

COMMENT

WHEN THE PROBLEM IS THE SOLUTION: EVALUATING THE INTERSECTION BETWEEN THE U VISA “HELPLESSNESS” REQUIREMENT AND NO-DROP PROSECUTION POLICIES

ABSTRACT

When Congress introduced the U visa in 2000, it intended to create a program that not only protected immigrant victims of domestic violence from deportation, but also strengthened law enforcement’s ability to investigate crimes and encouraged victims to report the abuse. Traditionally, immigrant victims are particularly vulnerable to domestic violence and have been provided with few options to leave the relationship without risking their immigration status. However, while the U visa provides immigration protections to broad categories of victims, it contains a unique “helplessness” requirement that compels victims to continually cooperate with law enforcement in order to receive the necessary certification. This requirement alone is not contradictory to the goals of the U visa, but particular problems arise in jurisdictions with no-drop prosecution policies. No-drop prosecution policies remove the ability of victims to request that their cases be dropped and the discretion of prosecutors to drop cases unless there is a clear lack of evidence. In these jurisdictions, if immigrant victims cease cooperation, they lose their eligibility to receive a U visa. However, where sufficient evidence exists, the case will continue to be tried and could result in the victim’s deportation along with her abuser. Therefore, to further the goals of the U visa, I recommend adopting the evidence-based standard of no-drop prosecution policies for the certification requirement in place of the current cooperation-based standard.

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INTRODUCTION

Immigrant populations are particularly vulnerable to becoming victims of violent crimes, such as domestic violence.¹ Exacerbating this issue is the fact that immigrant populations may be less likely to come forward to report the criminal activity to law enforcement.² Under the Violence Against Women Act (“VAWA”), Congress attempted to address these concerns by allowing immigrant victims of domestic violence to enter a self-petition to gain legal status separate from their abusers (“VAWA self-petition”).³ However, the relief provided was only available to immigrants who were married to their abusers and whose husbands were United States citizens or lawful permanent residents.⁴ The U visa was created under the Victims of Trafficking and Violence Protection Act in an attempt to close the gaps left by the VAWA self-petition.⁵

The U visa covers victims of certain enumerated crimes, including domestic violence, regardless of the marital or immigration status of the parties.⁶ However, unlike the VAWA self-petition, the U visa requires victims to meet a “helpfulness” requirement by cooperating with law enforcement efforts.⁷ While the U visa was enacted to encourage immigrant victims to report crimes to law enforcement and strengthen the ability of law enforcement to investigate and prosecute offenders,⁸ the “helpfulness” requirement tends to work against these goals. The definition of “helpfulness” is left to the discretion of the individual law enforcement

1. Radha Vishnuvajjala, Note, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J.L. & SOC. JUST. 185, 188–89 (2012).

2. See Rachel Gonzalez Settlage, *Uniquely Unhelpful: The U Visa’s Disparate Treatment of Immigrant Victims of Domestic Violence*, 68 RUTGERS U. L. REV. 1747, 1758 (2016).

3. See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 1 (2012).

4. *Id.* at 2–3. This comment, as well as some of the acts discussed, use feminine pronouns and terminology to refer to the victims of domestic violence and male terminology to refer to the abusers, however these are not intended to be gender exclusive. While domestic violence is statistically more likely to occur as male against female, it occurs across all demographics. All provisions mentioned in this article are gender neutral despite their terminology.

5. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502(a)(3), (b)(1)–(2), 114 Stat. 1464, 1518.

6. Settlage, *supra* note 2, at 1763; Micaela Schuneman, Note, *Seven Years of Bad Luck: How the Government’s Delay in Issuing U-Visa Regulations Further Victimized Immigrant Crime Victims*, 12 J. GENDER, RACE & JUST. 465, 472 (2009).

7. 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2012).

8. Victims of Trafficking and Violence Protection Act § 1513(a)(2)(A)–(B).

agencies, so certification can be difficult, if not impossible, to obtain.⁹ Additionally, the “helpfulness” certification can be withdrawn if the victim stops cooperating with law enforcement.¹⁰ Without the “helpfulness” certification, the victim will not be eligible for a U visa.¹¹ Moreover, in jurisdictions with no-drop prosecution policies, the case may be able to move forward without the cooperation of the victim.¹² No-drop prosecution policies prevent victims from withdrawing charges and prevent prosecutors from dropping cases if sufficient evidence exists of the abuse, even if the victim becomes uncooperative.¹³ A conviction could lead to the victim being deported with her abuser, or being left behind with no source of income and a precarious immigration status.¹⁴

This comment argues that lowering the standard for the U visa’s “helpfulness” requirement to an evidence-based, instead of a cooperation-based, evaluation will better satisfy the goals of the U visa by encouraging victims to report criminal behavior and strengthening law enforcement’s ability to convict criminals. Part I discusses the history and purpose of the U visa as a means to protect immigrant victims of domestic violence. Part II discusses the problems with the U visa’s “helpfulness” requirement and how it works against Congress’s stated goals for the visa. Part III analyzes the intersection between no-drop prosecution policies and the U visa “helpfulness” requirement, focusing on how it further undermines the visa’s goals and can hurt, instead of help, the immigrant victim. Finally, Part IV details a proposed change to the “helpfulness” requirement and how it could better serve the purpose of the U visa and help victims leave their abusive relationships without risking their immigration statuses.

9. U.S. CITIZENSHIP & IMMIGRATION SERVS., OMB NO. 1615-0104, INSTRUCTIONS FOR SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION 1, 4 (2017), <https://www.uscis.gov/i-918> [<https://perma.cc/G7ER-QRKU>] [hereinafter INSTRUCTIONS FOR SUPPLEMENT B].

10. *Id.* at 5.

11. *Id.* at 1.

12. Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 216 (1999).

13. *See id.*

14. *See* Schuneman, *supra* note 6, at 468.

I. HISTORY OF THE LEGAL OPTIONS AVAILABLE FOR IMMIGRANT VICTIMS OF DOMESTIC ABUSE

Many times, noncitizen victims of domestic violence rely on their spouse, partner, or other close family member for their immigration status, if they even have a legal immigration status.¹⁵ Often the same people on whom they rely are, in fact, their abusers.¹⁶

In the interest of family unity, the United States allows citizens and lawful permanent residents to sponsor family members for visas.¹⁷ Many, particularly wives, take advantage of this opportunity, but, as a result, their immigration status is dependent upon that of their husbands.¹⁸ Immigrants in this category require sponsorship from their citizen spouses in order to obtain a green card,¹⁹ leaving immigrant victims of domestic violence particularly vulnerable to their abusers.²⁰

This problem is exacerbated by the fact that immigrants are more likely to be victims of domestic violence in the first place. The statistics on domestic violence in the United States are already startlingly high. Twenty-two percent of women surveyed by the United States Department of Justice reported being physically assaulted by an intimate partner in their lifetime.²¹ This increases to 25% when rape and stalking are taken into account.²² Approximately 1500 women are killed each year as a result of domestic violence.²³ Across all domestic violence victims, 55% report the abuse to law enforcement.²⁴ These same statistics for immigrant populations in the United States are even worse,²⁵ with immigrant

15. *See id.* at 467–68.

16. *See id.*

17. *Id.*; *Family Immigration*, BUREAU CONSULAR AFF., <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration.html> [<https://perma.cc/BV5L-RDHX>] (last visited Apr. 1, 2019).

