

# MANDATORY U-VISA CERTIFICATION UNNECESSARILY UNDERMINES THE PURPOSE OF THE VIOLENCE AGAINST WOMEN ACT’S IMMIGRATION PROTECTIONS AND ITS “ANY CREDIBLE EVIDENCE” RULES— A CALL FOR CONSISTENCY

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## INTRODUCTION

The Violence Against Women Act’s (VAWA) immigration protections were designed to enhance protection for immigrant victims of domestic violence, sexual assault, human trafficking, and other crimes. Since 1990, Congress has passed a series of immigration law protections designed to remove barriers keeping immigrant victims from calling the police for help and from cooperating

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in criminal investigations and prosecutions against those that perpetrate crimes against them. Such barriers include a victims' fear of deportation and the control a crime perpetrator has over victims' immigration status. The safety of both the crime victim and the community are enhanced when all crime victims, including immigrant victims, can seek the help and protection they need and when the justice system has the tools it needs to prosecute those who commit crimes in our communities.

The legislative history of the Violence Against Women Acts of 1994, 2000, and 2005 are replete with references to, explanations of, and justifications for Congress' dual purposes of VAWA—to strengthen relief and protection for victims of domestic violence, sexual assault, stalking, and trafficking and to facilitate investigation and prosecution of the perpetrators of these crimes.<sup>1</sup> The overarching goal of the Violence Against Women Act of 1994 was to enhance the social services and justice system protections available for battered women and victims of sexual assault.

Recognizing that status under immigration laws is often used as a tool of power and control over immigrant victims of domestic violence, VAWA included special protections for immigrants abused by U.S. citizens or lawful permanent resident spouses or parents. When the legal immigration status of these non-citizen victims depends upon their relationship to their U.S. citizen or legal permanent resident abusers, abusers frequently use this power over their spouse's and/or children's immigration status to control, threaten, isolate, harass, and coerce the immigrant victims.<sup>2</sup> Fearing removal by Immigration and Customs Enforcement (ICE), immigrant victims do not seek the protections offered by our civil and criminal justice systems. The immigration protections included in VAWA 1994 and expanded by Congress in VAWA 2000 and again in VAWA 2005 were designed to provide immigration relief that is critical toward the enhancement of the ability of immigrant victims to come forward and access victim services and justice system protections. VAWA has increasingly sought to cut off the ability of abusers and crime perpetrators to misuse the immigration laws in order to threaten and control victims and the victims' children.<sup>3</sup>

An important component of the effectiveness of VAWA's immigration protections has been the statutory guarantee that immigrant victims applying for immigration relief

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1. See, e.g., 151 CONG. REC. S13,749-13,765 (2005) (statement of Sen. Leahy); H.R. REP. NO. 109-233, at 123 (2005); 146 CONG. REC. S10,192 (2000) (statement of Sen. Hatch on behalf of the joint managers of the 2000 reauthorization of the Violence Against Women Act); Victims of Trafficking and Violence Protection Act of 2000, §§ 1502, 1513, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in various sections of the U.S.C.) [hereinafter VTPVA]; H.R. REP. NO. 103-395, at 38 (1993).

2. 106th CONG. REC. S10,192 (2000) (Senator Hatch's statement on behalf of the joint managers); H.R. REP. NO. 103-395, at 31 (1993) (domestic violence is "terribly exacerbated in marriages where one spouse is not a citizen and the non-citizens' legal status depends on his or her marriage to the abuser.")

3. Leslye Orloff, *Good Cause Justification and VAWA for Issuance of Interim "U Visa" Regulations*, Materials provided to the Office of Management and Budget, May 27, 2007, available at <http://www.whitehouse.gov/omb/assets/omb/oir/1615/meetings/608.pdf> (noting that the victim's children may be children of the victim and the abuser or they may be the victim's children from another relationship).

under VAWA or the Trafficking Victims Protection Act (TVPA)<sup>4</sup> are able to submit “any credible evidence”<sup>5</sup> that they can garner in support of their case. This article discusses the development of immigration law’s “any credible evidence” standard of proof and its application in VAWA and TVPA related immigration cases.

This article urges reforms in immigration law to remove U-visa certification as a mandatory prerequisite that bars many otherwise eligible immigrant crime victims from being able to access U-visa protections. Victims who can prove to Department of Homeland Security (DHS) adjudicators that they have been, are being, or are willing to be helpful in the detection, investigation or prosecution of criminal activity covered by the U-visa should be given the opportunity to prove their case to DHS by presenting “any credible evidence.”

Section I of this article considers the legislative history of VAWA’s “any credible evidence” standard of proof. As part of this survey, the article examines the pre-1994 battered spouse waiver protections created by Congress to offer immigration relief to abused immigrant spouses and efforts by the Immigration and Naturalization Service (INS, now ICE) to limit the kinds of evidence that an abused immigrant spouse could offer to support their petition for lawful permanent residency. Such evidentiary limitations ultimately lead to Congress’s mandating the “any credible evidence” rule which applies, with one exception, to all forms of immigration benefits involving crime victims. Between 1994 and 2005, Congress strengthened and broadened available protections under immigration law for victims of domestic violence, sexual assault, and trafficking and continued to apply the “any credible evidence” more flexible standard of proof to each VAWA-related petition for legal immigration status. The logic of this evidentiary change has been to make clear Congress’s intention that evidentiary rules alone should not be used to block an immigrant victim’s access to VAWA’s protections where a broader or more flexible standard would suffice to establish victimization as well as all other elements of proof required for a victim to receive an approval of a VAWA or T-visa case from DHS or an immigration judge. These “any credible evidence” rules also apply to all other aspects of U-visa cases except the government official certification.

In light of the broad protections and flexible evidentiary standards envisioned by Congress in VAWA, Section II examines the deterrent effect on eligible victims of the current U-visa requirement that each U-visa petition include a certification from a law enforcement officer, a prosecutor, a judge, or another federal, state, or local government official with responsibility for detection,

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4. See Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, § 40701(a)(3), 40702(a) and 40703(b), 108 Stat. 1955 (codified as amended at 8 U.S.C. 1186a(c)(4)(C)) [hereinafter VAWA 1994]; Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) [hereinafter TVPA].

5. See, e.g., Immigration and Nationality Act § 216(c)(4), 8 U.S.C. § 1186a(c)(4) [hereinafter INA]; INA § 202(a)(1)(J), 8 U.S.C. § 1154; INA § 240A(b)(2), 8 U.S.C. § 1252a; Violence Against Women Act of 2000 § 1513(c)(4), Pub. L. No. 106-386, 114 Stat. 1464 (codified at 8 U.S.C. § 1184) [hereinafter VAWA 2000]; 8 C.F.R. § 214.11(d)(2009); TVPA Regulations 67 Fed. Reg. 4786 (proposed Jan. 31, 2002) (to be codified at 8 C.F.R. § 214).

investigation, or prosecution of criminal activity. In this required certification the government official attests that the person seeking certification has been a victim of criminal activity and the victim has been, is being, or is likely to be helpful in the detection, investigation, or prosecution of criminal activity. This article considers how the actual application of this requirement has, in fact, created a significant and unwarranted procedural hurdle for victims. The mandatory U-visa certification requirement by a government official is in direct conflict with VAWA's "any credible evidence" protections. As a result, victims who have the courage to come forward and report crimes and who are helpful in criminal investigations and prosecutions without certification are unable to apply for relief no matter how compelling the case and evidence and no matter how significant the crime victim's injuries.

Section III proposes that the mandatory U-visa certification requirement should be amended by Congress to become one form of evidence to be considered in the adjudication process as opposed to a condition precedent to the filing of the U-visa application. DHS has the experience and has developed the necessary procedures in the context of T-visa applications to adjudicate U-visa applications without mandatory law enforcement or government agency certifications. Adjudications of U-visa applications should be in the same manner as T-visa applications and crime victims should be allowed to prove that they have been, are being, or are likely to be helpful to law enforcement or other government officials through "any credible evidence."

## I. BACKGROUND AND LEGISLATIVE HISTORY OF VAWA'S "ANY CREDIBLE EVIDENCE" STANDARD OF PROOF PROVISIONS

### A. FROM COVERTURE TO THE IMMIGRATION ACT OF 1990'S BATTERED SPOUSE WAIVER

Historically, a woman's citizenship was based on her husband's citizenship under the doctrine of coverture, which equated a wife's legal identity with her husband's.<sup>6</sup> Men who were U.S. citizens or lawful permanent residents had control over the immigration statuses of their immigrant wives, but the reverse was not true if the wife was a U.S. citizen or lawful permanent resident and the husband was not.<sup>7</sup> The lack of control a married woman had over her immigration status created a strong potential for abuse by her husband. As Janet Calvo notes, "The law gives so much power to the citizen or resident spouse that the alien spouse is faced with a Hobson's choice: either remain in an abusive relationship, or leave and confront deprivation of home, livelihood, and ability to promote a child's best interests."<sup>8</sup>

In 1986, Congress passed the Immigration Marriage Fraud Amendments (IMFA) in

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6. See Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 595 (1991).

7. Act of May 29, 1921, Pub. L. No. 5, § 2(a), 42 Stat. 5 (1921).

8. Calvo, *Spouse-Based Immigration Laws*, *supra* note 6, at 613.

an effort to prevent sham marriages for the purpose of receiving priority immigration status.<sup>9</sup> IMFA changed immigration law to presume that marriages were fraudulent unless proven to be valid. IMFA required that immigrant spouses<sup>10</sup> be provided only conditional U.S. residence for two years rather than permanent residence if they had been married to their U.S. citizen or lawful permanent resident spouses less than two years on the date of their immigration interview.<sup>11</sup> Only after that two year period had run would the INS<sup>12</sup> consider the marriage to have been valid.

