Immigration Relief for Crime Victims: The U Visa Manual

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NY Anti-Trafficking Network

The New York Anti-Trafficking Network has provided direct services to over 450 survivors of human trafficking (NYATN), including most of the major trafficking cases prosecuted in New York City, and advocated on issues of trafficking in persons since 2002. As the first network in New York to engage in advocacy on issues relating to trafficked persons in New York, the NYATN aims to bring together the voices of those who have first-hand experience of the injustices of human trafficking, who work consistently to meet the needs of trafficked persons, and who advocate for a more humane and responsive policy towards trafficked persons. Our membership includes many organizations and individuals advocating on behalf of survivors of trafficking and other forms of violence.

The NYATN is a group of diverse service providers and advocates in New York dedicated to ending human trafficking and coordinating resources for trafficked persons. It seeks to establish dialogue and discuss service options in a range of cases and enable cross-communication regarding each agency's work with trafficked persons. We provide direct services to trafficked persons; technical assistance to attorneys, case managers, and other service providers who work with trafficked persons; train law enforcement and non-governmental organizations on issues relating to trafficking in persons; outreach in communities to provide resources and information on trafficking in persons; and engage in policy advocacy on these issues.

NYATN members played a key role in the passage of the New York Anti-Trafficking law as well as reauthorizations of the federal Trafficking Victims Protection Act. We continually advocate for legislation that promotes the rights of trafficked persons at the state and federal levels.

The New York Anti-Trafficking Network is guided by the following principles:

- Recognizing that sustainable change and improved response to trafficked persons requires increased capacity of network partners working in concert to support trafficked persons.
- Developing new ways of working together to deliver services, share information, identify resources, and advocate, is pivotal to an effective response to trafficked persons.
- Educating service providers, law enforcement, governmental entities and the general public is critical to reaching trafficked persons.

Also see http://nyatn.wordpress.com for additional information, events and resources including our ***Identification and Legal Advocacy for Trafficking Survivors*** manual which can be downloaded from our website.

For more information contact a NYATN Steering Committee Member or visit us at http://nyatn.wordpress.com.

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Introduction

The U visa was established under the Trafficking Victims Protection Act of 2000 (TVPA),[1] and was subsequently reauthorized in 2003, 2005, and 2008 (Trafficking Victims Protection Reauthorization Act, or TVPRA).[2] It was created as humanitarian relief for a vulnerable population, most of which do not have lawful status in the United States. It provides legal status to victims of certain serious crimes who have suffered substantial physical or mental harm and can document cooperation with law enforcement. If favorably adjudicated, the U visa grants permission to remain and work in the U.S. for up to four years, and allows beneficiaries to eventually apply for permanent resident status.

The U visa is a new and somewhat untested visa classification. After its initial passage, it languished due to a lack of implementing Federal Regulations. In the absence of regulations, United States Citizenship & Immigration Services (USCIS) offered "interim relief" to those who established prima facie eligibility for the U visa classification. As the name suggests, interim relief is only a temporary fix, offering no long term benefits. For permanent benefits, those holding interim status were required to re-apply for U status following publication of the interim final rule seven years later. While the interim final rule went into effect on October 17, 2007,[3] a majority of the U petitions continued to be held in abeyance pending clarification on filing fees associated with waiving grounds of inadmissibility for the visa (Form I-192). This was later clarified by regulations that came into effect on January 12, 2009.[4] As a result, most petitions for U status first began to be adjudicated in January 2009.

Congress allocated 10,000 U visas to be issued each year, not including spouses and other derivative family members.[5] Once the annual cap of 10,000 is reached, applicants for U status will be placed on a waitlist and will be issued deferred action,[6] the same benefit that was offered under interim relief. As with interim relief, those on the waitlist are eligible to receive employment authorization and deferred action status for U derivatives.[7]

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1 Pub. L. No. 106-386, 114 Stat. 1464 (2000). The U visa was incorporated in the section of the TVPA known as the Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1518 (2000).

2 Pub. L. No. 108–193, 117 Stat. 2875 (2003), Pub. L. No. 109-164, 119 Stat. 3558 (2006), Pub. L. No. 110-457, 122 Stat. 5044 (2008); Immigration & Nationality Act (INA) § 101(a)(15)(U).

3 8 CFR § 214.14; USCIS Interim Final Rule: New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status, 72 Fed. Reg. 53014 (Sept. 17, 2007). Effective October 17, 1007.

4 8 CFR § 103.7(c)5(iii); USCIS Interim Final Rule: Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75540 (Dec. 12, 2008). Effective January 12, 2009. Pursuant to 8 CFR 103.7(c)(5) fee waiver requests will now be accepted by applicants for T or U nonimmigrant status.

5 8 CFR § 214.14(d)(1).

6 8 CFR § 214.14(d)(2).

7 *Id.*

Like the T visa manual,[8] this manual aims to provide guidance to lawyers on issues that arise in the context of representing U visa applicants. It is designed for practitioners who are familiar with basic immigration terms and legal concepts. The manual is not meant to be an exhaustive source of the law; it is not meant to provide instruction on every aspect of representation, nor is it meant to take the place of direct legal advice, advocacy, or a practitioner's own research and evaluation of the case.[9] It also does not address in detail other avenues of immigration relief that may be available to crime victims. Practitioners should always consider other avenues for status or relief, such as asylum, a petition under the Violence Against Women Act (VAWA), the T visa, petitions for Special Immigrant Juvenile Status (SIJS), Cancellation of Removal, and other family- and employment-based petitions. We encourage practitioners to be creative in exploring other possibilities for immigration relief on behalf of victims.