18. Schuneman, *supra* note 6, at 467–68.

19. *Id.*

20. *Id.* at 470.

21. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 26 (2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf> [<https://perma.cc/JDS8-DTTM>].

22. *Id.*

23. Vishnuvajjala, *supra* note 1, at 189.

24. *Id.*

25. Natalie Nanasi, *The U Visa's Failed Promise for Survivors of Domestic Violence*, 29 YALE J.L. & FEMINISM 273, 284 (2018).

women being the most vulnerable.²⁶ For Latina, South Asian, and Korean immigrant populations, the rates of domestic abuse range from 30% to 50%.²⁷ Just shy of 50% of unmarried immigrant women and just under 60% of married immigrant women experience domestic abuse.²⁸ Of the victims of intimate partner homicide in New York City, 51% were foreign born, compared to 45% for those born in the United States.²⁹ As far as reporting goes, only 30% of documented immigrants and 14% of undocumented immigrants report domestic violence to law enforcement.³⁰

A victim's immigration status provides an additional means of control for her abuser, though studies vary on the rate at which this occurs. Ayuda³¹ has found that 20% of Latina immigrant victims have either been threatened with deportation or had their immigration sponsorship held over their heads.³² The National Institute of Justice, surveying immigrant victims from across many different cultures, found that number to be 65%.³³ Many abusers follow through on their threats, with 72% never filing petitions to sponsor their wives, leaving them unable to gain independent immigration status.³⁴

A. *Immigration Options for Victims of Domestic Violence Prior to the Violence Against Women Act*

Prior to the passage of the VAWA in 1994 ("VAWA 1994"), immigrant victims of domestic violence had no special recourse to protect their immigration status. Unless a victim had grounds to apply for a visa separately from her abuser, such as a work visa or student visa,³⁵ she had to rely on the sponsorship of a citizen or lawful

26. Vishnuvajjala, *supra* note 1, at 189.

27. GISELLE AGUILAR HASS ET AL., LEGAL MOMENTUM, BATTERED IMMIGRANTS AND U.S. CITIZEN SPOUSES 2 (2006), https://library.niwap.org/wp-content/uploads/2015/BB_RS_RCH_ImmVictims_Battered_Imm.pdf [<https://perma.cc/4KCT-EUW3>].

28. *The Facts on Immigrant Women and Domestic Violence*, FUTURES WITHOUT VIOLENCE, https://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Immigrant.pdf [<https://perma.cc/A4NA-XBQ3>] (last visited Apr. 1, 2019).

29. *Id.*

30. Vishnuvajjala, *supra* note 1, at 189–90.

31. Ayuda is an immigrant-focused legal services group in the District of Columbia. *About Us*, AYUDA, <https://www.ayuda.com/about-us> [<https://perma.cc/XZX4-QXW8>] (last visited Apr. 1, 2019).

32. HASS ET AL., *supra* note 27, at 3.

33. *Id.*

34. *See id.* at 4.

35. However, by applying for a separate visa, a victim may be giving up her chance to

permanent resident relative.³⁶ Specifically, the relative must have been an immediate relative, namely a spouse; an unmarried, minor child; or a parent.³⁷ This relative was required to file a petition establishing the qualifying relationship,³⁸ or an immigrant's green card application would be denied.³⁹ When the citizen or lawful permanent resident relative was the abuser, this gave him complete control over his victim's immigration status.⁴⁰

B. *Green Card Self-Petition Under the Violence Against Women Act*

In an effort to address the control abusers were able to exercise over their victim's immigration status, Congress included the Protections for Battered Immigrant Women and Children provision when it passed the VAWA 1994.⁴¹ These provisions allow victims of domestic abuse to file a petition for a green card on their own behalf rather than relying on their abuser to petition for them.⁴² There is no requirement to report the abuse to law enforcement or

become a lawful permanent resident. Schuneman, *supra* note 6, at 468–69; *see also Green Card Eligibility Categories*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/greencard/eligibility-categories> [<https://perma.cc/S2MX-LKR5>] (last visited Apr. 1, 2019).

36. *Green Card Eligibility Categories*, *supra* note 35. This is still the general rule today; the VAWA self-petition and the U and T visas have only created exceptions to this process for victims of domestic violence and other crimes. *See id.*

37. 8 U.S.C. § 1154 (2012); *Green Card for Immediate Relatives of U.S. Citizen*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/greencard/immediate-relative-us-citizen> [<https://perma.cc/PB22-GH22>] (last visited Apr. 1, 2019). “Minor child” in this case refers to children under twenty-one. *Green Card for Immediate Relatives of U.S. Citizen*, *supra*. In order to qualify as a parent of a citizen or lawful permanent resident, the sponsoring child must be twenty-one or older. *Id.*

38. *Green Card for Immediate Relatives of U.S. Citizen*, *supra* note 37; *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/i-130> [<https://perma.cc/82JX-SNXJ>] (last visited Apr. 1, 2019).

39. *See Green Card for Immediate Relatives of U.S. Citizen*, *supra* note 37.

40. Settlege, *supra* note 2, at 1756–57.

41. *See* WILLIAM K. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT 1 (2012); *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40701–40703, 108 Stat. 1796, 1953–55. VAWA 1994 was included in Title IV of the Violent Crime Control and Law Enforcement Act of 1994, and Subtitle G contains the Protections for Battered Immigrant Women provisions.

42. *See* Violent Crime Control and Law Enforcement Act § 40701 (codified at 8 U.S.C. § 1154(a)(1) (2012)). Without the petition from the qualifying relative, the immigrant must provide documentation proving the citizenship status of her husband. Schuneman, *supra* note 6, at 471.

to cooperate in any ensuing investigation or prosecution.⁴³ However, this relief is only available to spouses and children of United States citizens or lawful permanent residents.⁴⁴

In 2000, Congress reauthorized the VAWA (“VAWA 2000”).⁴⁵ Most notably, the VAWA 2000 added more flexibility to the requirement that the qualifying relationship exists at the time of application.⁴⁶ Under the VAWA 1994, an immigrant victim whose husband lost his citizenship or lawful permanent resident status would have her self-petition denied automatically.⁴⁷ The VAWA 2000 allows a victim whose spouse has died or lost his citizenship or lawful permanent resident status as a result of the domestic violence within the past two years to still have access to the self-petition.⁴⁸ Access to the self-petition for divorcées was also added, as long as the divorce occurred within the past two years and was related to the domestic violence.⁴⁹ There is still no requirement to provide assistance to law enforcement in pursuing charges or a conviction.⁵⁰

While the VAWA 1994 self-petition was a great improvement upon the availability of lawful immigration options for immigrant victims of domestic violence, it had substantial gaps in its reach. The marriage requirement flatly excluded victims who were not married to their abusers.⁵¹ However, not all married immigrants were covered, since they must be married to a citizen or lawful permanent resident.⁵² With the VAWA 2000, Congress addressed this issue by creating the U visa.⁵³

43. Settlage, *supra* note 2, at 1756–57; see Greta D. Stoltz, Comment, *The U Visa: Another Remedy for Battered Immigrant Women*, 7 ST. MARY’S L. REV. ON MINORITY ISSUES 127, 129 (2004).

44. Schuneman, *supra* note 6, at 470–71.

45. Deanna Kwong, Recent Development, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN’S L.J. 137, 138 (2002).

46. *See id.* at 145–47.

47. *Id.* at 145.