To have the immigrant spouse's conditional status changed to lawful permanent residency, the husband and wife had to file an application to remove the conditions ninety days before the end of the two-year conditional residence period.<sup>13</sup> Married immigrant spouses in this conditional period were required to stay married and obtain their spouses' support in order to make their immigration statuses permanent. The joint application requirement became a tool of immigration related psychological abuse that an abuser could effectively use to dominate and isolate the victim.<sup>14</sup> Since a joint application and interview were required, the process "forc[ed] those spouses and children in abusive relationships to prolong the relationship in order to secure their permanent residency status and avoid deportation."<sup>15</sup> IMFA contained two options for removal of conditional residency status without the cooperation of the U.S. citizen or lawful permanent resident spouse. Immigrant spouses could file for a waiver of the joint petition requirement if they could demonstrate "extreme hardship" or "good faith/good cause." These IMFA waivers for "extreme hardship" and "good faith/good cause" were available only in very limited<sup>16</sup> circumstances and in practice were not granted for immigrant women abused by their citizen or lawful permanent resident husbands.<sup>17</sup>

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9. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. §§ 1154, 1184, 1186a (1994)).

10. It is important to note that the Immigration Marriage Fraud Amendment, the Battered Spouse Waiver, and the Violence Against Women Act's immigration provisions are all gender neutral and affect or protect immigrant victims equally whether they are male or female.

11. INA § 216(a)(1), 8 U.S.C. § 1186a(a)(1); INA § 216(g)(1), 8 U.S.C. § 1186a(g)(1).

12. In March 2003, the Immigration and Naturalization Service (INS) was moved from the Department of Justice and merged into the Department of Homeland Security. This article references INS when the issues discussed specifically relate to regulations, policies or actions of INS. When issues, policies or actions were taken by DHS or when these were both INS and DHS, this article will reference DHS.

13. INA § 216(c)(1), 8 U.S.C. 1186a(c)(1); INA § 216(d)(2), 8 U.S.C. 1186a(d)(2); INA § 216(d)(3), 8 U.S.C. 1186a(d)(3).

14. Mary Ann Dutton, Giselle Hass & Leslye E. Orloff, *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in DOMESTIC VIOLENCE: GLOBAL RESPONSES, 93-113 (2000) (the existence of psychological abuse, that fits into the category of dominance and isolation should be treated not only as evidence relevant to any domestic violence adjudication, but as a clear indicator that physical and sexual abuse is likely to be present in the relationship).

15. Letter from Network for the Rights of Immigrant Women to Gene McNary, Commissioner, Immigration and Naturalization Service (Dec. 31, 1990).

16. INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

17. Calvo, *Spouse-Based Immigration*, *supra* note 6, at 610 (1991); Maxine Yi Hwa Lee, *A Life Preserver for Battered Immigrant Women: The 1990 Amendments to the Immigration Marriage Fraud Amendments*, 41 BUFF. L. REV. 779, 788-790 (1993).

In recognition of the problems immigration laws created for immigrant women who were abused by their husbands, Congress enacted the “battered spouse waiver”<sup>18</sup> in 1990.<sup>19</sup> The battered spouse waiver provided immigrant victims of battering or extreme cruelty an opportunity to leave the abusive relationship and obtain lawful permanent residency without having to comply with IMFA’s joint petitioning requirement.<sup>20</sup> The battered spouse waiver provided immigrant victims a powerful legal tool to escape their abusive relationships. It helped keep immigrant battered women from being locked by immigration law in abusive marriages by allowing victims to file for removal of the conditions on their residency statuses without their abusers’ knowledge or cooperation and without having to wait two years.<sup>21</sup> This allowed victims to flee abusive marriages and to file for and obtain full lawful permanent residency. The Immigration Act of 1990 also included another new waiver that has been helpful to battered immigrants. Immigrant spouses who had been divorced could file for a waiver of the joint filing requirement, and immigrant spouses were no longer required to have initiated divorce proceedings and to have demonstrated “good cause” for marriage termination.<sup>22</sup>

#### B. THE IMMIGRATION AND NATURALIZATION SERVICE’S IMPLEMENTATION OF THE BATTERED SPOUSE WAIVER

In order to be eligible for the battered spouse waiver, however, immigrant women were required to prove that they were victims of “battering or extreme cruelty.”<sup>23</sup> INS regulations define “battering or extreme cruelty” as:

being the victim of any act or a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under this rule. Acts or threatened acts that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence.<sup>24</sup>

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18. INA § 216(c)(4)(C), 8 U.S.C. § 1186a(c)(4)(C) (1986).

19. Immigration Act of 1990, 701, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended at 8 U.S.C. § 1186a(c)(4)). See also Conditional Basis of Lawful Permanent Residence for Certain Alien Spouses and Sons and Daughters; Battered and Abused Conditional Residents, 56 Fed. Reg. 22,635 (May 16, 1991) (to be codified at 8 C.F.R. pt. 216) (interim rule).

20. Cecilia Olavarria & Moira Fisher Preda, *Additional Remedies Under VAWA: Battered Spouse Waiver*, Chapter 3, 2–3, in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS* (Leslye Orloff & Kathleen Sullivan, eds, Legal Momentum, Washington, D.C. 2004).

21. *Id.*

22. William R. Tamayo, *The Evolution of U.S. Immigration Policy*, in *DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN* 8 (Debbie Lee *et al.* eds., 1991).

23. 8 U.S.C. § 1186a(c)(4) (1986).

24. 8 C.F.R. § 204.2(c)(vi) (2009).

The legislative history of the battered spouse waiver provisions suggest that abused immigrant spouses were intended to be able to prove battering or extreme cruelty by presenting evidence that included, for example, reports and affidavits from police, medical personnel, psychologists, school officials, and social services agencies.<sup>25</sup> The report “specified that Congress did not intend to limit the types of evidence that could support the waiver.”<sup>26</sup> The waivers were intended to be granted broadly. The Conference Report specified that the Attorney General’s “discretion to deny waiver requests under this provision is to be limited to the rare and exceptional circumstances such as when the alien poses a clear and significant detriment to the national interest.”<sup>27</sup>

By regulation, however, the INS narrowed the acceptable evidence to show battering or extreme cruelty. The rule distinguished between proof of physical and mental abuse. Proof of physical abuse could be shown by reports and affidavits from police, judges, medical personnel, school officials, and social service personnel.<sup>28</sup> However, “extreme cruelty” was defined by the battered spouse waiver regulations to be “extreme mental cruelty” and only an affidavit of a licensed mental health professional would suffice to meet the definition of extreme cruelty under the statute.<sup>29</sup>

Congresswoman Louise Slaughter, the chief sponsor of the battered spouse waiver provisions, in a letter to the INS, summarized the problem created by the INS regulation, stating that “such restrictive documentation requirements create an access problem which undermines the protective intent of the waiver.”<sup>30</sup> The regulations created an approach that was not feasible for most battered immigrants.<sup>31</sup> First, because of their abuser’s control over all family funds, many battered immigrant spouses had no access to the economic resources needed to pay for a mental health evaluation.<sup>32</sup> Second, few mental health professionals had the requisite domestic violence training,

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25. Letter from Network for the Rights of Immigrant Women to Gene McNary, Commissioner, Immigration and Naturalization Service (Dec. 31, 1990) (citing Conf. Rep. at 78-79); H.R. REP. NO. 723(I), at 79 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6759.

26. *Id.*

27. H.R. REP. NO. 723(I), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6759; Letter from Network for the Rights of Immigrant Women to Gene McNary, Commissioner, Immigration and Naturalization Service (Dec. 31, 1990) (citing Conf. Rep. at 63).

28. Janet Calvo & Martha Davis, *INS Interim Rule Diminishes Protection for Abused Spouses and Children*, 68 INTERPRETER RELEASES 665, 665-68 (1991) (citing Interim 8 C.F.R. § 216.5(e)(3)(iii) (2001)).

29. 8 C.F.R. § 216.5(e)(3)(iv)-(vii) (2001). It is important to note that this regulation still exists although overruled by statute in 1994. Neither DHS nor INS has issued updated regulations reflecting this 1994 statutory change. We assume this conflict between the statute and the regulations will be corrected when DHS issues regulations implementing the rest of the VAWA self-petitioning and immigrant victim work authorization regulations (INA § 106) that reflect statutory changes from VAWA 2000 and VAWA 2005 that have yet to be issued by DHS.

30. Lee, *A Life Preserver for Battered Immigrant Women*, *supra* note 17, at 798 (1993) (quoting Letter from Rep. Louise M. Slaughter to Richard Sloan, Director of Policy Directives and Instructions Branch, INS (June 7, 1991)).