8 "Identification and Legal Advocacy for Trafficking Survivors" (3rd Ed., Jan 2009) by NY Anti-Trafficking Network Legal Subcommittee. This manual can be found online at http://www.ny-anti-trafficking.com/assets/docs/t_visa_manual_3rd_edition_2009.pdf.

9 An excellent source of relevant legal documents can be found at www.asistaonline.org. Also, materials can be found on the probono.net/ny/family website (registration is free) in the library under immigration, which is available at: http://www.probono.net/ny/family/library/folder.21203-Immigration.

Part A: Determining if U Visa Is Appropriate for Your Client

I. What is a U Visa?

The U visa is a nonimmigrant status that, according to the statute,[10] may be available when:

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of the following qualifying crimes or substantially similar criminal activity:[11]

- 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
- Murder, manslaughter
- Felonious assault
- Witness tampering
- Obstruction of justice
- Perjury
- Attempt, conspiracy, or solicitation to commit any of the above

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning the criminal activity;

[10] INA § 101(a)(15)(U)(i); 8 USC § 1101(a)(15)(U)(i).
[11] 8 USC § 1101(a)(15)(U)(iii); 8 CFR § 214.14(a)(9).

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to USCIS, or to other Federal, State, or local authorities investigating or prosecuting the criminal activity; and

(IV) the criminal activity violated the laws of the U.S. or occurred in the U.S. (including in Indian country and military institutions) or the territories and possessions of the U.S.

In general, the U visa is meant to protect a vulnerable population from being targeted for crimes, by providing those who cooperate with law enforcement the ability to remain lawfully in the U.S. and eventually gain permanent residency.

A. Benefits

- U visa nonimmigrant legal status for four years, which may, under certain circumstances, be extended.[12]
- Opportunity to seek permanent residency ("green card") after three years in U status.[13]
- Employment authorization for the principal applicant.[14]
    - Living in the U.S.
        - For the principal applicant applying in the U.S., USCIS will automatically issue an initial Employment Authorization Document (EAD) to applicants granted U-1 nonimmigrant status.
        - Applicants with a pending, bona fide application for U status may also be eligible for an EAD. However, as of the drafting of this manual, USCIS had not issued a bona fide standard.[15]
    - Living Outside the U.S.

12 8 CFR § 214.14(g).
13 INA § 245(m), 8 USC § 1255(m).
14 8 CFR § 214.14(c)(7).
15 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 08), P.L. 110-457, 122 Stat. 5044-5091, (2008).

- Principal applicants who apply from outside the U.S. will not be issued an EAD until the applicant has been granted U status. After admission, the applicant may receive an initial EAD upon request.

- Derivative status for family members.[16]

  - If petitioner is under 21, then spouse, children, parents (only if petitioner is unmarried) and siblings under 18 at the time of filing I-918 (not time of interim filing) can apply for derivative status.

  - If petitioner is over 21, then spouse and children can apply for derivative status.

  - Derivatives may apply for EAD either as part of the initial submission, or after receiving U status.

- Eligibility for certain public benefits.

- Travel outside the U.S., but note potential risks.[17]

B. Initial Considerations in Case Evaluation

1. Immigration Status

Applicants for U status may have problems with the validity of their immigration status. The most common issues include the following:

- Entering the U.S. without passing through a border post or port of entry (known as "entry without inspection" or "EWI");

- Entering on a tourist visa (B1/B2) and engaging in unauthorized employment. This is considered a violation of that particular status;

- Entering on a tourist visa (B1/B2) but overstaying the authorized period of stay on the I-94 Departure Record. Once an individual overstays the I-94 card by even one day, they are considered "unlawfully present." There are serious and permanent consequences associated with unlawful presence;[18]

- Entering on a fraudulent passport or using another person's passport. This constitutes visa fraud, and does not confer a valid nonimmigrant status.

16 8 CFR § 214.14(f).
17 *See* Section IV, "After Issuance of U Status," Part B "Travel Overseas."
18 INA § 212(a)(9)(B)(i).

However, if the individual did not overstay the I-94 (even though fraudulently issued), s/he is not considered to be unlawfully present.

The validity of a U applicant's status is important because if an applicant is not in valid status, and s/he is being brought to the attention of USCIS or Immigration & Customs Enforcement (ICE), the applicant could be issued a Notice to Appear (NTA) at Immigration Court, and removal (deportation) proceedings may be commenced.

Another important consideration with violations of status or unlawful presence is that it may interfere not only with the U application, but also with the applicant's eligibility for future immigrant benefits (such as obtaining legal permanent resident status – the "green card"). A waiver of "inadmissibility" may remedy these status violations and are granted at the discretion of the USCIS. To request a waiver of inadmissibility on the above grounds, Form I-192 and the accompanying fee (or request for fee waiver) should be filed concurrently with the I-918.[19]

2. Liability for Criminal Behavior

All criminal acts, even minor ones, should be disclosed to the attorney and the applicant should provide certificates of disposition for each act and/or a certificate of good conduct. If the applicant is not sure of this history, a good place to start is the Federal Bureau of Investigations (FBI), which will provide a copy of the applicant's 'rap sheet' for informational purposes. Complete information on requesting an FBI Identification Record can be found at http://www.fbi.gov/hq/cjisd/fprequest.htm.

Attorneys and advocates should be wary of any prior arrests or convictions that may come back to haunt the client. If the applicant was arrested, it is critical to engage in aggressive advocacy that avoids a conviction, even if it involves only a low-level offense. As noted above, a criminal conviction may impact the client's ability to stay in the U.S. and/or obtain legal permanent residency. ICE and USCIS will take into consideration if the conviction was caused by, or incident to, the victimization. However, it is better to advocate for an appropriate disposition.

