 (9th Cir. 2001) for the proposition that Mr. Hawke's claims that DHS has unconstitutionally withheld information do not become ripe until he has been tried and convicted. In *Mak*, an assassin was tried, convicted, and sentenced to death for thirteen execution-style murders. 252 F.3d at 1090. His death sentence was vacated in federal habeas proceedings, and the state sought to retry him to reinstate the death sentence. *Id.* at 1090-91. In preparation for the second trial, Mak sought from the FBI the names of two confidential informants. *Id.* at 1091. The FBI refused to disclose the confidential informants' identities. *Id.* Mak then brought suit under the APA arguing that, among other things, the FBI's refusal to disclose certain information violated his constitutional rights. *Id.* at 1093-94. The Ninth

Circuit did not decide whether the federal government must supply information to aid a defendant in state court proceedings, passing on that question and analyzing the right as though it existed. *Id.* at 1093-94. Doing so, the court concluded that such a right is only violated when "'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Id.* at 1094 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Based on the nature of the right, the court observed that Mak's challenge was premature because it could not yet assay the impact of the FBI's refusal to disclose information. *Id.* Likewise, the court declined to consider Mak's claim that withholding the informants' identities violated his Eighth Amendment right to present mitigating evidence in the death penalty phase of his trial because he had not yet been convicted and sentenced to death. *Id.* By contrast, Mak also claimed that the FBI denied him his Sixth Amendment right to compulsory process by refusing to serve subpoenas on the confidential informants. *Id.* at 1093. The court held that this too was premature, but because Mak had not sought or obtained subpoenas for the FBI to serve, not because Mak had yet to be convicted. *Id.*

As mentioned, DHS urges that *Mak* requires a defendant to be tried and convicted before resolving whether the federal government violated his constitutional rights by withholding requested information. This court disagrees that the holding in *Mak* is so general. Were it so, the Ninth Circuit would not have needed to analyze the Sixth Amendment claim separately from the other two. Instead, the Ninth Circuit analyzed each constitutional claim and determined when the harm of denying that right occurs. The court concluded it could not gauge the alleged Fifth and Eighth amendment violations until (and unless) Mak was convicted; therefore, it could not order the FBI to produce the information based on a constitutional violation until then. Notably, the Ninth Circuit did not use the same justification to find that it could not rule on the Sixth Amendment claim. Applying *Mak* to this case, the court believes it must analyze *when* Mr. Hawke will suffer the alleged constitutional violations, and then determine whether his claims are ripe.

**B. Mr. Hawke's Sixth Amendment Rights**

Mr. Hawke characterizes the Sixth Amendment as entitling him to "present an adequate defense" at trial, and that he therefore has the right to obtain materials to allow him to meaningfully cross-examine witnesses. Mr. Hawke does not sharpen his arguments, but generally invokes his

right to confront witnesses, cross-examine them and serve them with compulsory process, as well as his right to due process.

The parties largely confine their argument on this issue to a single case, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The first question raised in *Ritchie* was whether a trial court's refusal to grant a defendant access to information held by a state agency interfered with his Sixth Amendment right to confront witnesses. *See* 480 U.S. at 51. Four justices shared the view that "nothing" in the case law supports the view that the Confrontation Clause contains "a constitutionally compelled rule of pretrial discovery." *Id.* at 52. Those justices read the Confrontation Clause as providing only "a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Id.* (emphasis in original). Three justices sharply disagreed, writing that the Confrontation Clause does include some constitutional right to access information before trial. *See id.* at 61-62 (Blackmun, J., concurring in part and dissenting in part); *id.* at 71-72 (Brennan, J., dissenting). Two justices did not reach the issue. *See id.* at 72 (Stevens, J., dissenting). Surprisingly, this ambiguity regarding the Confrontation Clause brought to light in *Ritchie* has not been resolved. *See People v. Hammon*, 15 Cal. 4th 1117, 1128-31 (1997) (Mosk, J., concurring). Absent further development in the case law, this court is bound to follow the plurality in *Ritchie* that the Confrontation Clause applies only at trial.

The Confrontation Clause is not the only basis for Mr. Hawke's petition though. Mr. Hawke also invokes the Compulsory Process Clause and his due process rights. The Compulsory Process Clause, while similar, is distinct from the Confrontation Clause and confers a separate constitutional right.[5] In *Ritchie*, the Court could not command a majority to address the question of whether the Confrontation Clause entitles a defendant to certain pretrial discovery, but it did decide the issue of whether the Compulsory Process Clause provides a defendant the right to access those materials. Comparing the Compulsory Process Clause to the Due Process Clause, the Court held that the defendant had the right to have certain information protected by a qualified privilege reviewed by

[5] The distinction is helpfully laid out in Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974).

the trial court, and that the court then had to disclose any relevant information to the defendant. *See* 480 U.S. at 55-58.

By focusing almost entirely on the Confrontation Clause discussion in *Ritchie*, DHS fails to meaningfully distinguish Mr. Hawke's compulsory process claim from that in *Ritchie*. DHS first misconstrues the Court's analysis in *Ritchie* and by seizing on the Court's brief discussion of the prosecutor's *Brady* obligation to turn over exculpatory evidence. DHS then argues that because it is not the prosecutor, it has no duty to disclose information to Mr. Hawke. DHS misses that neither the prosecution nor the defense possessed the privileged information at issue in *Ritchie*, Pennsylvania Children and Youth Services did. *See id.* at 57. Nothing in the analysis in *Ritchie* turns on whether the entity possessing the information is the prosecutor, and there is no reason to infer such a limit.

DHS next argues that Mr. Hawke would only be entitled to "investigative files of the charges against him." To the extent DHS means to suggest that Mr. Hawke is entitled to know the charges against him, the Sixth Amendment has always required that a defendant know the "nature and cause of the accusation." But again, there is no basis for reading *Ritchie* so narrowly, especially since *Ritchie* involved the prosecution's chief witness' file maintained by the Children and Youth Services agency, not the charges against Mr. Ritchie. *See id.* at 43.

