

National Network to End Violence Against Immigrant Women

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We write on behalf of the National Network to End Violence Against Immigrant Women, the national organization which worked with Congress in 2000 to craft the U visa and its amendments in 2005, and with CIS to implement U interim relief. We have over 1,000 members in our Network, including domestic violence and sexual assault advocates, immigration practitioners, prosecutors, police officers and civil and criminal court judges.

General Comments

The U forms should further the Congressional goals, which the most recent U visa memo aptly described:

The goal of the legislation was to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of persons, and other criminal activity of which aliens are victims, while at the same time offering protection to victims of such offenses.

Applications for U Nonimmigrant Status, Revisions to *Adjudicator's Field Manual (AFM)* Chapter 39, Memorandum from Aytes/Sposato to Director, Vermont Service Center, HQPRD 70/6.2, January 6, 2006 (hereinafter "January U Memo")

While we appreciate the significant effort embodied in the proposed forms, they are complicated and confusing, and in some instances apply standards not mandated by the law. This makes them time-consuming to complete and

enhances, rather than minimizes, the burden on victims of crimes and law enforcement officials seeking to help them.

To further the Congressional goals the forms and instructions should be simple, reflecting both the reality of how the criminal justice system works and how immigrant crime survivors experience that system. The statute's eligibility requirements and proof standards are purposefully broad to capture these realities.

In addition to flagging places where the forms seem to discourage participation in the U process, we provide suggested alternatives that we believe will enhance the quality, utility and clarity of information collected by these forms. When suggesting such language, we've attempted to use language accessible to those who are not versed in legal jargon or immigration terminology.

Where the form creates requirements not contained in the statute it undermines its practical utility, since those harmed by restrictive interpretations will challenge the form and any regulations that impose ultra vires requirements. Ultra vires requirements also raise serious questions about whether the agency's methodology and assumptions violate the will of Congress.

VAWA 05 Changes

VAWA 05 made changes that affect the content of the U form's sections on derivatives. Obviously, the final form must reflect these changes. Of most significance to the U form, Congress created a new U derivative category for "unmarried siblings under 18," eliminated the extreme hardship and certification requirements for derivatives, and mandated that U visas last for 4 years. See Violence Against Women Act of 2005, sections 801(b) & 821(b)

PAGE 1 INSTRUCTIONS Form I-918

The boxes throughout are helpful; there obviously has been an attempt to make this accessible. The initial box, however, fails to explain how U interim relief recipients can meet the U visa requirements, without having to start all over again.

U Interim Relief Certifications

The agency's lengthy delay in issuing regulations should not harm victims of crimes who requested U interim relief and the law enforcement officers who assisted them. For those applicants to receive interim relief, their certifications had to meet the statutory requirements under INA section 214(p).

Law enforcement officers are extremely busy and should not have to rifle through old files to recertify. The officers involved at the time of certification may no longer be at the agency, making recertification impossible. Moreover, insisting

that law enforcement officers recertify because the new form contains question that go beyond the statutory requirements violates the law and the will of Congress. The National Network will challenge the denial of U visas to interim relief applicants who satisfied the statutory requirements for certification.

To avoid violating the law, the Instructions and Form must make clear that old certifications suffice.

BOX on page 1, third bullet point

ADD “or a copy of the certification filed with your U interim relief application.”

Filing Deadline

There is no statutory basis for the one-year deadline on past crimes (or after 16th birthday). The reason there is no statutory deadline is that victims of crimes, especially undocumented victims of crimes, may not be aware that the U visa is an option for them. Once they do, tracking down law enforcement involved in crimes that occurred in the past may take a long time. It is unclear why the age of 17 is chosen for when a victim of crime should become aware that the immigration option is available to them. The National Network will challenge any U visa denials based on failure to meet the ultra vires deadline and suggests deleting this entire section.

Exceptional Circumstances

In general, the exceptional circumstances examples for overcoming the ultra vires deadline are helpful. The requirements for showing ineffective assistance of counsel are overly legalistic, however, and we suggest an additional example that captures the reality most immigrant crime victim’s experience.

In light of the ameliorative intent of the law, the *Lozada* test for ineffective assistance of counsel is burdensome, unrealistic and unwarranted. It fails, for instance, to recognize fraud by *notarios* and others unqualified to practice law, which poor crime victims are more likely to have experienced than attorney incompetence. Complying with the *Lozada* test is virtually impossible without representation by experienced immigration counsel. This is not a case where someone is making strategic decisions about relief or procedure; the barrier this test should help overcome is, in fact, not required by the statute.

DELETE “Ineffective assistance of counsel” and all its subparagraphs and **REPLACE** with “Inaccurate legal advice; explain in detail”.

ADD the following example, which captures the primary reasons many noncitizen crime victims will not meet the deadline:

“Limited fluency in English; limited knowledge of criminal justice system and immigration remedies; poverty and/or limited resources”

PAGE 2

Step 1: When Should I Use Form I-918 (page 2)

Interim Relief

As noted above, interim relief recipients must not be required to submit new certifications or documentation, if the evidence already submitted meets the statutory standards for the U visa. It is fundamentally unfair for USCIS to shift the burden for failing to timely promulgate U implementing regulations onto the victims of crimes and law enforcement officials whom Congress sought to help when it created this new form of relief in 2000. The form must state that interim relief recipients may resubmit evidence used to achieve interim relief status.

After the first full paragraph under Step 1

INSERT:

U Interim relief recipients should use this form to ensure they receive full U status. We encourage you to submit additional evidence to comply with all the U requirements, but you may also resubmit the evidence used to obtain interim relief.

Explicitly Mention the Any Credible Evidence Standard

The Form mentions “credible” evidence in several parts, but never explains that a special “any credible evidence” standard applies. See INA section 214(p)(4). In several places it implies that primary evidence is required, which would violate the law, so we have suggested changes, where appropriate, that encourage but do not require such evidence.