31. See generally James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U.L. REV. 679, 698 (1997).

32. Ignatius Bau & William R. Tamayo, *Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Act) and Other Related Issues*, in DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN 15 (Debbie Lee *et al.*, eds., 1991).

cultural competency, and language ability to conduct evaluations the INS required for proof of extreme cruelty in battered spouse waiver cases.<sup>33</sup> Third, this approach mistakenly focused the extreme hardship inquiry on the effect the domestic violence had on the victim instead of on the perpetrator and his abusive conduct. In the context of the battered spouse waiver, the INS adopted a regulatory approach that was unworkable, insensitive, and contrary to congressional intent.<sup>34</sup>

C. THE VIOLENCE AGAINST WOMEN ACT OF 1994'S RESPONSE:  
"ANY CREDIBLE EVIDENCE" AND INS/DHS IMPLEMENTATION

The evidentiary standard requiring an affidavit of a licensed mental health professional had gone too far and was much more stringent than Congress had intended. Where the law had been previously silent, INS imposed a restriction that cut victims off from relief. Congress, however, wanted to remove impediments in the law that would deter battered immigrants "from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges, or calling the police because of the threat or fear of deportation."<sup>35</sup> To correct this misinterpretation, to ensure that similar regulatory errors did not happen with the VAWA 1994 immigration protections, and to overrule INS regulations requiring submission of evidence from a licensed mental health professional, Congress mandated that the INS must accept "any credible evidence" in all VAWA and battered spouse waiver cases.<sup>36</sup> In the legislative history of the Violence Against Women Act of 1994's immigration provisions Congress stated:

This [battered spouse waiver] regulation focuses the inquiry on the effect of the cruelty on the victim, rather than on the violent behavior of the abuser, and it may be discriminatory against non-English speaking individuals who have limited access to bilingual mental health professionals. This section overrides this regulation by directing the Attorney General to consider any credible evidence submitted in support of hardship waivers based on battering or extreme cruelty whether or not the evidence is supported by an evaluation by a licensed mental health professional.<sup>37</sup>

Mindful of the difficulties domestic violence and crime victim survivors often encounter in marshalling "primary evidence" to support their cases, particularly because abusers, traffickers, or employers control much of that information, Congress created the most liberal evidentiary standard in the immigration laws: the "any credible evidence" standard. This immigration law "any credible evidence" standard was

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33. *Id.*

34. This provision in the regulations was criticized in comments on the interim regulations. See Calvo & Davis, *INS Interim Rule*, *supra* note 28, at 665-68.

35. H.R. REP. NO. 103-395, at 26 (1993).

36. VAWA 1994 § 40702, 8 U.S.C. § 1186a(c)(4)(C); INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

37. See H.R. REP. NO. 103-395, at 38 (1993).

modeled after evidentiary provisions in domestic violence and family law cases that allowed parties flexibility in the types of evidence they could present to meet their burden of proof.<sup>38</sup> VAWA 1994's "any credible evidence" provisions state that "[i]n acting on applications under this paragraph, the Attorney General *shall* consider any credible evidence relevant to the application".<sup>39</sup>

VAWA's "any credible evidence" requirements were designed to ease the evidentiary standard for battered immigrants filing battered spouse waivers, VAWA self-petitions, and VAWA suspension of deportation applications. VAWA 1994 recognized that victims of abuse often lack access to evidence that is in their abuser's control and that immigrant victims may lack specific forms of corroborative evidence of abuse.<sup>40</sup> Domestic violence victims face greater obstacles to securing the kinds of documentation that DHS generally requires of immigrants applying for immigration benefits because the needed documents are often in the control of the abuser.

Although each self-petitioner is required to prove that he or she meets each of the VAWA requirements, DHS is required to accept "any credible evidence" as proof.<sup>41</sup> Accordingly, the VAWA self-petitioning regulations state that DHS will consider "any credible evidence" submitted by a battered immigrant spouse or abused immigrant child to support each required element of proof for approval of the immigrant's VAWA self-petition.<sup>42</sup> Congress recognized that immigrant crime victims face the same difficulties and potential dangers that battered immigrants face in obtaining evidence to support their U-visa case. To address this issue, Congress applied the "any credible evidence" standard of proof to U-visa cases<sup>43</sup> and to all other forms of immigration benefits involving immigrant crime victims. With each VAWA reauthorization in 2000 and 2005, and in the Trafficking Victims Protection Act in 2000, Congress continued to apply the "any credible evidence" standard of proof, offering this flexible evidence standard to assist a broad range of crime victims. Congress has extended "any credible

38. *See, e.g.*, H.R. CON. RES. 172, 101st Cong., 2d Sess., 104 Stat. 5183 (1990) ("Now, therefore, be it Resolved by the House of Representatives (the Senate concurring) it is the sense of the Congress that, for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse."). As Rep. Morella said, "Battering is socially learned behavior. Witnessing domestic violence, as a child, has been identified as the most common risk factor for becoming a batterer in adulthood . . . . But, this cycle can only be broken when there is a recognized consequence for these actions." 135 CONG. REC. H4030 (1989).

39. *See, e.g.*, INA § 244(a)(3) (as in existence before 1997); INA § 240A(b)(2)(D), 8 U.S.C. § 1229(b)(2)(D) (emphasis supplied).

40. *See generally* VAWA 1994, *supra* note 4.

41. CATHOLIC LEGAL IMMIGRATION NETWORK, INC. AND IMMIGRANT LEGAL RESOURCE CENTER, THE VAWA MANUAL: IMMIGRATION RELIEF FOR ABUSED IMMIGRANTS 4-4 (San Francisco, Ca., August 2002).

42. 8 C.F.R. § 103.2(b)(2)(iii) ("Evidence provided with a self petition filed by a spouse or child of abusive citizen or resident. The USCIS will consider any credible evidence relevant to a self-petition filed by a qualified spouse or child of an abusive citizen or lawful permanent resident under . . . the Act. The self petitioner may, but is not required to demonstrate that preferred primary or secondary evidence is unavailable. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the USCIS."). *See also* 8 C.F.R. § 204.1(f)(1); 8 C.F.R. § 204.2(c)(2)(i); 8 C.F.R. § 204.2(e)(2)(iii); 8 C.F.R. § 204.2(e)(2)(i).

43. Leslye E. Orloff & Janice 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, 167 (2001).

evidence” provisions to every type of VAWA case, including:

- Battered spouse waivers;<sup>44</sup>
- VAWA self-petitions;<sup>45</sup>
- VAWA Cuban Adjustment Act Cases;<sup>46</sup>
- VAWA Nicaraguan Adjustment and Central American Relief Act (NACARA) Cases;<sup>47</sup>
- VAWA Haitian Refugee Immigration Fairness Act (HRIFA);<sup>48</sup>
- VAWA suspension of deportation cases;<sup>49</sup>
- VAWA cancellation of removal cases;<sup>50</sup>
- K-visa waiver adjudications;<sup>51</sup>
- U-visas;<sup>52</sup> and
- T-visas.<sup>53</sup>

When creating the “any credible evidence” standard, Congress recognized that

44. INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

45. INA § 202(a)(1)(J), 8 U.S.C. § 1154.

46. Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255).

47. 8 U.S.C. § 1255 note; Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100 § 202(d)(3), 111 Stat. 2195 (1997) (codified at 8 U.S.C. § 1101).

48. Haitian Refugee Immigration Fairness Act of 1998, § 902(d)(1)(B)(iii) Pub. L. No. 105-277, Div. A, § 101(h), 112 Stat. 2681-480, 2681-538, (codified as amended at 8 U.S.C. § 1255 note).

49. *See* VAWA 1994 § 40703(b), 8 U.S.C. § 1254 (adding the “any credible evidence” standard to the Attorney General’s requirements in considering petitions to suspend deportation), *repealed by* Pub. L. No. 104-208, Div. C, Title III, § 308(b)(7), 110 Stat. 3009-615(1997) (amending and renumbering INA § 244, 8 U.S.C. 1254a). Although suspension of deportation was repealed in 1997, VAWA suspension of deportation continues to be a form of relief available to battered immigrants. Each VAWA reauthorization has continued to make amendments offering new legal protections for VAWA suspension of deportation eligible victims. *See* VAWA 2000 §§ 1504(a)(2)(B)–(C), 1504(b)–(c), 1506(b)(3)–(4), 1506(c)(2), 1508, 1510(b), 1513(a), 8 U.S.C. §§ 1229b, 1101, 1229a, 1641; *see also* Violence Against Women Act of 2005, Pub. L. No. 109-162, §§ 812, 813(b)(2), 817, 825(a)(2)(C), 119 Stat. 2960, 3057-64 (2005) (codified at scattered sections of the U.S.C.) (hereinafter VAWA 2005). It is important to note that the correct citation for VAWA suspension of deportation is “INA § 244(a)(3) (as in effect on March 31, 1997).” The current INA § 244(a)(3) as of April 1, 1997 is the citation for temporary protected status.

50. INA § 240A(b)(2) (In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General). VAWA cancellation of removal was created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at scattered sections of 8 U.S.C.).

51. INA § 214(d)(2)(C)(iii); VAWA 2005 § 832(a)(1) (adjudication of waivers of disclosure of criminal convictions for battered immigrants filing K-visa petitions for their immigrant spouses or fiancés).