48. 8 U.S.C. § 1154(a)(1)(A)(iii)(II), (B)(ii)(II) (2012); Kwong, *supra* note 45, at 145–46; Sarah M. Wood, Note, *VAWA’s Unfinished Business: The Immigrant Women Who Fall Through the Cracks*, 11 DUKE J. GENDER L. & POL’Y 141, 148 (2004).

49. 8 U.S.C. § 1154(a)(1)(A)(iii)(II), (B)(ii)(II); Kwong, *supra* note 45, at 146; Wood, *supra* note 48, at 148.

50. *See* 8 U.S.C. § 1154.

51. Schuneman, *supra* note 6, at 470–71.

52. *Id.*

53. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533.

C. *Creation of the U Visa Under the Victims of Trafficking and Violence Protection Act*

The VAWA 2000 included the Victims of Trafficking and Violence Protection Act, which created the U visa.⁵⁴ The U visa is a nonimmigrant visa⁵⁵ available exclusively to victims of violent crime, regardless of their current immigration status.⁵⁶ In creating the U visa, Congress had two primary motivations surrounding protecting victims and aiding the efforts of law enforcement. First, Congress wanted to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence.”⁵⁷ Second, Congress wanted to “facilitate the reporting of crimes to law enforcement officials by . . . abused aliens.”⁵⁸ More specifically, Congress intended to remove immigration laws as a barrier keeping women and children locked in abusive relationships by providing protection against deportation.⁵⁹

The U visa allows victims to remain in the United States legally for four years, extendable, if required, for the investigation or prosecution of the qualifying crime or at the discretion of the Secretary of Homeland Security upon a showing of exceptional circumstances.⁶⁰ Once their application is pending, victims are also eligible to receive work authorization from the Secretary of Homeland Security.⁶¹ Though the U visa is a nonimmigrant visa, recipients are also eligible to receive a green card after three years if additional criteria are met.⁶² In order to qualify for a U visa, an immigrant must satisfy the following requirements: (1) be the victim of a qualifying crime, such as domestic violence; (2) have suffered

54. *Id.*

55. A nonimmigrant visa is a temporary visa issued for a specific purpose. *Glossary*, U.S. DEPT ST., <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/glossary.html> [<https://perma.cc/AQY6-M8WB>] (last visited Apr. 1, 2019) (defining the term “nonimmigrant visa”). Generally, an immigrant visa is required to establish permanent residence in the United States. *Id.* (defining the term “immigrant visa”).

56. *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> [<https://perma.cc/NKJ8-HN7Z>] (last visited Apr. 1, 2019).

57. Victims of Trafficking and Violence Protection Act § 1513(a)(2)(A).

58. *Id.* § 1513(a)(2)(B).

59. *See id.* § 1513(a)(1)(B).

60. 8 U.S.C. § 1184(p)(6) (2012); *see also* Nanasi, *supra* note 25, at 277–78.

61. 8 U.S.C. § 1184(p)(6).

62. Nanasi, *supra* note 25, at 278; *Victims of Criminal Activity*, *supra* note 56.

substantial physical or mental abuse as a result; (3) have information about the crime; (4) provide help to law enforcement in the investigation or prosecution of the crime; (5) have been victimized within the United States or by activity that violated the laws of the United States; and (6) be admissible to the United States or be able to qualify for a waiver of inadmissibility.⁶³

The first requirement is that the immigrant must have been the victim of a qualifying crime.⁶⁴ There are currently twenty-eight crimes expressly listed in the statute, including domestic violence, rape, torture, prostitution, stalking, female genital mutilation, abduction, witness tampering, and murder.⁶⁵ But this list is not exhaustive, allowing similar crimes to qualify, as well as attempts, conspiracies, and solicitations.⁶⁶ While the list of qualifying crimes is quite extensive, domestic violence related crimes comprise the basis for 75% of all U visa applications.⁶⁷ Notably, there is no time limitation on when the crime occurred.⁶⁸

The second requirement is that the immigrant must have suffered substantial physical or mental abuse as a result of the crime.⁶⁹ According to the *Code of Federal Regulations*, physical or mental abuse means physical, emotional, or psychological harm.⁷⁰ The United States Citizenship and Immigration Services (“USCIS”) uses a factor-based test to evaluate the harm, weighing factors such as the nature of the injury, the severity of the harm, the severity of the criminal conduct, the duration of the abuse, and the permanence of any harm.⁷¹ No one factor is determinative; instead, each case is decided based on the totality of the circumstances using an “any credible evidence” standard.⁷²

63. 8 U.S.C. § 1101(a)(15)(U); *Victims of Criminal Activity*, *supra* note 56.

64. 8 U.S.C. § 1101(a)(15)(U)(i)(I).

65. 8 U.S.C. § 1101(a)(15)(U)(iii) (Supp. V 2018).

66. *Id.*

67. Settlege, *supra* note 2, at 1764.

68. DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT 1, 10 (2011) [hereinafter U VISA LAW ENFORCEMENT CERTIFICATION RESEARCH GUIDE], https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf [https://perma.cc/ST85-HKTH].

69. 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2012).

70. 8 C.F.R. § 214.14(a)(8) (2018).

71. *Id.* § 214.14(b)(1); Jamie R. Abrams, *Legal Protections for an Invisible Population: An Eligibility and Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence*, 4 MOD. AM. 16, 27 (2008).

72. 8 C.F.R. § 214.14(c)(4); Abrams, *supra* note 71, at 27; Giselle Hass et al., *Barriers*

The third requirement is that the immigrant must have information about the crime.⁷³ The victim should possess “specific facts” showing that she will be able to assist in the investigation or prosecution of the crime.⁷⁴ The information provided by the victim must relate to the same crime that forms the basis of her visa application.⁷⁵

The fourth requirement is that the immigrant must assist law enforcement in the investigation or prosecution of the crime.⁷⁶ More precisely, the victim must show that she

has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity.⁷⁷

The investigation does not need to result in a conviction,⁷⁸ nor does the crime even have to be prosecuted for the “helpfulness” requirement to be satisfied.⁷⁹ A showing of helpfulness is achieved by filing a certification signed by a qualifying law enforcement officer.⁸⁰ While the statute includes an extensive list of qualifying law enforcement agencies, the certification must be signed by the agency head or a supervisor who has been granted authority to sign certifications.⁸¹ Though judges also have authority to sign certifications, some refuse to do so unless they have been involved in an actual ongoing investigation or prosecution.⁸² Though there is no

and Successes in U Visas for Immigrant Victims: The Experiences of Legal Assistance for Victims Grantees, 2014 ARTS & SOC. SCI. J. 1, 2.

73. 8 U.S.C. § 1101(a)(15)(U)(i)(II).

74. 8 C.F.R. § 214.14(b)(2).

75. Abrams, *supra* note 71, at 28.

76. 8 U.S.C. § 1101(a)(15)(U)(i)(III).

77. *Id.* Here, the “Service” refers to the “Immigration and Naturalization Service of the Department of Justice.” *Id.* § 1101(a)(34).