ADD after the U interim relief paragraph, the single following sentence:

“The agency will review “any credible evidence” you submit.”

Certification paragraph (second paragraph from bottom, column 2, page 2)

ADD the following phrase at the end of “like to be helpful”

“in an investigation or prosecution of a qualifying crime.”

PAGE 3

Principal Applicant filing for qualifying family members (page 3)

VAWA 05 changed derivatives and their eligibility requirements. Derivatives now qualify by showing the requisite relationship with the principal; no other proof is required. In addition, derivatives included in the U interim relief process must not now be ineligible because they have since aged out.

In the section for applicants under the age of 21:

ADD the following additional bullets after “Unmarried children under the age of 21”

“Unmarried children over the age of 21, if they were included in a U interim relief application.”

“Unmarried siblings under the age of 18”

In the section for applicants over the age of 21:

ADD the following additional bullet:

“Unmarried children over the age of 21, if they were included in a U interim relief application.”

DELETE the following two paragraphs (on extreme hardship and law enforcement certification).

EADs (fourth paragraph from bottom, column 1

It's good that the Instructions mention that work authorization will flow from U approval, but the language should be more accessible.

DELETE “you will be employment authorized incident to status”;

REPLACE with “you will be eligible to work legally” and

DELETE “concurrently” instead of and

REPLACE with “at the same time”

DELETE “of that authorization.”

REPLACE with “that you may work legally”

At end of the paragraph about the principal's EAD

ADD “You do not need to file a work authorization form (I-765).”

Inadmissibility and waivers

Page 3, bottom of first column through top of second column

Applicants will not understand this explanation; they do not know what 212(a) is. We suggest, instead, that the explanation reference the questions on the form that go to inadmissibility (see suggestions for improving that section of the form, below). It also must mention 212(d)(14), since Congress created this waiver especially for U applicants. Providing the written explanations for “yes” answers may suffice for showing exceptions or meeting the waiver requirements, so VSC should be in charge of deciding when an applicant needs to file an I-192 form, which they can explain in an RFE.

DELETE the last paragraph in column one, page 3, and the first paragraph in column 2, page 3 and **REPLACE** with:

"If you or your family members checked one of the boxes in Part 5 of Form I-918 or I-918A, you or they may be "inadmissible." This does not necessarily mean you cannot receive a U visa, but USCIS must decide whether to grant you a "waiver" of your inadmissibility. Congress created a special waiver for you (INA section 212(d)(14)) but other exceptions and waivers may apply. If you believe you are inadmissible but eligible for a waiver, you may file a Form I-192 (Application for Permission to Enter as a Nonimmigrant) with this application. The explanations you attach to explain your "yes" answers may, however, satisfy adjudicators that you are not, in fact, inadmissible, that you meet exceptions to the grounds of inadmissibility, or that you have demonstrated that you merit a waiver.

The immigration laws in this area are extremely complicated. If you check a "yes" box in this section, we encourage you to talk to an experienced immigration advocate or attorney before sending in your application. This will help ensure you provide all the information USCIS needs to determine whether you are eligible for a U visa, despite possible inadmissibility."

Step 2: Complete the Forms

A. Completing Form I-918

To avoid the problems noted in the discussion on the Box on page 1,

ADD the following sentence before the last sentence in this paragraph:

"If you filed for U interim relief you may meet this requirement by submitting a copy of the certification filed with that application."

Part 1. Basis for Filing

Box A should include options for including derivatives. Since the statute does not require that people with U status renew or refile for status prior to requesting lawful permanent residence, boxes B & C only make sense for principals subsequently filing for derivatives; they should be consolidated and elucidated. In addition, the form must include a category for those who have received or filed for U Interim Relief.

ADD to Box A:

"and I am/am not (circle one) including family members in this application (I've attached a Supplement A for each family member included).

DELETE B & C and

REPLACE with

"My U-1 application is pending or has been approved and I am now filing for family members (I've attached a Supplement A for each family member).

ADD to the list of options, the following category:

* I filed for and received U interim relief and am now filing for a U visa. I am/am not (circle one) including family members in this application.

PAGE 4

Information about you

ADD after "If you do not have an email address" the following"
"or your email address is unsafe"

Part 6 description: Information about Family Members

There is no statutory requirement that U visa applicants must provide information on family members who are not included as part of the application, nor is the current location of spouses and children required. These ultra vires requirements will deter undocumented victims of crimes from accessing the status Congress created for them, for fear DHS will seek out and remove their undocumented family members. This is not a result Congress intended when it passed this law.

Since Supplement B contains all the information necessary for processing derivative family members, Part 6 is unnecessary and unduly intimidating. It should be deleted; minimally it must be clear that only information about derivative family members is required. The National Network will raise this problem with Congress and the Courts if USCIS does not fix it.

DELETE description of Part 6.

PAGE 5

B. Completing Form I-918A (Derivative Supplement)

Certifications are no longer required for derivatives. Requiring a new form and fee for a principal who subsequently files for a derivative is onerous, discouraging applicants from legalizing family members. A copy of the original approved U visa for the principal, plus proof of the qualifying relationship, should suffice.

DELETE second sentence of first paragraph (certification)

DELETE all but the first sentence of the second paragraph and

REPLACE with

"You may file a new Form I-918 or a copy of your U visa approval. No new fee is required if you choose to file a new Form I-918, except for the fees for your family members' forms (I-918A and I-765, if they seek work authorization).

PAGE 6

C. Completing Form I-918B (Law Enforcement Certification)

This section misstates the law in several places, imposing burdens on law enforcement not contemplated by Congress. It fails to acknowledge, moreover, the validity of certifications filed on behalf of U interim relief applicants, who should not be required to submit new certifications to achieve U visas (see comments on the Box on Page 1).