To recap, Mr. Hawke possesses a constitutional right pursuant to the Sixth Amendment's Compulsory Process Clause and the Fourteenth Amendment's Due Process Clause to obtain access to information held by the government to allow him to mount his defense. *Ritchie*, 480 U.S. at 55-58; *see also United States v. Colima-Monge*, 978 F. Supp. 941 (D. Or. 1997). Unlike the Fifth and Eighth Amendment rights asserted in *Mak*, the court can discern whether Mr. Hawke's constitutional rights have been violated now. This follows from the fact that Mr. Hawke's constitutional right is a *pre-trial* right; it has been violated now regardless of the outcome of the trial. By contrast, the Fifth Amendment right in *Mak* was a *post-trial* right, namely, the right to have received exculpatory evidence that would have been reasonably likely to lead to acquittal. *See Mak*, 252 F.3d at 1094.

**C. Balancing Mr. Hawke's Rights and DHS's Asserted Privilege**

In *Ritchie*, the information the defendant sought was protected by a limited privilege. 480 U.S. at 57. Accordingly, the Court ordered the trial court on remand to examine the information *in*

*camera* and disclose any relevant information. *Id.* at 57-58. Because the privilege at issue in *Ritchie* was not absolute, the Court expressly did not reach whether the defendant's constitutional right could compel the production of documents protected by an absolute privilege. *Id.* at 57 & n.14; *but see Hammon*, 15 Cal. 4th at 1128 (holding that a defendant had no right to pretrial discovery of privileged psychotherapy records). The court therefore turns to consider the nature of the privilege asserted by DHS for withholding Mrs. Hawke's information.

Specifically, DHS contends that the Violence Against Women Act prohibits disclosure of any record that it may or may not have regarding Mrs. Hawke. The law provides that:

> Except as provided in subsection (b) of this section, in no case may the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of State (including any bureau or agency of either of such Departments)--
>
> (2) permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief under paragraph (15)(T), (15)(U), or (51) of section 101(a) of the Immigration and Nationality Act [8 U.S.C.A. § 1101(a)] or section 240A(b)(2) of such Act [8 U.S.C.A. § 1229b(b)(2)].

8 U.S.C. § 1367(a)(2).

Mr. Hawke acknowledges this confidentiality provision, but argues that it does not apply for two reasons. First, Mr. Hawke notes that the statute "shall not be construed as preventing disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information " 8 U.S.C. § 1367(b)(3). DHS argues that "judicial review of a determination" refers to judicial review of a VAWA self-petitioner's immigration petition, not any court proceeding. Mr. Hawke does not refute this argument, and while subsection (b)(3) is vague, the court agrees that "a determination" refers to the government's determination of a VAWA self-petitioner's immigration status. The court reaches this conclusion in part because subsection (a)(1) uses the term "determination" in this limited context. Accordingly, the exception in subsection (b)(3) does not apply to court proceedings like this one.

Mr. Hawke's second argument is that the confidentiality provision has expired. Mr. Hawke points out that"[t]he limitation under paragraph (2) ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted." 8 U.S.C. § 1367(a). The text of this

provision appears unambiguous, and DHS's only argument that it does not apply is that Mr. Hawke has not satisfactorily shown that Mrs. Hawke's application has been denied. But Mr. Hawke has included DHS's denial of Mrs. Hawke's petition on the grounds that she already was a lawful permanent resident. There is also no evidence that she appealed this determination.

It is important to note, however, that DHS denied Mrs. Hawke's petition because it was moot, not because she failed to qualify for residency because she did not meet the requirements of the law. To qualify for residency, a VAWA self-petitioner like Mrs. Hawke need only demonstrate that "(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien" and that "(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse." 8 U.S.C. § 1154(a)(1)(A)(iii). If such a petitioner's application is denied on the merits, it must be because they (a) never intended in good faith to marry the United States citizen or (b) there was no evidence to support the allegations of abuse. In either of those cases, there is no policy reason to protect the confidentiality of the petition, hence the statutory expiration of the secrecy. On the other hand, when an application is denied because it is moot, the petition may contain sensitive information that the policy behind VAWA still urges remain secret. For example, consider a VAWA self-petitioner who after filing her request for lawful residency decides she can no longer live in the same country as her abuser and wishes to return home. Her decision to stop seeking residency moots her petition. But her petition remains sensitive, and sound policy dictates that her file should not be disclosed.

These illustrations of the purpose behind the language in section 1367(a) compel the court to conclude that when Congress wrote "denied," the word meant "denied *on the merits*." The text of section 1367(a) harmonizes with this interpretation. The full provision dictates that the confidentiality expires "when the application for relief is denied *and all opportunities for appeal of the denial have been exhausted*." 8 U.S.C. § 1367(a). But a mooted petition cannot be appealed because there is nothing to appeal. Congress' focus on the exhaustion of all opportunities for review underscores its intent to limit the expiration of confidentiality to petitions that have been denied on the merits. This focus on the merits also accords with the fact that the confidentiality never expires

on *granted* petitions filed by the victims of abuse. To hold that a mooted petition is "denied" would defeat one of the primary purposes of the VAWA confidentiality provision, namely, to prohibit disclosure of confidential application materials to the accused batterer. *See* 151 Cong. Rec. E2605, E2607 (daily ed. Dec. 18, 2005) (statement of Rep. Conyers that VAWA confidentiality provisions "are designed to ensure that abusers and criminals cannot use the immigration system against their victims").

Accordingly, the strict confidentiality of the Violence Against Women Act still applies to any petitions filed by Mrs. Hawke. While Mr. Hawke's Sixth Amendment right to Compulsory Process permits him access to some information held by the government, it does not permit him to receive absolutely privileged information like any records held by DHS here.

## III. ORDER

For the foregoing reasons, the court denies Mr. Hawke's petition.

DATED: 9/29/2008

Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

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Counsel are responsible for distributing copies of this document to co-counsel that have not registered for e-filing under the court's CM/ECF program.