52. VAWA 2000 § 1513(c)(4), 8 U.S.C. § 1184.

53. 8 C.F.R. § 214.11(d) (2009); New Classifications for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Visas, 67 Fed. Reg. 4786 (Jan 31, 2002) (codified at 8 C.F.R. pts. 103, 212, 214, 247a, 299).

spousal violence, crime victimization, and trafficking uniquely affect a person's ability to explain or document the victim's case. As the INS Office of the General Counsel has noted, the purpose of this flexibility in evidence rules is to take into account the experience of victimization:

This principle recognizes the fact that battered spouse and child self-petitioners are not likely to have access to the range of documents available to the ordinary visa petitioner for a variety of reasons. Many self-petitioners have been forced to flee from their abusive spouse and do not have access to critical documents for that reason. Some abusive spouses may destroy documents in an attempt to prevent the self-petitioner from successfully filing. Other self-petitioners may be self-petitioning without the abusive spouse's knowledge or consent and are unable to obtain documents for that reason. Adjudicators should be aware of these issues and should evaluate the evidence submitted in that light.<sup>54</sup>

This INS General Counsel memo went on to categorically state: "A self-petition may not be denied for failure to submit particular evidence. It may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility."<sup>55</sup> This memo articulated the "any credible evidence" standard in the context of VAWA self-petitions reflecting VAWA's purposes, permitting but not requiring petitioners to demonstrate that preferred primary or secondary evidence is unavailable.<sup>56</sup>

Not only may it not be feasible for a battered immigrant, trafficking victim, or crime victim to obtain the necessary documentation, it may also be dangerous for the victim to try. Often, abusers of immigrant victims and perpetrators of crimes against them maintain control of documents that victims need to use as evidence in their case. The abusive spouse, parent, employer, or human trafficker may have taken or destroyed the victim's passport, identity documents, or other documentation. Absent VAWA's "any credible evidence" rules, victims would be forced to obtain these documents in order to receive VAWA immigration benefits. Taking and/or destroying the victim's documents is part of the pattern of abuse that is a particularly effective means of exerting power and control over immigrant victims that serves as a form of severe psychological abuse and at the same time undermines the victim's ability to gain independence from the abuser.<sup>57</sup> Loss of

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54. Memorandum from Paul W. Virtue, Office of General Counsel, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children to Terrance O'Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), at 7-8, reprinted in 1 INS AND DOJ LEGAL OPINIONS § 98-14 (Jan. 25, 1999).

55. *Id.*

56. See, e.g., 8 C.F.R. §§ 103.2(b)(2)(iii), 204.1(f)(1); Virtue *supra* note 54, at 7; Hernandez v. Ashcroft, 345 F.3d 824, 838-39 (9th Cir. 2003) (considering DHS' administrative approach to VAWA cases in evaluating eligibility requirements in the context of applying the "any credible evidence" standard in VAWA suspension of deportation cases).

57. Anita Raj, Jay G. Silverman, Jennifer McCleary-Sills, & Rosalyn Liu, *Immigration Policies Increase South Asian Immigrant Women's Vulnerability to Intimate Partner Violence*, 60 AMWA 26,

identity documents, passports, immigration papers, or other documents impedes the victim's ability to travel, drive a car, and attain legal immigration status.

Requiring victims to obtain specific forms of information including but not limited to police reports, court records, and statements on government letterhead may force a victim to travel back to a location in which the abuser or crime perpetrator lives or works. Contact or even proximity to her abuser puts an immigrant victim in immediate danger. Additionally, since the types of evidence victims need to prove eligibility for any form of VAWA immigration relief require victims to remember, reconnect with, and often relive the abuse they experienced, requiring victims to return to the location of the abuse to obtain specific documents can trigger pain and a resurgence in the victim of the trauma they previously experienced from their abuser.<sup>58</sup> This makes the process of obtaining specific documentation even more harmful for victims.

Although Congress intended that DHS and the former INS would interpret the "any credible evidence" standard, that interpretation must give the statute Congress's intended ameliorative effect.<sup>59</sup> In *Hernandez v. Ashcroft*, the Ninth Circuit Court of Appeals emphasized the importance of interpreting VAWA's immigration protections in a manner that was "mindful of Congress's intent that domestic violence be evaluated in the context of professional and clinical understandings of violence within intimate relationships."<sup>60</sup> An interpretation that is cognizant of the dynamics of victimization is appropriate for legislation intended to mitigate the suffering and uncertainty faced by people who are in precarious positions. There is a "general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion. This is particularly so in the immigration context where doubts are to be resolved in favor of the alien."<sup>61</sup>

VAWA's "any credible evidence" rules were designed to protect against these types of specific harms. All DHS regulations and DHS forms should be designed to encourage victims to prove their eligibility by the safest means possible for the victim. Victims who cannot safely access primary evidence should be able to submit secondary evidence, including their own personal statement, to prove each element of their VAWA, T-visa, or U-visa case. The preamble to the VAWA self-petitioning regulations provides the victims the type of flexibility that is

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28–29 (2006); Maia Ingram, Jean D. McClelland, Valerie Hink, Jessica Martin, & Montserrat Caballero, *The Experiences of Immigrant Women Who Self-petition for Lawful Permanent Residence under the Violence Against Women Act* (Feb. 2008)(unpublished manuscript, on file with the GEO. J. GEND. LAW); Andrea Hazen & Fernando I. Soriano, *Experience of Intimate Partner Violence Among U.S. Born, Immigrant and Migrant Latinas* 13, 14, 23 (June 2005) (unpublished report submitted to the National Institutes of Justice, on file with the GEO. J. GEND. LAW) (describing document destruction as one of the most reported forms of severe psychological aggression).

58. Ingram *et al.*, *The Experiences of Immigrating Women*, *supra* note 57.

59. H.R. REP. NO. 103-395, at 25 (1993).

60. *Hernandez v. Ashcroft*, 345 F.3d 824, 828 (9th Cir. 2003).

61. *Id.* at 840 (9th Cir. 2003) (citing *United States v. Sanchez-Guzman*, 744 F. Supp. 997, 1002 (E.D. Wash. 1990)).

consistent with the *Hernandez* court's articulation of VAWA's ameliorative intent. Both INS and DHS have issued regulations that confirm the application of the "any credible evidence" standard in VAWA, T- and U-visa cases.<sup>62</sup> The VAWA self-petitioning regulations preamble recognizes, for example, that:

[a]vailable relevant evidence will vary, and self-petitioners are encouraged to provide the best available evidence of qualifying abuse . . . Persons who have obtained an order of protection against the abuser or taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. This rule also provides that other forms of credible evidence will be accepted, although the Service will determine whether documents appear credible and the weight to be given them . . . The Service is not precluded from deciding, however, that the petitioners' unsupported affidavit is credible and that it provides relevant evidence of sufficient weight to meet the self-petitioners burden of proof.<sup>63</sup>

Since 1994, Congress has repeatedly expanded the "any credible evidence" provisions to ensure that battered immigrants and immigrant crime victims can apply for any and all of VAWA's and the TVPA's immigration benefits by submitting the best available evidence each victim can safely muster. Congress has made its intentions clear that VAWA's goals include assuring that evidentiary rules do not block victim access to VAWA's immigration protections. In addition to statutory provisions, VAWA's legislative history is consistent with these goals. VAWA 2000's legislative history stated:

This legislation also clarifies that the VAWA evidentiary standard under which battered immigrants in self-petition and cancellation proceedings may use any credible evidence to prove abuse continues to apply to all aspects of self-petitions and VAWA cancellation as well as to the various domestic violence discretionary waivers in this legislation and to determinations concerning U-visas.<sup>64</sup>

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62. 8 C.F.R. §§ 103.2(b)(2)(iii), 201.11 (2009) (VAWA self-petitioning regulations); 8 C.F.R. § 214.11(d) (T-visa regulations); 8 C.F.R. § 214.14(c)(4),(f)(5) (U-visa regulations).

63. Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13066 (proposed March 26, 1996) (codified at 8 C.F.R. pts 103, 204, 205, 216).

64. 146 CONG. REC. S10,192 (2000). Further, VAWA 2000's legislative history explained that an intended benefit of VAWA 2000 section 1503's provisions offering VAWA self-petitioning for unknowing spouses of U.S. citizen or lawful permanent resident bigamists was to overcome provisions in VAWA 1994 that required VAWA self-petitioners to provide documentary proof of each of the prior divorces of their abusive spouse. VAWA 2000's legislative history confirmed Congressional intent to remove this remaining evidentiary barrier for VAWA self-petitioners. The Conference report on page S10,192 stated:

In deciding applications submitted by crime victims for each VAWA or TVPA form of immigration relief, including the U-visa and adjustment of status to lawful permanent residence in U-visa cases, DHS is required by statute to apply the “any credible evidence” standard.<sup>65</sup> Under current law, immigrant domestic violence victims, trafficking victims, and crime victims are able to prove each element of any VAWA-related case under the “any credible evidence” standard, *with one exception—mandating filing of Form I-918, Supplement B, “U Nonimmigrant Status Certification,” in every U-visa case.* Victims of domestic violence, human trafficking, and crime filing for U-visa protections are required to provide a certification from a law enforcement official, prosecutor, judge, or other state, federal, or local government official involved in detecting, investigating, or prosecuting the criminal activity.<sup>66</sup> Without this certification, DHS will not adjudicate the victim’s U-visa case. While the “any credible evidence” standard applies to all other U-visa evidentiary proof requirements, it does not apply to certification.

As will be illustrated below, this certification requirement is barring access to U-visa protections for many immigrant crime victims. Victims are being cut off from VAWA protections much in the same way that requiring an affidavit from a licensed mental health care provider cut battered immigrant spouses off from battered spouse waiver protections. Both victim safety and the safety of our communities are being jeopardized by the U-visa’s mandatory certification requirement. Certification should be a form of evidence victims can present to prove helpfulness, but must no longer be a prerequisite that blocks immigrant victim access to U-visa protections.

