The Political Geography of the U Visa: Eligibility as a Matter of Locale

Authors
UNC School of Law Immigration/Human Rights Policy Clinic
Jean Abreu
Sidney Fowler
Nina Holtsberry
Ashley Klein
Kevin Schroeder
Melanie Stratton Lopez
Deborah M. Weissman - Faculty Advisor

ASISTA
Cecelia Friedman Levin
Gail Pendleton

http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf

The Political Geography of the U Visa: Eligibility as a Matter of Locale

Authors
UNC School of Law Immigration/Human Rights Policy Clinic
Jean Abreu
Sidney Fowler
Nina Holtsberry
Ashley Klein
Kevin Schroeder
Melanie Stratton Lopez
Deborah M. Weissman - Faculty Advisor

ASISTA
Cecelia Friedman Levin
Gail Pen

http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf

Acknowledgements

We would like to thank Gail Pendleton and Cecelia Friedman Levin (ASISTA) for their collaboration and support of this project. We would like to acknowledge Amber Raffeet for her research assistance. Thanks to Helen Jugovic for her help with the dissemination of th I/HRP survey. We are grateful to the many advocates around the country who took the time to complete the I/HRP survey and for their persistent efforts to serve immigrant crime victims. Thanks to Melissa Cobb and Jesse Ramos who provided ongoing efforts to support this project. A special note of gratitude to Debra Edge who assisted with the completion of this project.

Table of Contents

EXECUTIVE SUMMARY……1

INTRODUCTION……7

SECTION ONE – U VISA CERTIFICATION DATA

I. Existing Data…….……12
A. National and Local Data Compilation……..13
1. National Immigrant Women's Advocacy Project Data……13
2. Data from Collaborative Advocacy Spreadsheets……14
B. ASISTA Survey Data 2012……..17
1. Declarations and Affidavits……....17
2. Agency Correspondence……20

II. UNC I/HRP/ASISTA 2013 Survey and Data……...21
A. Survey Development……...21
1. Survey Rationale and Methodology……...21
2. Constructing Questions……..23
B. Survey Findings……...25
1. Analysis by Certification Policy Categories……..25
2. Analysis by Narrative Data: Best Practices/Problem Practices…….32
3. Analysis by Narrative Data: Problem Practices……47
4. Narrative Reports: Problem Practices--Agencies that Lack Clearly Established Certification Procedures ……61
5. Conclusion: Problem Practices……...63
C. UNC I/HRP/ASISTA 2013 Survey and Data Findings Conclusion……...64

SECTION TWO – LEGAL POLICY IMPLICATIONS

INTRODUCTION……..67

I. Abuse of Discretion…….....68
A. Statutory and Regulatory Language Defining the Parameters of Discretion..68
B. Federal Court Rulings on the Exercise of Discretion for I-918B certifications ……72
C. Department of Homeland Security Guidance……..76
II. Federal Preemption and Uniformity…….....77
A. Preemption……...77
B. Uniformity……80
III. Equal Protection and Title VI……...83
A. The Equal Protection Clause and U visa Certification Denials……...84

1. Race and National Origin Discrimination……..86
2. Immigration Status Discrimination……92
3. "Geography Roulette" and Equal Protection: Creating a Sub-class of Undocumented Immigrants……96
4. Blanket Denial Policies and Equal Protection Claims……...99
B. Claims Under Title VI.……102
1. The law under Title VI…….....102
2. Relevance of Title VI Claims to U visa applicants……..103
IV. Agency and Regulatory Problems: Some Certification Practices are *Ultra Vires*.…107
A. The I-918B Form……108
B. Update Guidance to Certifying Agencies……...111
V. State and Local Governments Oversight……....111
A. Power of local government action……..111
1. Local funding for Law Enforcement Agencies……111
2. Hiring and Firing……..112
3. Local government directives and guidance……..114
B. State government action……115
1. State funding for LEAs, sheriffs' offices, DA's offices……..115
2. Hiring and Firing……..116
VI. The Federal Statutory Scheme…….117

SECTION THREE – RECOMMENDATIONS AND ADVOCACY STRATEGIES

I. Congressional Action……..119
A. Amending the INA…….....120
B. Encouraging Best Practices through Congressional and Federal Agency Action……122
II. Administrative and Regulatory Action……...124
A. Agency Guidance Reform……....124
B. Revising the I-918B Form……....125
III. Litigation Strategies…….....126
A. The Right to a Remedy: Private Right of Action…….....126
B. Standing and Alleged Injury…….....128
C. Possible Litigation Claims……129
1. Claims against Certifying Agencies……129
2. Claims Under the Equal Protection Clause and Title VI……133
3. Remedial Action via State and Local Government Action…….135
4. Expanding the Realm of Certifiers……..142
5. Enhancing Individual Advocacy Strategies ……...143

CONCLUSION…….145

SEE APPENDICES (ADD URLS)

EXECUTIVE SUMMARY

In 2000, Congress enacted the Battered Immigrant Women Protection Act (BIWPA) as part of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA)[1] in response to concerns about the particular ways in which immigrants were vulnerable to crime victimization. Congress sought to facilitate the reporting of crimes by immigrants, to improve their relationships with law enforcement agencies, and enable them to participate fully in the investigation and prosecution of crimes without fear of deportation. Toward this end, the BIWPA/VTVPA created a new nonimmigrant visa classification: the U visa. This immigration remedy provided immigrant victims of crime the possibility of acquiring legal status if they met the statutory requirements. Congressional intent was explicit:

> 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 ... committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interest of the United States.[2]

The statute sets forth the requirements for successful U visa applications. Eligible immigrants are required to prove (1) that they were victims of a qualifying crime that occurred in the United States or its territories; (2) that they possess information about the crime; (3) that they have been or will be helpful in the investigation; and (4) that they suffered substantially as a result of the crime.[3]

---

[1] 8 USC §§ 1501-1513, 114 Stat. at 1518-37 (codified in scattered sections of 8 U.S.C., 18 U.S.C., 20 U.S.C., 22 U.S.C., 27 U.S.C., 28 U.S.C., 42 U.S.C., and 44 U.S.C.).
[2] Victims of Trafficking and Violence Protection Act § 1513(a)(2)(A).
[3] 8 U.S.C. § 1101(a)(15)(U)(i); Alien Victims of Certain Qualifying Criminal Activity,8 C.F.R. § 214.14(b). Only certain crimes enumerated in the statute qualify. 8 U.S.C. § 1101(a)(15)(U)(iii).

Congress vested the authority to decide whether a petitioner is eligible for U visa status to the U.S. Citizenship and Immigration Services (USCIS). A mandatory requirement of the U visa application is a signed certification by a law enforcement agency indicating that the victim was helpful in the investigation or prosecution of a qualifying crime. The law enforcement certification is commonly known by its USCIS form designation, "I-918B" or "Supplement B." This report primarily uses the phrase "I-918B" to refer to the law enforcement certification form requirement of the U visa application.

The U visa holds out promise to those who have suffered as crime victims and at the same time, promotes improved community relations with law enforcement and other investigatory agencies. Despite the salutary purposes of the statute, immigrant and civil rights advocates have observed that there is no uniformity among U visa certification processes, as the decision whether to sign a U visa certification is within discretion of that law enforcement agency. For this reason, certification practices vary among different law enforcement agencies and in different jurisdictions. As a result, some immigrant victims who meet the statutory elements are successful in obtaining the signed I-918B certification form and, ultimately, the U visa. Other immigrant victims with virtually identical fact patterns are often denied certification by agencies whose policies run contrary to the Congressional intent in establishing the U visa program. These applicants, thus, have no chance to obtain consideration of their U visa application by USCIS as they are unable to meet the requirement of submitting an I-918B certification.