3. Privilege[20]

The attorney-client privilege is an established principle of law that protects communications between attorneys and their clients, when such communication is for the purpose of requesting or receiving legal advice. This privilege encourages openness and honesty between attorneys and their clients by prohibiting attorneys from revealing (and being forced to reveal) attorney/client communications. The privilege belongs to the client, meaning that only the client may waive the privilege to give consent to reveal the protected communications. However, certain situations

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19 This is outlined in more detail in Part B.

20 We are grateful to Dechert LLP for researching and evaluating this important, yet complex issue. This section provides only a cursory review of the memoranda provided to us by Dechert LLP. These memoranda are available for review at www.ny-anti-trafficking.com, under the publications link.

may "break" the privilege, even if the client did not have the intention to reveal the communications. This includes the presence of a third party in attorney-client communication.

In the U visa application context, the presence of a social worker in the interview process or throughout the representation may break privilege. Once privilege is broken, the communication may no longer be kept private, and defense attorneys or prosecutors may be able to access the client's statements. Limited exceptions to this rule include where the social worker, or other assistant, is acting solely in the context of an interpreter or translator, or where the social worker is there solely to facilitate the provision of legal services.[21]

Generally speaking, communications between a lawyer and her client made in the presence of a known third party are not privileged. The theory is that such communications could not have been intended to remain confidential.[22] Nevertheless, in circumstances where a client can demonstrate that she had a reasonable expectation of confidentiality and the communications were "made to [or in the presence of] agents of an attorney ... hired to assist in the rendition of legal services," the attorney-client privilege is not broken.[23] This holds even where such communications were made entirely outside the presence of the attorney so long as the communications were made to the third party in order to facilitate the attorney's representation of her client.[24] The federal courts have applied the privilege to diverse professionals working with attorneys, including "a psychiatrist assisting a lawyer in forming a defense."[25] However, it is important to remember that this jurisprudence protects communications made to an attorney or on behalf of the services provided by an attorney; it does not extend beyond the scope of representation provided by an attorney.

A separate question is whether there is a privilege protecting communications between a social worker and a client made pursuant to providing other services, such as counseling, assisting with housing, medical assistance, et cetera. This is not as well-established in the law. In very broad terms, the issue seems to turn on the professional level of the social worker, i.e. licensure or certification, the expectations of the client as to confidentiality of the communications, and the purpose of the communications. For example, the Supreme Court recognizes "the ability to

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21 *See e.g., United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976). Although such "exceptions" may not break the privilege, it is extremely important that where a social worker is playing such a role, his or her function is fully documented as limited to that role. Should the social worker's role go beyond translating or facilitating the provision of legal services, it may blur the line, making the privilege easier to pierce. Moreover, such exceptions are not absolute, and both the attorney and social worker should ensure that any communications are made in a setting most conducive to protecting the communications.

22 *See Weatherford v. Bursey*, 429 U.S. 545, 554 (1977).

23 *United States v. Schwimmer,* 892 F.2d 237, 243 (2d Cir. N.Y. 1989), *cert. denied,* 502 U.S. 810 (1991).

24 Note that this privilege applies to both the testimony and records of the third party. *See e.g.*, *Federal Trade Commission v. TRW, Inc.,* 628 F.2d 207, 212 (D.C. Cir. 1980)(citing *United States v. Kovel,* 296 F.2d 918 (2d Cir. N.Y. 1961)) (Finding the reports prepared by a third party privileged where report was prepared at request of attorney and "the purpose of the report was to put in usable form information obtained from the client").

25 *Occidental Chemical Corp. v. OHM Remediation Services Corp.*, 175 F.R.D. 431, 437 (W.D.N.Y. 1997).

communicate freely without the fear of public discourse [as] the key to successful treatment" in psychotherapy and clinical social workers.[26] However, it is not clear how far this privilege extends. Moreover, in state courts, privilege is adjudicated under state law, and each state has different rules regarding this matter.[27] Therefore, social workers and social services organizations need to take every precaution to protect clients' communications, and/or to advise clients that such communications may not be confidential.[28]

C. Legal Assessment

1. Screening Clients

The following are some suggested questions that may facilitate initial screening and evaluation of potential U applicants. These questions were drafted to elicit information relevant to the regulatory criteria, but are not exhaustive. Practitioners should be mindful of their client's specific circumstances, and to direct their questions accordingly.

i. Background Immigration Information

- When did you enter the U.S.? List every place, date, and type of entry.
- For each time that you entered the U.S., did you enter with a valid passport and visa? *Check passport and I-94 card*.
- If you did not enter with a valid passport and visa, did you have any contact with an official, immigration, or other agent, during the entry?
    - Were you detained?
    - Were your fingerprints or photograph taken?
    - Did you claim to be someone else?
    - Did you claim to be a U.S. Citizen?
- Have you filed any immigration papers? If so, do you have a copy of those papers?
- Have you ever been ordered removed, excluded, or deported from the U.S.?

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[26] *Jaffee v. Redmond*, 518 U.S. 1, 6, 15 (1996).

[27] As of this writing, Dechert LLP has researched social worker privilege in New York, New Jersey, Florida, Texas, and Arizona. This research is available at www.anti-nyc-trafficking.com under the link to publications.

