

# LEGAL PROTECTIONS FOR AN INVISIBLE POPULATION: AN ELIGIBILITY AND IMPACT ANALYSIS OF U VISA PROTECTIONS FOR IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE

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Domestic violence has oft been described as a “hidden war” taking place in the privacy of the home. Undocumented immigrants in the United States are also commonly labeled as “invisible,” living outside the sights and minds of society. When undocumented immigrants become the victims of domestic violence these two social phenomena coalesce, compounding feelings of fear, isolation, and marginalization. In 2000, Congress began to give a voice to this silent and invisible population by enacting the Battered Immigrant Women Protection Act (“BIWPA”) as part of the Trafficking Victims Protection Act.<sup>1</sup>

Advocates for immigrants and victims of domestic violence generally championed the BIWPA because it created a new non-immigrant classification, known as a “U” visa, for victims of certain qualifying criminal activity.<sup>2</sup> The new status offers immigration protections to victims of certain statutorily enumerated crimes that occurred in the United States and resulted in “substantial physical or mental abuse.”<sup>3</sup> The victim must also show that they have information about qualifying criminal activity and that they “ha[ve] been helpful, [are] being helpful, or [are] likely to be helpful” in the investigation or prosecution of that activity.<sup>4</sup> The new classification addressed a gap left by prior Violence Against Women Act (“VAWA”) legislation in its efforts to protect immigrant victims of domestic violence who are neither married to citizens nor lawful permanent residents.<sup>5</sup> On September 17, 2007, the United States Citizenship and Immigration Services (“USCIS”) finally rescued the U visa from seven years in administrative limbo, publishing an interim rule that outlined the specific eligibility requirements and procedures to obtain U visa nonimmigrant status.<sup>6</sup> While advocates applaud the new visa in many respects, they simultaneously express a guarded caution that aspects of the scope of the rule, its intersection with other immigration proceedings, and the processing of applications may undermine the intent and effectiveness of the visa. This article reviews the procedural background of the U visa legislation, summarizes the interim rule requirements, highlights the broad categories of advocates’ comments submitted in response to the interim rule, and analyzes the impact and effectiveness of the U visa statutory and regulatory framework.

## BACKGROUND OF THE U VISA LEGISLATION

In enacting the BIWPA, Congress recognized that undocu-

mented immigrant victims of crimes may be reluctant to pursue the arrest or prosecution of criminal activity committed against them, thwarting the goals of law enforcement and putting many victims in further danger.<sup>7</sup> These concerns are often daily realities for victims of domestic violence-related crimes who may already face social and physical isolation, fear and threats of deportation from their abuser, and other social, economic, and psychological hurdles to reporting crime.<sup>8</sup> Congress intended the BIWPA to address these concerns by “strengthen[ing] the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes while offering protection to victims of such crimes.”<sup>9</sup> The BIWPA generally requires the petitioner to present evidence that he or she: has suffered substantial mental or physical abuse as a result of having been a victim of certain qualifying criminal activity; has information regarding the relevant criminal activity; and has provided assistance to government officials in the investigation and prosecution of such criminal activity.<sup>10</sup> The statute delegated the authority to USCIS to promulgate regulations defining the U visa application procedures, evidentiary burdens, and other key implementing details.<sup>11</sup>

Since 2000, USCIS has taken modest steps to establish U visa guidelines and to make available the victims’ protections that Congress intended through interim relief procedures.<sup>12</sup> Despite much public pressure and litigation, it took USCIS seven years to promulgate an interim rule for public comment.<sup>13</sup> The reorganization of the Department of Homeland Security after September 11, 2001 was a major factor in the delay,<sup>14</sup> as was the

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complicated intersection between U visas and other areas of immigration law. The delay left many petitioners uncertain about whether, when, and how to file a petition for a U visa. USCIS acknowledged that the delay had potential implications on immigrant victims of crimes, and concluded that

there was a compelling need for rapid implementation. While the Administrative Procedure Act generally requires that the agency solicit and address public comments before issues the final rule, USCIS invoked a public interest exception to make its interim rule take effect thirty days after publication.<sup>15</sup>

Regardless of the cause of the delay, for seven years immigrant victims of crimes have lacked both the full protection of the law and clear application approval guidelines. Although advocates and regulators can only speculate as to how many meritorious petitioners have remained in the shadows during this ad-

ministrative limbo, USCIS received approximately 8,000 applications for interim relief before publishing the interim rule in September 2007.<sup>16</sup> USCIS adjudicated the petitions it received and granted interim status to approximately 5,800 petitioners that presented a *prima facie* case.<sup>17</sup> The interim rule necessarily also explains how petitioners with interim status should proceed.

The interim rule is a much-anticipated and long overdue publication. It provides more comprehensive structure and guidelines to the U visa application process and thus more protection and certainty to victims. Yet, absent public comment and a final rule, it fails to offer finality to both petitioners and practitioners. For example, threshold questions regarding the role of law enforcement, the definition of victim, and intersections with other immigration laws remain unanswered, making it difficult for practitioners to advise their clients. USCIS accepted public comments on the interim rule through November 16, 2007.<sup>18</sup> Dozens of advocates weighed in with both praise and concern. It is unknown when USCIS will issue its final rule

### SUMMARY OF THE U VISA INTERIM RULE AND THE PUBLIC'S RESPONSE

The interim rule fills critical gaps in the statutory scheme. USCIS further defines the eligibility requirements, burdens of proof, administrative implementation, the U visa's scope, caps on admissions, and the admission of qualifying family members.

#### PETITIONER ELIGIBILITY REQUIREMENTS

To file for U visa relief, the enabling legislation and the interim rule require the victim to submit a petition (Form I-918, Petition for U Nonimmigrant Status) and to demonstrate four eligibility requirements: (1) The petitioner must show that he or she "has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity"<sup>19</sup>; (2) The petitioner must "possess credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her petition is based"<sup>20</sup>; (3) The petitioner must demonstrate that she "has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based"<sup>21</sup>; (4) The criminal activity upon which the petitioner bases his or her petition must have violated a law of the United States.<sup>22</sup> While seemingly straightforward, the statute and interim rule further unpack the nuances and complexities of these requirements. The following sections analyze each requirement in turn.

#### PETITIONER HAS SUFFERED SUBSTANTIAL PHYSICAL OR MENTAL ABUSE FROM A QUALIFYING CRIMINAL ACTIVITY

The statute and regulations require proof that the petitioner "has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity."<sup>23</sup> This element has two distinct parts: the scope of "substantial physical or mental abuse" and the definition of "victims of qualifying criminal activity."

The statutory requirement of a showing of "substantial

physical or mental abuse" is of critical importance to victims of domestic violence.<sup>24</sup> USCIS took precautions to implement a rule that acknowledged the complexities and challenges of petitioners in abusive relationships. The interim rule defines "physical or mental abuse" as "injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim."<sup>25</sup> USCIS selected this definition after reviewing other regulations promulgated under VAWA, intending to encompass a "wide range of physical or mental harm."<sup>26</sup> In determining whether the abuse meets the "substantial" threshold, USCIS will consider, but is not limited to, the following factors: "the nature of the injury inflicted or suffered; 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, including aggravation of pre-existing conditions."<sup>27</sup>

This standard allows USCIS the flexibility to consider the severity of abuse from either the perspective of the injury to the petitioner or the abuse inflicted by the perpetrator.<sup>28</sup> USCIS will also look at "[a] series of acts taken together" as evidence of substantial abuse.<sup>29</sup> No one factor will be considered a prerequisite, nor will any one factor create a presumption of substantial abuse,<sup>30</sup> further expressing USCIS' preference for "case-by-case determinations."<sup>31</sup> USCIS will "consider the abuse in its totality."<sup>32</sup>