This policy brief examines the specific nature of the problem. It reviews national, state and local data collected and shared by various immigrant advocacy organizations

and individuals, and newly obtained information gathered through an online national survey for purposes of gaining additional insight about the problem of U visa certifications.

SECTION ONE: This section examines existing data and recently collected survey responses obtained from a survey conducted by the UNC Immigration/Human Rights Policy clinic in consultation and cooperation with ASISTA Immigration Assistance, a nonprofit organization that provides assistance for advocates and attorneys facing complex legal problems in advocating for immigrant survivors of domestic violence and sexual assault. Among the key findings, the data shows that:

- Certifying agencies with on-going collaborative relationships with victim advocate agencies were more likely to create U visa certification policies in line with statutory, regulatory, and DHS/USCIS guidance.

- Throughout the United States, certification policies were found to be inconsistent, non-uniform, and at variance with the purpose of the U visa statute, regulations, and DHS/USCIS guidance.

    - Throughout the United States, many certifying agencies refuse to certify or sign I-918B certifications under all and any circumstances. These agencies have "flat out" or "blanket" refusal policies.

    - Throughout the United States, many certifying agencies arbitrarily refuse to certify or sign I-918B certifications under particular circumstances and/or for particular applicants that have no relation to the statutory, regulatory, or DHS/USCIS guidance.

    - Throughout the United States, many certifying agencies consistently certify or sign I-918B certifications when the applicants are victims of one of the statutorily enumerated crimes and demonstrate "helpfulness" per statutory, regulatory, or DHS/USCIS guidance.

The data pertaining to U visa certification practices demonstrates that law enforcement agency policies may be firmly established or else *ad hoc* and constantly evolving. The inconsistent policies and procedures contribute to the problematic phenomenon of

"geographical roulette" for U visa applicants, allowing agency and crime location to determine the remedy's availability rather than the actual merits of an applicant's petition.

SECTION TWO: This section identifies the legal policy considerations, and demonstrates the need for corrective action and reform at the federal level and state level. The data on U visa certification practices reveals the following legal concerns:

- Certifying agencies abuse their discretion by implementing very limited certification policies or by refusing to participate in the U visa process at all.
- Inconsistent certification practices may raise federal preemption issues and thus conflict with Supreme Court rulings requiring national uniformity in immigration law.
- Some agencies refuse to certify in ways that may violate the Equal Protection Clause of the U.S. Constitution and Title VI.
- DHS has not sufficiently guided certification practices by failing to regulate or otherwise remediate the *ultra vires* practices committed by certifying agencies.
- U visa certification practices raise questions about the obligations local governments may have to oversee certifying agencies to assure that they act in compliance with the Congressional intent behind the U visa statute.

SECTION THREE: This section sets forth legal recommendations and advocacy strategies to respond to the problems identified and analyzed in **SECTIONS ONE AND TWO** above:

- Congressional action: The most effective way to remedy the problem of U visa certification "geographic roulette" is to change the legislation by amending the Immigration and Nationality Act that invites the problem in the first place or through appropriations legislation.
- Administrative and Regulatory Action:
    - Advocates should petition DHS to revise its regulations, and otherwise seek judicial remedy toward this end.
    - DHS should also issue new and/or revised policy memoranda and guidance to give clarity and greater definition regarding the scope of authority of certifying agencies and the parameters of acceptable practice.
    - Administrative action must also include revising the I-918B form.

- Litigation Strategies: The U visa statute may create an implied private right of action and U visa applicants who are denied certification and thus denied their *right to apply* for a U visa may have standing and be able to show they have suffered sufficient injury to make a claim. Such claims may be seeking remedies as against:

    - Certifying agencies: A U visa applicant denied the right to apply for a U visa because of a certifying agency's improper certification process or policy can seek a court order directing the certifying agency to review the survivor's I-918B certification request within the proper statutory and regulatory guidelines.
    - Certifying state agencies: State Administrative Procedure Act (APA) remedies: A U visa applicant denied the right to apply for a U visa because of a *state agency's* improper certification process or policy can seek a judicial review under the APA, and may allege arbitrary and capricious conduct or abuse of discretion.
    - Certifying agencies: A U visa applicant denied the right to apply for a U visa bring suits to under the Equal Protection Clause when they can demonstrate intentional discrimination, or may file administrative complaints with the Department of Justice where the discrimination has a disparate impact on certain groups of immigrants.
    - Certifying agencies: A U visa applicant denied the right to apply for a U visa may pursue remedies under Title VI when the refusal to certify is based on national origin, including a failure to provide linguistic access in the U visa process, or race.

- State Action and local action:
    - U visa advocates can seek statewide resolutions and/or Attorney General advisory opinions.
    - Advocates can support local government action including law enforcement training, public demands regarding the hiring and firing of agency personnel, local ordinances and resolutions that affect local budgeting issues.
    - The advocate community should continue to foster collaborative relationships and provide law enforcement with the necessary support and training to create successful U visa certification policies and procedures.

- Other Advocacy recommendations: U visa advocates can continue to identify potential certifying agencies, including domestic violence abuser treatment programs that are obligated to report to the court on the progress of perpetrators, guardian ad litem, probation offices, and others.

Conclusion:

Congress created the U visa program because it recognized the nation's humanitarian obligations to assist victims of certain designated crimes who have suffered severely and the importance of providing law enforcement protection to vulnerable communities whose members are understandably reluctant to contact the police when they are victims of crime. Moreover, it supports the goals of law enforcement agencies that depend on residents to cooperate as witnesses and to provide information regarding serious criminal activity within their jurisdiction. The U visa program fails to accomplish any of these important statutory goals when local law enforcement agencies act arbitrarily and capriciously, and otherwise unlawfully refuse in any instance to provide law enforcement certification for eligible victims.

This policy brief illuminates the practices that best serve the important federal statutory objectives, as well as those that thwart Congressional intentions. The brief's legal analysis and legal policy recommendations serve to demonstrate the ways in which the U visa can and must be improved so that immigrants who are victims of crimes may avail themselves of a program designed for their benefit, and so that communities everywhere may enjoy greater safety and security.

INTRODUCTION

The U visa is an immigration remedy passed in 2000 as the Battered Immigrant Women Protection Act (BIWPA) and as part of the Victims of Trafficking and Violence Protection Act (VTVPA).[4] Enacted with Congressional bipartisan support, the statute was designed to enhance cooperation between local law enforcement and immigrant communities and provide humanitarian relief to immigrant crime victims. Congressional intent was explicit:

> 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 ... committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interest of the United States.[5]

The U visa offers immigration relief to certain immigrants who have been the victims of a qualifying crime and who have cooperated with law enforcement in the investigation and prosecution of the crime.