[28] Legal Aid Foundation of Los Angeles (LAFLA) has also done substantial research on the social worker privilege issue. Information can be found on their website at www.lafla.org.

ii. Information on Crime

- Do you know the perpetrator? If so, how?
- Name of perpetrator/abuser, if known;
- Information on where perpetrator/abuser is residing, if known;
- Provide details of the crime (when, where, what occurred);

iii. Cooperation with Certifying Agency[29]

- Have you spoken to law enforcement about this crime?
- Did you assist law enforcement in their investigation?
- Do you have contact information/address for the law enforcement official with whom you spoke?

iv. Harm Suffered

- Are you experiencing any lasting physical or mental effects as a result of the crime? Do you have any medical conditions that have worsened since the crime?
- Have you spoken to a therapist, case manager, or counselor about the harm you have suffered?
- Are there any other effects that you have suffered as a result of the crime that you can describe?[30]
- Can you provide medical reports?

v. Inadmissibility and Good Moral Character

- Have you ever been arrested, including any time you were detained by immigration?

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[29] Under 8 CFR § 214.14(a)(2), the term "Certifying Agency" is defined broadly to include any authority "that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity." Common examples include, but are not limited to local, State and Federal law enforcement, prosecutors, judges, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.

[30] Many types of evidence may be available to support the harm suffered by a victim of a crime. Evidence could include official medical reports, formal statements by a case manager or counselor attesting to the harm suffered, and letters of support by people close to the victim, including neighbors, family, and employers.

- Detailed information about circumstances of each arrest/conviction;
- Have you ever used drugs?
- Have you ever helped someone cross the border without a visa?
- Have you ever pretended to be a U.S. citizen?
- Do you have a disease, such as tuberculosis, which could be considered a public health concern?

2. Choosing a Remedy[31]

Many victims of crime have a history of abuse that may or may not be related to the most recent crime committed against them. Based on this history, the applicant may have different options for types of relief under U.S. immigration law. During the initial screening, it is important to pay attention to any red flags in the story, and to ask questions beyond the specific crime the client is reporting. Asking basic questions about a person's family history, life in their home country, arrival into the U.S., and conditions under which they have lived in the U.S. will provide a more complete picture of the individual's options for relief.

A chart outlining some options to consider is at A11**,** and may include the following:

i. Violence Against Women Act (VAWA)[32]

The Violence Against Women Act (VAWA) was passed to improve criminal justice and community-based responses to domestic violence, dating violence, sexual assault, and stalking in the U.S. Under VAWA, victims of domestic abuse may apply for permanent resident status. A petition under VAWA basically requires the following:

- The perpetrator/abuser is a U.S. Citizen or Lawful Permanent Resident;
- The perpetrator/abuser is a spouse, parent, or, in the case of the elderly, a U.S. Citizen child;
- The abuse committed amounted to battery or extreme cruelty.

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[31] A chart, "Basic Comparison of U Visa, VAWA Self-petitions, T Visas, and Asylum," is included with these materials and outlines some options to consider when choosing a remedy for your client.

[32] Pub.L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994); *see also* "U Visa Regulations Fact Sheet," Legal Momentum: Advancing Women's Rights, *available at* http://www.legalmomentum.org/news-room/press-releases/u-visa-regulations-released.html.

A VAWA petition may be more advantageous because:

- U visa applicants have a 3-year continuous presence requirement before they can apply for lawful permanent residency.
- U visa recipients can only obtain lawful permanent residency if they can prove humanitarian need, family unity, or public interest.[33] VAWA self-petitioners can obtain lawful permanent residency once a visa becomes available.
- U visa applicants have to rely on the I-918 Supplement B certification from law enforcement. VAWA applicants may self-petition and prove their entitlement to the remedy without any mandatory cooperation from law enforcement.

ii. Asylum

Asylum is a form of protection that may be an option for those who have suffered, or are likely to suffer, persecution in their home country. Often, victims of violence in their home country will have experiences of violence during their travel to the U.S., or following their arrival in the U.S. A client may initially present as a potential U-visa holder, but careful questioning regarding his/her history may also demonstrate eligibility for asylum.

The rules surrounding an application for asylum can be complicated and require a great deal of documentation. To be eligible for asylum, a person must be in the U.S. and meet the definition of a refugee.[34] Under this definition, a person must have been persecuted, or fear the possibility of persecution if returned to their home country, on account of their race, religion, nationality, membership in a particular social group, or political opinion.

General points regarding eligibility for asylum:

- An application must be submitted within one year of arrival in the U.S., or within one year of expiry of lawful status. If an application is not timely submitted, an applicant must show "either the existence of **changed circumstances** which materially affect the applicant's eligibility for asylum or **extraordinary circumstances** relating to the delay in filing the application…."[35] (emphasis added).
- The persecution suffered by the applicant may be at the hands of the government, or an entity that the government is unable or unwilling to control.[36]

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33 8 CFR § 245.24(b)(6).

34 A refugee is defined as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A), 8 USCS § 1101(a)(42)(A).

35 INA § 208(a)(2)(B), (D).

36 *Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007).

- An applicant may be eligible for asylum if persecuted because of the persecutor's erroneous belief that they held an unpopular political opinion, religious view, or were members of a particular social group. While substantial case law supports the idea of persecution based on an "imputed" ground, it is important to document these cases thoroughly and be creative in the argument in favor of granting their application.

An asylum petition may be more advantageous because:

- The asylum application, while burdensome, may be preferred because it does not require applicant cooperation with, or certification by, law enforcement.