To avoid harming victims and law enforcement officers who complied with the U interim relief process,

ADD the following sentence after the first sentence in the first paragraph.

“If you filed for U interim relief, you may file a copy of the certification supplied with that application.”

Ultra Vires Requirements

The first sentence of the second paragraph violates the statutory language in three ways:

- A. The statute does not require that the certifying official be conducting the investigation or prosecution;
- B. The statute does not require that the applicant be the victim of the same crime as that investigated by the certifier.
- C. The statute has a broad list of those who may certify, with no chain of command requirement. Limiting acceptable certifiers creates significant hurdles to law enforcement participation in the U process, thereby undermining the purpose of the law.

A. Certifying Official Nexus to Investigation/Prosecution

While most of the time the official certifying the U visa will be involved in the investigation or prosecution (which would not be true if only agency head may sign forms), there will be instances in which an official who generally investigates or prosecutes an enumerated crime may certify. Cases of crimes that occurred years ago are examples of situations in which the officers involved in the investigation or prosecution at the time may no longer be available. Officers whose job is to investigate or prosecute such crimes may, however, pull and review the old case file and determine that the applicant was a victim of a qualifying crime, and possessed information and was helpful in the investigation or prosecution of a qualifying crime. Victims of crimes should not become disqualified because the specific individuals who investigate or prosecute their crimes are unavailable to sign certificates; other law enforcement officers are qualified to make this decision, as evidenced by USCIS' insistence on heads of agencies signing certification forms, addressed below. .

B. Victim of Qualifying Crime v. Investigation of Qualifying Crime

This may seem like a legalistic argument, but here's an example derived from real-life experience, that demonstrates why the law's flexibility is crucial to law enforcement and to victims of crimes:

A father involved in a custody dispute kidnaps his youngest child, Ellen, from her school. Ellen calls her sister, Gail, who is now 19, and tells her where she is. Gail calls the police, who uses the

information she's provided to find Ellen and arrest the father. Ellen is eligible for a U visa as a victim of kidnapping, but Gail is not, even though she possesses useful information and was very helpful in the investigation. In the course of the kidnapping investigation, however, Gail reveals that she was repeatedly sexually abused by her father when she lived with him. Unfortunately, the statute of limitations has now run on that abuse. The prosecutor charges the father with kidnapping and signs a certification form for Ellen as a victim of kidnapping who possessed useful information and was helpful in the investigation and prosecution of her father. She also signs a form certifying that she was a victim of sexual abuse and possessed useful information and was helpful in the investigation and prosecution of the kidnapping.

The statutory language permits this bifurcation, and Form I-918 B itself, is structured to allow this kind of bifurcated certification. The vast majority of cases will not require such bifurcation, but the Instructions should not preclude such bifurcation when necessary.

C. Certifying official

The statute says that a certifier must be an authority "investigating criminal activity described" in the U statute who must state that the applicant has been helpful, is being helpful or is likely to be helpful in the investigation or prosecution of criminal activity described in the statute. Requiring certification only by "head of agency" or "certifying official" will create an unnecessary burden on law enforcement, undermining the law's goals.

Officers working on criminal cases are in the best position to develop relationships of trust and rapport with immigrant crime victims, and the U visa is a helpful tool for them to do this effectively. They are the officers who have first-hand knowledge of the victim's circumstances and the help he or she is able to provide. They should not have to go up a chain of command to get a certification form signed. This requirement will discourage them from using it, a result which violates the Congressional goals of the law.

Many heads of agencies, including police chiefs, do not want or need this additional responsibility; they are busy dealing with a department's larger issues and will not have time to review individual case files to make certification decisions. They will not, moreover, have the direct knowledge of the case that officers working the cases possess.

As practitioners working with U interim relief applicants have discovered, many Chiefs prefer to let the officers working on the cases decide whether to certify. Local law enforcement agencies should make their own decisions about who has responsibility for signing certifications. The form should reflect this flexibility.

Law Enforcement Discretion

The National Network worked hard with Congress to craft a form of relief that encouraged law enforcement to work with immigrant crime victims, and to give them a simple tool they could use, in turn, to encourage victims to work with them. Congress recognized that law enforcement agencies are the experts in this area, and delegated to those agencies broad discretion to certify noncitizen crime victims and achieve the law's goals. The Network will bring to the attention of Congress and the Courts any infringements on this discretion imposed by USCIS.

To avoid violating the statutory language and Congressional intent, USCIS should:

DELETE the first sentence of the second paragraph and **REPLACE** it with the language used in the most recent USCIS Memorandum on U interim relief (see "January U memo")

"The goal of the legislation was to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of persons, and other criminal activity of which aliens are victims, while at the same time offering protection to victims of such offenses.

Congress specifically stated:

Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status."

8 U.S.C. 1101 Note.

DELETE the third paragraph (cert for derivatives), no longer required

Step 3: Submit Your Application

Fee Waivers

The fee section **MUST** mention fee waivers, and how to get them (economic necessity proof), since many immigrant crime victims will not be able to afford the fees for both themselves and derivatives. The description of the contents of the fee waiver request are derived from the March, 2004 Yates Field Guidance on Granting Fee Waivers.

ADD at the end of the first paragraph the following sentence:

"Fee waivers are available for these fees. If you need a fee waiver explain in as much detail as possible, on a separate sheet of paper, why you are unable to pay the fees. A summary of your income and expenses, including family members who depend on you, will help. Submit any other documents you think help show

your inability to pay the fees. Please note that your application is not viewed as actually filed with USCIS your fee waiver is granted.”