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The interim rule also articulated how petitioners, such as victims of domestic violence, should prove this eligibility requirement. The petitioner must submit "credible evidence" of substantial physical or mental abuse showing both the nature and severity of the abuse.<sup>33</sup> While many practitioners followed this practice informally, the interim rule added a specific requirement that the petitioner must submit a written personal statement, including a description of the abuse suffered because of the criminal activity.<sup>34</sup> "Credible evidence" might also include the following submissions: "reports and/or affidavits from judges and other court officials, medical personnel, school officials, clergy, social workers and other social service personnel; protection orders and related legal documents; photos of visible injuries supported by affidavits; and affidavits from witnesses, acquaintances or family members who have personal knowledge of the facts regarding the criminal activity."<sup>35</sup>

Congress intended that the "victims of qualifying criminal activity" eligibility requirement be both flexible and expansive. The definition includes a wide range of crimes that constitute domestic violence and impact immigrant victims, including rape,

sexual assault, assault, and trafficking (as well as the attempt of any of the statutorily enumerated crimes).<sup>36</sup> USCIS explicitly did not limit the definition to specific crimes as defined in various jurisdictions' statutes.<sup>37</sup> It also included broad language covering "any similar activity" to those crimes specifically listed in the statute.<sup>38</sup> Thus, while frequently identified as a statute impacting victims of domestic violence, the statute and the interim rule in fact covers a wide range of criminal activity.

USCIS categorizes a victim of a crime in three separate ways. In classifying an individual as a direct victim of a crime, USCIS considers whether an individual has suffered "direct and proximate harm."<sup>39</sup> This approach is similar to the Attorney General Guidelines for Victims and Witness Assistance.<sup>40</sup> A bystander of a crime may qualify for status on "a case-by-case basis" if he or she suffered direct injury.<sup>41</sup> Although the statute is silent regarding the possible culpability of the victim in the qualifying criminal activity, USCIS' definition of victim expressly *excludes* those who are culpable for the qualifying criminal activity; while applicants with culpability in *other* crimes – even related ones – remain eligible.<sup>42</sup> For example, an applicant who participates in the crime of smuggling to obtain entry into the United States may still apply for protection as a victim of an involuntary servitude crime, despite her involvement in the crime of smuggling.

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In addition to qualifying as a direct victim of criminal activity, the interim rule also includes limited categories for indirect victims, also derived from the Attorney General Guidelines. In cases of murder, manslaughter, or incompetent or incapacitated victims over the age of 18, the interim rule defines indirect victims to include the direct victim's spouses and children less than 21 years of age.<sup>43</sup> For direct victims in the same categories but under the age of 18, the interim rule also covers parents and unmarried siblings under 18.<sup>44</sup> USCIS highlighted one important way in which the interim rule deviates from the Attorney General Guidelines, which USCIS otherwise followed. Whereas the Attorney General Guidelines only define indirect victims to include the first eligible and available person in the hierarchy listed above, USCIS' definition is more flexible in that any individual may qualify, not just the first available individual.<sup>45</sup> Thus, an incapacitated victim's spouse and children may all qualify as indirect victims. USCIS believed that this interpretation best implemented the statutory framework and intent.

Victims of crimes such as witness tampering, obstruction, or perjury are approached differently than those of murder or manslaughter.<sup>46</sup> Victims of crimes not targeted against the person include individuals who have suffered direct and proximate harm, "where there are reasonable grounds to conclude that the perpetrator principally committed the offense as a means: (1)

To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring him or her to justice for other criminal activity; or (2) to further his or her abuse or exploitation of or undue control over the alien through manipulation of the legal system."<sup>47</sup>

*PETITIONER HAS KNOWLEDGE OF THE DETAILS OF A QUALIFYING CRIME*

The BIWPA also requires the petitioner to present "credible and reliable information establishing that he or she has knowledge of the details" of the crime.<sup>48</sup> The interim rule refined this requirement to state that the petitioner must possess "specific facts."<sup>49</sup> USCIS required the petitioner to have information relating to the same crime upon which the petitioner bases his or her request for relief.<sup>50</sup> USCIS believed that such an interpretation was necessary to embrace Congress' intent to "facilitate the investigation and prosecution of criminal activity of which immigrants are targets while providing protection for victims of such criminal activity."<sup>51</sup> Where the victim was under the age of sixteen at the time of the crime, or the victim is incapacitated or incompetent, a parent, guardian, or "next friend" may instead possess information relating to the criminal activity.<sup>52</sup>

One critical tool for petitioners to meet this requirement is the "U Nonimmigrant Status Certification," known generally as the Law Enforcement Certification ("LEC"). As discussed more fully below, the petitioner must obtain a certification from a qualifying law enforcement official. The petitioner may use this requirement to show knowledge of the crime and may also submit other evidence, such as "reports and affidavits from police, judges, and other court officials."<sup>53</sup> The petitioner's required personal statement should also contain details of the criminal activity, including the nature of the activity, when it occurred, the person responsible, any events surrounding it, and how law enforcement came to prosecute it.<sup>54</sup>

*PETITIONER HAS BEEN HELPFUL, IS BEING HELPFUL, OR IS LIKELY TO BE HELPFUL IN AN INVESTIGATION OR PROSECUTION OF QUALIFYING CRIMINAL ACTIVITY*

Perhaps the most distinguishing eligibility requirement in the U visa application process is the statute's requirement that a petitioner "has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution" of the qualifying criminal activity.<sup>55</sup> USCIS articulated these certification requirements in the interim rule, which have important ramifications for victims of domestic violence.

The interim rule required the petitioner to include a Supplement B Form for agency certification in the application.<sup>56</sup> USCIS will give this certification "significant weight."<sup>57</sup> Certifying law enforcement officials must demonstrate their qualifications to complete the form, select the category of criminal activity involved, describe the relevant criminal investigation, describe any injuries to the victim, identify and describe the type of help that the victim is providing, and explain the involvement of any of the victim's family members.<sup>58</sup> USCIS specifically stated that the rule did not require actual prosecution, thus reaffirming the range of cooperation available.<sup>59</sup> The petitioner may also submit

other evidence of helpfulness, such as “trial transcripts; court documents; police reports; news articles; copies of reimbursement forms for travel to and from court, affidavits of other witnesses or officials.”<sup>60</sup>

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While the interim rule broadly defined the range of eligible certifying agencies, it limited the scope of individuals within each agency who may provide certifications. The interim rule defined “certifying official” as a law enforcement agency, an agency with criminal investigative jurisdiction, a prosecutor, or a judge.<sup>61</sup> USCIS interpreted the term broadly to include agencies such as child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.<sup>62</sup> It also included agencies involved in the detection, conviction, and sentencing of qualifying criminal activity.<sup>63</sup> The interim rule expressly required that in order to issue U visa certifications, the signatory must be either the head of the qualifying agency or a supervisor designated by the head.<sup>64</sup> USCIS explained that this additional requirement was “to ensure the reliability of certifications.”<sup>65</sup> USCIS interpreted the statute to require an “ongoing responsibility on the alien victim to provide assistance, assuming there is an ongoing need for the applicant’s assistance.”<sup>66</sup> In applying for permanent resident status, the petitioner must not have refused or failed to cooperate in providing “information and assistance reasonably requested.”<sup>67</sup>

#### JURISDICTION OF THE CRIMINAL ACTIVITY

The petitioner must also show that the crime “occurred in the United States (including Indian country and U.S. military installations) or in the territories or possessions of the United States, or violated a U.S. federal law that provides for extraterritorial jurisdiction to prosecute the offense in a U.S. federal court.”<sup>68</sup> USCIS clarified the phrase “occurred in the United States” to include qualifying criminal activity committed both in the country and in violation of U.S. law.<sup>69</sup> The language “violated the laws of the United States” covers criminal activity outside the United States that violated domestic law, thus encompassing criminal laws with extraterritorial jurisdiction.<sup>70</sup> USCIS referred petitioners to the LEC as one method to meet this burden of proof.<sup>71</sup> Petitioners may also submit any other credible evidence, including the relevant statutory provisions of the criminal activity and other facts that demonstrate the activity meets the list of qualifying crimes.<sup>72</sup>