- An asylee is able to apply for lawful permanent residency one year after their asylee status was approved, while a U visa holder must wait three years.

iii. T Visa[37]

The T visa was initially created by the Trafficking Victims Protection Act (TVPA) of 2000[38] and further defined in subsequent reauthorizations. Under the TVPA, a person is eligible to apply for a T visa if s/he is a survivor of a severe form of trafficking. In many instances, a trafficking survivor may also have been a victim of another crime. Depending on the severity of the trafficking situation and the identity of the trafficker, the survivor may be more willing to report another crime to law enforcement, and apply for the U visa in lieu of the T visa.

However, it is not necessary to choose between filing for a T visa and filing for a U visa; it may even make sense to file both types of petitions so that USCIS may review the facts under both standards. If it turns out that the applicant is eligible for both the U visa and the T visa, USCIS will probably ask that one petition be withdrawn since a foreign national can only hold one nonimmigrant status at a time. In making this type of decision, practitioners may want to consider the benefits available under each visa category.

Important considerations in deciding between the T visa and the U visa are:

- Those in T status are eligible for more public benefits than those in U status. Applicants approved for T status receive a Certification Letter from the Department of Health and Human Services, given them access to benefits.
- Those in T status are eligible to adjust status to permanent residence before three years if they document that the investigation and prosecution against the trafficker is complete.
- A T visa holder must only be "willing to cooperate" with a law enforcement investigation or prosecution against the trafficker.

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37 T Visa Manual, *supra* n. 8.

38 Pub. L. No. 106-386 Division A, 114 Stat. 1464 (2000).

Basic Comparison of U Visa, VAWA Self-petitions, T Visas, and Asylum

The purpose of this chart is to provide a general comparison of the possible options for humanitarian forms of immigration relief for crime victims. It is not meant to be exhaustive, or to replace a complete of the case specifics. Note that an applicant may apply for more than one relief at a time, but can only hold one status at a time. Please refer to the actual law and regulations when making a determination for your client.

	U Visa	VAWA Self-petition	T Visa	Asylum
Qualifying Criminal Activity	Must be a victim or the attempted victim of one of the enumerated crimes.	Battering or extreme cruelty;	Labor or sex trafficking	Persecution or well-founded fear of persecution based upon one of five factors.
Does crime have to have happened inside the U.S.?	Yes, or U.S. territories and possessions	Yes, or U.S. territories and possessions	Yes. Must be physical present on account of trafficking	No, events occurred in country of nationality or last country of residence.
Cooperation with law enforcement required?	Yes	No	Must demonstrate reasonable efforts to cooperate	No
Familial relationship to abuser?	No	Yes	No	No
Timeframe to apply	Within 180 days of the certification	No limit, unless qualifying relationship is terminated, abuser deported, or children aging out.	Must demonstrate physically present in U.S. on account of trafficking.	Within one year of expiry of lawful status, unless country conditions changed or extraordinary circumstances can be documented..
Extreme hardship upon removal?	No	No	Yes	No
Derivatives which can be included?	May include spouse children, parents, and siblings depending on the principal's age when the victimization occurred.	Children under 21.	May include spouse children, parents, and siblings depending on the principal's age when the victimization occurred.	Spouses and children under 21.
Point at which application for permanent residency, aka a green card?	Can apply after 3 years in U status.	Immediately if married to or formerly married to a USC.	After T visa if investigation complete. Otherwise, after 3 years in T visa status.	Can apply after one year in asylee status

II. Elements of a U Visa

In order to qualify for the U visa, a person must establish the following:

A. Information about Criminal Activity

The applicant must possess information about the criminal activity of which s/he has been a direct or indirect victim. It must be established that the criminal activity either violated the laws of the U.S. or occurred within the U.S., its territories, or possessions. The U visa is available to victims who have suffered from any of the following qualifying crimes or substantially similar criminal activity:[39]

- 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
- Murder, manslaughter
- Felonious assault
- Witness tampering
- Obstruction of justice
- Perjury
- Attempt, conspiracy, or solicitation to commit any of the above

It is important to note that this list is not exhaustive, and practitioners should advocate if their client is a victim of 'substantially similar' crimes, particularly those that target vulnerable immigrant populations.[40]

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39 8 USC § 1101(a)(15)(U)(iii); 8 CFR § 214.14(a)(9).

40 USCIS Fact Sheet, "USCIS Publishes Rule for Nonimmigrant Victims of Criminal Activity," dated Sep. 7, 2007, *available at* http://www.uscis.gov/files/pressrelease/U-VisaFS_05Sep07.pdf.

B. 'Direct' or 'Indirect' Victim of the Crime

Both direct and indirect victims are eligible to apply for U status. A **direct victim** is a person who has suffered direct harm or who is directly or proximately harmed as a result of the commission of a criminal activity.

USCIS also has the discretion to consider bystanders as direct victims, if they suffered unusually severe harm as a result of having witnessed the criminal activity. The example given in the comments to the interim final rule was of a woman who miscarries after witnessing such activity.[41] Another example of a bystander-victim is a **witness** who suffers a heart attack after witnessing a murder.

An **indirect victim** may include any of the following:

- Qualifying family members of murder victims, manslaughter victims, and victims who are incapacitated or incompetent;[42]
    - **Practice Pointer**: During a Vermont Service Center (VSC) USCIS Stakeholder's Meeting, VSC stated that parents of sexually abused U.S. Citizen children qualify as indirect victims of someone who is incompetent/incapacitated. VSC recommends completing the I-918 listing the parent as the victim.[43] In these situations, it is not clear if the substantial harm must only be to the U.S. Citizen child, or if it must also be to the parent. The affidavit should address all the harm suffered by the family.
        - **Example**: In May 2009, Ms. OH's five-year old U.S. Citizen son, J, told her that he was molested by a neighbor, Mr. ID. Ms. OH immediately took J to the hospital and the police were called. Based on Ms. OH's statements, Mr. ID was arrested and charged with predatory sexual assault and endangering the welfare of a child. Mr. ID's spouse was angry with Ms. OH, and continued to harass her in the building. Ms. OH and J had to move to another neighborhood, where J is seeing a counselor at his new school. Ms. OH is eligible to petition for a U visa based on her minor U.S. Citizen son's victimization of a qualifying crime, her cooperation with the police and the District Attorney's office, and the substantial harm her son suffered as a result of the crime.