The U visa offers immigration relief to certain immigrants who have been the victims of a qualifying crime and who have cooperated with law enforcement in the investigation and prosecution of the crime.[6] As the statute notes, the U visa strengthens "the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes."[7]

[4] 8 USC §§ 1501-1513, 114 Stat. at 1518-37 (codified in scattered sections of 8 U.S.C., 18 U.S.C., 20 U.S.C., 22 U.S.C., 27 U.S.C., 28 U.S.C., 42 U.S.C., and 44 U.S.C.).
[5] Victims of Trafficking and Violence Protection Act § 1513(a)(2)(A).
[6] Victims of Trafficking and Violence Protection Act of 2000 (Public Law No: 106-386, 114 Stat. 1464) t (*hereinafter* VTVPA) 8 USC § 1513.
[7] VTVPA, 8 USC § 1513(a)(2)(A).

The U visa process is set forth in the U visa statute, implementing regulations and agency guidance.[8] There are four statutory eligibility requirements:

- The individual must have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity.
- The individual must have information concerning that criminal activity.
- The individual must have been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the crime.
- The criminal activity violated U.S. laws.[9]

Only certain crimes will qualify as criminal activity. They include:

- Abduction
- Abusive Sexual Contact
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Fraud in Foreign Labor Contracting
- Genital Female Mutilation
- Felonious Assault
- Hostage
- Incest
- Involuntary Servitude
- Kidnapping Manslaughter
- Murder
- Obstruction of Justice
- Peonage
- Perjury
- Prostitution
- Rape
- Sexual Assault
- Sexual Exploitation
- Slave Trade
- Stalking
- Torture
- Trafficking
- Witness Tampering
- Unlawful Criminal Restraint
- Other Related Crimes[10]

In order to apply for U visa status, applicants must file a form issued by the U.S. Citizenship and Immigration Services (USCIS), a federal agency within the Department of Homeland Security (DHS) entitled Form I-918, Petition for U Nonimmigrant Status.[11] The form allows petitioners to demonstrate their eligibility for a U visa as well as their admissibility to the United States. The form has two subparts: an I-918A which is a separate petition for eligible family members of the crime victim to apply for derivative

[8] 8 USC § 1513, INA §101(a)(15)(U), INA §214(p); 8 C.F.R . §§103, 212, 214, 248, 274a and 299, DHS U visa Law Enforcement Certification Guide (*hereinafter* DHS Guide), available at http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf.
[9] Questions and Answers: Victims of Criminal Activity, U Non Immigrant Status, available athttp://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/questions-answers-victims-criminal-activity-u-nonimmigrant-status
[10] INA §101(a)(15)(U)(iii) as amended by VAWA 2013, Pub. Law 113-4, 127 Stat. 54 (March 7, 2013).
[11] To obtain a copy of the form, visit : http://www.uscis.gov/sites/default/files/files/form/i-918.pdf.

U visa status and an I-918B which is the required documentation from a certifying agency that proves the victim was, is, or is likely to be helpful in the investigation or prosecution of a qualified criminal activity.[12] USCIS has identified certain types of agencies as a "qualifying certifying agency."[13] Certifying agencies can be federal, state or local law enforcement agencies, prosecutors, judges or other authorities or agencies that investigate or prosecute criminal activity including but not limited to child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.[14] It is crucial to note that certifying agencies are not legally obligated to sign the certification form and the decision whether or not to sign a U visa certification is within the sole discretion of that agency. This report will use the phrase "I-918B" to refer to the Law Enforcement Certification form requirement of the U visa application.

USCIS has designated the Vermont Service Center to receive and adjudicate all U nonimmigrant petitions. There is no filing fee for submitting the U visa petition and qualified applicants can seek a fee waiver for ancillary applications related to the U visa process.[15] Additional information describing the U visa requirements and process has been centralized in various non-profit websites and manuals, and it is not the intention here to set forth a comprehensive practice guide.[16]

Since the advent of the U visa, immigrant and civil rights advocates have observed that there is no uniformity in the I-918B certification process given the broad

[12] *Id.*
[13] *See* 8 CFR 214.14(a)(2).
[14] *Id. See also supra* note 9.
[15] To obtain a copy of the fee waiver form, I-912, visit: http://www.uscis.gov/i-912.
[16] For example, *see* ASISTA, U visa http://www.asistahelp.org/en/access_the_clearinghouse/u_visa/, *The U visa: Obtaining Status for Immigrant Victims of Crime, 3rd Ed.* (Sally Kinoshita, Susan Bowyer, Jessica Farb & Catherine Seitz) http://www.ilrc.org/publications/the-U visa, *Getting a U visa: Immigration Help for Crime Victims*, http://www.law.stanford.edu/sites/default/files/child-page/163220/doc/slspublic/ProSeUVisaManual_ENGLISH.pdf.

discretion that law enforcement agencies have in their decision whether to issue a law enforcement certification. For this reason, certification practices vary among different law enforcement agencies and among different jurisdictions. As a result, some immigrant victims who meet the statutory elements are successful in obtaining the signed certification form and, ultimately, the U visa. Other immigrant victims with virtually identical fact patterns are denied certification by agencies whose policies run contrary to the Congressional intent in establishing the U visa program. These applicants, thus, have no chance to obtain consideration of their U visa application by USCIS as they are unable to meet the requirement of submitting a law enforcement certification.

The UNC School of Law Immigration/Human Rights Policy Clinic (I/HRP Clinic) in consultation and cooperation with ASISTA Immigration Assistance, a nonprofit organization that provides assistance for advocates and attorneys facing complex legal problems in advocating for immigrant survivors of domestic violence and sexual assault, set about to determine the specific nature of the problem.[17] The authors designed a survey that asked advocates to identify and comment on U visa certification policies and the problems and inconsistencies that they have experienced in their U visa work. In addition to the survey, the authors examined previous data, and other sources of information collected in pursuit of this project. This policy paper identifies specific problems regarding agency policies and practices pertaining to U visa certification, and the legal policy implications that arise with regard to the U visa remedy. Based on the data and legal analysis, this policy paper offers recommendations for changes to the U visa program.

[17] ASISTA, http://www.asistahelp.org/en/about_asista/.

Congress created the U visa program because it recognized the nation's humanitarian obligations to assist victims of certain designated crimes who have suffered severely and the importance of providing law enforcement protection to vulnerable communities whose members are understandably reluctant to contact the police when they are victims of crime. Moreover, it supports the goals of law enforcement agencies that depend on residents to cooperate as witnesses and to provide information regarding serious criminal activity within their jurisdiction. The U visa program fails to accomplish any of these important statutory goals when local law enforcement agencies act arbitrarily and otherwise refuse in any instance to provide law enforcement certification for eligible victims.

It is the purpose of this policy brief to illuminate the practices that best serve the important federal statutory objectives, as well as those that thwart Congressional intentions. The brief's legal analysis and legal policy recommendations serve to demonstrate the ways in which the U visa can be improved so that immigrants who are victims of crimes may avail themselves of a program designed for their benefit, and so that communities everywhere may enjoy greater safety and security.

SECTION ONE

U VISA CERTIFICATION DATA

Introduction

In order to evaluate the certifying practices of law enforcement agencies across the country, this chapter first examines existing data and recently published findings related to U visa certification practices before presenting the recently collected data obtained from a survey conducted by the University of North Carolina School of Law Immigration/Human Rights Clinic (I/HRP) during the spring of 2013, and its conclusions.[18] Currently, there exists very little data apart from this survey in tracking law enforcement agencies and their certifying polices for I-918B forms.[19] The purpose of collecting and presenting this data is threefold, to present the current deficiencies and successes nationwide, to determine what legal policy implications result from such findings, and to make recommendations for improvements to the U visa certification process for certifying agencies.