PAGE 7

3. Evidence to Support Your Application

Personal Affidavit

There is no statutory requirement of a personal affidavit; such a requirement violates the any credible evidence standard. This section should also mention that the Personal Statement may include information on the information the applicant possesses about the criminal activity, and any explanations of “yes” answers to questions in Part 4 & 5 of the form.

To avoid violating the Congressionally mandated evidentiary standard, in the paragraph before the list of evidentiary requirements,

DELETE “You must” and

REPLACE it with “We encourage you to”

DELETE “The statement should” and

REPLACE with “Helpful personal statements will”

DELETE “must” in “must include” and

REPLACE with “will”

To consolidate useful written explanations by the applicant in one document, **ADD** at the end of the evidentiary list:

“The information you possess about the criminal activity.”

After the list of evidentiary requirements, add the following sentence:

“You also may include in your personal statement your explanations of “yes” answers to Part 5. Mark this section of your statement: “Part 5 Explanations””

Certification

The description of the certification is good, but this paragraph must acknowledge the certifications from the U interim relief process suffice.

ADD the following sentence after the first sentence:

“If you received U interim relief you may submit a copy of the certification you filed with that application.”

Evidence You are the Victim of a Qualifying Activity

Requiring primary documentation violates the any credible evidence standard.

DELETE “You should” and

REPLACE with “We encourage you to”

DELETE “You should include” and

REPLACE with “We encourage you to include”

Evidence of Substantial Physical or Mental Abuse

This section is very good, reflecting both the any credible evidence standard and an understanding of the broad spectrum of abuse applicants may experience.

PAGE 8

4. Form I-918A

Derivatives who received interim relief should not be harmed by the agency's failure to timely promulgate regulations. Those who aged out or married should have their applications for U visas adjudicated as if they were in the status at the time they receive U interim relief. In addition, a showing of extreme hardship is no longer required for derivatives, so

ADD a new introductory sentence:

"Complete the information concerning your family members to the best of your knowledge. Supplement A is required for family members who received U interim relief, but children who turned 21 or married after receiving interim relief are still eligible. The principal should check the appropriate section in Part 1 for these special cases, and applicants in this category may resubmit the certification and documentation they submitted to receive interim relief. They shall continue to be considered "children" for purposes of their U applications until their status is granted or denied."

DELETE last paragraph, bottom of column 1

Credible documentation list

Birth Certificates for children (whether father, mother or stepparent, your father, your stepparent) should not require showing both parents, as long as the qualifying parent is listed. To require more violates the language and purpose of the statute. No one must be denied status because their birth certificate didn't mention a parent not involved in the U process.

DELETE "both parents' names" everywhere it occurs and
REPLACE with "the qualifying parent's name"

PAGE 9

5. Form I-918B

See earlier comments: Recognize interim relief and no certifications for derivatives.

ADD the following sentence after the first sentence:

"If you received U interim relief you may submit a copy of the certification you filed with that application."

DELETE second paragraph (derivative certifications).

PAGE 10

Privacy Act Notice: Mention special confidentiality provisions designed for victims of crime

Include notice of confidentiality provisions under 8 USC 1367. This provision prohibits DHS from sharing information except in very limited circumstances, and subjects those who share such information to fines and discipline.

ADD the following sentence:

"8 USC 1367 precludes us from sharing information in your U case except in rare circumstances."

Paperwork Reduction Act Notice

Very few applicants will need 2 hours and 30 minutes to assemble and file the application. Just getting the certification will take many hours if not days. If what you really mean is putting the documentation together once you've spent weeks getting it, say that. Otherwise,

Checklist

Fourth box (certifications)

This box must recognize the validity of certifications filed for the U interim relief process; derivatives are no longer required to file certifications.

DELETE "and each qualifying member for whom you are applying"

REPLACE with "or a copy of the certification submitted by law enforcement for your U interim relief application."

Sixth box (fees)

Reference the fee cap and fee waivers.

DELETE the last question mark with a comma and

ADD:

"but no more than \$540, or a fee waiver request for these fees? If you have requested a waiver, have you submitted a statement explaining why you need it?"

FORMS

I-918

PAGE 1

Part 1. Basis for Filing

See comments on Instructions for this section, above, for explanations of suggested changes.

ADD to Box A:

"and I am/am not (circle one) including family members in this application (I've attached a Supplement A for each family member included)."

DELETE B & C and

REPLACE with

"My U-1 application is pending or has been approved and I am now filing for family members (I've attached a Supplement A for each family member).

ADD to the list of options, the following category:

* I filed for and received U interim relief and am now filing for a U visa. I am/am not (circle one) including family members in this application.

Part 2. Filing on Behalf of Family Members

No certification required, so

DELETE "*and Supplement B*".

Part 3: Info about you

Safe address is good

Email is dangerous, so make clear this is optional.

ADD after "E-Mail Address"

"(optional)"

PAGE 4

Part 4: Additional info

The personal statement must be optional, not required. Requiring it violates the any credible evidence.

DELETE "require explanations and supporting documentation. Attach" and **REPLACE** with "must be supported by credible evidence. We encourage you to attach"

DELETE "You must also attach" and

REPLACE with "We encourage you to attach"

Question 5: Occurred in the US

This should contain the full list of qualifying locations.

ADD after "occurred in the United States"

"(including Indian country and military installations) or the territories and possessions of the United States"

Question 6: Under Age 16

Clarify that this box is for applicants whose parent, guardian or next friend is satisfying the helpfulness and information possession requirements.

ADD before the period

"and my parent, guardian or next friend possesses useful information and is being, has been or is likely to be helpful in the investigation or prosecution of a qualifying crime."

Question 7: EAD request

Applicants should be given all their EAD options here, so **REPLACE** this question with:

“Check all boxes that apply:

I want an Employment Authorization Document

I am requesting work authorization for my eligible family members and am including Forms I-918A and I-765 for each of them.”