41 USCIS Interim Final Rule, 72 Fed. Reg. 53014 (2007), *supra* n. 3.

42 8 CFR § 214.14(a)(14)(i).

43 AILA VSC Liaison Committee's Minutes of VSC Stakeholders Meeting (August 20, 2009) available at www.aila.org. AILA InfoNet Doc. No. 09090265. (Posted 9/2/09).

- "Next friend"[44] a person who appears in a lawsuit to act for the benefit of an immigrant victim:
  - who is incapacitated, incompetent, or under the age of 16, and
  - who has suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity.

  Note: The next friend is not a party to the legal proceeding and is not appointed as a guardian.[45]

- An indirect victim can also qualify for a U visa as a victim of witness tampering, obstruction of justice, or perjury, if the perpetrator committed the offense:
  - to avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity committed against the direct or indirect victim, or
  - to further the perpetrator's abuse, exploitation of, or undue control over the U Visa applicant through manipulation of the legal system.[46]

C. Cooperation with Law Enforcement

Eligibility for U nonimmigrant status requires certification that the applicant was helpful, is being helpful, or is likely to be helpful in the criminal investigation or prosecution of the crime.[47] The applicant must obtain a "U Nonimmigrant Status Certification," on Form I-918, Supplement B, from a federal, state or local law enforcement official, or a judge investigating or prosecuting the criminal activity. [48]

Although not required by the statute, federal regulations require the applicant to continue to cooperate in the investigation or prosecution even after receipt of U status. The applicant must not refuse or fail to provide information and assistance "reasonably requested." [49]

Under the interim final rule, authorization to issue certification is limited to "the head of the certifying agency, or any person(s) in a supervisory role who has been specifically

44 8 CFR § 214.14(a)(7).

45 *Id.*

46 8 CFR § 214.14(a)(14)(ii)(B). Petitions have been filed on the basis of perjury for an applicant who was the victim of immigration fraud. The perpetrator knowingly filed incorrect immigration forms for thousands of people, and applicant was one of the first people to come forward and report the perpetrator to the authorities.

47 8 USC § 1101 (a)(15)(U)(i)(III).

48 8 CFR § 214.14(c)(2)(i); Form I-918, Supplement B is discussed in Part B.

49 8 CFR § 214.14(b)(3).

designated by the head of the certifying agency."[50] Examples of agencies and certifying officials at those agencies include the following:

- Investigating agency;
    - Local police department
    - U.S. Marshal
    - Victim witness coordinator, Federal Bureau of Investigation
    - Victim witness coordinator, Immigration and Customs Enforcement
    - Federal or state Department of Labor
    - Equal Employment Opportunity Commission
- Federal Administration for Children and Families or state or local equivalent;
- Prosecutor;
    - District Attorney
    - State Attorney General
    - Victim witness coordinator, U.S. Attorney
- Federal, state, or local judge.

Some agencies may not have a designated signatory. In fact, some agencies may lack understanding about U visas and the role of certification. In such a situation, it is important for advocates to collaborate with the agency to establish a protocol and procedures to certify cooperating victims.

- **Practice Pointer:** The applicant may cooperate with several agencies in the investigation and prosecution of a qualifying crime. Talk to the official with whom the applicant has had the most contact, and advocate to that official's agency that certification would most properly come from them. If the agency does not have a designated signatory or is unaware of U visas, you should be prepared to educate them on the law, the needs of the victim as a cooperating witness, and the importance of certification.

D. Substantial Physical or Mental Abuse

The applicant must document substantial physical or mental abuse as a result of being a victim of an enumerated crime or substantially similar criminal activity.[51] The regulations define physical or mental abuse as "injury or harm to the victim's physical

[50] 8 CFR § 214.14(c)(2)(i).
[51] 8 USC § 1101(a)(15)(U)(i)(I).

person, or harm or impairment of the emotional or psychological soundness of the victim."[52]

The term "substantial" is used in both the definition of severity of the injury to the victim and the severity of the abuse inflicted by the perpetrator. The regulations indicate "no single factor is a prerequisite to establish that the abuse suffered was substantial."[53] A series of acts taken together may constitute substantial physical or mental abuse, even when no single act alone rises to that level.[54] Some examples include:

> **Example #1:** An applicant who was assaulted and held at gunpoint, and beaten with a blunt object. He sustained injuries that left him hospitalized for a week and had to go to physical therapy for three months. He continues to have back pain and was forced to quit his job as a delivery worker. He has trouble sleeping at night because of his pain and nightmares from the incident.
>
> **Example #2:** An applicant who was a victim of domestic violence, abused over period of two years. She did not report this abuse to the authorities or seek medical assistance until she left her partner. She filed a disorderly conduct report with the police. She has trouble holding on to a job for longer than a few months, has difficulties with concentrating on tasks, and exhibits signs of depression.
>
> **Example #3:** An applicant who was stalked by her ex-boyfriend for more than six months. He sat in a car outside her house three or four nights a week, called her office and hung up on her and her coworkers on a daily basis, and sent unsolicited letters, gifts, and emails to her constantly. He told her that they were destined for each other and no one can come between them. He followed her when she tried to go out on dates. She developed a fear of being alone at night because she constantly feels watched. She moved in with her parents and had two deadbolt locks installed at each of the entrances.