I. EXISTING DATA

Prior to conducting our survey, the I/HRP Clinic reviewed information that had previously been gathered regarding problems with the I-918B certification process. This data compiled in this section comes from a collection of immigrant advocate list serves and emails, earlier surveys, and advocate testimonials. Moreover, the I/HRP Clinic represents individual U visa applicants as well. I/HRP Clinic's experience, coupled with

[18] The information collected only includes information from advocates who answered the survey on a volunteer basis. While there may be contradictions and disputes as to the accuracy of the information, the survey results track general knowledge about U visa certification problems, and more importantly, demonstrate the need for further investigation into questionable practices.

[19] *See infra* Part I and accompanying text on existing data prior to this report.

the documented cases of others in the advocate community, allowed the Clinic to develop a survey to address gaps in the already-existing information and to effectively supplement the growing narrative about the varying nature of U visa law enforcement certification practices nationwide.

A. National and Local Data Compilation

1. National Immigrant Women's Advocacy Project Data

In April 2013, the National Immigrant Women's Advocacy Project (NIWAP) published the results of a survey of service providers on police responses to immigrants who have been victims of crimes, including issues related to U visa certifications, and language access.[20] A total of 772 victim and legal service providers responded to the NIWAP survey, with 49 states represented. The data collected revealed that while agencies who signed certifications were "almost four times more likely to have on-going collaborative relationships with victim advocate agencies," only 36.3% of the service providers had indicated having these collaborative relationships.[21]

Despite the effectiveness of the U visa as an incentive to encourage victims of crime to cooperate with law enforcement, the NIWAP survey reported that many law enforcement agencies declined to certify under any circumstances or for reasons unrelated to the statute.

Despite the effectiveness of the U visa as an incentive to encourage victims of crime to cooperate with law enforcement, the NIWAP survey reported that many law enforcement agencies declined to certify under ***any*** circumstances or for reasons unrelated to the statute. A total of 4,447 denials to certify were reported by the victim

[20] *See* NIWAP National Survey of Service Providers on Police Response to Immigrant Crime Victims, U visa Certification and Language Access, April 16, 2013. Available at: http://uwifap.files.wordpress.com/2013/04/police-response-u-visas-language-access-report-niwap-4-16-13-final.pdf

[21] *Id.* at 10.

advocacy and legal services organizations that responded.[22] Eighteen different patterns of behavior or policies were identified as having occurred more than one hundred times as reasons not to certify. The table below identifies the most common reasons law enforcement agencies refused to issue I-918B certifications and the frequency with which advocates and attorneys encountered these problems.[23]

The crime happened too long ago.	12.0% (534/4447)
The criminal was not successfully prosecuted.	12.1 % (536/4447)
The criminal was not arrested.	7.8% (346/4447)
The victim's case was not closed.	7.2 % (322/4447)
The victim had not suffered substantial harm.	6.6% (293/4447)
The certifier did not want to grant legal status to the petitioner.	6.3% (281/4447)
The certifier believes that granting a certification may result in the petitioner not cooperation in the ongoing investigation or prosecution.	5.1% (225/4447)
The victim is a child and the parent is seeking the certification.	3.1% (139/4447)
The criminal was not convicted.	3.1% (139/4447)
The agency would not certify due to concerns about liability.	2.9% (130/4447)
The victim never testified in court despite helpfulness during the investigation.	3.0% (133/4447)
The victim has a removal order or is in removal proceedings.	2.9% (133/4447)
The agency does not have a certification policy.	2.3% (102/4447)

2. Data from Collaborative Advocacy Spreadsheets

Because of the nationwide problems regarding certification processes and the lack of transparency on the part of certifying agencies, U visa advocates have created collaborative mechanisms by which certification information and practices may be

[22] *Id.* at 13.
[23] *Id.* at 13-14.

recorded and shared by those who endeavor to represent U visa applicants. Advocates at the Immigration Center for Women and Children in California created collaborative resources for advocates that identify particular certifying agency practices including unwritten or informal certification policies, as well as the most effective methods of working with certifiers on behalf of immigrant crime victims. The data has revealed that for many districts, not only is there a lack of a clearly identified policy about whether or when to certify, but there is often no designated certifier.

a. National U visa Advocates' Shared Listing of I- 918B Certifiers

Immigration attorneys and advocates across the country dedicated to providing assistance to immigrant survivors of domestic violence and sexual assault contribute to a sharable resource that compiles responses to broad questions about certifying agencies' behavior.[24] At last review, the data included information from 34 states and a total of 645 responses. Many advocates and attorneys reported positive experiences with some certifying agencies and described these agencies' efficient and transparent processes, and their meaningful and positive understandings of the benefits of the U visa program. But the data also included numerous examples of law enforcement agencies that had very limited awareness of the U visa program and irregular certification practices. From the shared documentation, specific policies or behaviors can be identified demonstrating that certifying agencies had adopted that could be described as practices that improperly limited the circumstances where certifications

The data has revealed that for many districts, not only is there a lack of a clearly identified policy about whether or when to certify, but there is often no designated certifier.

[24] This document is on file with the authors and was created with the leadership of the Immigrant Center for Women and Children in California.

would be signed. The following are examples of certifying behaviors provided in the narratives that were clearly articulated problems faced by U visa advocates.

Policy/Behavior	Times Reported/Percentage of Occurrence among Policies/Reasons not to certify
Agency will only certify open cases that are currently under investigation or prosecution by that agency. (e.g. Police Department will not certify for a case that has moved to the prosecutor's office)	30 (21.6%)
Agency will only certify "recent" crimes or crimes that have occurred within a certain time limit. (e.g. some agencies have a policy to not certify crimes that have happened over one year ago)	36 (25.9%)
Agency will only certify cases that are open. (ongoing investigation or prosecution)	8 (5.8%)
Policy to only certify if the petitioner has been the victim of a specific crime. (frequently identified crimes: attempted murder only, child abuse, sex crimes involving children only, felonies only)	18 (12.9%)
Agency had never provided a certification based on an unfamiliarity with the U visa process.	34 (24.5%)
Agency will only certify closed cases.	2 (1.4%)
Police must have brought charges to issue I-918B certification.	5 (3.6%)
Policy to not certify because the agency does not want to be responsible for providing a benefit to undocumented workers.	1 (0.7%)
Policy do not certify for petitioners who have a criminal background.	3 (2.6%)
Agency will only certify if the victim is essential to the investigation or prosecution.	2 (1.4%)

b. State and Local Data Compilations

Professional organizations provide their member advocates the opportunity to confidentially identify particular problems with certifiers.[25] Not surprisingly, there is some overlap in the identification of specific designated certifiers and certification policies. While one purpose of the data compilation via list serves is to identify the designated certifiers in various law enforcement organizations, a repeatedly noted problem apparent from a review of comments on the compilation documents is that many jurisdictions do not have designated certifiers. Other issues identified by advocates who contribute to the spreadsheets include:

- Certifying agencies have "flat out" policies not to sign I-918B law enforcement certification forms.
- Agencies refuse to sign certifications for survivors as believe they are under no legal obligation to complete the I-918B.
- Agencies do not want to provide an I-918B to victims, as they are wary of grant legal immigrant to undocumented workers and illegal residents.
- Agencies refuse to certify for any victim with a criminal record.
- Agencies refuse to certify closed cases as they see no benefit to be gained from ongoing collaboration with victims after they have successfully closed a case.