78. Stoltz, *supra* note 43, at 136.

79. Abrams, *supra* note 71, at 28–29.

80. See INSTRUCTIONS FOR SUPPLEMENT B, *supra* note 9, at 1; Nanasi, *supra* note 25, at 278.

81. INSTRUCTIONS FOR SUPPLEMENT B, *supra* note 9, at 3; Abrams, *supra* note 71, at 29–30.

82. See, e.g., *Baiju v. U.S. Dep’t of Labor*, No. 12-cv-5610, 2014 U.S. Dist. LEXIS 12372, at *64–69 (E.D.N.Y. Jan. 31, 2014); *Agaton v. Hosp. & Catering Servs.*, No. 11-1716, 2013 U.S. Dist. LEXIS 46966, at *11 (W.D. La. Mar. 28, 2013) (“[A]lthough the regulations provide that the statutory term ‘investigation or prosecution’ should be interpreted broadly . . . to read the regulations so broadly as to allow certification by a judge when that judge has no connection to any criminal prosecution or investigation involving the victims does violence to the rest of the regulatory language.”).

statute of limitations on receiving a certification,⁸³ a signed certification is only valid for six months.⁸⁴

The fifth requirement is that the crime must have either taken place within the United States or have been in violation of the laws of the United States.⁸⁵ “Within the United States” includes United States territories and possessions; Native American reservations, communities, and allotments; and military installments, including those located abroad.⁸⁶

The sixth and final requirement is that the immigrant must be admissible to the United States or be capable of obtaining a waiver of inadmissibility.⁸⁷ U visa applicants are required to meet the same general admissibility requirements as other visa applicants.⁸⁸ Some excluding characteristics include: being unvaccinated; being convicted of certain crimes, such as money laundering, human trafficking, and those involving controlled substances or “moral turpitude;” being suspected of applying for entry for terrorist or revolutionary activities; being likely to become a public charge; having violated immigration laws, such as illegally entering the country or falsely claiming to hold citizenship; and having been previously removed.⁸⁹ Waivers are statutorily available for many of the inadmissibility factors,⁹⁰ and there is an express exception to the illegal entrance factor for battered women.⁹¹ As long as these requirements are met, immigrant victims are eligible for the U visa, regardless of marital or immigration status. However, these requirements are not always easy to meet.

83. See Hass et al., *supra* note 72, at 8 (stating that certification can be signed even if the case is closed or if the investigation occurred years ago).

84. INSTRUCTIONS FOR SUPPLEMENT B, *supra* note 9, at 2.

85. 8 U.S.C. § 1101(a)(15)(U)(i)(IV) (2012).

86. 8 C.F.R. § 214.14(a)(4), (a)(8), (b)(4) (2018).

87. 8 U.S.C. § 1182(a).

88. See *id.*

89. *Id.* Applicants for a U visa who are in removal proceedings or have a removal order entered against them may request a dismissal without prejudice, a continuance, or a stay until the application has been evaluated. Nick Quesenberry & Tayler Summers, *Immigration CLE Materials*, AM. B. ASS'N 1, 24–25 (2011), https://www.americanbar.org/content/dam/aba/events/gpsolo/2011/10/gpsolo_2011_fallmeetingnationalsoloandsmallfirmconference/immigration_cle_materials.pdf [<https://perma.cc/R77S-5BYW>]. If the application is denied, the removal proceedings may resume and the stay on removal will be lifted. *Id.* However, if the application is approved, the removal order will be cancelled. *Id.*

90. 8 U.S.C. § 1182(a).

91. *Id.* § 1182(6)(A)(ii). There is, however, a requirement that the abuse be connected to the unlawful entry. *Id.* § 1182(6)(A)(ii)(III). There is also a battered women exception for the unlawful presence inadmissibility factor. *Id.* § 1182(9)(B)(iii)(IV).

II. DISCUSSION OF THE PROBLEMS WITH THE U VISA “HELPFULNESS” REQUIREMENT AND HOW IT DEFEATS THE PURPOSE OF THE VISA

The creation of the U visa was a significant improvement to the immigration options available to immigrant victims of domestic violence, but the unique “helpfulness” requirement limits the U visa’s effectiveness. By requiring cooperation with law enforcement, the U visa’s “helpfulness” requirement was intended to directly support the law’s first intent of strengthening law enforcement’s ability to detect, investigate, and prosecute crimes.⁹² However, its implementation has done much more to discourage this purpose than to further it. A lack of education and guidance has led to poor accessibility and disparate standards of eligibility.⁹³ And a failure to take into account historic relations between immigrant groups and law enforcement, as well as the pattern of domestic violence victims recanting their statements, undercuts the second intent of encouraging victims to report their abuse.⁹⁴ The “helpfulness” requirement has also been justified as a measure necessary to prevent immigration fraud by ensuring the immigrant was truly a crime victim.⁹⁵

A. *Lack of Knowledge Amongst Immigrants and Law Enforcement Agencies*

A lack of knowledge across the board frustrates the intent behind the U visa. Many law enforcement agencies lack knowledge concerning the U visa generally and the certification requirement specifically. Many law enforcement agencies do not receive training or information on the U visa.⁹⁶ A survey of Legal Assistance for Victims grantees⁹⁷ found that many police departments were unaware of the U visa or were misinformed about its availability and

92. See Settlage, *supra* note 2, at 1750–51.

93. *Id.* at 1773.

94. See *id.* at 1772, 1778.

95. *Id.* at 1790; Imogene Mankin, *Abuse-in(g) the System: How Accusations of U Visa Fraud and Brady Disclosures Perpetrate Further Violence Against Undocumented Victims of Domestic Abuse*, 27 BERKELEY LA RAZA L.J. 40, 51 (2017); Nanasi, *supra* note 25, at 279–80. There is no consensus on how prevalent fraud is in the U visa. See Mankin, *supra*, at 51.

96. Settlage, *supra* note 2, at 1773.

97. The Legal Assistance for Victims Grant Program was created by the VAWA 1994 to provide legal representation to victims of domestic violence. Hass et al., *supra* note 72, at 4–5. This study reviewed 226 reports from law enforcement agencies across forty-three states

requirements.⁹⁸ Departments would deny certifications because they incorrectly believed that certification could not be issued if the crime was no longer under investigation or if the case was not prosecuted.⁹⁹ Without sufficient knowledge of the availability of the U visa and the eligibility of immigrant victims, relief is effectively denied to many of the populations the visa was created to protect.¹⁰⁰

Many immigrant victims are also unaware of the availability of the U visa.¹⁰¹ Thus, many victims rely on law enforcement or advocacy groups, who may be equally unaware, to inform them of the options available to immigrant victims of crimes.¹⁰² The visa cannot encourage victims to come forward if they are not aware of its protections until after they report the crime. If those who do come forward are not informed of their options, there is no incentive to continue cooperating. Additionally, many immigrants may be unaware that domestic violence is a crime in the United States.¹⁰³ Without an understanding that legal ramifications exist, immigrant victims have little reason to contact law enforcement.¹⁰⁴ Therefore, lack of knowledge on both fronts hinders law enforcement's ability to detect and investigate crimes against immigrants.

B. *Lack of Trust Between Immigrant Communities and Law Enforcement Agencies*

Without fostering trust between law enforcement agencies and immigrant communities, the U visa will be unable to significantly improve law enforcement's ability to investigate crimes against immigrants. There are many factors that create a lack of trust between immigrant communities and law enforcement agencies, especially when it comes to victims of domestic violence. Some factors are unique to immigrant populations, but many apply to victims of

filed over a period of two years. *Id.* at 5.

98. *Id.* at 7.

99. *Id.* at 8.

100. See Settlege, *supra* note 2, at 1773–74.

101. U.S. CITIZENSHIP & IMMIGRATION SERVS., IMMIGRATION OPTIONS FOR VICTIMS OF CRIMES: INFORMATION FOR LAW ENFORCEMENT, HEALTHCARE PROVIDERS, AND OTHERS (2010), https://www.dhs.gov/xlibrary/assets/ht_uscis_immigration_options.pdf [https://perma.cc/83G4-4X5T].