I already have work authorization but I am now requesting an extension or renewal of work authorization if this application is approved. My current work authorization is based on my status as _____.”

Questions 8: Experience with immigration proceedings

Question 8 is confusing and irrelevant to basic eligibility, and better addressed in current Question 12 Part 5. Question 9’s chart should be a separate question under Part 5, the admissibility section.

DELETE Question 8.

MOVE Question 9 to Part 5.

PAGE 3**Part 5: Processing Information**

This section is a good attempt to capture inadmissibility and provide applicants with an opportunity to identify and clarify any inadmissibility barriers posed to their U status. Some of the questions, however, do not appear to be tied to any existing ground of inadmissibility, and some important grounds of inadmissibility are missing. In addition, as noted in our comments on the Instructions, since this is a very complicated area of the law, the form should encourage those who check “yes” boxes to consult an immigration expert before attempting to explain or answer questions raised by flagging potential inadmissibility. Despite this encouragement, however, many applicants will not consult an attorney before filing for financial or other access reasons.

To be truly comprehensive the form must capture all the exceptions, to good moral character bars, for instance. We do not suggest that USCIS try to do this in the form, however, because it would be extremely confusing and require too many questions, many of which will be irrelevant to most applicants’ eligibility. Instead, we suggest making these questions shorter and simpler, and allow USCIS to resolve the details through the RFE process.

Here are our suggestions for making this section more comprehensive and accurate and less intimidating.

ADD after parenthetical about “yes” not necessarily meaning denial, the following:

“If you check a “yes” box below, we strongly encourage you to consult an immigration advocate or attorney with expertise in immigration consequences of crimes. If USCIS needs more information to determine whether you are eligible for U status, it will give you the opportunity to provide this information before denying your application.”

Question 1

Although we applaud the attempt to ferret out all possible inadmissibility concerns arising from criminal conduct, the long list of subparts to Question 1 is confusing, intimidating and unnecessary. Most people won't know what many of the terms mean and may unwittingly fail to answer correctly, thereby committing fraud. As you know, for instance, “conviction” (Q 1(d)) is a complicated legal term of art for immigration purposes, one that changes over time due to court and Congressional interpretations. Alternative sentencing/rehabilitative programs (e), suspended sentences/probation/parole (f), pardons/amnesty/etc.(h), and diplomatic immunity (i) are concepts only those intimately familiar with the criminal system will understand.

Questions (a), (b) and (g), which exist on other forms, capture the primary issues that raise inadmissibility concerns in this area. As on the I-485, however, (a) should solicit KNOWINGLY committing an offense whether arrested or not, not ensnare applicants who are unaware that their actions may have violated the law. In addition, the disposition chart is an excellent innovation and should, by itself, provide much of the information USCIS will need to determine the answers to the rest of the questions in this section.

To ensure applicants don't unwittingly commit fraud, or have the opportunity to explain their confusion, we suggest,

ADD to the end of the explanatory paragraph:

“If you are unclear or unsure about your answers to the following questions, please explain on a separate sheet of paper.”

At Question 1(a)

REPLACE “Committed” with
“Knowingly committed”

RETAIN (b) and (g), and the chart on dispositions.

DELETE the rest of Q 1: (c) – (f); (h) & (i).

PAGE 4

Several important grounds of inadmissibility are missing. To capture those grounds,

ADD the following questions:

“Do you have a communicable disease of public health significance or HIV/AIDS?”

“Have you entered the United States as a stowaway?”

“Have you ever been an illicit trafficker or knowingly aided, abetted, assisted, conspired, or colluded in the illicit trafficking in persons or controlled substances?”

Question 9 and its chart, from Part 4.

Question 3: Prostitution, Commercialized Vice & Smuggling

The statute has a ten-year time frame which these questions lack. The commercialized vice question misstates the law (it’s planning to engage in gambling in the US, not ever having done it in the past, that makes a person inadmissible). To make this question comport with the statute,

At subpart (a), after “Engaged in prostitution or procurement of prostitution” **ADD** “within the past 10 years”

At subpart (b),

DELETE “Ever engaged in” and

REPLACE with “Intend to engage in”

Question 4: Terrorism

Combine (d) & (e) to reflect the terrorism context. This seems to be an attempt to make generally waving a gun around is a per se terrorist act, which is not true and which would seriously displease the NRA.

DELETE “firearm” and

REPLACE with “biological agent, chemical agent, or nuclear weapon or device, or explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain)”

Question 5: More terrorism

The statute says “material support” not “support.” “Support is unconstitutionally nebulous and overbroad. It would, for instance, include children who feed terrorist family members, whether they supported their relatives’ terrorist activity or not. Mere “association” is similarly impermissibly overbroad and not supported by the statute. Only those found by the Secretary of State, after consultation with the Attorney General, or vice versa, to be associated with a terrorist organization AND intends to engage in activities that endanger the welfare, security or safety

of the United States are inadmissible. See INA section 212(a)(3)(F). This definition seems a little too involved to include in this list.

The undesignated “small group” terrorist definition does not include subgroups who engage in terrorist activity; the statute requires that the group of two or more individuals engage in it themselves. Nor does it cite the material support section of the statute (see 212(a)(3)(B)(vi)(III), citing subparts (I), (II) & (III) of (iv), the engaging in terrorism definition; (VI) contains the material support definition. Subpart 4 of this section once again would make many gunowners terrorists; this list is unnecessarily repetitive in any case.

To make this section comply with the statute and Constitution,
In the introductory phrase:

DELETE “been associated with”

DELETE “provided support for”

REPLACE with “material support for, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons explosive or training”

At (b), to comply with the statute and make the form simpler:

DELETE “or has a subgroup which has engaged in”

DELETE subparts (1) through (6) and the colon that precedes them and

REPLACE with

“any activity described in Question 4 above.”