B. ASISTA Survey Data 2012

1. Declarations and Affidavits.

In addition to reviewing existing data gleaned from surveys and list serves, the authors of this policy review also examined declarations and affidavits prepared for ASISTA which had been submitted by advocates in situations where a certifying agency refused to sign an I-918B. This information confirmed that some agencies when choosing

[25] The shared documentation is on file with the I/HRP clinic.

not to certify, paid little, if any attention to the effects of crime victimization upon neither a U visa applicant, nor their helpfulness in the varied investigatory and prosecutorial processes.

In a declaration from an attorney in Seattle, WA, a domestic violence victim requested an I-918 B certification from the Ellensburg Police Department after her daughter called the police during a domestic violence dispute.[26] The victim provided a written statement to police. A photograph was taken of a cut on her face and she filed for a temporary restraining order and dissolution of marriage. The victim's husband was arrested and booked for domestic violence assault. Despite attempts from the victim's attorney, the Ellensburg Police Department refused to certify explaining that such refusal was a "matter of policy." [27]

Agencies that choose not to certify often pay no attention to the effects of crime victimization upon the U visa applicant, and ignore how the U visa can contribute to improved community law enforcement relations.

An attorney in Indianapolis, Indiana provided information regarding another instance of a policy against certifying despite harm to the petitioner who was the victim of a qualifying crime and who was helpful to both the police and the prosecutor in securing a conviction against the perpetrator.[28] The attorney provided evidence that her client was a domestic violence victim who had been in an abusive relationship with her husband for over 12 years. The specific incident reported by the U visa applicant occurred when the "victim's husband punched her in the face… pulled her to the floor by her hair… got on top of her, grabbed her arms, and began banging her back and head

[26] Declaration of Brian Tang and Declaration of Erin Cippola, Esq., on file with the I/HRP Clinic.
[27] *Id.*
[28] Affidavit of Lauren E. Grizzard on file with the I/HRP Clinic.

against the floor…." The husband also kicked her and threatened her life. The victim suffered substantial physical harm and psychological harm from the ongoing abuse. The victim contacted the Elkhart police department to report the incident, and the husband was arrested and charged with Domestic Battery. The victim communicated with the prosecutor and was willing to testify in court notwithstanding ongoing intimidation by her husband who called her during court hearings and threatened her life. When the attorney contacted the prosecuting attorney in Elkard County to get an I- 918B certification after her client had helped the prosecutor in securing a guilty plea, the prosecutor explained that they had a blanket policy of refusing to certify as signing the certification was "akin to paying our clients for their testimony" and that the benefit "undermine[d] the creditability of [the] clients' testimony in court."[29] Despite the attorney's arguments against this policy, the prosecutor held that the only possible exception would be providing a certification for sex crimes involving children.

An attorney in Coon Rapids, Minnesota provided an affidavit describing her client's horrific victimization and inability to obtain a certification from the investigating police department, again because of blanket policy to not certify. [30] This attorney's client had been the victim of kidnapping, assault, and terrorist threats. The client had been kidnapped, had a knife held to her neck, had her life threatened, and had been harassed for two years prior to the incident. Despite the client's full cooperation in the investigation, the suspects were never found. The Columbia Heights Police Department explained a blanket policy of refusing to certify and explained that the city attorney had advised them to refuse to sign all I-918-B certifications.

[29] *Id.*
[30] *Id.*

2. Agency Correspondence

In addition to obtaining information from U visa advocates in the form of declarations and affidavits, the ASISTA 2012 survey obtained correspondence from various state and local agencies and municipalities from across the United States, each providing different reasons for their decision to deny U visa certification.[31] For example, the City of Dallas, Texas, and the City of Pasco, Washington stated that they have blanket policies that deny I-918B certifications for U visa applicants.[32] Other certifying agencies also have blanket denial policies. For example, the Illinois Department of Children and Family Services stated that they did not "submit or certify U visas for families."[33]

> The existing data on U visa certification practices clearly establishes that certifying agencies are either ignoring their obligations to establish processes and procedures with regard to I-918Bs, or they have established policies that are not compliant with the statutory purpose or regulatory and agency guidance.

Some agencies have put forth more specific reasons for their certification denials. For example, the Chief of Police of the Spring Lake Minnesota Police Department stated that he would not feel "comfortable" certifying U visa applications to anyone that he did not know personally.[34] The Sheriff's Department of Orange County, Florida stated that they were within their discretion to deny U visa certifications where the cases had concluded years before a request for certification had been made. A Superior Court judge in Cass County, Indiana wrote on order stating that he would not certify because the

[31] Information on file with the I/HRP Clinic
[32] City of Dallas Letter; City of Pasco Letter, on file with the I/HRP Clinic.
[33] Illinois Department of Children and Family Services Letter, on file with the I/HRP clinic.
[34] Spring Lake Police Department Letter, on file with the I/HRP clinic.

"execution of Certification by a member of the judiciary on behalf of an individual may constitute a violation of the Code of Judicial Conduct."[35]

The existing data on U visa certification practices establishes that some certifying agencies are either ignoring their obligations to establish processes and procedures with regard to I-918B certifications, or they have established policies that are not compliant with the Congressional intent in establishing the U visa program. The UNC I/HRP Clinic survey data adds additional information to demonstrate that nationwide problems that exist and underscores the need for remedies at the federal and local level.

II. UNC I/HRP CLINIC/ASISTA 2013 SURVEY AND DATA

A. Survey Development

To further develop the existing available data on U visa certification practices, the I/HRP Clinic sought to develop a survey that would provide useful and categorical data on certifying agencies around the country. The survey was developed using Qualtrics, an online service that allows for construction, distribution and analysis of survey questions.[36] The survey was distributed via three national immigration law listservs comprised of immigration advocates, many of whom specialize in U visas.[37]

1. Survey Rationale and Methodology

An examination of the existing research on law enforcement agency certification practices around the county suggested that such practices vary widely from jurisdiction to

[35] Cass County Superior Court Order, on file with the I/HRP clinic.
[36] *About Us*, QUALTRICS, (last visited Apr. 21, 2013), http://www.qualtrics.com/about/. The survey was designed and built with the help of Guangya Liu, PhD an Empirical Research Associate at the University of North Carolina School of Law, *Guangya Liu*, UNC SCHOOL OF LAW, (last visited May 3, 2013), http://www.law.unc.edu/directory/liuguangya/, and Gail Pendleton, Co-Director of ASISTA, Cecelia Friedman Levin, Staff Attorney *About ASISTA*, ASISTA, http://www.asistahelp.org/en/about_asista/.
[37] For information on the listservs used to obtain responses to the survey, contact the authors. Names or affiliations of individual respondents, however, will not be identified. The survey as distributed with the help of Gail Pendleton and Helen Jugovic, an immigration attorney in Wilmington, NC. *Team Biographies*, THE LAW OFFICES OF HELEN JUGOVIC, P.A., (last viewed Apr. 21, 2013), http://helenjugovic.vpweb.com/Biographies.html.

jurisdiction.[38] While some certifying agencies employ "best practices" in certification,[39] others provide I-918B certifications only in certain circumstances (i.e. for certain qualifying crimes, at certain periods during a case, etc.), and others flatly refuse to certify under any circumstances.[40]

As a consequence of these variations in certification practices, the U visa has become an immigration remedy available only to applicants living in certain parts of the country. Arbitrary certification policies create a sort of "geographical roulette" for U visa applicants, allowing a victim's location to determine the remedy's availability, rather than the actual merits of an applicant's petition.[41]

While some certifying agencies employ "best practices" in certification, others certify only in certain circumstances (i.e. for certain qualifying crimes, at certain periods during a case, etc.), and others flatly refuse to certify under any circumstances.