**Dated:** 9/29/2008

TSF
**Chambers of Judge Whyte**

**United States District Court**
For the Northern District of California

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

| | |
|---|---|
| **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION** | **CIVIL ACTION** |
| **VERSUS** | **NO. 12-557** |
| **SIGNAL INTERNATIONAL, L.L.C.** | **SECTION "E" (3)** |

**ORDER**

On July 31, 2013, the EEOC's Motion for Protective Order [Doc. #207] and the Motion of Defendant Signal International, L.L.C. for Protective Order [Doc. #208] came on for oral hearing before the undersigned. Present were Gerald Miller and Julie Bean on behalf of plaintiff EEOC, Daniel Werner and Thomas Fritzsche on behalf of plaintiffs-intervenors, and Erin Hangartner and Hal Ungar on behalf of defendant Signal International, L.L.C. After the oral hearing, the Court took the motion under advisement. Having reviewed the motion, the opposition and the case law, the Court rules as follow.

## I. Background

This is a companion case to *David v. Signal International, L.L.C.*, and this Court has repeated the factual background on numerous occasions and will not do so again. *See David v. Signal Int'l, L.L.C.*, Civ. A. No. 08-1220, 2012 WL 4344540 (E.D. La. Sept. 21, 2012).

## II. The EEOC's Motion for Protective Order [Doc. #207]

### A. The EEOC's Contentions

The EEOC first asks the Court to grant its motion to protect information that has an inherently *in terrorem* effect. It asks the Court to prohibit defendants from inquiring into any individual's immigration history or status. Citing case law, it notes that courts have held that social security numbers ("SSNs"), employment histories, places of birth, places of residence, post-Signal employment history and income, information about family members and tax documents have an *in terrorem* effect. It does not dispute that defendants are entitled to any alias used during an individual's employment with them.

The EEOC argues that the immigration status of any individual has no bearing on his entitlement to protection under Title VII and Section 1981. It contends that even were the Court to find the information relevant, that relevance is outweighed by the risk of injury and prejudice to any individual. It maintains that the production of such information will chill or outright preclude some of the individuals' claims. The EEOC argues that courts have recognized that the production of such information may even preclude other workers from maintaining their claims, thus limiting the enforcement of the federal civil rights statutes. It contends that it must be able to ensure all of the individuals' involvement in this lawsuit, their availability for discovery and trial and their willingness to communicate with the government as witnesses and victims.

The EEOC also notes that there is a widely-recognized policy against the disclosure of tax returns. It maintains that forcing such disclosure threatens the effective administration of our tax laws given the self-reporting of income and would deter future plaintiffs from coming forward. The EEOC contends that this reasoning applies to any document that would reveal income received or

sources of income (other than that received from Signal). It maintains that Signal can not demonstrate the relevance of such documents. The EEOC argues that courts have routinely held that any relevance of a civil rights plaintiff's employment history is outweighed by the risk of harm posed to the plaintiff.

The EEOC notes that the rest of the protective order sets out the procedure for all parties to follow in handling documents that a party deems to be confidential.

**B. Signal's Opposition**

Signal notes that this Court earlier denied it access to T-visa applications and other immigration-related documents in the related *David* lawsuit. Signal also notes that when it did so, the Court stated that the parties were concentrated on class-certification discovery, and that Signal may be able to establish such information's admissibility at trial during a later phase. In the order denying class certification, the District Court noted that it did not believe that the immigration evidence would remain collateral for purposes of trial. Signal notes that the District Court noted that plaintiffs were complicit with Signal when entering the country. This, Signal contends, alters the balance in its favor.

Noting that this Court earlier relied on a decision from the Ninth Circuit, Signal contends that the Fifth Circuit has never examined nor adopted that decision. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004). Signal doubts that the Fifth Circuit would adopt the Ninth Circuit's sweeping statement that never in an employment lawsuit will this information be relevant.

Signal maintains that it simply seeks to enforce its constitutional right under the Fifth Amendment to impeach its antagonists with powerful evidence that is probative of bias or lack of credibility. Signal contends that the evidence is squarely rooted in the litigation's origins. As the

District Court recognized, plaintiffs knew that green cards were difficult to obtain, and they could only obtain them from the United States government. The District Court also recognized that some of the plaintiffs were willing to misrepresent to obtain entry to the United States. An example of such misrepresentation, Signal argues, would be to devise a story of trafficking to remain here with their families. The District Court also noted that given the plaintiffs' own complicity in doing whatever was necessary to enter this country, Signal (and others) may be able to prove that the injuries alleged were not proximately caused by defendants' conduct. The District Court also pointed out that at least one plaintiff had worked in this country before under the H-2B visa and would have understood the temporary nature of such a visa.

Signal maintains that it and the EEOC must work together to craft a plan to utilize the information with as little collateral damage as possible. It argues that it is unreservedly willing to minimize this Court's and the EEOC's concerns.

Signal contends that it has a right to full, probing and effective cross-examination of every member of the class as to motive. It maintains that the EEOC potentially intends to present as witnesses at trial the approximately 500 class members here, and it has the right to cross-examine them to determine whether they invented the appalling conditions to bolster their trafficking claims.

Signal consents to the majority of the remaining protective order, but notes that it does not consent to the following: "Finally, as a federal government agency, the EEOC has substantial obligations to disclose documents not prohibited from disclosure by law, or valid reason." Signal notes that the EEOC cites to the Freedom of Information Act ("FOIA") as authority but contends that FOIA exempts federal courts from its provisions.

## III. The Motion of Defendant Signal International, L.L.C. for Protective Order [Doc. #208]

### A. Signal's Contentions

While this memorandum is near identical to its opposition to the EEOC's motion, Signal notes in the section on handling the confidential information that it seeks to avoid the abuse of the discovered material. As an example, it points to plaintiffs' appearances on Dan Rather Reports to lambaste it. Citing case law, Signal notes that the United States Supreme Court and the Fifth Circuit have held that parties do not have a First Amendment right to disseminate, in advance of trial, information gained through the pre-trial discovery process. Courts that have ruled similarly have held that parties may only publish, disseminate or use the information when necessary to prepare for or to try the case. Signal also seeks to protect the privacy of non-parties in its submitted proposed protective order.