## II. THE CONFLICT BETWEEN THE U-VISA’S CERTIFICATION AND THE U-VISA’S “ANY CREDIBLE EVIDENCE” REQUIREMENTS

### A. U-VISA

In 2000, Congress created the U-visa as part of the Violence Against Women Act, explicitly recognizing the vulnerable position of immigrant victims of crimes. VAWA 2000 contained findings regarding the goals Congress intended to accomplish with regard to the VAWA 2000’s immigration protections:<sup>67</sup>

- (a) FINDINGS.—Congress finds that—
  - (1) the goal of the immigration protections for battered immigrants

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“For an abused spouse to obtain sufficient detailed information about the date and the place of each of the abuser’s former marriages and the date and place of each divorce, as INS currently requires, can be a daunting, difficult and dangerous task, as this information is under the control of the abuser and the abuser’s family members. Section 1503 should relieve the battered immigrant of that burden in the ordinary case.” *Id.*

65. VAWA 2000 § 1513(c)(4), INA § 214(o)(4), 8 U.S.C. § 1184.

66. 8 C.F.R. § 214.14(c)(2)(i) (2007).

67. VAWA 2000 § 1502, 8 U.S.C. § 1101.

included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships;

(2) providing battered immigrant women and children who were experiencing domestic violence at home with protection against deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration benefit under the abuser's control; and

(3) there are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law.

(b) PURPOSES.—The purposes of this title are—

(1) to remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children; and

(2) to offer protection against domestic violence occurring in family and intimate relationships that are covered in State and tribal protection orders, domestic violence, and family law statutes.

With regard to the creation of the new U-visa immigration relief for immigrant crime victims, Congress made additional important findings:<sup>68</sup>

(a) FINDINGS AND PURPOSE.—

(1) FINDINGS.—Congress makes the following findings:

(A) Immigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained.

(B) All women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.

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68. VAWA 2000 § 1513, 8 U.S.C. § 1184.

(2) PURPOSE.—

(A) The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.

(B) 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 also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.

(C) Finally, this section gives the Attorney General discretion to convert the status of such nonimmigrant to that of permanent residents when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.

The new visa offered victims relief in cases of certain crimes that tend to target vulnerable foreign individuals without immigration status. To qualify for a U-visa, victims are required to prove:

- that they suffered substantial physical or mental abuse as a result of the crime;
- that the victim has information about the crime;
- that the crime occurred in the United States including territories or possessions of the United States or was in violation of U.S. law; and
- that the victim has been helpful, is being helpful, or is likely to be helpful in detecting,<sup>69</sup> investigating or prosecuting the crime.<sup>70</sup>

The U-visa is designed to offer protection to noncitizen crime victims who have mustered the courage to come forward and report crime and cooperate with

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69. 8 C.F.R. § 214.14(a)(5) (2007).

70. 146 CONG. REC. S10,195 (2000) (Violence Against Women Act of 2000 Section-by-Section summary); INA § 101 (a)(15)(U); 8 C.F.R. § 214.14(b)(3).

government officials investigating or prosecuting such criminal activity.<sup>71</sup> In creating this new nonimmigrant visa, Congress recognized that it is virtually impossible for state and federal law enforcement, other government enforcement agency officials, and the justice system in general to punish and hold perpetrators of crimes against noncitizens accountable if abusers and other criminals can avoid prosecution by having their victims deported.<sup>72</sup>

#### B. CERTIFICATION REQUIREMENT

Congress mandated that VAWA's "any credible evidence" rules apply in U-visa cases, as it has for all forms of crime-victim-related immigration relief since VAWA 1994.<sup>73</sup> However, unlike the "any credible evidence" standard in all other VAWA cases, the U-visa application process also requires an immigrant crime victim to obtain a certification by an approved certifying official verifying that the victim possesses information about the criminal activity perpetrated against the U-visa applicant and attest to the fact that the victim has been, is being, or is likely to be helpful in the detection, investigation, or prosecution of that criminal activity.<sup>74</sup> Petitioners are required to submit a certification form (commonly referred as "Form B") filled out and signed by a certifying law enforcement official during the six months immediately preceding the submission of the victim's U-visa application.<sup>75</sup>

In recognition of the fact that obtaining certification may be difficult for U-visa victims, Congress explicitly listed in the statute a wide range of government officials who could provide U-visa certifications. These certifying officials include:<sup>76</sup>

- federal, state, or local law enforcement officials;<sup>77</sup>
- federal, state, or local prosecutors;
- federal, state, or local criminal, civil, or administrative law judges;<sup>78</sup>

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71. VAWA 2000 § 1513(a)(2)(a), 8 U.S.C. § 1184 (recognizing the dual goals of the new nonimmigrant visa classification to strengthen the ability of law enforcement agencies to prosecute crimes against immigrants and to protect the victims of such crimes).

72. *Id.* §1513(a)(1)(B) (finding that all immigrant victims, women and children alike, must be able to report the crimes committed against them in the United States and to participate fully in the subsequent investigation and prosecution).

73. INA § 214(p)(4), 8 U.S.C. § 1184(p)(1) (2006).

74. INA § 214(p)(1), 8 U.S.C. § 1184(p)(1); 8 C.F.R. § 214.4(c)(2)(i); 72 Fed. Reg. 53020, 53024 (proposed interim final rule Sept. 17, 2007).

75. 8 C.F.R. § 214.14(c)(2)(i) (2007).

76. INA § 214(p)(1), 8 U.S.C. § 1184(p)(1) (2006).

77. 8 C.F.R. § 214.14(a)(3).

78. 8 C.F.R. § 214.14(a)(3); Fed. Reg. 53,015, 53,024 (Sept. 17, 2007). It is important to note that Congress specifically wanted judges to be included as certifiers. Both family court judges make findings regarding events that constitute criminal activity in the context of divorce, custody and protection order proceedings. This is detection of criminal activity. Criminal court judges hearing criminal cases become involved in detection, conviction and sentencing all of which fall within the types of activities both the statute and DHS contemplated for certifying authorities. Under the statute and the regulations judges clearly have the authority to sign

- the Department of Homeland Security; or
- other authorities investigating a criminal activity described in section 101(a)(15)(U)(iii).<sup>79</sup>

The Department of Homeland Security issued regulations requiring that with the exception of certifications provided by judges, the government official signing the I-918 Supplement B certification form must be an official with a supervisory role and must be specifically designated as a certifying official by that official's agency heads.<sup>80</sup> This supervisory official certification requirement was not required by statute. As with the imposition of the mandatory affidavit of a licensed mental health professional by regulation when INS implemented the battered spouse waiver, DHS's regulatory requirement that all certifying officials have supervisory authority and be the head of an agency or specifically designated by the head of an agency to sign U-visas, this requirement significantly narrowed immigrant victim's access to U-visa protection.

### 1. Problems in the Implementation of the Regulations

The U-visa regulations have had the effect of directly undermining Congressional intent to facilitate the reporting of crimes,<sup>81</sup> the fostering of better relationships between

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certifications for U-visa cases and are well placed to do so. The requirement that the certifying official be a supervisor imposed by the DHS regulations does not apply to judges. 8 C.F.R. § 214.14(a)(3). The preamble to the U-visa regulations Fed. Reg. 53,020 (Sept. 17, 2007) states that "[t]he rule provides that the term 'investigation or prosecution,' used in the statute and throughout the rule, includes the detection or investigation of a qualifying crime or criminal activity, as well as the prosecution, conviction, or sentencing of the perpetrator of such crime or criminal activity. New 8 C.F.R. § 214.14(a)(5). Referring to the AG Guidelines, USCIS is defining the term to include the detection of qualifying criminal activity because the detection of criminal activity is within the scope of a law enforcement officer's investigative duties. AG Guidelines, at 22–23. Also referring to the AG Guidelines, USCIS is defining the term to include the conviction and sentencing of the perpetrator because these extend from the prosecution. *Id.* at 26–27. Moreover, such inclusion is necessary to give effect to section 214(p)(1) of the INA, 8 U.S.C. 1184(p)(1), which permits judges to sign certifications on behalf of U nonimmigrant status applications. INA § 214(p)(1), 8 U.S.C. § 1184(p)(1). Judges neither investigate crimes nor prosecute perpetrators. Therefore, USCIS believes that the term 'investigation or prosecution' should be interpreted broadly as in the AG Guidelines."

79. 8 U.S.C. § 1101(a)(15)(U)(i) (2006); 72 Fed. Reg. 53,014, 53,023–53,024 (Sept. 17, 2007). The preamble to the U-visa regulations Fed. Reg. 53,019 (Sept. 17, 2007) states that "the rule defines a 'certifying agency' as a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority that has responsibility for the investigation or prosecution of the qualifying criminal activities designated in the BIWPA. New 8 C.F.R. § 214.14(a)(2). This includes traditional law enforcement branches within the criminal justice system. However, USCIS also recognizes that other agencies, such as child protective services, the Equal Employment Opportunity Commission, and the Department of Labor, have criminal investigative jurisdiction in their respective areas of expertise." 72 Fed. Reg. 53,019 (Sept. 17, 2007).

80. 72 Fed. Reg. 53,023 (Sept. 17, 2007) ("This rule defines 'certifying official' as the head of the certifying agency or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency, or a Federal, State, or local judge. 8 C.F.R. § 214.14(a)(3). USCIS believes that this definition is reasonable and necessary to ensure the reliability of certifications. It also should encourage certifying agencies to develop internal policies and procedures so that certifications are properly vetted.").

81. VAWA 2000 § 1513(a)(2)(B), 8 U.S.C. § 1101.

justice system officials and immigrant crime victims, the encouragement of law enforcement to better serve immigrant crime victims, the prosecution of crimes perpetrated against immigrants,<sup>82</sup> and the furtherance of the humanitarian interests of the United States in protecting crime victims.<sup>83</sup> These regulations also created confusion among law enforcement officials and agencies and had the effect of narrowing the number of certifiers available to victims.