As a consequence of these variations in certification practices, the U visa has become an immigration remedy available only to applicants living in certain parts of the country. Arbitrary certification policies create a sort of "geographical roulette" for U visa applicants, allowing a victim's location to determine the remedy's availability, rather than the federal law and the actual merits of an applicant's petition.

[38] *See* Section One, Part I.
[39] *Id*.
[40] *Id*.
[41] The idea of geographical roulette is inspired by *Refugee Roulette: Disparities in Asylum Adjudication*, an article on decision-making in the asylum process. *See* Jaya Ramji-Nogales *et al*., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STANFORD L. REV. 295 (2008). That article explored how the chances of an applicant winning an asylum claim correlated with factors irrelevant to the substantive merits of their claim, and that the introduction of luck into the process is unjust. For example, the article quotes former Attorney General Robert Jackson, saying: "It is obviously repugnant to one's sense of justice that the judgment meted out . . . should depend in large part on a purely fortuitous circumstance; namely the personality of the particular judge before whom the case happens to come for disposition." *Id.* at 295-96.

In light of this apparent problem, we sought to design a survey that would bolster the existing evidence of arbitrary certification practices. The survey was designed to gather data from a wide variety of practitioners that advocate for certifications from local certifying agencies.

2. Constructing Questions

As mentioned above, I-918B certification practices can be generally categorized into three groups. First, some certifying agencies utilize what could be fairly called "best practices." These agencies follow the spirit of the U visa statute and regulations in their implementation of the discretion granted to them to determine whether to issue a certification. These agencies, for example, closely follow the language of the statute that asks whether an applicant "has been helpful, is being helpful, or is likely to be helpful" in the course of an investigation or prosecution and consider certifications that are requested at any stage during or after agency involvement in the case.[42] Agencies with "best practices" exercise their discretion within the bounds contemplated by the controlling regulations—that a qualifying crime occurred, that the victim possesses information, and that they were, are or will be helpful. Furthermore, those "best practice" agencies exercise discretion on an individualized, case-by-case basis.[43]

Agencies with "best practices" exercise their discretion within the bounds contemplated by the controlling regulations—that a qualifying crime occurred, that the victim possesses information, and that they are helpful.

[42] Immigration and Nationality Act, 8 U.S.C. § 1184(p)(1).

[43] The regulations outlining the extent of the determination to be made by the certifying agency are codified at 8 C.F.R. 214.14(c)(2)(i). That section states: [T]he certifying official must affirm the following in the certification: (1) That the person signing the certificate is the head of the certifying agency or person(s) in a supervisory role who has been specifically designated with the authority to issue U nonimmigrant status certifications on behalf of that agency, or a Federal, State, or local judge; (2) that the agency is a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity; (3) that the

Whether motivated by limited resources for training and implementation of a U visa policy, mistrust of the federal government, racial animus, anti-immigrant sentiment, or any other reason, some agencies have made the decision to institute a policy of blanket refusal to certify, and are often uncooperative or even hostile towards applicants and advocates.

A second category includes those certifying agencies that refuse to certify under ***any*** circumstances. Whether motivated by limited resources for training and implementation of a U visa policy, mistrust of the federal government, racial animus, anti-immigrant sentiment, or any other reason, these agencies have made the decision to institute a policy of blanket refusal to certify, and are often uncooperative or even hostile towards applicants and advocates.

Finally, many certifying agencies fall into a third broad category of agencies that only certify under certain circumstances. Such agencies may certify only in cases involving a certain crime, only if a case went to trial, or only if a case is still open, among other possibilities. In this category, I-918B certifications are only granted in limited circumstances which are often disconnected from the Congressional intent of establishing the U visa program.

Given the statutory and regulatory guidance provided to certifying agencies on the meaning of helpfulness and the boundaries of discretion, it seems unlikely that Congress could have intended certification policies to be so disparate. To best understand the problem and to make the data collected by the survey useful, we attempted to construct a survey that would quickly and effectively categorize responses into one of the three categories described above. Accordingly, the survey asked respondents to first answer

---

petitioner has been a victim of qualifying criminal activity that the certifying official's agency is investigating or prosecuting; (4) that the petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; (5) that the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity; and (6) that the qualifying criminal activity violated U.S. law, or occurred in the United States, its territories and possessions, Indian country, or at military installations abroad. 8 C.F.R. 214.14(c)(2)(i).

whether or not they had ever attempted to receive a certification from an agency falling into one of those categories, and if the respondent answered affirmatively, the survey prompted the respondent to list those agencies. In the case of the third, broad category of agencies that certify only under certain circumstances, the survey also prompted the respondent to describe the particular situations in which the agencies refuse to certify.[44]

Another consideration in constructing the survey questions was the ease of answerability of the survey. Since the goal of the survey is to provide as broad and complete a picture of certifying agencies as possible, the survey needed to be straightforward and clear so that practitioners would be more likely to respond. Organizing certifying agencies into easily distinguishable categories effectively achieved this goal by allowing respondents to quickly delineate and classify agencies with which they had experience. Due to the large number of responses, the survey was also created to be efficiently and effectively sorted and analyzed. Having determined categories helped make the information more useful by making it sortable.

To allow for more depth without sacrificing ease of answerability, the survey provided optional sections in which practitioners could describe their particular experiences with certifying agencies. The survey also allowed practitioners to request that they be contacted for a follow up interview.[45] This structure produced results that were both all encompassing and in-depth. For the full text of the survey and sample answers, see Appendix I.

B. Survey Findings

1. Analysis by Certification Policy Categories

[44] *See* Appendix I.
[45] *Id.*

The survey responses included information on certifying agencies in forty-two states and Puerto Rico. **It is important to recognize that the survey includes information from those attorneys and advocacy agencies seeking certifications, and not from the certifiers themselves.** Moreover, certification policies are sometimes *ad hoc*, and subject to change. Given those disclaimers, the survey respondents have first-hand information about certification practices as they are the ones interacting with law enforcement certifying agencies on behalf of their clients.

The states with data from the highest number of municipalities include California (104), North Carolina (60), Texas (46), Illinois (31), and Georgia (26).[46] The states which are not represented in the survey data are Delaware, Maine, Mississippi, Montana, North Dakota, South Dakota, West Virginia, and Wyoming.[47] A total of 280 attorneys completed the survey. The majority of respondents had attempted to obtain I-918B certification forms between 6-50 times (54%).[48]

The survey responses include information on certifying agencies in forty-two states and Puerto Rico.

The data on agency practices is found in questions two through ten of the survey which ask attorneys to provide a list of agencies which fit into three categories. These categories are:

- Agencies which refuse to certify I-918B certifications under any circumstances;
- Agencies which refuse to certify I-918B certifications under particular circumstances and/or for particular applicants; and

[46] Appendix II
[47] Appendix II. One attorney from North Dakota did provide information on the lack of available advocates in North Dakota to provide services for potential U visa petitioners.
[48] Appendix II. This includes the category of 6-20 attempts (29%) and 21-50 attempts (25%).