The petition should include an explanation/documentation of how the applicant suffered substantial injury both subjectively and objectively. The applicant's own statement is critical to establishing the subjective nature of the injury, and may include issues pertaining to that applicant's particular vulnerability.[55] The regulations state that aggravation of preexisting conditions will be considered.[56] Moreover, it is not necessary to support the subjective elements with a professional evaluation. The victim's statement in his or her own words outlining the injury that resulted from the criminal activity may be sufficient.

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52 8 CFR § 214.14(a)(8).
53 8 CFR § 214.14(b)(1).
54 *Id.*
55 8 CFR § 214.14(c)(2)(iii).
56 8 CFR § 214.14(b)(1).

If there are medical reports, they may certainly be included as they provide useful objective evidence of physical injuries and harm. If the applicant seeks counseling, consider including a psychological evaluation. A description of how the physical and mental abuse constitutes substantial harm as defined by the regulations should be addressed in the application cover letter.

E. Admissible to the U.S.

The applicant must be admissible for nonimmigrant status to obtain U visa status. "Admissibility" is the legal standard for all foreign nationals applying for a legal status to either enter or extend their stay in the U.S. [57] Common grounds of inadmissibility include:

- Entry without inspection
- Criminal convictions
- Unlawful presence
- Previously lying to federal immigration authorities (i.e., submitting applications with false information or presenting false documents)
- Unlawful voting
- Claiming to be a U.S. Citizen

Many, but not all, grounds of inadmissibility may be waived at USCIS's discretion. Those seeking a waiver must file Form I-192 with accompanying fee or request for a fee waiver. In adjudicating the waiver, USCIS will balance the adverse factors of inadmissibility against the social and humanitarian considerations presented.[58] If the inadmissibility is based on violent or dangerous crime, then the Department of Homeland Security (DHS) will exercise favorable discretion only in extraordinary circumstances.[59]

- **Practice Pointer**: In the affidavit, outline the circumstances that warrant favorable exercise of discretion, such as reasons the applicant wants to stay in/enter the U.S. and any sympathetic factors that explain the issue giving rise to the inadmissibility.

[57] INA § 212; 8 USC § 1182.
[58] 8 CFR § 212.17(b)(1).
[59] 8 CFR § 212.17(b)(2).

III. Special Considerations

A. U Interim Relief

Approximately 7,000 individuals received provisional – or interim – relief prior to the release of U visa regulations. With no regulatory guidance, these applications tracked the language of the statute, and would include a letter from law enforcement documenting cooperation, the applicant's biographic information, a copy of the passport information page, documentation that the applicant was a victim of qualifying criminal activity, and documentation of the harm suffered. Based on the presentation of a prima facie case, USCIS would generally grant deferred action status, which qualified the applicant for employment authorization.

While those with U interim relief were required to apply for U status by April 14, 2008, on December 18, 2009 USCIS extended that deadline to February 1, 2010.[60] USCIS notified those individuals potentially affected by termination of interim relief status on November 9, 2009, advising them of this change. U interim relief recipients who miss this new deadline *may* qualify even after February 1, 2010 if they can establish exceptional circumstances for failing to meet the deadline. Exceptional circumstances may include the applicant's incapacitation or incompetence during the relevant time period. Consult an immigration attorney immediately, as the period of time from the filing deadline to the time of application for full U status may trigger inadmissibility issues.

Those granted U interim relief are exempt from providing a newly executed Form I-918, Supplement B certification, and if approved, the U status will be retroactive to the date of initial interim relief approval.

B. Derivative Family Members

Certain family members may accompany or follow to join the U principal applicant, whether in the United States or overseas.[61] Family members are considered "qualified" as derivatives depending on their relationship to the principal, the age of the principal at the time of filing, and the age of the derivative.[62] U principals over 21 years of age at the time of filing may include as derivative applicants their spouse and unmarried children under the age of 21. Applicants under 21 years of age at the time of filing may include

60 "U Nonimmigrant Relief Final filing Date Extended" USCIS Update, Dec. 18, 2009, www.uscis.gov; www.aila.org doc. 09221223

61 INA § 101(a)(15)(U)(ii); 8 USC § 1101(a)(15)(U)(ii).

62 An eligible qualifying member will be admitted in one of the following U nonimmigrant statuses; U-2 spouse, U-3 child, U-4 parent of a U-1 holder who is a child under 21 years of age, or U-5 unmarried sibling under the age of 18. 8 CFR § 214.14(f).

their spouse, children, parents, and unmarried siblings under the age of 18.[63] Note that a qualifying family member who is the perpetrator/abuser cannot apply for derivative status.[64]

The relationship between the U applicant and the qualifying family member must exist at the time of filing and continue to exist at the time of adjudication.[65] The regulations protect applicants and derivatives that 'age out' during the adjudication process. If the U principal was under 21 at the time of filing for an unmarried sibling, USCIS will continue to consider the sibling a qualifying family member even if at the time of adjudication the U principal is no longer under 21 and/or the sibling is no longer under 18 years of age.[66]

Derivatives must be able to document their qualifying relationship to the principal applicant, with a birth or marriage certificate, and must be admissible to the U.S.[67] Qualifying family members who may be inadmissible may file a waiver on Form 1-192.[68] To apply for derivative status on behalf of qualifying family members, a U principal must submit Form I-918, Supplement A, "Petition for Qualifying Family Member of U-1 Recipient" for each family member. The U principal may apply on behalf of the qualifying family member either at the same time as their U visa application, or at a later date. All Form I-918, Supplement A's must be accompanied by initial evidence[69] and the required biometrics fees (or fee waiver).[70] If represented by counsel, a separate Form G-28 for each derivative should also be included.