102. See *id.*; Hass et al., *supra* note 72, at 7.

103. Nanasi, *supra* note 25, at 299.

104. See *id.*

domestic violence across the board. The “helpfulness” requirement does little to foster trust between victims and law enforcement, and without that trust, immigrant victims are less likely to remain cooperative over the course of the investigation and prosecution.¹⁰⁵

1. Language Barriers

One factor leading to a lack of trust between immigrant communities and law enforcement agencies is the possible language barrier. Most immigrants coming to the United States have poor English language skills, if they speak the language at all.¹⁰⁶ According to the United States Census, 35% of Asian Americans are unable to speak English well.¹⁰⁷ Similarly, only 24% of foreign-born Latinos consider themselves to have strong English language skills.¹⁰⁸ An inability to communicate with law enforcement officers prevents immigrant victims from coming forward, particularly when law enforcement agencies do not have sufficient interpretation services.¹⁰⁹ Law enforcement’s ability to detect and investigate crimes will not improve, and immigrant victims will be unlikely to continue cooperation without the ability to communicate effectively.

The inability to communicate or understand the process has more consequences than just having difficulties in reporting the abuse. Some associate poor or nonexistent English skills with dishonesty and regularly dismiss such claims.¹¹⁰ Other problems can arise if the abuser speaks English.¹¹¹ In situations where the victim does not speak English but the abuser does, law enforcement officers commonly speak only to the abuser, granting less credibility to the victim’s story.¹¹² Even if there are other English-speaking witnesses available, the victim may deny or downplay the abuse

105. See Settlage, *supra* note 2, at 1792–93.

106. See CHRISTINE P. GAMBINO ET AL., U.S. CENSUS BUREAU, ENGLISH-SPEAKING ABILITY OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2012, at 12 (2014), <https://www.census.gov/library/publications/2014/acs/acs-26.pdf> [<https://perma.cc/3XCM-S8UY>].

107. Gina Szeto, *The Asian American Domestic Violence Movement*, in DOMESTIC VIOLENCE LAW 117, 119 (Nancy K.D. Lemon ed., 5th ed. 2018). This percentage can be much higher depending on the country of origin, with 61% of Vietnamese, 57% of Korean, 55% of Chinese, and 52% of Thai respondents lacking strong English speaking skills. *Id.* Not all of those covered in the survey were foreign-born, but about 61% were. *Id.*

108. Wood, *supra* note 48, at 150–51.

109. See Settlage, *supra* note 2, at 1780; Vishnuvajjala, *supra* note 1, at 194.

110. See Szeto, *supra* note 107, at 120.

111. See Settlage, *supra* note 2, at 1780.

112. *Id.*; Vishnuvajjala, *supra* note 1, at 194.

for cultural reasons.¹¹³ Without both sides of the story, the officer may even arrest the victim instead of the abuser.¹¹⁴ Results like these may serve to foster further distrust of law enforcement, preventing immigrant victims from fully cooperating with law enforcement efforts.

2. Cultural Considerations

Another factor contributing to a lack of trust is the victim's cultural background. An immigrant's cultural background can affect a victim's willingness to come forward and report the abuse. In many cultures, domestic violence is still seen as a private issue, and it is considered shameful for domestic violence issues to come to light in the community.¹¹⁵ For immigrant victims who try to report the abuse, they may distrust interpreters or others out of fear that their private matters will be exposed to the community.¹¹⁶ Even if they are willing to come forward, a lack of cultural understanding can prevent immigrant victims from being taken seriously.¹¹⁷ For example, many Asian cultures consider it rude to make eye contact, even while speaking with another person, which can be taken as a sign of dishonesty when they attempt to report the abuse.¹¹⁸ Additionally, many immigrant victims may mistrust law enforcement officers based on their experiences with law enforcement in their countries of origin.¹¹⁹ A requirement to cooperate does little to overcome these considerations, leaving immigrant victims just as unlikely to report crimes as without the requirement.

113. Vishnuvajjala, *supra* note 1, at 194. See *infra* Part II.B.2 for a discussion of cultural reasons to deny or downplay domestic violence.

114. Vishnuvajjala, *supra* note 1, at 194–95.

115. See, e.g., Michelle DeCasas, *Protecting Hispanic Women: The Inadequacy of Domestic Violence Policy*, 24 CHICANO-LATINO L. REV. 56, 71 (2003) (stating that Latinas face the risk of bringing shame and embarrassment to their whole family if they confront their husband's abusive behavior); Hass et al., *supra* note 72, at 12 (explaining that reporting the abuse could cause the victim to be ostracized from her own community); Vishnuvajjala, *supra* note 1, at 191–92 (discussing the idea that Asian women would be bringing shame to their families by reporting the abuse or leaving their abusers).

116. Szeto, *supra* note 107, at 120.

117. See Abrams, *supra* note 71, at 32.

118. Szeto, *supra* note 107, at 120.

119. Vishnuvajjala, *supra* note 1, at 196.

3. Investigative Practices of Law Enforcement Officers

For immigrant victims who do contact law enforcement officers, the experience may become another factor leading to additional distrust between the victim and the officers. When law enforcement officers respond to a domestic violence call, they may not believe what the victim says, or may only speak to the abuser.¹²⁰ This can lead to police reports filed against the victim or even to the arrest of the victim.¹²¹ Many times, law enforcement officers fail to collect evidence, or collect inadequate evidence at the scene.¹²² Without this evidence, immigrant victims may have a difficult time meeting the requirements of the U visa since they are expected to submit evidence that they have been the victim of a qualifying crime, evidence that they have suffered physical or mental abuse, and evidence that they possess information about the crime.¹²³ Furthermore, law enforcement officers may be reluctant to make a police report.¹²⁴ Some officers have attempted to convince immigrant victims not to press charges or file a report, and some have filed incorrect or incomplete police reports.¹²⁵ Others have even mischaracterized the criminal activity, leading to lesser charges not serious enough to qualify for the U visa.¹²⁶ Finally, law enforcement officers may give warnings to abusers instead of making an arrest, or they may arrest both parties.¹²⁷ These dual arrests generally occur when law enforcement officers are not able to determine what happened but are compelled to make an arrest.¹²⁸ Arrests of the victim can lead to her deportation instead of her protection.¹²⁹ Such negative interactions with law enforcement are likely to discourage reporting and cooperation.

120. Hass et al., *supra* note 72, at 7.

121. *Id.*

122. *Id.*

123. U.S. CITIZENSHIP & IMMIGRATION SERVS., OMB No. 1615-0104, PETITION FOR U NONIMMIGRANT STATUS 2 (2017), <https://www.uscis.gov/sites/default/files/files/form/i-918.pdf> [<https://perma.cc/PWT3-KWHN>].

124. *See* Hass et al., *supra* note 72, at 7.

125. *Id.* A 2013 study found that in cases where immigrant victims of domestic violence called the police, although 83.4% of these calls involved visible injuries on the victims or other physical evidence, police reports were only taken in 10.4% of cases. *Id.* Officers may be reluctant to file a report if they do not believe the investigation or prosecution would be fruitful. Robbins, *supra* note 12, at 221.

126. Hass et al., *supra* note 72, at 7.

127. *Id.*

128. Nanasi, *supra* note 25, at 307.

129. *Id.* at 307–08.