Question 6: Security Grounds

The overthrow of the US government description is incomplete. To comply with the statutory language

ADD at the end of subpart b, before the question mark:
“by force, violence or other unlawful means.”

Question 7: Communists, etc.

Who qualifies for the involuntary membership exception is as simple as it may appear. Applicants may, therefore, unwittingly commit fraud by checking “no” when they should check “yes.” Whether applicants meet the exception should be explored through the RFE process, as with exceptions to other grounds of inadmissibility.

DELETE “except when membership was involuntary”

Question 9: Genocide and Torture

Direct participation in genocide or torture renders an applicant inadmissible. Indirect participation does not. The rest of the subparts listed here are not inadmissibility grounds at all and must be removed, since there is no other

statutory basis for including them. People who have participated in the military may have killed people. "Violate another person's religious freedom" is overly vague: does it include requiring Muslim, Jewish and Atheist children to say Christian prayers in school? Persecuting others is derived from the asylum context and, while heinous, is not a bar to U status. USCIS may not import or create new obstacles to status unsanctioned by Congress. To comport with the statute,

DELETE "either directly or indirectly" and subparts (c), (d) and (e).

Questions 10 & 11 are not bases of inadmissibility or ineligibility and, if they are supposed to go to physical or mental abuse, they are inartfully crafted and should be contained in the basic eligibility section. As noted above, USCIS may not create barriers to status unsanctioned by Congress. These questions, moreover, will scare victims who have lived in violent homes and situations and who may believe, incorrectly, that their experience will make them ineligible for a U visa. They should not fear accessing justice because of these ultra vires questions. The National Network will share these concerns with Congress and the Courts should they remain in the final form.

DELETE Questions 10 & 11.

PAGE 6

Question 12: Immigration Proceedings

Parts (e)(nonimmigrant visas) and (f)(failure to comply with voluntary departure) do not reflect existing inadmissibility grounds. Being denied a visa triggers no inadmissibility ground; people are denied nonimmigrant visas all the time with no prejudice to filing again. Failing to comply with a voluntary departure order becomes relevant only at the adjustment phase; it does not preclude obtaining a U visa. Failure to attend removal proceedings, on the other hand, is a ground of inadmissibility not adequately captured by the current questions. The chart on proceedings should go at the end of this question.

DELETE Questions 12(e) & (f)

ADD

"Have you ever failed to attend an immigration hearing?"

ADD

The content of Question 9 (the chart) from Part 4.

Question 14: Fraud

The current question misstates the law; the "for" before "entry" changes the meaning of this section and is not supported by the statutory language or case law. This section also fails to capture false claims to US citizenship. To correct these problems,

DELETE and

REPLACE with the following

"Have you ever represented yourself as a United States citizen to obtain a Federal or state benefit?

Have you ever, through fraud or willful misrepresentation, sought to procure a visa, other documentation, or admission into the United States or any other immigration benefit?

Part 6: Info about spouses and children

See discussion of this section in the Instructions: ultra vires, unduly intimidating, violates the will of Congress. We will challenge it unless it's limited to derivatives included in the application (in which case it's duplicative).

DELETE Part 6.

Part 7: Attestation

The attestation requires certifying to not withholding information. We are unaware of this attestation appearing on any other immigration. It is not, for instance, in attestation for a T visa. Most people don't know what information is material to their applications; this question is, therefore, confusing and encourages applicants to unwittingly commit fraud. If USCIS suspects an applicant has material information they have not shared, it should use the RFE process, as it already does for VAWA self-petitioners and T visa applicants. Whether USCIS adopts our suggestion to use the T visa attestation instead or not,

DELETE "I certify that I have not withheld any information that would affect the outcome of this application."

We believe the attestation statement on T visas is more helpful than this one because it requires that anyone assisting the applicant ensure the applicant has read or had read to them its contents. We therefore suggest USCIS adopt it for these forms.

The warning contained in the derivative attestation should appear here, as well, since removal is a possible consequence of filing a U visa application.

DELETE the attestation at Part 7 and

REPLACE with

"I have read, or had read to me, this form, the information provided on it and the evidence provided with it, and I certify, under penalty of perjury under the laws of the United States of America, that all of the information in this entire application package, including any documentary evidence submitted with it, is true and correct.

ADD:

"WARNING: Applicants who are in the United States illegally are subject to removal if their claims are not granted. Any information provided while completing this supplementary application may be used as a basis for the

institution of, or as evidence in, removal proceedings even if the application is withdrawn”

Part 8: Preparer's Signature

As noted above, “materiality” is a legal term of art, the contours of which may not be obvious to those assisting U visa applicants with their forms. Unless USCIS is trying to ensnare those who help victims of crime, it should

DELETE “I have not knowingly withheld any information that would affect the outcome of this application.” And

REPLACE with the language from the T form:

“I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.”

Form I-918A

PAGE 1

Part 1: family members

Add siblings and box for derivatives who received U status before they aged out or married.

ADD boxes:

“Unmarried sibling under 21”

“Spouse who received U interim relief”

“Child who received U interim relief”

“Child over 21 who received interim relief before turning 21”

“Married child who received interim relief before marriage”

PAGE 2

Question 7: Derivatives' derivatives

Why does this ask about derivative's spouse and children? Are they eligible for U visas? If not, then the information is not relevant and should be deleted.

PAGE #

Part 4: Additional Info about family members

ADD “to the best of your knowledge” at the end of the first sentence.

DELETE Question 8: Extreme hardship no longer required.

Question 10 et seq.

MOVE these admissibility questions to a new Part 5, as in 918.

Incorporate suggestions for Part 5 on 918.

PAGES 4 - 6

Question 14: Family members' intentions

The best a principal can attest to is that, to their knowledge, their family members don't plan to engage in espionage, etc. The question should reflect this reality:

DELETE “Does” and

REPLACE with “To the best of your knowledge, does”

|

Incorporate suggestions for admissibility questions from 918.