The mandatory certification requirement in the regulations left victims' cases dependent on the ability of the often time-pressed agency head to sign the form or to designate an official with authority to do so. While some law enforcement agencies have issued protocols, implemented procedures, or adopted practices of designating law enforcement officials as certifiers,<sup>84</sup> a great number of law enforcement agencies and prosecutors' offices have not.

The problems created by the regulations are exemplified in the stories of immigrant victims of crimes that have attempted to comply with the certification requirement.<sup>85</sup> Advocates, individual attorneys, and service providers have reported reluctance on the part of law enforcement officials to certify victims.<sup>86</sup> The extensive application required by the regulations require the assistance of an experienced professional, and the fact that many agencies and police departments have not designated certifying officials delays the process and, in some cases, discourages victims from continuing cooperation with law enforcement.<sup>87</sup>

The 2007, DHS U-visa regulations led some law enforcement agencies that had previously been issuing U-visa certifications to stop U-visa certifications all together. The Lexington, Kentucky police department had, prior to the issuance of the DHS U-visa regulations, received national recognition for its U-visa certification work. The U-visa certification process provided an opportunity for the development of strong and improved relationships between the police

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82. VAWA 2000 § 1513(a)(2)(A), 8 U.S.C. § 1101.

83. *Id.*

84. Austin Police Department, General Orders, Policies, and Procedures, Part B-Enforcement Operations, Ch. 3-Specialize Situations and Services, B301B-U Nonimmigrant Status Certifications (May 30, 2008) (on file with author), available at [http://www.ci.austin.tx.us/police/gen\\_orders\\_b2.htm#b301b](http://www.ci.austin.tx.us/police/gen_orders_b2.htm#b301b).

85. Victims have reported that their interactions with law enforcement can be difficult due to the lack of translators or inability of law enforcement officials to understand the effects the crime has on immigrant victims. Jamie Rene Abrams, *Legal Protections for an Invisible Population: An Eligibility and Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence*, 4 AM. U. MODERN AM. 26, 32 (2008).

86. Charlie Beck, Chief of Detectives at the Los Angeles Police Department, agreed that the applications have to be carefully vetted based on the stringent requirements. "Not everybody who applies is entitled to one," he said. "Just being a victim is certainly not enough." Anna Gorman, *Victims' U-visa program falters; Illegal immigrants who help law enforcement officials are eligible, but few receive them*, L.A. TIMES, Jan. 26, 2009, at B-1.

87. In 2008, U.S. Citizens and Immigration Services (USCIS) received 13,300 U-visa applications and granted "interim relief" to 10,300 applicants. The certification form, part of the application, is now required by some jurisdictions for victims to show when issuing driver licenses to applicants. Luis L. Perez, *New Anti-fraud Policy for Driver's Licenses Alarms Advocates for Immigrants: New Policy May Keep Victims from Helping Authorities*, SOUTH FL. SUN SENTINEL, Feb. 2, 2009.

department and the local immigrant community. This work led the National Network to End Violence Against Immigrant Women to highlight the Lexington Police Department's achievements and issue them an award for their work at the Network's national conference in November of 2007, shortly after the U-visa regulations went into effect. Within a year after receiving this award, following issuance of the U-visa regulations requiring that only the chief of police or a designated supervisory authority be the only persons authorized to issue U-visa certifications, the Lexington police department stopped issuing U-visa certifications altogether. Unfortunately, while the Lexington police department provides a stark example of the significance of this problem, they are not the only police department to decide to not issue U-visa certifications.<sup>88</sup>

Since certifying the application is mandatory for the immigrant victim of crime,<sup>89</sup> but left at the discretion of the investigating agency,<sup>90</sup> the aggregate result of the obstacles imposed by the regulation is to undermine the stated purpose of Congress in creating the U-visa. When law enforcement officers and prosecutors refuse to sign U-visa certifications, perpetrators of crimes against immigrants are not prosecuted and immigrant victims willing to assist with the detection, investigation, and prosecution of crimes are blocked by the lack of certification from attaining Violence Against Women Act U-visa protection. This is not what Congress envisioned when creating the U-visa.

## 2. The Equal Employment Opportunity Commission

Shortly after the Violence Against Women Act U-visa provisions became law, one of the first agencies in the country to issue U-visa certifications was the Equal Employment Opportunity Commission (EEOC), which issued certifications as early as 2001 to immigrant women who had been victims of employer- or supervisor-perpetrated sexual assault. One of the first cases in the country that the EEOC was able to successfully pursue with the assistance of witnesses for whom the EEOC completed U-visa certifications was the case against DeCoster Farms on behalf of women who were subjected to sexual harassment (including rape), abuse, and retaliation by certain supervisory workers at DeCoster's Wright County, Iowa, plants.<sup>91</sup> The investigation, launched in August of 2001, led to a finding by the EEOC "that certain supervisors employed by DeCoster Farms sexually assaulted and harassed female employees, especially those of Mexican and other Hispanic national origin—some of whom were undocumented workers

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88. Personal communication to Leslye Orloff by Lea Webb, Webb & Pillich, LLC, Covington Kentucky, October 16, 2008. Another example is the police department in Dallas, Texas that has refused to do any certifications in U-visa cases.

89. 8 U.S.C. § 1184(p) (2009).

90. *Catholic Charities CYO v. Chertoff*, 622 F. Supp.2d 865, 887 (N.D. Cal. 2008) (holding that there is no statutory directive to law enforcement officials to issue law enforcement certifications).

91. Complaint at 1, *EEOC v. DeCoster*, No. C02-3077MWB (N.D. Iowa Sept. 26, 2002); *see also* Press Release, EEOC and DeCoster Farms Settle Complaint for \$1,525,000 (Sept. 30, 2002), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/archive/9-30-02-b.html>.

at the time—and threatened retaliation if they complained of such conduct.”<sup>92</sup> In the press release announcing a \$1,525,000 settlement on the EEOC’s employment discrimination lawsuit brought against DeCoster Farm under Title VII of the Civil Rights Act of 1964, Chairperson of the EEOC at the time, Cari M. Dominguez, stated that “[p]rotecting immigrant workers from illegal discrimination has been, and will continue to be, a priority for the EEOC.”<sup>93</sup> These types of enforcement actions against perpetrators of U-visa covered criminal activity include rape and sexual assault, which Congress intended to reach when it created the U-visa.

Congress chose the term “criminal activity” as opposed to crimes and included the statutory language allowing “other federal, state or local authorities investigating a criminal activity” to be U-visa certifiers because its goal was to enhance tools that would make perpetrators accountable for their criminal activity. As illustrated by the DeCoster case, Congress understood there would be many instances in which state, local, and federal authorities would bring actions against perpetrators that may not be criminal prosecutions. Examples include but are not limited to EEOC enforcement actions, child abuse cases, elder abuse investigations, and state or federal labor department investigations.<sup>94</sup>

When the Department of Homeland Security issued interim U-visa regulations establishing the requirements and procedures for victims of crimes seeking a U-visa nonimmigrant status in 2007, it correctly included the Equal Employment Opportunity Commission as an investigating agency with the authority to certify the U-visa Form B.<sup>95</sup> The EEOC plays an important role in detecting, investigating, and prosecuting labor law violations that are also U-visa listed criminal activity—such as debt peonage, involuntary servitude, rape, sexual assault, abusive sexual contact, felonious assault, extortion, and unlawful criminal restraint.<sup>96</sup> These crimes often occur in tandem and the inclusion by the EEOC reflected the intent to have the U-visa serve not only victims of domestic violence crimes but also victims of labor exploitation.<sup>97</sup> The definition of a “certifying agency”<sup>98</sup> in the regulations allowed the EEOC to investigate violation of U.S. labor laws and to ensure the cooperation of workers without an immigration status in such investigations.

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92. Complaint, EEOC v. DeCoster, No. C02-3077MWB (N.D. Iowa Sept. 26, 2002)

93. Press Release, EEOC and DeCoster Farms Settle Complaint for \$1,525,000 (Sept. 30, 2002), available at <http://www.eeoc.gov/eeoc/newsroom/release/archive/9-30-02-b.html>.

94. William R. Tamayo, Regional Attorney U.S. Equal Employment Opportunity Commission, *Partial List of Sexual Assault Cases Litigated and Resolved by EEOC Commission in Sexual Harassment and Assault in the Workplace: The Role of Advocates, Counselors and Medical Professionals in Obtaining Court Awarded Damages for Victims* (May 2007), available at <http://www.wcsap.org/events/Workshop07/SexualHarassment.pdf>.

95. 72 Fed. Reg. 53,014, 53,019 (September 17, 2007).

96. Each of which is a U-visa listed crime. INA § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2008).

97. Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 910 (2008).

98. 8 C.F.R. § 214.14(2) (2009).