C. *Certification Is Left to the Discretion of Law Enforcement Agencies*

The discretionary nature of the certification process prevents the U visa from fulfilling its intended purposes. While the USCIS has created Form I-918 Supplement B to standardize the certification process, whether and when to issue certification is left to the discretion of individual law enforcement agencies.¹³⁰ “Helpfulness” is defined in the Supplement B instructions as “assisting law enforcement authorities in the investigation or prosecution of the qualifying criminal activity.”¹³¹ The law enforcement agency has the discretion to determine what is considered helpful on a case-by-case basis and must describe the victim’s cooperation on the Supplement B.¹³² There is an additional level of discretion when it comes to “helpfulness,” because certification by law enforcement does not alone satisfy the requirement.¹³³ While given significant weight, the USCIS makes the final determination of whether the “helpfulness” requirement has been met based on all the evidence submitted.¹³⁴

Law enforcement agencies are not obligated to provide certification, nor can they be compelled to do so.¹³⁵ In fact, many have policies against signing certifications regardless of the level of cooperation provided by the victim.¹³⁶ While others may not have policies against certification, they do not have anyone properly designated to sign it, which equates to the same thing.¹³⁷ Decisions to deny certification, no matter the reason, are not subject to review.¹³⁸ If

130. INSTRUCTIONS FOR SUPPLEMENT B, *supra* note 9, at 1.

131. *Id.* at 4.

132. *Id.* at 1, 4; U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 3.

133. *See* INSTRUCTIONS FOR SUPPLEMENT B, *supra* note 9, at 4.

134. *Id.* Some law enforcement agencies make it difficult for victims to obtain the evidence needed to supplement their application, potentially making a “helpfulness” finding less likely. Hass et al., *supra* note 72, at 78.

135. U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 3; Stacey Ivie & Natalie Nanasi, *The U Visa: An Effective Resource for Law Enforcement*, FBI L. ENFORCEMENT BULL. (FBI), Oct. 2009, at 10, 15.

136. Hass et al., *supra* note 72, at 7. A study by University of North Carolina School of Law found that 165 law enforcement agencies, across thirty-five states, have such policies. Nanasi, *supra* note 25, at 305. Such policies are likely the result of the misconception that certification directly grants legal status to immigrants and some agencies do not want to grant legal status. *Id.*

137. Hass et al., *supra* note 72, at 7.

138. Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 396 (2010).

victims are aware that certification may not be possible, they have no reason to continue cooperating.¹³⁹

D. “Helpfulness” Is an Ongoing Requirement and Certification Can Be Withdrawn

As a further hindrance to meeting the U visa’s stated purposes, the “helpfulness” requirement has been interpreted as being ongoing.¹⁴⁰ “Petitioner victims who, after initiating cooperation, refuse to provide continuing assistance when reasonably requested, will not meet the helpfulness requirement.”¹⁴¹ The ongoing nature of the requirement could make the bar exceedingly high depending on the discretion of the particular law enforcement agency. Victims unsure about cooperating or facing the threat of retaliation by their abusers could struggle to meet such a long-term requirement. Because the requirement is ongoing, the certifying law enforcement agency has the power to withdraw the certification if the victim stops cooperating.¹⁴² Certification can even be withdrawn after a victim’s application has been approved, revoking the visa.¹⁴³ While withdrawal, like the original granting, is left to the discretion of the law enforcement agency,¹⁴⁴ the USCIS encourages agencies to file for withdrawal upon noncooperation.¹⁴⁵ The possibility of withdrawal may incentivize continued cooperation, but it fails to take into account that continued cooperation may place victims at increased risk for violence.¹⁴⁶ By not addressing these considerations, the “helpfulness” requirement undercuts the effectiveness of the U visa and hinders its ability to satisfy its intended purposes.

139. Settlage, *supra* note 2, at 1792–93.

140. 8 C.F.R. § 214.14(b)(3) (2018); INSTRUCTIONS FOR SUPPLEMENT B, *supra* note 9, at 4.

141. INSTRUCTIONS FOR SUPPLEMENT B, *supra* note 9, at 4.

142. U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 3–4.

143. Quesenberry & Summers, *supra* note 89, at 26–27 & n.91 (citing 8 C.F.R. § 214.14(h)).

144. INSTRUCTIONS FOR SUPPLEMENT B, *supra* note 9, at 5; Ivie & Nanasi, *supra* note 135, at 14.

145. *See* U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 4.

146. Settlage, *supra* note 2, at 1784.

III. HISTORY OF NO-DROP PROSECUTION POLICIES AND THEIR INTERSECTION WITH THE U VISA “HELPLESSNESS” REQUIREMENT

Dissatisfied with the prosecution rates of domestic violence cases, a number of jurisdictions have introduced no-drop prosecution policies. These policies limit the victim’s ability to withdraw charges and the prosecutor’s ability to drop cases.¹⁴⁷ Particularly, prosecutors are prevented from dropping cases just because the victim becomes uncooperative.¹⁴⁸ While this may increase prosecution rates, it can undermine the goals of the U visa and lead to the deportation or economic instability of the victim.

A. *History and Purpose Behind No-Drop Prosecution Policies*

No-drop prosecution policies, intended to increase prosecution rates, in combination with the U visa “helpfulness” requirement can nullify the protections promised by both programs. Historically, prosecution rates of domestic violence were quite low as prosecutors often chose not to pursue the case.¹⁴⁹ While there were many reasons why domestic violence cases were not often prosecuted, perhaps the most common was the unwillingness of victims to testify against their abusers.¹⁵⁰ Victims tend to become uncooperative for a variety of reasons: they may feel responsible for any action taken against their abuser or encounter victim-blaming within the legal system;¹⁵¹ they may give in to their abusers’ threats;¹⁵² and, as may often be the case for immigrant victims, they may be risking devastating economic repercussions if they have no independent source of income aside from their abusers.¹⁵³ Expectations that the victim would eventually become uncooperative led to prosecutors conveying a lack of commitment to the case and a lack of sensitivity to the victim, starting a vicious cycle. Prosecutors may have conveyed blame or disbelief while questioning

147. Robbins, *supra* note 12, at 216.

148. *Id.*

149. See Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 10 (2009).

150. See *id.* Victims would frequently recant or request that cases be dropped, or simply fail to appear in court. Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 857 (1994).

151. Corsilles, *supra* note 150, at 870–71; Robbins, *supra* note 12, at 214.

152. Corsilles, *supra* note 150, at 870, 872–73.

153. *Id.* at 871; Robbins, *supra* note 12, at 214.

victims or trivialized the violence and abuse, causing victims to further distrust the legal system.¹⁵⁴ Often, the victim was the only witness and her testimony was the only evidence, so without her cooperation there was not much of a case left.¹⁵⁵

The evidentiary issues raised by uncooperative victims led to the advent of victimless prosecutions. Instead of relying solely on the testimony of the victim, prosecutors presented physical evidence, such as 911 tapes, police reports, photographs, and medical records.¹⁵⁶ However, despite these changes, prosecution rates remained low because prosecutors continued to dismiss cases instead of taking them to court.¹⁵⁷ In order to raise prosecution rates, jurisdictions started implementing no-drop prosecution policies, which prevent victims from withdrawing charges and prosecutors from dropping cases without a clear lack of evidence.¹⁵⁸

In jurisdictions with no-drop prosecution policies, once formal charges have been filed, the case will be tried as long as there is sufficient evidence. After charges are filed, victims are unable to request that the case be dropped.¹⁵⁹ Essentially, the state replaces the victim as the party to the case.¹⁶⁰ No-drop prosecution policies also prevent prosecutors from dropping the case without a “clear lack of evidence.”¹⁶¹ In these jurisdictions, victim noncooperation is no longer considered a valid justification for dropping a case.¹⁶²

154. Corsilles, *supra* note 150, at 867–69.

155. *See* Goodmark, *supra* note 149, at 10.