### B. The EEOC's Opposition

After detailing alleged examples of Signal's intransigence during the initial-discovery phase – *i.e.*, refusing to produce documents, refusing to produce documents in a certain format, refusing to meet with IT employees to discuss electronically-stored information ("ESI") – the EEOC notes that Signal is surreptitiously asking the Court to enter the protective orders from the *David* litigation, albeit it without the *in terrorem* provisions. The EEOC also notes that Signal asks the Court to adopt the protective order [Doc. #1352] in which this Court declined to order Signal to re-produce documents in their native format. The EEOC argues that it is not bound by *David*, and because Signal surreptitiously asks the Court to adopt the order for that reason, the EEOC contends that Signal has waived the issue. The EEOC argues that the two lawsuits are separate and distinct, have not been consolidated, and it has been afforded no opportunity to be heard on the protective orders

in the *David* litigation.

The EEOC maintains that there is no case law to support the blanket adoption of protective orders in another lawsuit. It argues that it has no idea to which documents each specific protective order refers, and while asking the Court to adopt all of the *David* protective orders, Signal lists only three (there were more). The EEOC notes that under Rule 34, courts routinely order parties to produce ESI in native format, with metadata attached.

The EEOC contends that the District Court's class-certification decision in *David* is of no moment as it was not a party and is not bound by that adverse decision. It notes that this Court determined that current immigration status is irrelevant because of its *in terrorem* effect, and the relevancy, if any, did not outweigh the public interest in allowing employees to enforce their rights. It maintains that this Court has already rejected Signal's argument that such evidence bears on motive or bias or credibility.

Noting Signal's case law on which it now relies, the EEOC argues that such case law was decided in 1972 and 1984, and it is thus not an intervening change in the law. The EEOC also cites its own Supreme Court and lower court case law in which the courts note that trial courts possess wide latitude to impose restrictions on the cross-examination of a witness.

The EEOC maintains that Signal's requested provision barring the dissemination of information is vague, overbroad and unworkable, and that the provision does not appear to bar Signal from dissemination. The EEOC contends that such a provision is unsupported by the law. Signal tried this once before, and the District Court denied it. The EEOC argues that Signal has failed to demonstrate good cause for such an order. It maintains that Signal can not demonstrate good cause because there has been no publicity in the last 18 months.

With regard to the addresses and telephone numbers of former Signal employees, the EEOC has no objection to the provision if it is modified to allow dissemination to persons deemed, in good faith by counsel, necessary to the prosecution of the lawsuit.

**III. Intervenor's Combined Opposition to Signal's Motion for Protective Order and in Support of the EEOC's Motion For Protective Order [Doc. #212]**

Intervenors note that Signal's arguments presuppose that the outcome and findings in this lawsuit or any other civil action bear on the requirements for a T or U visa.[1] They maintain that any individual may apply for a T or U visa, and none of the factors relates to participation or victory in a civil action. Intervenors thus did not need to sue – and thus did not need to contrive their deplorable conditions – to obtain a T or U visa.

Intervenors allege that Signal seeks to simply punish them – certainly by inquiring into information regarding their wives and children. Intervenors note that Signal has in the past made it clear that it would contact immigration officials and urge enforcement actions against them.

Intervenors also contend that Signal's desire to impose a blanket ban on dissemination is unsupported by the law. Distinguishing the case law on which Signal relies, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), they note that there, the moving party sought to impose a ban on specific dissemination related to their donors, not a blanket ban of all information produced during discovery.

Intervenors argue that the blanket "attorneys' eyes only" designation as to home addresses and telephone numbers is overbroad, given that attorneys must sometimes discuss this information with their staff, clients and expert witnesses. Intervenors also object to the suggestion that counsel

[1] The intervenors here are – generically – the plaintiffs in the related *David* lawsuit.

must serve subpoenas on a non-party should it wish to speak to the non-party and use the home address and telephone number with respect to serving such a subpoena. Such a provision would delay litigation and increase expense.

**IV. Law and Analysis**

The Federal Rules state that before a protective order may issue, the movant must show good cause why justice requires an order to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense." *See* Fed. R. Civ. P. 26(c)(1). To make a showing of good cause, the movant has the burden of showing the injury "with specificity." *Pearson v. Miller*, 211 F.3d 57, 72 (3d Cir. 2000). In other words, the party seeking the protective order must show good cause by demonstrating a particular need for protection. *See Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). To establish good cause, a party seeking a protective order must set forth particular and specific demonstrations of fact, as distinguished from stereotyped and conclusory statements. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981); *In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998). Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. *See Cipollone*, 785 F.2d at 1121 (citing *United States v. Garrett*, 571 F.2d 1323, 1326, n.3 (5th Cir. 1978)) (requiring "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements"); *Gen. Dynamics Corp. v. Selb Mfg. Corp.*, 481 F.2d 1204, 1212 (8th Cir. 1973); 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2035 (Supp. 1985). Moreover, the alleged harm must be significant, not a mere trifle. *See Cipollone*, 785 F.2d at 1121 (citing *Joy v. North*, 692 F.2d 880, 894 (2d Cir.1982)).

This Court finds the EEOC's argument persuasive with regard to the current immigration

status of intervenors. Even if intervenors' current immigration status was relevant to the claims asserted by the EEOC, discovery of such information would have an intimidating effect on an employee's willingness to assert his workplace rights and subject such an employee to potential deportation. *See, e.g., Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) ("[W]ere we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported."); *In re Reyes*, 814 F.2d 168 (5th Cir. 1987) (granting mandamus and ordering district court to withdraw portion of discovery order allowing discovery of immigrants' current immigration status). The case law substantiates these fears. *See, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (noting that employer reported five undocumented workers after they voted in favor of union representation); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1062-63 (9th Cir. 2000) (allowing plaintiffs to plead their claims anonymously due to their fear of retaliatory deportation); *Fuentes v. INS*, 765 F.2d 886, 887 (9th Cir. 1985) (noting that employer reported undocumented workers he had employed for three years for less than minimum wage when they filed suit to recover wages owed), *vacated on other grounds by Fuentes v. INS*, 844 F.2d 699 (9th Cir. 1988); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1057 (N.D. Cal. 2002) (noting that employer recruited undocumented worker and then reported him to the INS after he filed an FLSA claim for unpaid wages); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1055 (N.D. Cal. 1998) (noting that employer reported an undocumented worker after she filed an FLSA claim for unpaid wages).