#### FILING AND VISA ADMINISTRATION

In addition to defining eligibility requirements, the interim rule also outlined the filing and administrative procedures to obtain U visa nonimmigrant classification. The petitioner must

submit the Form I-918, a signed law enforcement certificate (signed within six months of filing), any other credible evidence he or she wishes the USCIS to consider, and a personal statement describing the facts of victimization.<sup>73</sup> USCIS required the petitioner’s personal statement, desiring to learn about the victimization “from the petitioner in his or her own words.”<sup>74</sup> Applicants may apply for relief from either inside or outside of the United States.<sup>75</sup>

USCIS has adjudication authority over all petitioners for U nonimmigrant status.<sup>76</sup> There is no deadline for new petitioners to file for relief; thus, petitioners have the discretion to apply during an ongoing investigation or after the prosecution. However, USCIS imposed a filing deadline for petitioners who have already received interim relief since 2001.<sup>77</sup> Petitioners who received USCIS interim relief status since 2001 must file within 180 days of the effective date of the interim rule.<sup>78</sup>

USCIS administers the U visa adjudication process centrally at its Vermont Service Center.<sup>79</sup> Importantly, these officials are specially trained in domestic violence cases. USCIS first conducts a *de novo* review of the petition, along with any other submitted credible evidence, and then issues a written decision.<sup>80</sup> If USCIS denies the petitioner’s application, it will first issue a written explanation of its denial to the petitioner, which the petitioner may then appeal to the Administrative Appeals Office.<sup>81</sup> If USCIS grants the petition, the petitioner will receive written notice of the decision, which is effective as of the approval date.<sup>82</sup> USCIS will also issue a Form I-94 Arrival-Departure record, providing official documentation of the petitioner’s U nonimmigrant status.<sup>83</sup> This can offer critical protections for victims who fear deportation or immigration inquires.

Petitioners granted U nonimmigrant status may remain in the United States for up to four years.<sup>84</sup> Extensions beyond four years are available where the government determines that continued presence is “necessary to assist in the investigation or prosecution” of the crime.<sup>85</sup> USCIS also has the authority to later grant the alien permanent resident status if the petitioner shows the following: that they have not “unreasonably refused to provide assistance in a criminal investigation or prosecution” of the crime committed against them; they have been continuously present in the United States for a three-year period; and their presence in the United States is justified by humanitarian reasons, family necessities, or public interest.<sup>86</sup> USCIS has not

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*USCIS also has the authority to later grant the alien permanent resident status*

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yet issued regulations governing subsequent applications for permanent resident status, so the details of this process and the likelihood of obtaining such relief remain uncertain. U nonimmigrant status and derivative status also authorize employment in the United States.<sup>87</sup>

Qualifying family members of the U visa petitioner are also eligible for admission.<sup>88</sup> The petitioner may apply on behalf of eligible family members either at the time of the initial petition or thereafter.<sup>89</sup> Eligible family members include the petitioner's spouse, child, parent (if the petitioner is under 21 years of age), or unmarried sibling under 18 years of age.<sup>90</sup> Petitioners must first show the existence of a qualifying relationship at the time of the filing and that the relationship will last through approval.<sup>91</sup>

Congress imposed a statutory cap limiting the number of issued visas to 10,000 per fiscal year,<sup>92</sup> excluding derivative family members.<sup>93</sup> The interim rule acknowledges that "within the first few fiscal years after publication of this regulation, it will receive petitions for U nonimmigrant status from more than 10,000 principal aliens."<sup>94</sup> USCIS will place petitioners who are otherwise eligible for admission, but whose admission would exceed the 10,000 visa cap, on a waiting list in the order of approval.<sup>95</sup> The purpose of the waiting list "is to respect the intent of the numerical limitation imposed by Congress while still allowing the legislation to achieve maximum efficacy."<sup>96</sup> The interim rule also gives USCIS the discretion to remove a petitioner from the wait list.<sup>97</sup>

Many petitioners seeking U visa status also face other immigration hurdles in obtaining relief. A substantial number of petitioners are otherwise inadmissible for legal entry into the United States on one or more grounds, such as entering the United States without papers. The interim rule requires that those petitioners facing other immigration hurdles must file concurrently Form I-192 "Application for Advance Permission to Enter as Nonimmigrant" along with the other initial U visa evidence and Form I-918.<sup>98</sup> Congress gave USCIS the authority to issue waivers of inadmissibility to petitioners who are otherwise inadmissible to the United States if it determines that a waiver is "in the public or national interest."<sup>99</sup> In adopting the interim rule, however, USCIS further limited its discretion in considering inadmissibility waivers for "violent or dangerous crimes" to cases where "extraordinary circumstances" exist.<sup>100</sup> There is no right to appeal a denial of an inadmissibility waiver.<sup>101</sup>

Other petitioners may already have faced or are facing adverse immigration proceedings prior to seeking U visa relief. For example, petitioners might already be in removal proceedings or subject to a final order of removal or deportation. USCIS expressly stated that such petitioners may apply for U nonimmigrant status, notwithstanding the other pending proceedings, but that filing for relief would not otherwise affect the ongoing adverse proceedings.<sup>102</sup>

#### *ADVOCATES WEIGH IN WITH BOTH PRAISE OF AND CONCERNS WITH THE INTERIM RULE*

USCIS requested public comments on its interim rule through November 16, 2007. In response, immigrants' rights activists, domestic violence practitioners, various coalitions, and

other interested parties, submitted written comments to the agency. This article highlights the broad categories of comments submitted on behalf of advocates representing immigrant women and victims of domestic violence, but does not attempt to address all comments in their entirety.<sup>103</sup> Advocates praised aspects of the rule, such as a broader definition of domestic violence including both physical and mental abuse, an interpretation of "substantial harm" that incorporates patterns of abuse, and agency recognition of the ways in which criminals use the law enforcement system to control and further victimize immigrants. Commentators also voiced concerns with the interim rule, however, which this article divides into three categories: the scope of the rule, its intersection with other immigration proceedings, and the processing of applications.

#### *ADVOCATES' COMMENTS CONCERNING THE SCOPE OF THE INTERIM RULE*

Advocates' comments identified three primary areas in which the interim rule exceeded the scope of the statute calling for: (1) The elimination of the "supervisor" or "agency head" requirement governing LECs; (2) The broadening of the definition of "victim of qualifying criminal activity,"; and (3) Greater flexibility surrounding waivers for criminal convictions.

Advocates repeatedly and strenuously requested that USCIS remove the extra requirement imposed by the interim rule that a centralized law enforcement "supervisor" or "agency head" must sign certifications confirming the victim's cooperation,<sup>104</sup> arguing that the requirement imposed unnecessary bureaucratic constraints, exceeded the scope of the statute, and undermined the purpose of the law.<sup>105</sup> This is particularly problematic because many agencies have already developed effective approval

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systems that would have to change with the interim rule, risking delay and confusion for petitioners. The "chain of command" approach is also precarious because it minimizes the likelihood

that the victim would interact with someone familiar with the case and trained in victim's services.<sup>106</sup> For example, many agencies currently rely on individuals with special expertise, such as domestic violence or bilingual officers, to manage the certification process.<sup>107</sup> Advocates expressed concern that the "agency head" requirement might jeopardize the sensitivity and institutional knowledge that these trained units bring to the certification process. Advocates generally agreed that Congress gave each agency the flexibility to implement a system that works within its structure and that USCIS should not intervene in that process. Some proposed revisions included: asking the signatory to check a box affirming that the agency has assigned or authorized the signatory to evaluate and issue certifications,<sup>108</sup> leaving each agency with the discretion to implement authorization procedures, and adopting an alternate standard requiring the signatory to have "actual knowledge" of the criminal activity gained through either the investigation or prosecution of the criminal activity.<sup>109</sup>

Advocates also called for a broadening of both the definitions of “victim” and the definition of “qualifying criminal activity.” They argued that USCIS should construe “victim of qualifying criminal activity” to include the broadest possible group of eligible victimized family members.<sup>110</sup> The existing language required that the direct victim be an alien, but advocates requested broadening the definition to include United States citizens.<sup>111</sup> For example, advocates explained that situations may arise where a child is a United States citizen born to alien parents.<sup>112</sup> If that citizen child was the victim of a sexual crime, the parents would need to play a critical role in reporting and assisting in the prosecution of that sexual crime.<sup>113</sup> The current language of the interim rule would not offer U visa relief to reporting and cooperating parents, yet these parents would likely face the same fears and obstacles coming forward to law enforcement without lawful status that a direct petitioner would. USCIS’ proposed interpretation would be more consistent with both the interim relief procedures and prior adjudications.