PAGE 6

Part 5: Attestation, release and signature

Renumber this as Part 6 (see comments above).

Include the modifications suggested for the 918 attestation.

Part 6: Signature etc.

Renumber as Part 7

Incorporate suggestions for Signature section on 918.

Form I-918B: U Certification Form

It is helpful that the certification explains that it is not the only proof required, but otherwise its tone may be viewed as discouraging to law enforcement. In general, the form should encourage law enforcement participation and make such participation easy. As it stands, it is long, complicated, and requires a lot of written explanations.

PAGE 1

At the very beginning, before it starts describing **Eligibility**, the Form should explain the Congressional purpose:

The goal of the legislation was to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of persons, and other criminal activity of which aliens are victims, while at the same time offering protection to victims of such offenses.

Congress specifically stated:

Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status.

8 U.S.C. 1101 Note.

Instructions

Victim Definition

What is the legal basis for the "victim" definitions? Definitions used in the state criminal systems should be the touchstone, since the goal is to help those criminal systems help victims of crimes. Under Victim of Crime Act compensation systems, victims may comprise a larger group than the limited categories suggested by this form. Denying access to U visas to applicants considered by the states as victims of qualifying crimes violates the statutory language and will of Congress.

The form should reference state criminal definitions of victim, as well as the definitions supplied here. The “nexus” requirement comes close to this, but it is essential that DHS recognize that the states are the experts here.

ADD to the end of the first paragraph

“Your state’s laws and agencies that work with victims of crimes may apply broader definitions of “victim” in certain circumstances. If you are certifying that an applicant is a victim of a crime but was not the direct target of the perpetrator, please supply the state definition of victim that supports your certification.”

There is no statutory basis for the culpable ineligibility bar, nor does the statute include a good moral character eligibility requirement. In reality, victims of crimes such as domestic violence are often convicted of the crimes, because they fought back, or because the perpetrators are adept at manipulating the criminal justice system.

DELETE the paragraph that begins “A person who is culpable”

The National Network will challenge restrictive definitions of victim and ultra vires ineligibility bar that violate the statute and will of Congress.

THE NOTE:

This seems intended to discourage law enforcement from completing the form. Instead of saying officials are under no obligation to sign, the instructions should clarify that signing the form is not the same as sponsoring someone for immigration, but it is a necessary part of the application.

DELETE “the agency is under no legal obligation to complete a form I-918, Supplement B, for any particular alien” and

REPLACE with

“the agency’s certification will not necessarily qualify any particular alien for status, but is an essential part of an alien victim’s application.”

PAGE 2

Part 2: Agency Information

The description of agencies who qualify to certify is very good; the description of who may be a certifying official is legally unsupportable, as noted in the comments on the Instructions. Law enforcement offices often grant general authority to all officers in the field with the phrase “the head of the agency or his designee.” Who and how a law enforcement agency determines may certify U visas must be left to the discretion of the law enforcement agencies themselves. Congress has not granted USCIS the authority to limit their choices. As noted above, the National Network will bring to the attention of Congress and the Courts any ultra vires limitation on law enforcement certification.

DELETE all that follows after “Name of Certifying Official” and

REPLACE with

“The official signing the certification should fill in this section of the form. Agencies have the discretion to determine who shall provide certifications for U visas. “

Part 3: Criminal Acts

The description’s instructions for “similar activity” are good. The nexus between victim and investigation is not supported by the statutory language, however.

In the first bold phrase

DELETE “that your agency is investigating, prosecuting or sentencing”

Part 4: Helpfulness of the victim/witness

This section confuses and conflates the victim requirement with the helpfulness requirement (see discussion of this in section 918 instructions). Moreover, the last two sentences of the last paragraph are completely unauthorized by the statute, violating both its language and intent.

In the header

DELETE “of the victim/witness” and

REPLACE with “of the applicant”

ADD the following sentence at the end of this first paragraph:

You may investigate both qualifying and non-qualifying crimes. If the applicant was helpful in any of the qualifying crimes, she or he may be eligible for a U visa, whether the perpetrator was ultimately charged, prosecuted or convicted of that crime or a different, non-qualifying crime.

Provide an explanation. . .

For the reasons noted previously, an applicant may be the victim of one qualifying crime and helpful in the investigation of another. To clearly bifurcate these two issues,

REPLACE “victim” with “applicant” everywhere it appears in this paragraph.

In the next paragraph (“Being helpful.. . “)

DELETE “the qualifying criminal activity of which he or she is the victim” and

REPLACE with

“a qualifying criminal activity.”

In the next sentence

REPLACE “the victim” with “the applicant” everywhere it appears.

Ongoing Helpfulness: Ultra vires additional requirements

The last two sentences of the last paragraph, and Questions 3 & 4 in Part 4, appear to be attempts to implement the “unreasonably refused to provide assistance” eligibility requirement for lawful permanent residence. This

requirement does not apply, however, at the U visa application phase, nor does Congress place the burden for meeting it on law enforcement. *Compare* 245(m) (where it exists) *with* 101(a)(15) & 214(p) (where it does not).

Nothing in the statute requires “ongoing helpfulness.”¹ Such a requirement implies that the U visa requires as much prosecution as possible, which is neither what the law says nor what Congress intended. When it passed the law, Congress was well-aware that vast numbers of investigations never lead to prosecution, for multiple reasons. It wished, instead, to encourage participation in the criminal system whether investigations lead to prosecutions or not, hence the investigation OR prosecution language.

An “ongoing helpfulness” requirement also establishes an explicit quid pro quo situation (prosecutors promise to sign the form in exchange for cooperation) which perpetrators and defense lawyers will use against victims and prosecutors. This is why Congress made the U visa a self-petition, not a petition controlled by law enforcement.