This is an action for unpaid wages and overtime for work actually performed for Signal. Courts have recognized the *in terrorem* effect of inquiring into a party's immigration status and

authorization to work in this country when irrelevant to any material claim because it presents a "danger of intimidation [that] would inhibit plaintiffs in pursuing their rights." *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (citations omitted). Here, intervenors' current immigration status is a collateral issue. The protective order becomes necessary as "[i]t is entirely likely that any undocumented [litigant] forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face . . . potential deportation." *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (quoting *Flores v. Albertsons Inc.*, No. CV100515AHM, 2002 WL 1163623, *6 (C.D. Cal. Apr. 9, 2002)); *see also EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404 (E.D.N.Y. 2004) (holding that good cause shown for protective order where disclosure of immigration status would cause embarrassment, potential criminal charges, or deportation if status was discovered to be illegal).

The EEOC – and intervenors – have demonstrated good cause under Rule 26(c) for a protective order to prohibit the disputed information. This Court has already held twice – and been upheld once in holding – that the disclosure of the information that Signal seeks would create an *in terrorem* effect on interevenors. Courts frequently grant protective orders to protect an immigrant's current immigration status. In *Topo*, for example, the court noted:

> Plaintiff asserts that by seeking information on her immigration status, defendants are attempting to exploit the discovery process in an attempt to threaten plaintiff's continued prosecution of her claims. The court need not find such ominous undertones in defendant's discovery requests. Plaintiff's fears of her immigration status deterring further prosecution of her claims are well-founded. Courts have generally recognized the in terrorem effect of inquiring into a party's immigration status when irrelevant to any material claim. In particular, courts have noted that allowing parties to inquire about the immigration status of other parties, when not relevant, would present a "danger of intimidation [that] would inhibit plaintiffs in pursuing their rights." *Liu v. Donna Karan International, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (citations omitted). Were plaintiff's immigration status relevant to prove a material aspect of the defense, a protective order would not be appropriate.

> However, when the question of a party's immigration status only goes to a collateral issue, as in this case, the protective order becomes necessary as "[i]t is entirely likely that any undocumented [litigant] forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face ... potential deportation." *Flores v. Albertsons Inc.*, 2002 WL 1163623, *5 (C.D. Cal. 2002). Although the cases addressing this issue typically relate to the Fair Labor Standards Act, the underlying principle is still the same. When the potential for abuse of procedure is high, the Court can and should act within its discretion to limit the discovery process, even if relevancy is determined. The court finds, however, for the reasons listed below that, at best, plaintiff's immigration status is a collateral issue not relevant to any material aspect of the case.

210 F.R.D. 76, 78 (S.D.N.Y. 2002). Here, intervenors' immigration status is a collateral issue and does not go the merits of Signal's defense. This Court can not fathom in what way any such information would be relevant to the issues in this suit. Given that intervenors have invoked the Fifth Amendment before, Signal will not be able to use evidence of prior crimes to impeach intervenors at trial. In addition, the grounds for inadmissibility are irrelevant to any claim or defense here. The reasons why a particular intervenor may be refused admission to this country will not impact any evidence submitted at trial. Further, any information on family members who are not parties to this lawsuit is clearly irrelevant.

Signal asserts that information as to current immigration status would allow them to test intervenors' credibility. As the Court has noted before, credibility is always at issue. That, in and of itself, does not warrant an inquiry into the subject of current immigration status when such examination would impose an undue burden on private enforcement of employment discrimination laws. *See Rengifo v. Erevos Enters., Inc.*, No. 06 Civ. 4266, 2007 WL 894376 (S.D.N.Y. Mar. 20, 2007) (concluding that the opportunity to test the credibility of a party based on representations made when seeking employment does not outweigh the chilling effect that disclosure of immigration status has on employees seeking to enforce their rights); *Avila-Blum v. Casa de Cambio Delgado,*

*Inc.*, 236 F.R.D. 190, 192 (S.D.N.Y. 2006). "While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution." *Rivera*, 364 F.3d at 1064. In *Rivera*, the court observed that granting employers the right to inquire into immigration status in employment cases would allow them to implicitly raise threats of such negative consequences when a worker reports illegal practices. *Id.* at 1065. And while Signal maintains that the Fifth Circuit would not adopt the reasoning underlying *Rivera*, this Court notes that the Fifth Circuit has on one occasion issued a writ of mandamus – an extraordinary remedy – to order a district court to withdraw that portion of its discovery order that allowed discovery of immigrants' current immigration status. *Reyes*, 814 F.2d at 170-71. As it has before, this Court finds that Signal's opportunity to test the credibility of plaintiffs does not outweigh the public interest in allowing employees to enforce their rights.

That the parties are not in class-certification discovery proceedings is of no moment. The case law cited by this Court does not distinguish between class-certification and merits-based discovery to arrive at their conclusions. Indeed, in many of the cases, it is not readily apparent that the plaintiffs sought class certification. The Court finds that the underlying reasoning and analysis of those courts apply equally here at this stage of the litigation. Accordingly, the Court grants the EEOC's motion with respect to this issue. This holding includes the non-disclosure of intervenors' tax returns. *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D 499, 503 (W.D. Mich. 2005).

As noted above, Signal also challenges the EEOC's inclusion of the following language in the procedure to be followed with regard to confidential documents: "Finally, as a federal

government agency, the EEOC has substantial obligations to disclose documents not prohibited from disclosure by law, or valid reason." Signal cites *Valenti v. U.S. Department of Justice*, 503 F. Supp. 230 (E.D. La 1980), as support for its argument that such language should be stricken from the proposed protective order because the Freedom of Information Act ("FOIA") does not apply to courts of the United States. The Court finds *Valenti* distinguishable.

The FOIA requires that each agency of the government shall make available to the public information of a variety of kinds consisting mainly of agency records. 5 U.S.C. § 552(a)(2)-(3). In defining the term "agency," the Act itself specifically exempts "the courts of the United States" from the definition. *Id.* § 551(1)(B). In *Valenti*, the question before the court was whether a witness before the grand jury was entitled to a transcript of his testimony before the grand jury under the FOIA. *See id.* at 231-33. The court, relying on Section 551(1)(B), ultimately concluded that he was not because the grand jury is an arm of the court, and the plaintiff's testimony was thus generated by a court – and not an agency – of the United States. *See id.* at 232-33.