Advocates also argued that direct victims under the age of twenty-one need not be deceased, incompetent, or incapacitated for eligible family members to qualify as “indirect victims.”<sup>114</sup> This interpretation is consistent with federal and state law as well as the prior adjudication of interim relief procedures. Advocates also sought clarification of the definition of “qualifying criminal activity.” Some indicated that USCIS improperly conflated two distinct requirements – that the noncitizen has been a victim of a crime, and that the noncitizen has helped in the prosecution of a crime.<sup>115</sup> Advocates strenuously argued that a petitioner should qualify for U visa relief if he or she was the victim of one enumerated crime and has helped in the prosecution of another.<sup>116</sup>

Some advocates also requested that USCIS remove the additional requirement that applicants show “extraordinary circumstances” in waivers of inadmissibility for criminal convictions. The regulations currently state that, “in cases involving violent or dangerous crimes of inadmissibility based on the security and related grounds . . . USCIS will only exercise favorable discretion in extraordinary circumstances.”<sup>117</sup> Advocates contended that USCIS’ standard of review is already discretionary under the statute and that Congress did not contemplate or authorize further limitations on agency discretion in cases involving violent or dangerous crimes.<sup>118</sup> Advocates also noted that separating out violent or dangerous crimes violates the statute.<sup>119</sup> The removal of the language “extraordinary circumstances” would better emphasize a full and fair consideration of individual circumstances.

#### U NONIMMIGRANT CLASSIFICATION’S INTERSECTIONS WITH OTHER IMMIGRATION PROCEEDINGS

In addition to raising concerns regarding the scope of the

rule and its coverage, advocates also proposed four key changes to remedy problematic intersections between U visa classifications and existing immigration law: a U visa exemption to the ninety-day deadline to reopen proceedings; an automatic stay of removal for U visa applicants; a limited duration for U visa petitioners in detention; and modifications to the requirements and procedures governing waivers of inadmissibility.

Advocates argued that USCIS should create a U visa exemption to the ninety-day deadline to reopen.<sup>120</sup> The interim rule allows petitioners to submit U visa applications even when the individual has a final order of removal. Procedurally, however, in order to give effect to this right, petitioners have to seek both a discretionary stay of removal and a motion to reopen and terminate proceedings. Advocates asserted that by the time the petitioner files for a U visa, many applicants will have already

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*...by the time the petitioner files for a U visa, many applicants will have already exceeded the ninety-day deadline to file a motion to reopen to terminate removal proceedings*

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exceeded the ninety-day deadline to file a motion to reopen to terminate removal proceedings.<sup>121</sup> Falling outside of this statutory motion deadline leaves applicants subject to the discretion of Immigration and Customs Enforcement (“ICE”) to agree to a joint motion to reopen.<sup>122</sup> As with any discre-

tionary process, this presents considerable challenges and uncertainty for applicants. ICE may refuse to consent to the motion to reopen. The immigrant may refuse to approach ICE for fear of deportation. There will also be increased cost and delay with the filing of the motion. To address this concern, advocates requested that USCIS create a U visa exemption to the ninety-day deadline to reopen. This exemption would be similar to the VAWA regulations, which allows petitioners to move to reopen in cases of extraordinary circumstances or extreme hardship.

Advocates requested that USCIS incorporate an automatic stay of removal for U visa applicants following an agency determination that the pending petition meets the *prima facie* eligibility requirements.<sup>123</sup> This proposal is consistent with the regulations governing “T” visas for victims of trafficking. It also ensures that the victim will not be removed in the course of an active investigation or prosecution, thus rendering her unable to cooperate and derailing prosecution or investigation.

Advocates also argued that the interim rule might improperly extend the duration of detention for petitioners.<sup>124</sup> While detained applicants would ordinarily be eligible for release after six months, the current regulations appear to extend the period of duration for U nonimmigrant status petitioners. Advocates argued that this undermines the intent of the statute to encourage cooperation and to provide humanitarian relief, and instead penalizes U visa applicants for no legitimate reason. Advocates requested that USCIS clarify the rule such that petitioners who are *prima facie* eligible for U visa relief be released from detention in a shorter timeframe,<sup>125</sup> and at a minimum USCIS should withdraw the new rule providing the opportunity for release within six months under the detention rules.

Advocates also argued that requiring the applicant to submit at the time of the petition both Form I-192 and an Application for Advance Permission to Enter as a Nonimmigrant improperly places the burden on the applicant to determine inadmissibility grounds.<sup>126</sup> Rather, consistent with USCIS practice, the Department of Homeland Security should be required to make an initial determination of inadmissibility. The applicant would then have the opportunity to respond and contest a finding of inadmissibility.

#### MODIFICATIONS TO INTERIM RULE REQUIREMENTS FOR PROCESSING APPLICATIONS

Advocates also called for three key changes to the interim rule requirements for processing applications: the introduction of a fee waiver provision for waivers of inadmissibility; an extension to the application period for petitioners with interim relief; and modification of the “age-out” provisions governing derivative applicant. Advocates almost uniformly contested the lack of a fee waiver procedure for applicants submitting a waiver of inadmissibility.<sup>127</sup> Without a fee waiver, the waiver of inadmissibility costs approximately \$545, “serv[ing] as a virtual bar to accessing status” for many otherwise eligible U visa petitioners.<sup>128</sup> Advocates argued that providing a fee waiver provision is consistent with USCIS’ preamble explaining the broad basis for its blanket fee waiver for Form I-918.

Advocates also argued that 180 days is an insufficient period to allow current victims with interim relief status to file a U nonimmigrant visa application, requesting instead an application period of one or two years to account for the extensive caseloads of many service-providers and the difficulties in contacting and communicating with the client base.<sup>129</sup> This proposed modification impacts the approximately 5,800 petitioners who have already received interim relief through USCIS’ prior adjudication.

Advocates also proposed modifications to lock-in the age of qualifying unmarried siblings at the date of application for interim relief.<sup>130</sup> Under the interim rule, USCIS considers the relevant age of qualifying unmarried siblings from the date of the subsequent submission. Advocates argued that this rule effectively penalizes derivative family members unfairly for USCIS’ seven-year delay in implementing the interim rule. Advocates argued that USCIS should adopt a more equitable approach and measure the relevant age from the date of the interim relief application, not the filing of an I-918. Advocates argued for the same modification to address parents of siblings of minors turning twenty-one. Other advocates argued for an amendment to 8 C.F.R. § 214.14(f)(4)(ii) requiring that the relationship between the petitioner and the qualifying family member need only exist at the time of the filing and need not continue through the adjudication process.

#### IMPACT AND ANALYSIS

While U nonimmigrant status offers significant protections for victims of crimes, the following four potential obstacles may still hinder successful implementation of the statutory framework: the integral role of law enforcement personnel, the chang-

ing landscape of immigration policy in the United States, aggressive caps on visas, and the risks of re-victimization.