Despite the EEOC's early and consistent work with crime victims and its willingness to provide U-visa certifications, the EEOC's procedures for issuing U-visa certifications changed dramatically following the issuance of the U-visa regulations by DHS in September of 2007. One year after DHS promulgated the U-visa regulations, the EEOC established guidelines that would need to be followed by EEOC officials interested in providing future U-visa certifications for victims of criminal activities the EEOC was investigating. Under the new EEOC guidelines, regional attorneys have the authority to certify applications, but only upon the recommendation of the EEOC General Counsel. If the General Counsel determines certification is appropriate, the case must then be referred to the Office of the EEOC Chairperson who retains the authority, on a case-by-case basis, to determine if the EEOC should act as the certifying agency.<sup>99</sup>

This complex, multi-layered, daunting process is having the effect of reducing EEOC's issuance of U-visa certifications. A recent example is the case of immigrant workers subject to child labor violations,<sup>100</sup> extortion,<sup>101</sup> and assault<sup>102</sup> at the Agriprocessors Kosher meatpacking plant in Postville, Iowa. Among many of these workers were hundreds of victims of labor exploitation, including 9,311 child labor violations, and dozens of victims of gender-based crimes.<sup>103</sup> Although Agriprocessors was involved in a range of criminal activities against its workers, including crimes similar to those committed against workers in the De Coster case, the EEOC office that championed the De Coster case did not play any role in investigating complaints in the Postville Agriprocessors case. This occurred despite the fact that the EEOC had prior contact with the Agriprocessors.<sup>104</sup>

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99. Memorandum from Naomi C. Earp, Chair, Equal Employment Opportunity Commission, to District Directors and Regional Attorneys (Jul. 3, 2008) (on file with author).

100. Agriprocessors was charged with "a total of 9,311 child labor violations, involving 32 youths under the age of 18 (Seven of the 32 also were under age 16.) The alleged violations date back to Sept. 9, 2007, for some of the children, and to as recently as May 12, 2008, when Federal officials raided the Postville plant." Press Release, Iowa Attorney General's Office, Child Labor Law Charges Filed Naming Agriprocessors Officials and Plant in Postville (Sept. 9, 2008) (on file with author).

101. Julia Preston, *Meatpacker is Fined Nearly \$10 Million*, N.Y. TIMES, October 30, 2008, at A22, available at <http://www.nytimes.com/2008/10/30/us/30fine.html?adxnnl=1&adxnnlx=1257973385bLeLV5DvSdUwEUBVj4baPw>.

102. Julia Preston, *Inquiry Finds Under-Age Workers at Meat Plant*, N.Y. TIMES, Aug. 6, 2008, at A15, available at <http://www.nytimes.com/2008/08/06/us/06meat.html>.

103. Lynda Waddington, *Workers and Documents Paint Stories of Coercion and Sexual Exploitation at Agriprocessors*, IOWA INDEP., May 31, 2008, available at <http://iowaindependent.com/2401/workers-documents-paint-stories-of-coercion-sexual-exploitation-at-agriprocessors>.

104. Sholom M. Rubashkin, *Special Dossier: Agriprocessors Slaughterhouse Rules*, PHILADELPHIA JEWISH VOICE, Jul. 2006, available at <http://www.pjvoice.com/v13/13104iowa.html>.

III. AMEND THE IMMIGRATION AND NATIONALITY ACT TO ALLOW  
CRIME VICTIMS APPLYING FOR U-VISAS THE SAME ACCESS TO VAWA'S  
"ANY CREDIBLE EVIDENCE" PROTECTIONS CURRENTLY AFFORDED TO  
TRAFFICKING VICTIMS APPLYING FOR T-VISAS

VAWA 2000 significantly expanded protections beyond domestic violence and child abuse to include a range of immigrant victims of violence against women and immigrant victims who could access the protection of legal immigration status by creating two new immigration remedies—the T-visa for victims of human trafficking and the U-visa for victims of a range of mostly violent crimes, including trafficking, sexual assault, and domestic violence. In creating these remedies, Congress expanded the forms of immigration relief that individual immigrant crime victims might qualify for. With the passage of VAWA 2000 and the long-delayed implementation of the U-visa through DHS regulations issued in the late fall of 2007,<sup>105</sup> some immigrant victims would now have the option to decide which one of the multiple forms of VAWA immigration relief that they qualified for and which would be the best and safest to apply for in light of their individual circumstances. Victims of domestic violence would qualify for U-visas in addition to a VAWA self-petition or a VAWA cancellation of removal application. Human trafficking victims would have the option of applying either for a T-visa or for a U-visa, since trafficking crimes were included as covered offenses in both visas. Since some of the evidentiary requirements for a T-visa might be difficult for some victims of human trafficking to meet, Congress included trafficking on the list of U-visa crimes to offer immigration relief for trafficking victims in a broader range of state and federal prosecutions of human traffickers. Trafficking victims who could not prove that they would suffer extreme hardship involving unusual and severe harm upon removal would not be able to obtain T-visas, but would qualify for U-visas.

The T-visa offered immigration benefits for victims of severe forms of trafficking in persons,<sup>106</sup> which is defined to include sex or labor trafficking induced by force, fraud, or coercion.<sup>107</sup> The U-visa offered the protection of legal immigration status to immigrants who were victims of a broad range of crimes. The Congressional intent behind both visa categories was, from a humanitarian perspective, to help victims, and more broadly, to encourage victims to report crimes to law enforcement, thereby improving the ability of state and federal law enforcement officials to prosecute crime victims and discourage ongoing criminal activity in communities across the United States.<sup>108</sup> The Violence Against Women Act immigration protections for victims of spousal and child

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105. 72 Fed. Reg. 53,014 (Sept. 17, 2007) (proposed interim final rule).

106. INA § 101(a)(15)(T)(i)(I), 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2006).

107. TVPA § 103(8), 22 U.S.C. § 7102(8). Victims of sex trafficking under the age of eighteen are not required to prove force by fraud or coercion. *Id.* at (A).

108. *See* 22 U.S.C. § 7101 (2006).

abuse also shared these same goals.<sup>109</sup> Thus, VAWA self-petitions, VAWA cancellation of removal, and VAWA suspension of deportation join T-visas and U-visas in becoming points in a continuum of assistance offered by federal immigration law to enhance the safety of immigrant crime victims and to hold perpetrators of criminal activity accountable.

Both the T-visa and U-visa forms of immigration relief require that victims prove that they are cooperating with law enforcement in the investigation or prosecution of crime perpetrators.<sup>110</sup> Both statutes require that victims seeking lawful permanent residency through the T- or U-visa prove that they cooperated in an investigation or prosecution of criminal activity or that there was a valid reason for their inability to cooperate.<sup>111</sup> However, the T-visa and U-visa differ significantly with regard to the manner in which immigrant victim applicants must prove their helpfulness or willingness to be helpful and to cooperate with law enforcement in the investigation or prosecution of criminal activity. The regulations implementing the T-visa fill in the details of how a victim can obtain a T-visa:

The applicant must submit evidence that fully establishes eligibility for each element of the T nonimmigrant status to the satisfaction of the Attorney General. First, an alien must demonstrate that he or she is a victim of a severe form of trafficking in persons. The applicant may satisfy this requirement either by submitting an LEA endorsement, by demonstrating that the Service previously has arranged for the alien's continued presence under 28 CFR 1100.35, or by submitting sufficient credible secondary evidence, describing the nature and scope of any force, fraud, or coercion used against the victim (this showing is not necessary if the person induced to perform a commercial sex act is under the age of 18). An application must contain a statement by the applicant describing the facts of his or her victimization. In determining whether an applicant is a victim of a severe form of trafficking in persons, the Service will consider all credible and relevant evidence.<sup>112</sup>

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109. See generally VAWA 1994, *supra* note 4.

110. Compare INA § 101(a)(15)(U)(i)(III), 8 U.S.C. § 1101(a)(15)(U)(i)(III) (helpfulness requirement for U-visa victims) with INA § 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa) (requirement of compliance with any reasonable request for assistance in the investigation or prosecution of trafficking).

111. The standards for ongoing cooperation are different. T-visa victims must demonstrate either that the victim complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or that the alien would suffer extreme hardship involving unusual and severe harm upon removal from the United States. INA § 214(l)(1)(C), 8 U.S.C. § 1184(l)(1)(C). In the case of U-visa victims the U-visa regulations at 8 C.F.R. § 214.14(b)(3) impose an ongoing responsibility on a U-visa victim to provide assistance when reasonably requested. However, DHS can deny adjustment of status if DHS determines, based on affirmative evidence, that the U-visa victim unreasonably refused to provide assistance in the investigation or prosecution of criminal activity. INA § 245(m)(1), 8 U.S.C. § 1255(m)(1).

112. 8 C.F.R. § 214.11 (2008).

The T-visa regulations provide that a petitioner may submit an endorsement from a law enforcement agency, but it is not required. In the alternative, the trafficking victim may submit “any credible evidence” to prove the victims, efforts to cooperate with law enforcement.

The U-visa statute, on the other hand, requires that in order to prove helpfulness or willingness to be helpful, U-visa eligible applicants must obtain a certification from a justice system or law enforcement official.

(1) Petitioning procedures for section 1101(a)(15)(U) visas

The petition filed by an alien under section 1101(a)(15)(U)(i) of this title *shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity* described in section 1101(a)(15)(U)(iii) of this title. This certification may also be provided by an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations. This certification shall state that the alien “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of criminal activity described in section 1101(a)(15)(U)(iii) of this title.<sup>113</sup>

The U-visa statute further specifies that “in acting on any petition filed under this subsection, the consular officer or the Attorney General, as appropriate, shall consider any credible evidence relevant to the petition.”<sup>114</sup> The effect is that “any credible evidence” relevant to the U-visa petition shall be considered, but that no U-visa victim can file for U-visa immigration relief unless they file the mandatory I-918 Supplement B U-Visa certification form as a part of their U-visa application. The practical result of the U-visa certification requirement is that many immigrant crime victims who are eligible for U-visas are precluded from filing their U-visa cases when law enforcement and other potential certifying officials do not know about or are not interested in completing U-visa certifications.