156. *Id.* at 11. The reliance on physical evidence had the added benefit of providing a means of impeaching victims who testified in favor of their abusers. *Id.*

157. *See id.*

158. Robbins, *supra* note 12, at 216. Many other purposes have been touted for such policies, such as conveying a strong state interest in combating domestic violence, deterring the abuser’s behavior, and promoting victim safety through removing the threat and ensuring repeat offenders are recognized. Corsilles, *supra* note 150, at 874; Goodmark, *supra* note 149, at 12; Cathleen A. Booth, Note, *No-Drop Policies: Effective Legislation or Protectionist Attitude?*, 30 U. TOL. L. REV. 621, 634–35 (1999); Robbins, *supra* note 12, at 216. It has conversely been argued that no-drop policies spread already thin prosecutorial resources even thinner and undercut victim empowerment. Corsilles, *supra* note 150, at 857.

159. Robbins, *supra* note 12, at 216.

160. Corsilles, *supra* note 150, at 858.

161. Robbins, *supra* note 12, at 216. Some policies do allow cases to be dropped in the interest of victim safety. *Id.*

162. *Id.*

These policies have had some promising effects. Without no-drop policies, 50% to 80% of cases were dropped.¹⁶³ With no-drop policies, that percentage decreases from 10% to 34%.¹⁶⁴ There is also some indication that no-drop policies encourage victims' cooperation; fewer victims ask for charges to be dismissed and full cooperation is seen in 65% to 95% of cases.¹⁶⁵ Additionally, upon realizing that the victim does not have control over the case and that the charges will not be dismissed, some abusers stop harassing their victims and some even plead guilty.¹⁶⁶

B. *Intersection Between No-Drop Prosecution Policies and the U Visa "Helpfulness" Requirement*

Despite the promising effects of no-drop prosecution policies, when they are combined with U visa applications, they can have unintended consequences. The "helpfulness" requirement of the U visa alone struggles to meet the purposes behind the law. Immigrant victims meant to be protected by the U visa may have that protection denied if they are not deemed helpful enough by law enforcement.¹⁶⁷ In turn, while law enforcement agencies may benefit from the increased cooperation, the requirement may also deter immigrant victims from reporting their abuse.¹⁶⁸ However, in jurisdictions with no-drop prosecution policies, these issues can be exacerbated. The cooperation-based standard of the U visa "helpfulness" requirement and the evidence-based standard of no-drop prosecution policies can be incompatible and lead to negative consequences for immigrant victims.

1. *The Problematic Combination of the U Visa "Helpfulness" Requirement and No-Drop Prosecution Policies*

The combination of no-drop prosecution policies and the U visa "helpfulness" requirement can end up harming the victim more than helping her. If an immigrant victim relies on her abuser for her immigration status, the threat of deportation can be another

163. Corsilles, *supra* note 150, at 857.

164. *Id.*

165. *Id.* at 873–74.

166. *Id.* at 874.

167. INSTRUCTIONS FOR SUPPLEMENT B, *supra* note 9, at 1; U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 3.

168. Settlage, *supra* note 2, at 1792–93.

means of control and another reason not to seek help.¹⁶⁹ If the victim is not eligible for a VAWA self-petition, likely her only option is to apply for a U visa. Applicants for the U visa must submit a law enforcement certification, stating that they have been helpful or are expected to be helpful in the future.¹⁷⁰ If immigrant victims withdraw charges, or otherwise stop cooperating with the investigation or prosecution, they may lose their certification and, therefore, their chance to obtain a U visa.¹⁷¹

In jurisdictions with no-drop prosecution policies, an immigrant victim's failure to cooperate may end her eligibility for the U visa, but may not end the prosecution of her case.¹⁷² If enough evidence exists to continue prosecution without the victim's testimony, the case will go forward.¹⁷³ At this point, if the immigrant victim continues to remain unhelpful, she will not be able to qualify for a U visa and will be left without another path to gain legal immigration status on her own standing.¹⁷⁴ If the prosecution results in a conviction and the deportation of her abuser, the immigrant victim would be left in a precarious situation. Without her abuser's immigration status to establish her own, the victim may find herself being deported as well.¹⁷⁵ Even if the victim is not deported, if she relied on her abuser for her economic wellbeing, she may be left unable to support herself and her family.¹⁷⁶

2. Consequences of Prosecution Without the Help of the Immigrant Victim

When prosecution of the abuser continues and the immigrant victim is denied access to the U visa, the goals of the U visa are further defeated. The first goal of the U visa is to strengthen the

169. HASS ET AL., *supra* note 27, at 2–4.

170. U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 2.

171. *See id.* at 3–4, 12.

172. Corsilles, *supra* note 150, at 858.

173. Robbins, *supra* note 12, at 216.

174. U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 3–4.

175. Schuneman, *supra* note 6, at 468.

176. The U visa includes work authorization. U VISA ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 5. Without work authorization, an immigrant may be deported and become ineligible for a visa or green card. 7 U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MANUAL ch. 6 (2019), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter6.html> [https://perma.cc/3Z4Q-459M].

ability of law enforcement to investigate incidents of domestic violence regardless of the victim's immigration status.¹⁷⁷ Any immigrant victim unsure if she would be willing to follow through with prosecution will be hesitant to contact law enforcement since prosecution could continue without her and result in her deportation.¹⁷⁸

The second goal of the U visa is to encourage immigrant victims to report their abuse by protecting them from deportation.¹⁷⁹ Immigrant victims are already generally hesitant to come forward out of fear of being deported,¹⁸⁰ and requiring ongoing cooperation with law enforcement in order to prevent deportation may further discourage them.¹⁸¹ The risk of deportation is increased if no-drop policies permit their case to continue without their cooperation, creating a further disincentive to come forward.¹⁸² With such a risk for deportation, it is unlikely that immigrant victims would be encouraged to report their abuse to law enforcement. By working against the stated goals of the U visa and presenting the risk of deportation, no-drop prosecution policies are incompatible with the U visa requirements in their current state.

IV. PROPOSED CHANGES TO THE U VISA "HELPLESSNESS" REQUIREMENT

Currently, the "helpfulness" requirement works against the two goals set out by the U visa, particularly when paired with no-drop prosecution policies.¹⁸³ This is primarily because the requirements for a "helpfulness" certification and a no-drop policy do not line up. The law enforcement certification is based on victim cooperation, but no-drop policies are based on available evidence.¹⁸⁴ Particularly given the relationship many immigrant groups have with law

177. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464, 1533-34 (codified at 8 U.S.C. § 1101).

178. See Darlene Gavron Stevens, *Victim Testimony Not Needed in Domestic Violence*, CHI. TRIB. (Sept. 23, 1996), <https://www.chicagotribune.com/news/ct-xpm-1996-09-23-9609230139-story.html> [<https://perma.cc/X8UB-6JFF>].