#### THE INTEGRAL ROLE OF LAW ENFORCEMENT

Successful implementation of the statutory framework hinges on the role of law enforcement as necessary facilitators. This presents various potential obstacles for victims of crime. Many of the same barriers that led to the statute’s enactment threaten the success of its implementation. Absent active efforts to educate and sensitize law enforcement personnel, victims may fear interacting with law enforcement to obtain the protection. Women face significant barriers in reporting violence and participating in the prosecution of crimes, including intense shame, limited language ability, cultural differences, lack of knowledge about the criminal justice system, and unpleasant experiences with legal institutions in their country of origin.<sup>131</sup> Interviews with immigrant women show that their interactions with police are often hampered by law enforcement’s limited knowledge of women and domestic violence generally, the lack of available translators, insufficient sensitivity to issues of culture and gender, and a lack of understanding as to why immigrants might be reluctant to talk to police or provide details of the crime.<sup>132</sup>

To ensure a successful implementation, regulators and not-for-profit organizations should incorporate training and awareness programs for both law enforcement and immigrant communities.<sup>133</sup> This is particularly true for agencies that do not act as traditional law enforcement but have certification authority under the rule, such as child protective services, the Department of Labor, and the Equal Employment Opportunity Commission.<sup>134</sup>

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It is also important to monitor whether the administrative burdens on law enforcement personnel undermine cooperation. Police may be deterred from prosecuting crimes against aliens because of the increased administrative burden that may result. Because law enforcement personnel are the gatekeepers to certifying the U visa application, it is important to monitor their discretion in making initial determinations of arrest and their willingness to implement this regulatory scheme.

Lastly, there are also potential risks for law enforcement abuse in interacting with victims of qualifying criminal activity.<sup>135</sup> As one scholar phrased it: “[s]ince immigration law, by definition, applies only to a vulnerable population group – non-citizens – the harshness and the limited venues for averting deportation make the only alternative provided – cooperation – even more rife with abuse.”<sup>136</sup> The premise of the U visa protec-

tion is cooperation with law enforcement – the same actor who has the discretionary power to issue the requisite certifications. Under the existing statutory and regulatory scheme, potential abuses of power may include the unreviewable discretion of law enforcement in issuing certifications;<sup>137</sup> retaliatory immigration or criminal actions against victims who refuse to cooperate; ethnic, geographic, gender, or regional inconsistencies in enforcement; and the risks of coercive cooperation leading to exaggerated or misinformation.<sup>138</sup>

#### **THE CHANGING LANDSCAPE OF IMMIGRATION POLICY IN THE UNITED STATES**

In addition to the implementation challenges faced by the integral role of law enforcement, the landscape of immigration policy in the United States has also changed dramatically since the BIWPA's enactment in October of 2000. These changes support a re-evaluation of the existing statutory and regulatory structure. The BIWPA pre-dated the attacks of September 11, 2001, the "War on Terrorism", and the related concerns over borders and national security. Immigration policy has since become a top federal and local priority, as evident from recent presidential and congressional legislative priorities,<sup>139</sup> grassroots rallies and marches to raise awareness of federal proposals in immigrant communities,<sup>140</sup> and 2008 campaign rhetoric and platforms.<sup>141</sup>

Federal and local law enforcement is involved in immigration issues and enforcement on a much more significant level than in 2000. This magnifies the fears that aliens face in reporting crimes and interacting with police. Some jurisdictions have so-called "sanctuary policies" that offer varying degrees of protection to unauthorized aliens who report a crime to the police.<sup>142</sup> While these "sanctuary policies" are intended to protect undocumented aliens during interaction with law enforcement personnel, they are both too infrequent and too irregular to overcome implementation obstacles.<sup>143</sup> Other jurisdictions, however, have become *more* proactive and aggressive in immigration law enforcement.<sup>144</sup> The result for undocumented aliens is a tremendous amount of uncertainty and confusion, likely to result in a higher unwillingness to report crimes than Congress had considered when passing the BIWPA.<sup>145</sup>

This political dynamic also calls into question the intersection of immigration law and criminal law upon which Congress built this statutory scheme. As one scholar put it, "[i]mmigration law has become an adjunct to criminal law as it is being used to further punish criminal offenders and to reward those who cooperate in criminal investigations."<sup>146</sup> The merits and effectiveness of such a legislative structure warrants Congress' review from the lens of today's political landscape.

#### **AGGRESSIVE LIMIT OF VISAS RENDERS PROGRAM TOO NARROW IN APPLICATION TO ACHIEVE POLICY OBJECTIVES**

Congress legislated a 10,000 per year cap on U visas,<sup>147</sup> and USCIS implemented a procedure to wait list eligible petitioners after reaching the statutory cap.<sup>148</sup> Since the relief became available on an interim basis in August 2001, USCIS has

granted 5,800 interim visas to applicants.<sup>149</sup> Rough estimates suggest that this cap leaves perhaps as much as ninety percent of the need unmet.<sup>150</sup> In the interim rule, USCIS acknowledges that the cap will leave a considerable gap.<sup>151</sup> Congress' stated goals in implementing this legislation were to "curtail criminal activity, protect victims of crimes committed against them in the United States, and encourage victims to fully participate in the investigation of the crimes and the prosecution of the perpetrators."<sup>152</sup> Successful implementation of these goals requires both a fundamental rethinking of the way immigrant victims of crime view the criminal justice system and more widespread awareness of the relief mechanisms available to potential applicants. With 10,000 visas a year, it seems debatable whether Congress can meaningfully effectuate these goals. It is critical to ensure that the target population is both aware of the relief and able to utilize it. Many may be reluctant to seek relief because of the uncertainty of the waitlist, and many are also non-English speakers without legal assistance.<sup>153</sup> USCIS should therefore monitor implementation in order to track whether this cap is adequate to meet Congress' stated goals.

#### **THE U VISA NON-IMMIGRANT CLASSIFICATION FURTHER EMBEDS AND REINFORCES THE VICTIMIZATION PROCESS**

The U visa nonimmigrant procedures may reinforce the victimization that the petitioner already experienced. Congress' requirement that petitioners cross a "substantial abuse" threshold in cases of certain violent crimes is unnecessary and duplicative. The "substantial abuse" burden of proof may ensure that appropriate cases of obstruction, witness tampering, and extortion are selected for U visa protection. In inherently violent crimes, however, such as rape, torture, and sexual assault, the additional requirement that the victim prove substantial physical and mental abuse is unnecessary. Compiling and submitting such proof further reinforces the victimization process, which undermines the healing and restoration process for victims. For example, at least one comment submission noted that the interim rule requires all applicants to submit a written declaration in support of their petition.<sup>154</sup> By making written statements a requirement instead of a permissible form of "credible evidence," the rule re-traumatizes the victim by forcing them to recount the details of the crime.<sup>155</sup>

#### **CONCLUSION**

Through the U visa nonimmigrant classification, Congress has undoubtedly taken great strides to give voice to the silent, hidden, and invisible experience that many undocumented immi-

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*The result for undocumented aliens is a tremendous amount of uncertainty and confusion, likely to result in a higher unwillingness to report crimes than Congress had considered when passing the BIWPA.*

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grants face as victims of crimes like domestic violence in the United States. U visas fill critical gaps left by VAWA and offer much-anticipated and much-needed safeguards to immigrant victims of domestic violence.<sup>156</sup> U visas also have the potential to give victims of crimes the courage and the protection to pursue the investigation and prosecution of crimes. Yet, the forces of invisibility and silence remain tremendous forces to overcome in today's political landscape, particularly where the demands of law enforcement and immigration policy intersect. For example, advocates for these vulnerable populations have highlighted in the comment process that the existing interim rule suffers from several weaknesses or raises areas of concern in its administration, scope, and intersection with existing immigration law.

The advocate community continues to assess USCIS' response in remediating these identified concerns. Yet, as discussed

above, the statutory and regulatory framework still faces at least four critical obstacles to successful implementation: the integral role of law enforcement personnel; the changing landscape of United States immigration policy; the cap on admission; and the reinforcement of the victimization experience. The direction of United States immigration law raises larger issues as it relates to protections of immigrant victims of crime. It is essential that USCIS and Congress monitor the implementation and effectiveness of U visa regulations to ensure that it meets its stated goals. It is only through the successful implementation of programs such as the U visa nonimmigrant status that we can illuminate the continuing plight of immigrant victims of domestic violence, and in turn ensure an environment of protection and justice for this population.