That is not the situation here. The proposed protective orders in this lawsuit will not protect from disclosure records generated by a court of the United States. The records involved in the discovery process will be generated by the parties, one of which is an agency of the United States and subject to the FOIA. *Valenti* is thus inapposite.

Notwithstanding this finding, however, the Court finds that a protective order prohibiting parties from publicly disseminating information gleaned through the pre-trial discovery process is warranted here. Given the highly sensitive nature of this lawsuit and the potential for abuse through the media, the Court finds Signal's arguments persuasive on this point. The case law is rife with support for the argument that no party to a lawsuit has a First Amendment right to disseminate

information obtained through the pre-trial discovery process, and this Court's discretion is broad on this point. *See, e.g. Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (holding that when "a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pre-trial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment."); *Harris v. Amoco Prod. Co.*, 768 F.2d 669 (5th Cir. 1985) (holding that the EEOC was not entitled to "receive full use of material discovered as an intervenor, whether that use is further investigation, litigation, or interagency cooperation."); *Greene v. Thalhimer's Dep't Store*, 93 F.R.D. 657, 661 (E.D. Va. 1982) (limiting use of discovered material relating to EEOC conciliation efforts).

While the Court recognizes that Signal's request is broad – and the EEOC and intervenors object to such an expansive protective order – the Court also recognizes the highly sensitive nature of this lawsuit. There has already been substantial media coverage of this lawsuit, and there is the potential for more. This Court finds that the material gleaned through the pre-trial discovery process should be limited to the preparation for and use at trial and for no other purpose until this dispute is resolved, through trial or settlement. This Court can not fathom why the dissemination of any information obtained through the discovery process outweighs the privacy interest of the parties and non-parties at this time. And the EEOC's interest in complying with FOIA is of no moment pending trial. *See Harris*, 768 F.2d at 685. The EEOC's obligations under FOIA are limited to requests by the public, which at this time are negligible at best concerning this lawsuit. There is no mandatory dissemination requirement under the FOIA.

With regard to the production of electronically-stored information ("ESI"), the Court notes that Rules 34 governs the production of such data. The parties are the masters of their production

requests, and they may request ESI in any format allowed under the rules. *Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D 556, 560 (N.D. Ill. 2008). The protective order in *David* [Doc. #1352] is inapplicable here.

With regard to the addresses and telephone numbers of former Signal employees, the Court finds that the parties may disseminate such information to persons deemed in good faith necessary to the prosecution of the lawsuit. And lastly, the Court will not order the parties to serve a subpoena on a non-party should it wish to speak said non-party. Such a practice would be a waste of the Court's and the parties' resources.

## V. Conclusion

For the foregoing reasons,

**IT IS ORDERED** that the EEOC's Motion for Protective Order [Doc. #207] and the Motion of Defendant Signal International, L.L.C. for Protective Order [Doc. #208] are GRANTED IN PART and DENIED IN PART as outlined above. The parties shall meet and confer **no later than ten (10) days from the date of this Order** to confect a protective order in conformity with this Court's reasoning, and **no later than ten (10) days from said date**, the parties shall file said protective order for this Court's approval.

New Orleans, Louisiana, this 10th day of September, 2013.

**DANIEL E. KNOWLES, III**
**UNITED STATES MAGISTRATE JUDGE**

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# U Visa Applications for Immigrant Victims of Crimes

**December, 2011**

**Since 2000, certain crime victims who are helpful to a police investigation of the crime can apply for a "U-visa" which grants legal immigration status**.[1] After 3 years in U-visa status the person can apply to be a lawful permanent resident (LPR). U-visa-holders can get work authorization and are eligible for some public benefits

**To qualify for a U-visa, the applicant must satisfy the following criteria**:

1. The crime must have occurred in the U.S. or have violated U.S. law.[2]

2. Applicant must have suffered "substantial physical or mental abuse" as a victim of a "qualifying criminal activity" [3]

3. The victim must possess information about the criminal activity.[4]

4. He or she must help or have helped with the investigation or prosecution of the crime (or be willing to do so in the future),[5] and obtain a certification on Form I-918 Supplement B, "U Nonimmigrant Status Certification," from the law enforcement agency that he or she has cooperated with, signed within six months of filing the U-visa application.

5. The Department of Homeland Security's (DHS) Citizenship & Immigration Services (CIS) must approve the U-visa application and any waivers of inadmissibility, in the exercise of discretion. There are no appeals of a waiver denial.

**The "qualifying criminal activity" of which the person was a victim must be one of the following kinds, in violation of Federal, State, or local criminal law:**

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[1] 8 USC § 1101(a)(15)(U)
[2] *See* 8 USC § 1101(a)(15)(U)(i)(IV)
[3] *See* 8 USC § 1101(a)(15)(U)(i)(I); "*Physical or mental abuse* means injury or harm to the victims physical person, or harm to or impairment of the emotional or psychological soundness of the victim." 8 CFR § 214.14(a)(8). For more on the "substantial abuse" definition see 8 CFR § 214.14(b)(1).
[4] *See* 8 USC § 1101(a)(15)(U)(i)(II); "The alien must possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity." 8 CFR § 214.14(b)(2)
[5] *See* 8 USC § 1101(a)(15)(U)(i)(III); 8 CFR § 214.14(b)(3)

Abduction
Abusive Sexual Contact
Blackmail
Domestic Violence
Extortion
False Imprisonment
Felonious Assault
Female Genital Mutilation
Hostage
Incest
Involuntary Servitude
Kidnapping
Manslaughter
Murder
Obstruction of Justice
Peonage
Perjury
Prostitution
Rape
Sexual Assault
Sexual Exploitation
Slave Trade
Torture
Trafficking
Unlawful Criminal Restraint
Witness Tampering
Or: “any similar activity.