- Agencies which always (or almost always) certify I-918B certifications for applicants who meet the "helpfulness" and statutory crime standards of the statute.[49]

Respondents identified certifying agencies at the local, state, and federal level, and included police departments, sheriff's offices, district attorneys, social service agencies at the local and state level, and other federal and state agencies, including judges.

Respondents reported that approximately 165 agencies across the country refuse to certify an I-918B form under any circumstances.[50] These agencies are located in thirty-five states.[51] Moreover, the data collected in the I/HLP Clinic survey identified six municipalities across the country in which all or almost all certifying agencies in the jurisdiction have a blanket policy against certifying. These municipalities are:

- Gwinnett County, Georgia;
- Rockingham County, North Carolina;
- Dallas, Texas
- South Sioux City, Nebraska
- Riverside, California
- McClennan County, Texas.[52]

In these counties, immigrant victims are effectively denied access to the U visa remedy provided by Congress as they are unable to fulfill the requirement of obtaining an I-918B certification from law enforcement agencies. Potential U visa applicants from these jurisdictions and others that were not reported in this survey may have an otherwise

[49] *See* Appendix II. Data collected under these categories reflected different experiences for some attorneys than for others for a few agencies. There was also significant overlap between category one and two, refusal to certify and certifying under particular circumstances. In a few surveys attorneys noted that the policy of an agency had changed recently. This data should be used as a guide and those who are uncertain of policies should follow up with the agency for accurate and timely information on certification policies.
[50] *See* Appendix II. B.
[51] *Id.*
[52] *Id.*

particularly strong application for a U visa, but have been denied any opportunity to pursue it as they are unable to receive the required I-918B certification.[53]

Approximately 80 percent of respondents have worked with an agency whose certifying practices fit into the second category, that is, agencies that have a limited U visa certification policy or otherwise impose additional criteria that go beyond the scope set forth in U visa statute, regulations, or DHS guidance and memoranda.[54] Although certifying agencies are afforded discretion as to when they provide I-918B certifications to qualified victims, the respondents of the survey data identify over 190 certifying agencies that certify according to standards that seem to go beyond the scope of what was intended by Congress. For example, advocate and attorney respondents report that:

- Some certifying agencies will issue I-918B certifications only for criminal cases that have occurred within a particular time period. [55]
- Other certifying agencies will only provide I-918B certifications if a case is open; others only or the case is closed.
- Some certifying agencies will only issue I-918B certifications if a case has not gone to prosecution regardless of whether the victim was helpful in the investigation stage and/or prosecutorial stage.
- Some certifying agencies will only provide I-918B certifications to victims if the case has been prosecuted even when a helpful victim has no control over a District Attorney's decision whether to prosecute.
- Other agencies will not certify for victims of certain crimes notwithstanding that they are enumerated as qualifying crimes in the U visa statute.[56]

[53] *See infra* Section Three.
[54] Appendix II.
[55] Appendix II. C.

- Still other agencies refuse to certify for parents of children who are victimized by an enumerated crime although the statute and DHS guidance declares them eligible as "indirect victims."[57]

Victims in jurisdictions in which both the police department and district attorney's office utilize such time or case-phase limited categories to deny certification are often shuttled back and forth between certifying agencies based on arbitrary time limits and the procedural status of the case against the perpetrator, and are thus prevented from obtaining a certification from any agency.[58]

Best practices included a sheriff's office that provided referral services for victims who may be eligible for the U visa, a district attorney's office that insures that certifications are acted upon in a timely manner, a police department that certifies where a victim has been helpful with the investigation without considering limiting certifications to recent crimes only, and a police department that certifies without concern for whether the case was eventually prosecuted. Such practices reveal the actual and potential benefits which law enforcement, communities, and immigrants share from full and proper implementation of the U visa statute.

In many instances, responses to the survey reported conflicting information, as agencies were listed in both categories for refusal to certify and certifying under arbitrary standards. These discrepancies are indicative the fact that different advocates have mixed experiences with a particular jurisdiction, and may be caused by the *ad hoc* and transitory policies of agencies. [59]

Such inconsistent procedures and policies add to the problematic phenomenon of geographic roulette which immigrant victims encounter in attempting to obtain a I-918B certification.

---

[56] *Id.*
[57] *Id.*
[58] *See* Appendix IV.
[59] These mixed experiences of advocates may also be due to the individualized facts of the victim's case and the discretion of the law enforcement agency to issue an I-918B certification on a case-by-case basis.

Questions eight through ten of the survey asked practitioners to list certifying agencies that always (or almost always) certify I-918B certifications that meet the helpfulness and statutory crimes standards of the U visa statute, and to describe the best certifying practices across the country. The respondents in the survey identify those municipalities in which all or the majority of certifying agencies act within proper discretion because they certify if the applicant is a victim of a statutory enumerated crime and meets the helpfulness requirement.[60] These include:

- San Francisco, California
- Tarrant County, Texas
- Los Angeles, California
- Phoenix, Arizona
- Mecklenburg County, North Carolina.

Moreover, practitioners reported that police departments, Sheriff's offices, and District Attorney's offices around the country are seeing the full benefits of community policing by implementing the U visa certification process—a process that builds trust with immigrant communities. Respondents included examples of practices that demonstrated a commitment to implementation of the U visa program to benefit crime victims and enhance relationships between immigrants and law enforcement. Best practices included a sheriff's office that provided referral services for victims who may be eligible for the U visa, a district attorney's office that insures that certifications are acted upon in a timely manner, a police department that certifies where a victim has been helpful with the investigation without considering limiting certifications to recent crimes only, and a

[60] *See* Appendix II. A.

police department that certifies without concern for whether the case was eventually prosecuted. Such practices reveal the actual and potential benefits which law enforcement, communities, and immigrants share from full and proper implementation of the U visa statute.

The responses to the survey indicate that only three percent of the agencies with which respondents work on U visas have any semblance of an internal appeals process.[61] These appeals typically involve an additional level of review by a higher ranking official, or an additional chance for attorneys to advocate to the certifier. Although it is not known from the survey information whether these review processes provide meaningful appeal oversight, they have the potential to assure that "certifying agencies to develop internal policies and procedures so that certifications are properly vetted."[62] In doing so, such agencies give immigrant crime victims an opportunity to be heard and interact with law enforcement in a positive manner consistent with the legislative intent of the statute. Overall the data on certifying agencies across the country indicates certification policies are often in flux, and may drastically differ from county to county and year to year.[63] As stated earlier, in some municipalities, all of the certifying agencies in the jurisdiction categorically refuse to certify I-918B forms, while in others all of the agencies fully comply with the statute in certifying when there is a helpful victim of a qualifying crime. The data indicates that in many states, neighboring municipalities have

The survey data gathered for the purposes of this project indicates that only three percent of the agencies with which respondents work on U visas have any semblance of an internal appeals process.

[61] Appendix II.
[62] 8 CFR 214.14(c)(2)(i).
[63] *See* Appendix II.

differing policies. The survey findings suggest that many victims around the United States are truly facing a problem of "U visa geographic roulette."