## ENDNOTES

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<sup>1</sup> Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1477-1480 (2000).

<sup>2</sup> *Id.* See generally H.R. 3083, *The Battered Immigrant Women's Protection Act of 1999: Hearing on H.R. 3083 Before the House Judiciary Comm. Immigration and Claims Subcomm.*, 106<sup>th</sup> Cong. 134-148 (2000) (Prepared Testimony of Leslye Orloff, Director Immigrant Women Program, NOW Legal Defense and Education Fund) ("The Act will go far toward furthering the original purpose of VAWA's immigration provisions – freeing battered immigrant women abused by citizen and lawful permanent residence spouses or parents to report the abuse to police, to seek help and to prosecute their abusers for the multiple crimes they commit against family members."). *But see* *Hearing on 3083 Before the H. J. Comm. Immigration and Claims Subcomm.*, 106<sup>th</sup> Cong. 108-115 (2000) (Prepared Testimony of Duke Austin) (testifying that this legislation creates a "vast loophole of potential fraud and abuse").

<sup>3</sup> See 8 U.S.C. § 1101(U) (2007).

<sup>4</sup> See *Id.* at § 1101(U)(i)-(iv)

<sup>5</sup> The scope of VAWA did not cover at least the following categories of immigrants: "those abused by citizen and lawful permanent resident boyfriends; immigrant spouses and children of abusive non-immigrant visa holders or diplomats; immigrant spouses, children, and intimate partners abused by undocumented abusers; and non-citizen spouses and children of abusive United States government employees and military members living abroad." Karyl Alice Davis, *Unlocking the Door by Giving her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557, n.69 (Winter 2004) (citing Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 163 (2001)); see also *Hearings* (Prepared Testimony of Congresswomen Jackson-Lee); *Hearings*, (Prepared Testimony of Barbara Strack, Acting Executive Associate Commissioner, Office of Policy and Planning, Immigration and Naturalization Service); *Hearings*, 106<sup>th</sup> Cong. 158-165 (2000) (Prepared Testimony of Bree Buchanan, J.D. Public Policy Director, Texas Council on Family Violence); *Hearings*, 106<sup>th</sup> Cong. 79-86 (2000) (Prepared Testimony of Congresswoman Jan Schakowsky).

<sup>6</sup> See generally *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,036 (Sept. 17, 2007) (effective date October 17, 2007); 72 Fed. Reg. 54,813 (Sept. 27, 2007) (correcting the September 17, 2007 version).

<sup>7</sup> 72 Fed. Reg. 53,014.

<sup>8</sup> See generally Cecilia Menjivar and Olivia Salcido, *Immigrant Women and Domestic Violence: Common Experiences in Different Countries*, 16 GENDER & SOC'Y 898 (2002) (assessing the multiple challenges immigrant women face when they resettle in a foreign country), available at <http://www.jstor.org/view/08912432/sp030012/03x0180x/0>.

<sup>9</sup> 72 Fed. Reg. 53,015 (2007).

<sup>10</sup> 8 U.S.C. § 1184 (p)(2) (2008).

<sup>11</sup> 8 C.F.R. § 214.14 (d) (2008).

<sup>12</sup> USCIS took some steps to manage the process, including initiating an interim relief process. 72 Fed. Reg. 53,015 (2007) (noting that "USCIS implemented procedures to ensure that those aliens who appeared to be eligible for U nonimmigrant status under the BIWPA would not be removed from the United States until they had an opportunity to apply for such status"). Beginning in August 2003, the USCIS began accepting petitions for U visa interim relief at its Vermont Service Center, thus centralizing the process.

<sup>13</sup> The Center for Human Rights and Constitutional Law filed a class action lawsuit in the Central District of California against the Department of Homeland Security on October 17, 2005. The Plaintiffs challenged the agency's failure to issue U visas. See *Complaint for Mandamus, Rodriguez Ruiz v. Chertoff*, (2005) (Case No. EDCV 05-0966), available at <http://www.ilw.com/immigdaily/cases/2005,1201-rodriguez.pdf> (last visited on Mar. 5, 2008).

<sup>14</sup> Memorandum from Associate Director of Operations of U.S. Department of Homeland Security to Director Vermont Service Center (Oct. 8, 2003), available at <http://www.nationalimmigrationproject.org/domesticviolence/Uvisas/Uvisaindex.htm> (last visited on Mar. 5, 2008).

<sup>15</sup> "Many immigrant crime victims fear coming forward to assist law enforcement until this rule is effective. Thus, continued delay of this rule further exposes victims of these crimes to danger, and leaves their legal status in an indeterminate state. Moreover, the delay prevents law enforcement agencies from receiving the benefits of the BIWPA and continues to expose the U.S. to security risks and other effects of human trafficking. Therefore, delay in the implementation of these regulations would be contrary to the public interest." 72 Fed. Reg. 53,014 (2008).

<sup>16</sup> See Viji Sundaram, *U Visa Gives Immigrant Women Victims a New Chance*, New America Media, Sept. 21, 2007, available at [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=345ac44e65dd9d7761188595c37c7046](http://news.newamericamedia.org/news/view_article.html?article_id=345ac44e65dd9d7761188595c37c7046) (last visited Mar. 5, 2008).

<sup>17</sup> See *id.*

<sup>18</sup> News Release, *USCIS Publishes New Rule for NonImmigrant Victims of Criminal Activity*, Sept. 5, 2007, available at [http://www.uscis.gov/files/pressrelease/U-visa\\_05Sept07.pdf](http://www.uscis.gov/files/pressrelease/U-visa_05Sept07.pdf) (last visited Mar. 5, 2008).

<sup>19</sup> 8 C.F.R. § 214.14(b)(1) (2008).

<sup>20</sup> *Id.* § 214.14(b)(2).

<sup>21</sup> *Id.* § 214.14(b)(3).

<sup>22</sup> *Id.* § 214.14(b)(4) (including territories or possessions of the United States, Indian country, and U.S. military facilities within the scope of the regulations).

<sup>23</sup> 8 U.S.C. § 1101(U)(1)(i) (2008).

<sup>24</sup> 8 C.F.R. § 214.14 (b) (2008).

<sup>25</sup> *Id.* § 214.14(a)(8).

<sup>26</sup> 72 Fed. Reg. 53,017 (2007) (interpreting the VAWA terms "battery" and "extreme cruelty" and interchangeable with "abuse").

<sup>27</sup> 8 C.F.R. § 214.14 (b)(1) (2008).

<sup>28</sup> 72 Fed. Reg. 53, 018 (2007).

<sup>29</sup> 8 C.F.R. § 214.14 (b)(1) (2008).

<sup>30</sup> *Id.* § 214.14 (b)(1).