- Attempt, conspiracy, or solicitation to commit any of these crimes count as qualifying activity. [6]

- The perpetrator of the crime need not have had any particular relationship to the victim. Domestic violence is just one qualifying type of criminal activity.

**Law Enforcement Certification of Helpfulness to the Investigation of the Crime is a Requirement:**

- The certification that the applicant has been helpful, is being helpful, or is likely to be helpful in the investigation of the criminal activity[7] can come from a Federal, State or local law enforcement official, prosecutor, judge or other authority investigating or prosecuting the criminal activity.[8]

- Charges do not need to be filed nor a conviction obtained in order to receive the certification. No agency is required to do a certification.

- Certification must be submitted as part of the U-visa application. The Department of Homeland Security's (DHS) Citizenship and Immigration Services (CIS) will decide whether to grant a U-visa.

- **Even with a law enforcement certification the decision by DHS is separate and discretionary. Approval is not automatic.** However, the noncitizen will not be eligible for U nonimmigrant status without a certification.

**Practice Tip**: Defenders should ask non-citizen clients who are undocumented or in need of immigration relief if they have ever been a victim of one of the designated types of criminal activity and if they reported it to the police or had been involved with the investigation of that crime.

If so, seek immigration legal assistance for further U-visa eligibility screening. One agency in Washington that assists some immigrants with U- visas is the Northwest Immigrant Rights Project, (206) 587- 4009 (W. Washington), or (509) 854-2100 (E. Washington.)

People with prior criminal history are not barred from seeking a U-visa, although they may need a discretionary waiver.

and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities." 8 CFR § 214.14(a)(9).

[7] *See* 8 USC § 1101(a)(15)(U)(i)(III).

[8] *See* 8 USC § 1184(p).

**Additional U Visa Information:**

- In addition to the statutory provision at 8 USC § 1101(a)(15)(U), the requirements are spelled out in more detail in the implementing federal regulations at 8 Code of Federal Regulations (CFR) § 214.14.

- A person who is culpable for the qualifying criminal activity being investigated or prosecuted is excluded from being recognized as a victim of qualifying criminal activity.[9]

- Some family members may also receive U visa derivative beneficiary status, whether or not they are in the United States.[10] Only 10,000 petitioners can receive U status per fiscal year,[11] not including derivative beneficiaries.[12]

- Discretionary waivers for most grounds of inadmissibility, including inadmissibility for criminal convictions, are available if it is in the "public or national interest."[13]

- Generally, the authorized period of stay for a noncitizen individual in U-visa status is no longer than four years. However the period may be extended if a Federal, State, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting criminal activity certifies that the noncitizen's presence in the US is required to assist in the investigation or prosecution of the crime.[14]

Lawful Permanent Resident Status

- U-visa holders who have three years of continuous physical presence can apply to become lawful permanent residents (LPRs or "green-card" holders), if their continued presence in the United States is justified on humanitarian grounds to ensure family unity, or is otherwise in the best interest of the public.[15]

[9] 8 CFR § 214.14(a)(14)(iii)
[10] *See* 8 USC § 1101(a)(15)(U)(ii); 8 C.F.R. § 214.14(f). These family members include spouse, children, unmarried siblings under 18, and parents if the principal petitioner is less than 21 years old; and spouse and unmarried children under 21 if the principal petitioner is 21 years or older on the date of application.
[11] *See* 8 USC §1184(p)(2)(A).
[12] *See* 8 USC §1184(p)(2)(B).
[13] *See* 8 USC § 1182(d)(14)
[14] *See* 8 USC § 214(p)(6) and 8 CFR 214.14(g)
[15] *See* 8 USC § 1255(m)(B)

- To be eligible, the individual must not have declined any reasonable request to continue to cooperate with the investigation or prosecution of the crime committed against them.[16]

**Confidentiality Provisions Protecting Victims (or Alleged Victims):**

- The confidentiality provisions of the Violence Against Women Act, or VAWA, at 8 USC § 1367, generally prohibit third-party disclosure of any information relating to applicants for relief under VAWA, including applicants for U-visa status.[17]

- These provisions include prohibiting DHS from using information from the alleged "perpetrator of the substantial physical or mental abuse and the criminal activity" as the sole basis for arresting and charging a noncitizen with removability.[18]

- Disclosing to anyone, other than a sworn officer or employee of DHS, DOJ, or DOS for agency purposes, any information which relates to beneficiary of a U visa application is prohibited.[19]

- There are various exceptions to these prohibitions, including for law enforcement and judicial review purposes.[20]

- Although the issue has not been addressed in the Ninth Circuit, the Eighth Circuit has held in dicta that 8 USC § 1367(a)(2) does not provide for exclusion of evidence as a remedy for a violation, at least in criminal cases, and that the statute was not violated by disclosure to the US Attorney for prosecution.[21] It has been argued[22] that this decision conflicts with the goals of VAWA 2000 to help battered immigrants leave abusive relationships and to decrease domestic violence.[23]

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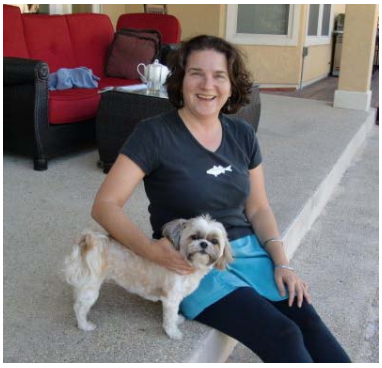
[16] *Id.*
[17] 18 USC 1367(a)(1)(E).
[18] *See* 8 USC §1367(a)(1)(E) and 8 CFR § 214.14(e)
[19] *See* 8 USC § 1367(a)(2) and 8 CFR § 214.14(e).
[20] *See* 8 USC § 1367(b).
[21] *U.S. v. Maswai*, 419 F.3d 822 (8th Cir. 2005).
[22] *See* Laura Jontz, Eighth Circuit to Battered Kenyan: Take A Safari-Battered Immigrants Face New Barrier When Reporting Domestic Violence, 55 Drake L. Rev. 195, 216 (2006).
[23] Victims of Trafficking and Violence Protections Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. at 1518.