Congress has made clear that it views those investigating and prosecuting crimes as the experts on the qualifying crimes, not USCIS. It is not law enforcement’s job to explain or educate USCIS about its choices, and Congress did not require law enforcement to bear this burden. USCIS may not now impose it.

PAGE 3

The language in the indented paragraph indicates that USCIS intends to substitute its judgment for that of law enforcement. Stating, for instance, that law enforcement’s certification is not presumptive evidence is disrespectful both to law enforcement and to Congress, which said its goal was to help law enforcement help victims of crimes. USCIS should construe a certification as *per se* credible evidence of helpfulness. Only if it suspects fraud or corruption should it question law enforcement’s judgment.

DELETE “Your certification will not be considered presumptive evidence of helpfulness” and

REPLACE with “Your certification is only one part of the victim’s application packet, but is extremely helpful to this agency.”

Part 5: Certification for Derivatives

¹ As a reminder, Congress specifically said: “Creating a new nonimmigrant visa classification will facilitate the *reporting* of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status.” It did not say, reporting and ongoing cooperation” or “reporting and allowing an investigation to move forward.” Requiring more than reporting violates the explicit intent of Congress.

DELETE entire section; no longer statutorily required.

Part 6: Family members implicated in criminal activity

Like the ineligibility for “culpable” victims noted above, this is a completely ultra vires ineligibility bar. Statute doesn’t say this, and there is no good moral character requirement. The National Network will challenge any U denials based on this ultra vires eligibility bar.

DELETE this entire section.

Part 7: Certification: Another Ultra Vires Requirement

The statute does not mandate that law enforcement make a later report on whether victims unreasonably refused to cooperate. This requirement is irrelevant until the adjustment phase. If law enforcement wishes to report to USCIS, it may, but USCIS cannot force them to do so absent a Congressional mandate. From a practical perspective, this certification would require that law enforcement set up a special tickler system for its files on noncitizens. These officers already are overworked, and this requirement will discourage, rather than encourage, them to work with immigrant crime victims.

REPLACE “must” with “may”

FORM I 918, Supplement B

PAGE 2

Part 3: Criminal Acts

Some of the questions need clarification, simplification and relocation. Question 5 is repetitive and burdensome. Question 3 elicits the actual crime and Part 4 is where certifiers should describe the applicant’s helpfulness (see suggested changes in Part 4 below). Concerning Question 6: Congress did not require that law enforcement certify to an applicant’s injury. USCIS may encourage but not require them to provide such information.

Question 3: List the crimes

To be clear that an investigation or prosecution need not be current or ongoing

ADD to the end of the question:

“or that was investigated or prosecuted.”

Question 5: Describe criminal activity

This open-ended question, requiring a written explanation, is onerous for law enforcement. Its content, in any event, should be elicited in Part 4.

DELETE Q 5 entirely and

REPLACE with check-list and additional info option, to go in Part 4

Question 6: Injury

There is no requirement that law enforcement certify to an applicant's injury, although any information they provide on this score would be helpful. To reflect this,

DELETE this section entirely and
REPLACE with:

"We encourage you to share any information you have on the physical or mental injury sustained by the applicant, including relevant reports and findings."

Part 4: Helpfulness of the Victim

Requiring written explanations violates the any credible evidence standard and is unduly burdensome. Questions 3 & 4 go beyond the statute's requirements, as noted in the discussion of the Instructions above. To avoid violating the statute and Congressional intent they must be deleted.

Question 2: Has been, etc.

DELETE entire question and
REPLACE with

"Certifiers are encouraged to fill out the check-list below, attach a written statement describing the victim's helpfulness or provide a self-explanatory report describing the applicant's helpfulness or any combination of these options. Note that being helpful in an investigation OR prosecution suffices, and that no particular form of helpfulness is statutorily required.

The applicant was helpful, is being helpful or is likely to be helpful in the following ways:

Providing information for a police report; and/or
Identifying or attempting to identify the perpetrator(s); and/or
Providing information leading to other witnesses or sources of information; and/or
Providing information leading to further investigation; and/or
Otherwise cooperating with the investigation; and/or
All of the above; and/or
Other (explain)

Providing information for prosecution review; and/or
Providing information leading to criminal charges; and/or
Providing information useful to prosecution; and/or
Providing information useful at trial; and/or
Testifying at trial; and/or
Otherwise cooperating with prosecution; and/or;
Other (explain)

Please provide any other information you think would be useful on a separate sheet of paper. We encourage you to include relevant reports and findings.”

Questions 3 & 4: Ultra Vires Requirements

DELETE these sections. The National Network will challenge the use of these extra tests not mandated by Congress if they remain in the final form.

PAGE 3

Part 5: Derivative Certification

DELETE entire section; no longer required.

Part 6: Family members involved in criminal activity

DELETE entire section. No statutory basis for this requirement.

Part 7: Certification

The limits on who can certify and the subsequent reporting requirement impose impermissible and onerous extra-legal requirements on law enforcement. The National Network will challenge these requirements if retained in the final form.

DELETE “I am the person in the agency who has been designated by the head of the agency” and

REPLACE with “I am an official in the agency with authority”

DELETE the last sentence on reporting unreasonable refusals.

Conclusion

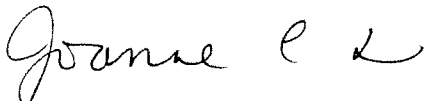
We appreciate this opportunity to suggest changes and improvements to the U visa form and accompanying supplements.

For the National Network to End Violence Against Immigrant Women



Gail Pendleton

ASISTA Immigration Technical Assistance Project



Joanne Lin

Legal Momentum Immigrant Women Program



Leni Marin

Family Violence Prevention Fund