179. See Victims of Trafficking and Violence Protection Act § 1513(a)(2)(B) (codified at 8 U.S.C. § 1101).

180. See Nanasi, *supra* note 25, at 302.

181. See Settlage, *supra* note 2, at 1792.

182. See Stevens, *supra* note 178.

183. See *supra* Part III.B.1.

184. Compare 8 C.F.R. § 214.14(b)(3) (2018) (explaining that one of the requirements to be eligible for the U visa is victim "helpfulness"), with Robbins, *supra* note 12, at 216 (explaining that no-drop policies do not require "helpfulness" because the prosecution will use

enforcement,¹⁸⁵ an evidence-based standard may be much easier to meet. Hence, a simple move from a cooperation-based to an evidence-based requirement for certification should better support the goals of the U visa, while still working to prevent immigration fraud.¹⁸⁶

An evidence-based standard would better “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence . . . committed against aliens.”¹⁸⁷ Detecting and investigating a crime is primarily concerned with evidence collection.¹⁸⁸ While, traditionally, the only evidence offered in domestic violence trials was the victim’s testimony,¹⁸⁹ there is a plethora of other evidence that can be collected and offered.¹⁹⁰ Photographs taken at the scene, 911 tapes, police reports,¹⁹¹ medical records,¹⁹² excited utterances,¹⁹³ and witness statements are all potentially effective forms of evidence¹⁹⁴ that can be gathered with little or no cooperation from the victim. Some cooperation from the victim would be necessary to collect additional photographs of injuries a few days after the incident.¹⁹⁵ Prosecutors and police officers in no-drop jurisdictions have learned how to proceed relying

other evidence when the victim refuses to cooperate).

185. Nanasi, *supra* note 25, at 297; Vishnuvajjala, *supra* note 1, at 188.

186. This standard may not work for other qualifying crimes, such as witness tampering, that may not have a lot of physical evidence, but can still be adopted for petitions based on domestic violence. See U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 3.

187. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464, 1533 (codified at 8 U.S.C. § 1101).

188. See *Overview*, UN WOMEN (Dec. 30, 2011), <http://www.endvawnow.org/en/articles/1135-overview.html> [<https://perma.cc/M63C-XVW8>].

189. Goodmark, *supra* note 149, at 10.

190. See *id.* at 11 (identifying police reports, witness statements, medical records, 911 tapes, and photographs taken at the scene as useful forms of evidence in domestic violence trials).

191. *Id.*

192. See *FAQ on Government Access to Medical Records*, ACLU, <https://www.aclu.org/other/faq-government-access-medical-records> [<https://perma.cc/286W-ED9L>] (last visited Apr. 1, 2019).

193. The excited utterance hearsay exception can be a helpful way to include statements made by the victim or abuser at the scene without calling either one to the stand. LAURA HODGES, CRIMINAL JUSTICE INST., DOMESTIC VIOLENCE AND VICTIMLESS PROSECUTION 6 (2008), <https://www.cji.edu/site/assets/files/1921/domesticviolenceandvictimlessprosecution.pdf> [<https://perma.cc/MA78-W8QV>].

194. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1904 (1996).

195. See *id.* at 1902.

solely on this sort of evidence.¹⁹⁶ In fact, statistics suggest that conviction rates do not suffer from evidence-only trials.¹⁹⁷

An evidence-based standard would also better “facilitate the reporting of crimes to law enforcement officials by . . . abused aliens.”¹⁹⁸ Low reporting rates among immigrant victims are generally due to poor relations between immigrant communities and law enforcement officers.¹⁹⁹ Forcing immigrant victims to cooperate with law enforcement officers in order to apply for a U visa does take this into account.²⁰⁰ However, with an evidence-based requirement, long-term cooperation often would not be required. If enough evidence can be collected at the time of reporting, victims can be as passive or as cooperative moving forward as they feel is necessary. If the immigrant victim feels she cannot trust the law enforcement officers, she may only ever have the single interaction, instead of being forced to continue cooperating long-term. The evidence collected with or without the victim’s cooperation can be used to achieve a conviction against the abuser,²⁰¹ so it should be enough to certify that the immigrant was in fact the victim of domestic abuse. This is not to say that a conviction, or even prosecution, would be required for certification. Instead, all that would be required would be sufficient evidence to move forward with the case absent any complicating factors.²⁰² Additionally, immigrant victims would likely have less fear of deportation because the burden to qualify for the U visa would be lower. After reporting the crime, they could cease cooperation and not risk their eligibility.²⁰³ Without the fear of deportation and with limited interactions with law enforcement, immigrant victims may be more likely to report their abuse.²⁰⁴

196. See Goodmark, *supra* note 149, at 11.

197. Corsilles, *supra* note 150, at 877 n.176 (finding conviction rates of 88%).

198. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(B), 114 Stat. 1464, 1534 (codified at 8 U.S.C. § 1101).

199. Nanasi, *supra* note 25, at 297.

200. See *supra* Part II.B.

201. Goodmark, *supra* note 149, at 11.

202. Such factors could include an inability to identify or locate the abuser, or if the abuser has already been deported. U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 4.

203. It is possible that retaliatory violence may not be as much of an issue since, as found with no-drop prosecution policies, abusers who recognize that their victims are not participating in the case may be less likely to continue to harass them. Corsilles, *supra* note 150, at 874.

204. See Settlege, *supra* note 2, at 1776.

An additional concern often raised about the U visa is the potential for fraud.²⁰⁵ An evidence-based certification requirement would continue to provide protections against cases of fraud. According to Imogene Mankin, “[a]lthough it was not explicitly created as a fraud prevention safeguard, the certification serves to discourage fraudulent claims by imposing an additional burden of production on the applicant beyond the statutory requirements.”²⁰⁶ Removing the cooperation requirement in favor of an evidence-based certification requirement, however, would not affect the risk of fraud. The primary concern of the U visa is that a “bona fide crime” has occurred.²⁰⁷ This can be done by cooperation, but also with the collection of relevant physical evidence.²⁰⁸ The more evidence is collected, the more apparent fraud should become. Additionally, any evidence collected should be evaluated for authenticity.²⁰⁹ If sufficient, authentic evidence exists that a qualifying crime has taken place, USCIS should be satisfied that the chance for fraud is low. As a further guarantee against fraud, a finding of fraud will result in revocation of the visa.²¹⁰

CONCLUSION

The U visa was created along with the VAWA 2000 to cover the gaps left by the VAWA self-petition.²¹¹ It was also meant to strengthen the ability of law enforcement agencies to investigate and prosecute crimes against immigrant victims and to encourage immigrant victims to report crimes committed against them.²¹² However, the “helpfulness” requirement, which is unique to the U visa,²¹³ does not further these goals.²¹⁴ Jurisdictions with no-drop prosecution policies suffer from the additional result that immigrant victims who are not certified as helpful may end up being deported along with their abusers.²¹⁵ Instead, the goals behind the

205. *Id.* at 1790.

206. Mankin, *supra* note 95, at 51.

207. *Id.* at 49.

208. Certification uses an “any credible evidence standard.” *Id.* at 51 (emphasis omitted).

209. *See* U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 68, at 14–15.

210. Quesenberry & Summers, *supra* note 89, at 26–27.

211. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 1502(a)(3), 114 Stat. 1464.

212. *Id.* § 1513(a)(2)(A)–(B).

213. Settlage, *supra* note 2, at 1768.

214. *See supra* Part II.

215. *See* Schuneman, *supra* note 6, at 468.

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U visa would be better served by adopting the evidence-based standard of no-drop prosecution policies for certification.

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