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Gail Pendleton is Co-founder of the National Network to End Violence Against Immigrant Women and Co-Director of ASISTA, a national immigration law technical assistance project funded by the federal Office on Violence Against Women. Formerly Associate Director of the National Immigration Project of the National Lawyers Guild, where she worked for twenty years, she is now an independent consultant, providing innovative multi-disciplinary trainings on immigration options for immigrant survivors of domestic violence, sexual assault and trafficking.

She received the American Immigration Lawyers Association's (AILA) Human Rights Award in 2001, received her J.D. in 1985 from NYU School of Law and her A.B. from Harvard/Radcliffe College in 1981.

WANDA M. LUCIBELLO
Chief, Special Victims Division
Kings County District Attorney's Office

Ms. Lucibello is the Chief of the Special Victims Division in the Brooklyn District Attorney's Office. She has conducted training programs for police, prosecutors and service providers in the investigation and prosecution of domestic violence cases, in conjunction with the National College of District Attorneys and the New York Prosecutors Training Institute.

At the request of the United States Department of State, she spent several weeks in 1998 and 2000 in Zimbabwe, Botswana and South Africa where she worked with prosecutors and women's groups on new legislative initiatives in family violence. She conducted additional international trainings in London, 2006; Grenada, Barbados, Belize, 2008; Ireland, 2008; Mexico, 2008; Jersey, Channel Islands, 2009; Doha, Qatar, 2009; and Armenia in 2009 and 2011.

In conjunction with the Office on Violence Against Women in Washington, D.C., she assisted in the preparation of a prosecutor's brochure on Full Faith and Credit in Interstate Orders of Protection. Ms. Lucibello also helped to develop a training curriculum for the National Institute on the Prosecution of Domestic Violence in conjunction with the Office on Violence Against Women and the American Prosecutors Research Institute.

She was awarded the *Robert N. Kaye Memorial Award* by the Kings County Criminal Bar Association in May 2004, the *Governor's Justice Award to End Domestic Violence* in October 2004, the National College of District Attorneys, *Lecturer of Merit* in October 2005, *Justice Ruth E. Moskowitz Award* in 2007, and the *Thomas E. Dewey Medal* by the City Bar Association in 2009.

She also served on the National Advisory Board for the President's Family Justice Center Initiative, and was instrumental in the establishment of the Family Justice Center in Brooklyn, New York. Ms. Lucibello is currently an Adjunct Professor at Benjamin N. Cardozo School of Law in New York City.

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# JONATHAN MOORE - BIOGRAPHY

Jonathan Moore has worked with people in immigration proceedings since 1983. He worked as a paralegal at Proyecto Libertad, in Harlingen, Texas, with mostly detained Central-American asylum-seekers, from 1983 until 1990. From 1985-1987 he also worked for the Rio Grande Defense Committee, on legal defense of South Texas sanctuary workers.

He worked in Seattle, at the Joint Legal Task Force – Hispanic Immigration Program and its successor, the Northwest Immigrant Rights Project, mainly on deportation defense, from 1990- 2005. Jonathan Moore was accredited by the Board of Immigration Appeals to represent people in immgration adjudications, in deportation proceedings and in administrative appeals, through NWIRP from 1993 until 2005.

He currently works at the Washington Defender Association Immigration Project, supporting public defenders and defense lawyers on issues related to the immigration consequences of criminal convictions. He is a currently a Board of Immigration Appeals (BIA) accredited representative through the WDA. He is member of the Board of Directors of the National Immigration Project of the National Lawyers Guild. Jonathan Moore has been a consultant on issues relating to the immgration consequences of criminal convictions for ASISTA, a national clearinghouse for for advocates and attorneys working with immigrant survivors of domestic violence and sexual assault, funded by the Justice Department's Office of Violence Against Women (OVW.


# Michael Agnew

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Michael was the lead Domestic Violence Detective with the Fresno Police Department for 15 years. He created the Domestic Violence Unit at the Fresno Police Department in 1996 which grew from two detectives and one victim advocate to ten detectives, 3 victim advocates and a Child Protective Service Worker. The Unit reviewed approximately 7,000 domestic violence police reports each year that occurred within the city.

With 38 years of law enforcement experience with the Fresno PD he retired in 2011 and returned to the Fresno Police Department as a volunteer assigned by the Chief to continue working with the U Visa Program. He has been handling the U Visa requests at the Fresno Police Department for the last 7 years and currently reviews in excess of 200 U Visa applications each year.

Michael continues to be an instructor for California POST for law enforcement training, the California District Attorneys Association, The Battered Women's Justice Project and the Nation Family Justice Center Alliance.

Michael was recognized by the California Attorney General's Office Task Force on the Criminal Justice Response to Domestic Violence as a statewide expert and has been asked by the task force to testify before its regional hearings on domestic violence.

Susan M. Breall is a judge in the Superior Court for the City and County of San Francisco. Currently, she presides over a juvenile delinquency department. Her previous assignments have included presiding over felony jury trials, domestic violence court, both adult and juvenile drug court, felony settlement court and long cause preliminary hearings. Prior to her appointment to the bench in 2001, she was Chief of the Criminal Division of the San Francisco district Attorney's Office for all crimes of violence against women, children, elderly and intimate partners. She prosecuted felony domestic violence cases for ten years, and was an Assistant District Attorney for seventeen years.

Ms. Breall has done numerous trainings for police and prosecutors throughout the United States. In 1997 she traveled to the Federation of Bosnia and Herzegovina where she conducted domestic violence trainings for the Federation of Bosnian Judges on police investigations, interview techniques and evidence gathering for domestic violence cases. In 1998, she conducted trainings for all the police officers in the United States Virgin Islands on legal issues affecting battered immigrant women.

Her special interest in the area of domestic violence is in working with under served populations. She tried numerous cases in the seventeen years in which she practiced law involving undocumented battered immigrant women as victims of domestic violence.

National Family Justice Center Alliance

*Webinar Training*

## U-Visa Discoverability, What to Do?

*Presented by Susan Breall, Wanda Lucibello, Mike Agnew, Jonathan Moore and Gail Pendleton*

February 26, 2014

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**Gael Strack, JD**
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Date of Issue: February 27, 2014