When Congress wrote the T-visa and U-visa protections in 2000, the two provisions came together and became law as part of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA).<sup>115</sup> However, these visas evolved in two different pieces of separately introduced legislation. The Trafficking Victims Protection Act of 2000 (TVPA), which became Division A of VTVPA,<sup>116</sup> sought to strengthen the ability of federal law enforcement officials to prosecute human traffickers and provide help, protection from deportation, and access to legal immigration status for immigrant victims of human trafficking in the United

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113. 8 U.S.C. § 1184(p) (2006) (emphasis added).

114. *Id.*

115. Victims of Trafficking and Violence Protection Act of 2000 §§ 107(e), 1513. Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified at 8 U.S.C. §§ 7105, 1101).

116. *Id.* at §§ 101-113 (codified at scattered sections of 8 U.S.C.).

States.<sup>117</sup> The U-visa was the new remedy for a broad range of crime victims that was included as the Violence Against Women Act of 2000, which became Division B of VTVPA.<sup>118</sup> The purpose of U-visas for crime victims was to strengthen the ability of law enforcement to detect, investigate, and prosecute crimes committed against immigrants and to encourage federal, state and local law enforcement officials to better serve and protect immigrant crime victims.<sup>119</sup> Congress understood in both the T- and U-visa contexts that successful prosecutions depended on trafficking and crime victims being able to access legal immigration status, supportive services, and protection from deportation.<sup>120</sup>

Although both the T-visa and U-visa had similar purposes, the U-visa statute required certification and the T-visa did not. The legislative histories of the TVPA and VAWA 2000 are silent on the reason for this difference in the procedures required of victims filing for relief under the T-visa and the U-visa.

The source of the difference in original approach potentially stems from the fact that the TVPA focused on assisting federal prosecutions brought by federal prosecutors. Successful prosecutions of human traffickers would only occur if victims received the stability that comes from protection from deportation, access to legal immigration status, and receiving much needed support and services.

The TVPA allowed federal law enforcement officials to seek “continued

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117. *See id.* at §§ 102(b)(14)-(17), (19), (20), 8 U.S.C. § 7101. “Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice . . . No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment . . . the seriousness of this crime and its components is not reflected in current sentencing guidelines, resulting in weak penalties for convicted traffickers . . . Existing laws often fail to protect victims of trafficking, . . . Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation . . . Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bond-age, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.

118. *Id.* at §§ 1001-1513 (codified at scattered sections of the U.S.C.).

119. *Id.* at § 1513(a)(2)(A), 8 U.S.C. § 1101.

120. *See id.* at § 102(a), 8 U.S.C. § 7101, which states that the purpose of the TVPA is to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.” In section 1513(a)(2)(A) of VAWA 2000, Congress states the purpose of the U-visa protection as follows: “The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.”

presence” on behalf of victims of severe forms of trafficking who are potential witnesses in human trafficking cases.<sup>121</sup> The TVPA of 2000 also allowed victims of severe forms of trafficking who could demonstrate that they have “complied with any reasonable requests for assistance in the investigation or prosecution of acts of trafficking” to self-petition for a T-visa.<sup>122</sup> Since the trafficking prosecutions originally envisioned by the TVPA of 2000 were federal, and victims had the burden of proof in their T-visa cases of proving to DHS that they complied with reasonable requests from federal law enforcement officials, Congress did not make certifications from a government official a mandatory prerequisite to trafficking victims filing for and being granted T-visas. Congress thus avoided burdening federal investigators and prosecutors with having to produce certifications.

Further, when Congress in 2003 amended the law to provide T-visa access for victims of severe forms of trafficking who were cooperating with state and local law enforcement in the investigation or prosecution of human traffickers, these additional trafficking victims were provided the ability to prove all aspects of their T-visa cases by presenting “any credible evidence.” No certification requirement was imposed. Following these 2003 TVPA amendments, both the U-visa and the T-visa were available for immigrant crime victims who were cooperating with federal, *state, or local* authorities in the investigations or prosecutions. However, in U-visa cases victims had to procure certifications as a prerequisite to filing and T-visa applicants did not. As a result of these 2003 TVPA amendments, DHS began adjudicating T-visa applications from victims who were involved in state and local prosecutions of traffickers.

The Department of Homeland Security has developed significant expertise in adjudicating T-Visa petitions since the interim T-Visa regulations were issued in 2002.<sup>123</sup> DHS has experience adjudicating T-visa cases that are based on state and federal prosecutions. All of the T-visas and the U-visas are adjudicated by the specially trained VAWA unit at the DHS Vermont Service Center.<sup>124</sup> The DHS

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121. TVPA § 107(c)(3), 22 U.S.C. § 7105(c)(3) (2000). Trafficking victims who are granted “continued presence” also receive access to public benefits and other services equivalent to those offered to refugees. *Id.* at § 107(b)(1)(E), 22 U.S.C. § 7105.

122. INA § 101(a)(15)(T)(i)(III), as originally included in section 107(e)(1) of the TVPA. Victims applying for T-visas would also have to prove that they would suffer extreme hardship involving unusual and severe harm if they were removed from the United States in order to be awarded a T-visa. INA § 101(a)(15)(T)(i)(IV), 8 U.S.C. § 1101(a)(15)(T)(i)(IV).

123. New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 67 Fed. Reg. 4784-01 (January 31, 2002).

124. H.R. REP. NO. 109-233, 116 (2005) (“In 1997, the Immigration and Naturalization Service consolidated adjudication of VAWA self-petitions and VAWA-related cases in one specially trained unit that adjudicates all VAWA immigration cases nationally. The unit was created ‘to ensure sensitive and expeditious processing of the petitions filed by this class of at-risk applicants,’ to ‘[engender] uniformity in the adjudication of all applications of this type,’ and to ‘[enhance] the Service’s ability to be more responsive to inquiries from applicants, their representatives, and benefit granting agencies.’ See 62 Fed. Reg. 16607–16608 (1997). T-visa and U-visa adjudications were also consolidated in the specially trained VAWA unit. See USCIS Interoffice Memorandum HQINV 50/1, August 30, 2001, from

VAWA Unit has developed sufficient expertise in determining whether T-visa victims under the “any credible evidence” standard have submitted sufficient evidence of both victimization and compliance with reasonable requests for assistance in the investigation or prosecution of human trafficking.<sup>125</sup> Under the T-visa regulations, victims are encouraged to seek and provide a law enforcement endorsement as part of the evidence submitted to DHS. If victims file T-visa applications without such endorsement DHS officials adjudicating the petition usually send the victim a request for further information asking the victim to explain more fully the steps she has taken to collaborate with law enforcement officials in the investigation or prosecution of the victim’s traffickers. The victim is provided an opportunity to supplement the record and prove her case through “any credible evidence.” While obtaining a T-visa is easier through the submission of law enforcement endorsements, T-visa victims, because of “any credible evidence,” have the opportunity to convince DHS adjudicators through the evidence they can garner and win approval of their T-visas using the “any credible evidence” standard.

In light of DHS’ proficiency in making required determinations regarding victim cooperation with law enforcement in T-visa cases both with law enforcement endorsements and without them, the DHS VAWA unit would be more than able in terms of both training and experience to make similar determinations in U-visa cases as to whether a U-visa victim has been helpful, is being helpful, or is likely to be helpful in the detection, investigation, or prosecution of criminal activity. The VAWA Unit has the expertise to make these determinations in U-visa cases based on evidence provided by the U-visa applicant under the “any credible evidence” standard of proof in which the U-visa form I-918 Supplement B would provide primary evidence of helpfulness, but alternatively, the U-visa victim could prove their helpfulness or willingness to be helpful by submitting other relevant credible evidence under the “any credible evidence” standard.

Mandatory certification in U-visa crime victim cases acts to significantly reduce the numbers of eligible crime victims who can come forward, out of the shadows and out from under the control of their abusive spouses, employers, or human traffickers to report, be protected from deportation, and to cooperate in criminal investigations and prosecutions. Requiring mandatory certification is unnecessary as a fraud check when U-visa cases are adjudicated by the same

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Michael D. Cronin to Michael A. Pearson, 67 Fed. Reg. 4784 (Jan. 31, 2002). Consistent with these procedures, the Committee recommends that the same specially trained unit that adjudicates VAWA self-petitions, T- and U-visa applications, process the full range of adjudications, adjustments, and employment authorizations related to VAWA cases (including derivative beneficiaries) filed with DHS: VAWA petitions T- and U-visas, VAWA Cuban, VAWA NACARA (§§ 202 or 203), and VAWA HRIFA petitions, 214(c)(15) (work authorization under section 933 of this Act), battered spouse waiver adjudications under 216(c)(4)(C) and (D), applications for parole of VAWA petitioners and their children, and applications for children of victims who have received VAWA cancellation.”)

125. INA § 101(a)(15)(T)(i)(III)(aa), 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa).

division of DHS, the VAWA Unit, that has years of expertise making similar adjudicatory decisions based on “any credible evidence” in T-visa cases.

Congress should amend the U-visa statute to offer U-visa victims the same access to crime victim protection available to trafficking victims and VAWA self-petitioners. Crime law enforcement or justice system certification in U-visa cases should become primary evidence of helpfulness, and U-visa victims should be able to prove helpfulness by providing the best evidence they can muster under the “any credible evidence” standard of proof. This approach will give U-visa eligible crime victims the equal access to VAWA’s U-visa crime victim protections wherever victims live in the United States. Victims in all jurisdictions across the United States will be able to come forward and report crimes and cooperate in criminal prosecutions and contribute to making all of our communities safer.