## ENDNOTES CONTINUED

- <sup>31</sup> 72 Fed. Reg. 53,018 (2007).
- <sup>32</sup> *Id.*
- <sup>33</sup> DEPARTMENT OF HOMELAND SECURITY, OMB No. 1615-0104, INSTRUCTIONS FOR FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, *available at* <http://www.uscis.gov/files/form/I-918instr.pdf> (last visited Mar. 5, 2008).
- <sup>34</sup> 8 C.F.R. § 214.14 (c)(2)(3) (2008).
- <sup>35</sup> *Id.*
- <sup>36</sup> 8 U.S.C. § 1101(a)(15)(U)(iii) (stating that “criminal activity” involves one or more of the following activities: 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, or perjury).
- <sup>37</sup> 72 Fed. Reg. 53,018 (2008).
- <sup>38</sup> 8 C.F.R. § 214.14(a)(9) (2008).
- <sup>39</sup> 72 Fed. Reg. 53,017 (2007).
- <sup>40</sup> *Id.* at 53,016.
- <sup>41</sup> *Id.*
- <sup>42</sup> *Id.* (noting that the exclusion would *not* cover any criminal activity, just the qualifying criminal activity).
- <sup>43</sup> 72 Fed. Reg. 53,017 (2007).
- <sup>44</sup> *Id.*
- <sup>45</sup> 72 Fed. Reg. 52,017 (2007).
- <sup>46</sup> *Id.*
- <sup>47</sup> *Id.* at 53,017 (citing 8 C.F.R. 214.14(a)(14)(ii)).
- <sup>48</sup> 8 U.S.C. § 1101(U)(1)(ii) (2008).
- <sup>49</sup> 8 C.F.R. § 214.14(b)(2) (If the petitioner is a child or incapacitated, the parent or guardian may have the necessary information).
- <sup>50</sup> 72 Fed. Reg. 53,018 (2007).
- <sup>51</sup> *Id.*
- <sup>52</sup> 8 U.S.C. § 1101(a)(15)(U)(i)(II) (2008); 8 C.F.R. § 214.14(a)(7) (2008). “Next friend” is an individual who acts for the benefit of the petitioner). 72 Fed. Reg. 53,019 (2008).
- <sup>53</sup> DEPARTMENT OF HOMELAND SECURITY, *supra* note 33. The instructions require additional evidence in cases involving a child or incompetence.
- <sup>54</sup> *Id.*
- <sup>55</sup> 8 U.S.C. § 1101(U)(1)(iii) (2008).
- <sup>56</sup> DEPARTMENT OF HOMELAND SECURITY, OMB No. 1615-0104, I-918 SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION, (2007), *available at* <http://www.uscis.gov/files/form/I-918.pdf> (last visited Mar. 5, 2008).
- <sup>57</sup> DEPARTMENT OF HOMELAND SECURITY, *supra* note 33.
- <sup>58</sup> *Id.*
- <sup>59</sup> 72 Fed. Reg. 53,020 (2007).
- <sup>60</sup> DEPARTMENT OF HOMELAND SECURITY, *supra* note 33.
- <sup>61</sup> 8 C.F.R. § 214(a)(3) (2008).
- <sup>62</sup> 72 Fed. Reg. 53,019 (2007).
- <sup>63</sup> *Id.*
- <sup>64</sup> 8 C.F.R. § 214(a)(3) (2008).
- <sup>65</sup> 72 Fed. Reg. 53,023 (2007).
- <sup>66</sup> *Id.* at 53,019 (USCIS believed this interpretation is consistent with the plain language of the statute).
- <sup>67</sup> 8 C.F.R. § 214.14(b)(3) (2008) (The Interim Rule includes special criteria and exceptions for minors and incompetents).
- <sup>68</sup> 8 C.F.R. § 214.14(b)(4) (2008).
- <sup>69</sup> 72 Fed. Reg. 53, 410, 53,020 (2007).
- <sup>70</sup> *Id.*
- <sup>71</sup> DEPARTMENT OF HOMELAND SECURITY, *supra* note 33.
- <sup>72</sup> *Id.*
- <sup>73</sup> 8 C.F.R. 214.14(c)(2) (2008).
- <sup>74</sup> 72 Fed. Reg. 53,024 (2007).
- <sup>75</sup> *Id.* at 53,021 (contrasting this requirement to U nonimmigrant status).
- <sup>76</sup> *Id.*
- <sup>77</sup> *Id.*
- <sup>78</sup> *Id.*
- <sup>79</sup> *Id.* (noting that the Vermont Service Center personnel are trained in handling these petitions).
- <sup>80</sup> 8 C.F.R. § 214.14(c)(4) (2008).
- <sup>81</sup> *Id.* § 214.14(C)(ii).
- <sup>82</sup> 72 Fed. Reg. 53,028 (2007).
- <sup>83</sup> 8 C.F.R. § 214.14(c)(5)(i)(A) (2008).
- <sup>84</sup> *Id.* § 214.14(g) (Supplement A to Form I-918 is a Petition for Qualifying Family Member of U-1 Recipient).
- <sup>85</sup> *Id.* § 214.14(g)(ii).
- <sup>86</sup> 8 U.S.C. § 1513(f)(1).
- <sup>87</sup> *Id.* § 1184(p)(3)(B).
- <sup>88</sup> 8 C.F.R. § 214.14(f) (2008).
- <sup>89</sup> 72 Fed. Reg. 53025 (2007).
- <sup>90</sup> 8 C.F.R. § 214.14(f)(1) (2008).
- <sup>91</sup> *Id.*
- <sup>92</sup> *Id.*
- <sup>93</sup> 72 Fed. Reg. 53023 (2007).
- <sup>94</sup> *Id.* at 53,027.
- <sup>95</sup> 8 C.F.R. § 214.14(d)(2) (2008).
- <sup>96</sup> 72 Fed. Reg. 53,027 (2007).
- <sup>97</sup> 8 C.F.R. § 214.14(d)(3) (2008).
- <sup>98</sup> *Id.*
- <sup>99</sup> 72 Fed. Reg. 53,021 (2007) (except in cases of Nazi persecutions, genocide, acts of torture, or extrajudicial killings).
- <sup>100</sup> *Id.* at 53,021.
- <sup>101</sup> *Id.* § 212.17(b)(2).
- <sup>102</sup> 72 Fed. Reg. at 53,022 (2007).
- <sup>103</sup> There were 108 submissions posted on Regulations.gov relating to the U nonimmigrant classification rules *available at* [http://www.regulations.gov/search/search\\_results.jsp?No=40&sid=1179EF6CA92B&Ne=2+8+11+8053+8054+8098+8074+8066+8084+8055+8&Ntt=new%20classifications%20for%20victims&Ntk=All&Ntx=mode+matchall&N=8100+8060+4294967210&css=0](http://www.regulations.gov/search/search_results.jsp?No=40&sid=1179EF6CA92B&Ne=2+8+11+8053+8054+8098+8074+8066+8084+8055+8&Ntt=new%20classifications%20for%20victims&Ntk=All&Ntx=mode+matchall&N=8100+8060+4294967210&css=0) (last visited Mar. 5, 2007). This count includes cover letters, attachments, and comments. The author reviewed all submissions in preparing this article. Approximately a dozen of the submissions express anti-immigration sentiment and suggest that this classification encourages false reporting and constitutes a piecemeal amnesty program. Because these comments do not address the substance of the interim rule, but rather critique United States immigration policy overall, they are not addressed in this article.
- <sup>104</sup> 8 C.F.R. 214.14(a)(3)(i) (2008).
- <sup>105</sup> *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>106</sup> *See, e.g.*, Comment Submitted by Safe Horizon, Nov. 16, 2007, USCIS-2006-0069.
- <sup>107</sup> *See, e.g.*, Comment Submitted by North Carolina Attorney, Nov. 16, 2007, Docket No. USCIS-2006-0069.
- <sup>108</sup> *See, e.g.*, Comment Submitted by Legal Aid of North Carolina, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>109</sup> *See, e.g.*, Comment Submitted by Lutheran Immigration and Refugee Services, Nov. 15, 2007, USCIS-2006-0069.
- <sup>110</sup> *See, e.g.*, Comment Submitted by Idaho Coalition Against Sexual and Domestic Violence, the Idaho Network to End Domestic Violence and Trafficking Against Immigrants, and Catholic Charities of Idaho, Nov. 16, 2007, Docket No. USCIS-2006-0069.
- <sup>111</sup> *Id.*
- <sup>112</sup> *Id.*
- <sup>113</sup> *Id.*
- <sup>114</sup> 8 C.F.R. § 214.14(a)(14)(i) (2008).
- <sup>115</sup> *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>116</sup> The comments offered an example where a petitioner was previously sexually abused by her father, but the statute of limitations on that crime had run. The petitioner later possesses information and helps in the prosecution of her father for kidnapping her sibling. In this scenario, advocates argued that the petitioner should be eligible to apply for relief consistent with the statutory language because she was the victim of one crime (sexual abuse) and assisted in the prosecution of another crime (kidnapping). *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>117</sup> 8 C.F.R. § 212.17(c)(2) (2008).
- <sup>118</sup> *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>119</sup> *Id.*
- <sup>120</sup> *See, e.g.*, Comment Submitted by Catholic Charities, Immigration and Legal Services, Nov. 16, 2007, Docket No. USCIS-2006-0069.
- <sup>121</sup> *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>122</sup> *See, e.g.*, 8 C.F.R. § 214.14(c)(1)(i).
- <sup>123</sup> *Id.*
- <sup>124</sup> *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.