Derivatives presently in the U.S. are eligible to apply for employment authorization concurrently with Form I-918, Supplement A, or at any time thereafter.[71] Derivative family members that live abroad may apply for employment authorization following their entry into the U.S. in derivative U status.[72]

63 *Id*.

64 8 CFR § 214.14(f)(1).

65 8 CFR § 214.14(f)(4).

66 8 CFR § 214(f)(4)(ii).

67 8 CFR § 214.14(f)(1).

68 8 CFR § 214.14(f)(3)(ii).

69 Initial evidence includes evidence demonstrating the qualifying relationship, and if the derivative is inadmissible, a Form I-192 waiver of inadmissibility. If the Form I-918, Supplement As are not filed at the same time as Form I-918 but are filed at a later date, they must be accompanied by a copy of the Form I-918 that was filed on behalf of the principal petitioner or a copy of his or her Form I-94 demonstrating proof of U status. 8 CFR § 214(f)(2).

70 *Id.*

71 8 CFR § 214.14(f)(7).

72 *Id.*

C. If Your Client Was or Is in Deportation Proceedings

1. Victims in Removal Proceedings

- An individual in removal proceedings may apply for U status, by filing the I-918 with USCIS, not with Immigration Court.
- An applicant in proceedings must file a joint motion with ICE to terminate removal proceedings if U status is granted.[73]
- Derivative family members in proceedings may also seek a joint motion with ICE to terminate if Form I-918, Supplement A was approved on their behalf.
- The motion should be filed with the Immigration Court or Board of Immigration Appeals (BIA).
- A grant of the motion results in cancellation of the order of removal, exclusion, or deportation as of the date of grant.[74]
- File Form I-918 at Vermont Service Center (VSC). If proceedings were terminated, and the U visa is denied, then DHS can issue a new Notice to Appear (NTA).

  Practice Pointer: If applicant is detained or in removal proceedings, expedited processing of the U petition may be requested. To request expedited processing, the U application must already be submitted to the VSC with a G-28. VSC may be reached at (802) 527-4888. You will need to leave a message, including the client's Alien Registration number (A-number)[75] and the Receipt number found on the I-918 Receipt notice. It usually takes up to 72 hours for the call to be returned.

  Upon confirming that the applicant is detained, VSC will notify ICE and issue a bona fide determination. This determination is not predictive of adjudicative outcome, but is meant to notify ICE that the person has submitted a complete application and may be eligible for U status.[76]

  Practice Pointer: While the regulations[77] suggest that the motion can be filed while the I-918 is pending, in practice ICE

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73 8 C.F.R. § 214.14(c)(1)(i), 8 C.F.R. § 214.14(f)(2)(i).

74 8 C.F.R. § 214.14(c)(5)(I), 8 C.F.R. § 214.14(f)(6).

75 The Alien Registration number, otherwise known as the A-number, is assigned by the DHS. If your client entered the U.S. without permission or inspection at a border point, it is likely s/he will not have an A-number. In this case, simply leave the I-918 Receipt number with the VSC Hotline. On applications, "none" or "n/a" should always be used instead of leaving the box blank.

76 VSC Stakeholders Meeting, supra note 43.

77 8 CFR 214.14c1(i) and (ii)

will not join a motion until the I-918 is approved. This may vary among the different immigration districts**.**

2. Prior Final Orders of Removal[78]

- Form I-918 should be filed at VSC.
- If the U visa is approved, then an order of removal, deportation, or exclusion by the Secretary (i.e., expedited removals, old INS exclusion orders) will be cancelled effective the date of the U visa approval.
- Orders of exclusion, deportation, or removal issued by an Immigration Judge or the BIA must be reopened and terminated to be cancelled.

  Practice Pointer: When reviewing prior final orders of removal, first call the EOIR Hotline at 800-898-7180 to determine if the Motion to Reopen should be filed with the Immigration Court that issued the order or with the BIA. The Hotline has an automated system that, with the victim's A-number, will indicate if an appeal was made in the prior case.

  If an appeal is on file, a Motion to Reopen with the BIA will need to be filed with the Immigration Court. The Office of the Chief Counsel should be contacted to determine if it would be willing to join the motion to reopen and terminate the prior order.
- If the U visa is denied, the stay will automatically terminate on the date of the denial.

IV. After Issuance of U Status

A. Employment Authorization

The Employment Authorization Document (EAD) issued to the U-1 principal should be for the full four-year period, allowing for one-year extensions if law enforcement certifies that continued cooperation is necessary. If the EAD is not granted for the full period, there may be an error. In this situation, contact VSC at 802-527-4888. If it was not an error, a renewal can be filed by submitting Form I-765, proof of identity, two passport photos, and appropriate filing fee[79] (or fee waiver). Those applying for U derivative status within the U.S. will need to apply for the EAD

[78] "U Visa Interim Regulations Fact Sheet and Guidance," National Network to End Violence Against Women, *available at* www.immigrantwomennetwork.org.

[79] USCIS filing fees can be found at www.uscis.gov. As of the time of writing, the filing fee for an I-765 was $340.00 (payable to **Department of Homeland Security),** but since filing fees are subject to change, the amount should be verified prior to filing.