## ENDNOTES CONTINUED

<sup>125</sup> Advocates pushed for the withdrawal of 8 C.F.R. §§ 214.14(c)(1)(ii) and (f)(2)(ii).

<sup>126</sup> See, e.g., Comment Submitted by Catholic Charities, Nov. 16, 2007, Immigration and Legal Services, Docket No. USCIS-2006-0069.

<sup>127</sup> See, e.g., Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069; Comment Submitted by Legal Aid of North Carolina, Nov. 15, 2007, Docket No. USCIS-2006-0069; Comment Submitted by Catholic Charities, Nov. 16, 2007, Immigration and Legal Services, Docket No. USCIS-2006-0069; Comment Submitted by Safe Horizon, Nov. 16, 2007, USCIS-2006-0069.

<sup>128</sup> Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.

<sup>129</sup> See, e.g., Comment Submitted by Catholic Charities, Nov. 16, 2007, Immigration and Legal Services, Docket No. USCIS-2006-0069.

<sup>130</sup> See, e.g., Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.

<sup>131</sup> See, e.g., Erez and Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, WESTERN CRIMINOLOGY REVIEW 4(2), 155, 158-159 (2003), Indira K. Balram, *The Evolving, Yet Still Inadequate, Legal Protections Afforded Battered Immigrant Women*, 5 UNIV. OF MARYLAND, J. OF RACE, RELIGION, GENDER AND CLASS 387, 388-90 (Fall 2005).

<sup>132</sup> Erez & Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, WESTERN CRIMINOLOGY REVIEW 4(2), 155, 162 (2003).

<sup>133</sup> "Increased community education will both increase the likelihood that a battered immigrant woman will encounter a helpful response when she turns to personal supports in her community and generally increase her knowledge about domestic violence laws and services available." Erez & Hartley, supra note 132 at 158-159; see also Gail Pendleton, *Ensuring Fairness and Justice for Noncitizen Survivors of Domestic Violence*, JUV. AND FAM. CT. J. at 69 (2003) (suggesting a publicity campaign would aid investigators in obtaining the cooperation of undocumented victims of crime).

<sup>134</sup> 72 Fed. Reg. 53,019.

<sup>135</sup> Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism*, 51 EMORY L. J. 1059, 1060 (Summer 2002) ("Any situation in which a law enforcement agency holds substantial power over an individual can lead to abuses. The immigration context is no exception.").

<sup>136</sup> *Id.*

<sup>137</sup> One advocate suggested that it would be a violation of due process for a law enforcement officer to not provide a written denial of the request for certification. Marlene Dougherty argued that the alien victims should have the right to review by an impartial decision-maker. Comment of Marlene A. Dougherty, available at <http://regulations.gov> (last visited Mar. 5, 2008).

<sup>138</sup> *Supra* note 135, at 1085-1090.

<sup>139</sup> In the last years of his presidency, President Bush made immigration reform a top domestic concern. After failed reform passages in 2006, a bipartisan bill was introduced into the Senate in 2007. The Senate measure would have coupled tighter border security and cracked down on the hiring of illegal immigrants. The bill eventually stalled after senators from both parties refused to cut off debate and move to a final vote, with Democrats creating an unlikely alliance with President Bush. See Jonathan Weisman, *Immigration Overhaul Bill Stalls in Senate Bipartisan Compromise Collapses; Reid Says Measure May Return*, WASH. POST, June 8, 2007 at A01. However, while the federal government has been unable to overhaul immigration law, states have slowly started taking tough immigration stances "creating a national patchwork of incongruous immigration

laws that some observers fear will make it far more difficult to enact any comprehensive, federally mandated bill down the line." See Anthony Faiola, *States' Immigrant Policies Diverge In Differences, Some See Obstacles For a National Law*, WASH. POST, Oct. 15, 2007 at A01.

<sup>140</sup> In May 2006, immigrant workers took part in a nationwide demonstration titled a "Day Without an Immigrant." Immigrants skipped work and boycotted businesses to demonstrate their economic influence in a quest for amnesty for the country's 11 million illegal immigrants. See Jenalia Moreno, *The Immigration Debate; Boycott felt here, elsewhere; But many say it's business as usual, even as thousands miss a day of work*, HOUS. CHRON., May, 2, 2006, at A1; Michael Martinez, *Rallies draw over 1 million*, CHI. TRIB., May 2, 2006 at C13.

<sup>141</sup> In a 2007 Gallup poll, immigration was ranked fourth among the issues important to voters in 2008 election. See *What Voters Want*, available at <http://www.gallup.com/poll/103534/What-Voters-Want.aspx> (Last visited on Mar. 5, 2008). The major Democratic and Republican candidates running for president differ among the stances each takes on the issue. See *Immigration: Election Center 2008*, available at <http://www.cnn.com/ELECTION/2008/issues/issues.immigration.html> (last visited Mar. 5, 2008).

<sup>142</sup> *Id.*

<sup>143</sup> Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1466-67, 1482-83 (July 2006).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Demleitner, supra note 135 at 1059; see also Karyl Alice Davis, *Unlocking the Door by Giving her the Key: A Comment on the Adequacy of the U-visa as a Remedy*, 56 ALA. L. REV. 557, 576 (Winter 2004) (concluding that the U-visa "relied too heavily on the criminal justice system," a system in which "immigrant women have little trust due to cultural barriers, language barriers, and experiences of racial discrimination").

<sup>147</sup> 8 C.F.R. § 214.14 (d) (2008).

<sup>148</sup> See generally 72 Fed. Reg. at 53,033 (2007) (describing the other methods that USCIS considered).

<sup>149</sup> See Nina Bernstein, *Special Visas For Victims Remain Elusive Despite a Law*, N.Y. TIMES, Mar. 7, 2007, at B6.

<sup>150</sup> Kittrie, supra note 143 at 1465.

<sup>151</sup> 72 Fed. Reg. 53,014 (2007).

<sup>152</sup> *Id.* at 53032

<sup>153</sup> Comment submitted by Michancy Schultz on November 16, 2007, available at <http://www.regulations.gov> (last visited Mar. 5, 2008), highlights that she ran the summary in the interim rule through a "Flesch-Kincaid" readability assessment and concluded that the summary of the rule had a readability level of twelfth grade. Schultz questioned whether "an immigrant with limited English capabilities will be able to read or understand this rule without some kind of professional assistance." See *id.* at 4. (comments by Shultz).

<sup>154</sup> Comment submitted by the Immigrant Center for Women and Children, November 15, 2007, available at <http://www.regulations.gov> (last visited Mar. 5, 2008) (citing the requirement at 8 C.F.R. 214.14(c)(2)(iii)).

<sup>155</sup> *Id.*

<sup>156</sup> See generally *Hearings* at 134-148 (Prepared Testimony of Leslye Orloff, Director Immigrant Women Program, NOW Legal Defense and Education Fund) ("H.R. 3083 is designed to correct unforeseen problems in the legislation and erosions in access to VAWA that have prevented many of the needy domestic violence victims VAWA sought to protect from seeking help."). Some of the gaps that Orloff highlights include children who "age-out" under VAWA, the U.S. residence requirement, the effect of changes in the abuser's immigration status, and the challenges of implementing the "extreme hardship" and "public charge" provisions of VAWA.