2. Analysis by Narrative Data: Best Practices/Problem Practices.

The survey produced seventy-three "best" or "better" practice narratives. After reading the responses, the I/HRP Clinic organized the narratives into two major categories: (a) certifying agencies that demonstrate familiarity with the purpose of I-918 B certifications; and (b) agencies which have clearly established I-918B certification procedures.[64]

a. Certifying Agencies that Demonstrate Familiarity with the Purpose of I-918B Certifications

Certifying agencies that demonstrate familiarity with the law are more likely to have exemplary U visa policies and procedures. Indeed, certifying agencies are more likely to develop this familiarity if they have participated in some sort of training on the requirements and purpose of the U visa program. Of the seventy-three responses identifying best practices, there is evidence that suggests that the training of certifying agencies is beneficial to the U visa process because designated certifiers seem to be more likely to properly limit their consideration to the statutory elements pertaining to certification. Advocates who participated in the survey indicate that successful jurisdictions i) understand the legal guidance on the issue of helpfulness; ii) exhibit familiarity with the definition of qualifying crime under the U visa statute; iii) certify within the confines of delegated authority; iv) do not place time limits on the issuance of

[64] Some of the narratives fall into more than one category; however, the duplication in description below provides a clearer picture of the best ways to improve outcomes for immigrant victims of crime and for law enforcement agencies committed to improving relationships with the immigrant community while enhancing their crime prevention obligations.

I-918B certifications by time limits; and v) actively seek to build relationships with the immigrant community per the purpose of the U visa program.

Agencies are more likely to understand the U visa legal guidelines if they have engaged in or participated in some sort of training.

i. Certifying agencies which follow the legal definitions of "Helpfulness"

Certifying agencies that demonstrate familiarity with statutory, regulatory, and agency guidance on the issue of helpfulness and make use of its broad definition are likely to certify in accordance with the statute and legal guidance. As noted previously, helpfulness is defined broadly and a crime victim is deemed helpful if she or he was, is, or will be engaged in action that furthered the investigation or prosecution of a qualified crime and who has not refused or failed to provide information and assistance *reasonably* requested. [65] Survey narratives include the following examples of an appropriate legal interpretation of helpfulness:

- Multiple advocates raised concerns about agencies that denied certifications in instances where the victim did not testify at trial. Although some agencies (especially district attorneys) require that the victim testify at trial, best practice agencies understand that a victim can be "helpful" without necessarily testifying as it may not be "reasonable" to expect a traumatized victim of violence to provide in-person testimony at trial.[66]

- In one case in Cook County, Illinois a certifying official still certified even though the victim did not testify, because the official employed "a broad definition of helpfulness," and was "familiar with the hardships to victims and the plethora of reasons why an individual who was helpful in the detection and investigation of [domestic violence] may not want to go forward with the prosecution." This interpretation of helpfulness is useful to immigrant crime victims because it does not prevent crime victims,

[65] *See infra*, SECTION TWO I. A. See also 8 CFR 214.14(a)(12) and 8 CFR 214.14(b)(3).
[66] Best Practices, Narrative 14.

who, for compelling reasons, do not wish to, or cannot safely testify as a prosecuting witness from obtaining U visa certification.[67]

- An advocate reported that the Denton County District Attorney's Office in Denton, Texas provided an I-918B certification for a mentally incompetent adult, who had become disabled due to a violent assault. USCIS approved the U visa application despite the client's inability to provide assistance to law enforcement.[68]

- A survey respondent indicated that in Yolo County, California the sheriff has certified U visas even when the perpetrator was never caught, and the victim was only able to report the crime.[69]

- One survey participated that the District Attorney in Queens, New York certify criminal cases even if the case is not concluded, as long as the victim has been helpful. They will look to see if the victim called the police and signed the complaint.[70]

- An advocate responded that the San Francisco Police Department certified a stranger rape case that occurred ten years prior because they found that "providing information about the crime was helpful, even though the perpetrator was not in the local area, because that [sic] information [is important] if he is ever arrested in their jurisdiction." Additionally, in this case the San Francisco Police Department found that "completely describing an injury" was sufficient to satisfy the statutory requirement of "helpfulness."[71]

ii. Agencies that demonstrate familiarity of what constitutes a "qualifying crime" regardless of the ultimate criminal charge or disposition.

Agencies that provide victims with I-918B certifications when the defendant is ultimately charged with a lesser crime than what is required by the statute demonstrate a thorough

[67] Best Practices, Narrative 2. In a similar case, another victim received an I-918B certification even though she "did not testify at trial when asked, because the reason she did not testify was that she had fled the state and could not afford to travel back to CO to attend the trial. She asked for travel expenses from DA and they said they could not cover her expenses." Again, this story indicates the fact that the requests for assistance from the certifying agency should be reasonable given the individual circumstances for the victim. Best Practices, Narrative 27.
[68] Best Practices, Narrative 5. In this case the victim's mother was an outspoken advocate and legal guardian of the victim. USCIS still approved the U visa application despite the lack of provision in the statute for a guardian for a mentally incompetent adult to provide that assistance on his behalf.
[69] Best Practices, Narrative 10.
[70] Best Practices, Narrative 27.
[71] Best Practices, Narrative 44.

understanding of the U visa statute and legal guidance. Indeed, the DHS U Visa Law Enforcement Certification Guide provides specific guidance on this issue and indicates that law enforcement officials may provide an I-918B certification as long as the victim is, has been, or will be helpful in the investigation or prosecution of the qualifying criminal activity and that a conviction is not necessary to obtain a U visa.[72] For example, advocates reported:

- The District Attorney's office in Travis County, Texas issued certifications after examining the underlying facts of the crime to determine whether they constituted an enumerated U visa crime notwithstanding the fact that the defendant was ultimately tried on a lesser charge. [73]

- The District Attorney in Queens, New York "will promptly certify based on an arrest for a qualifying crime before disposition of the arrest."[74]

iii. Certifying agencies which provide victims with I-918B certifications within the confines of delegated authority.

Certifying agencies that limit their certification to the statutory elements of helpfulness and qualifying crimes act in accordance with "best practices," as they do not impose additional requirements or conditions on the issuance of I-918B certifications other than what is required by the existing rules. For example, survey respondents indicated that some jurisdictions understand that it is beyond the scope of their authority to assess a victim's injuries as part of their decision whether to issue an I-918B certification. As one advocate noted, a successful U visa policy is one in which certifying agencies "really focus on what helpfulness means," and not on whether the victim "suffered enough" to

[72] DHS. Law Enforcement Certification Guide at 12.
[73] *Id.* Best Practices, Narrative 36. "[I]f the crime charged was a lesser crime than could have been charged, based on the facts of the case, they will certify the victim and provide explanation."
[74] Best Practices, Narrative 34.

"deserve" a U visas.[75] Additional respondents gave examples of jurisdictions that have a clear sense of the scope of their role in issuing I-918B certifications. For example, advocates reported:

- The police department in Raleigh, North Carolina does not consider the criminal history of the victim as a factor in deciding whether to issue a I-918B certification.[76] Advocates report that this police department only considers standards outlined by statute in the INA and does not "make up random and arbitrary policies" that contradict with the statute when certifying U visas.[77]

- As part of its U visa protocol, the sheriff's department in Multnomah County, Oregon reviews the legal requirements required to satisfy the statute when issuing certifications.[78]

- The District Attorney's Office in Waydonette County, Kansas will only consider if the crime was a qualifying crime and if the victim was "generally cooperative."[79]

Agencies that limit their certification to the statutory elements of helpfulness and qualifying crimes act in accordance with "best practices."

iv. Certifying agencies which do not impose time limits on the issuance of I-918B certifications by time limits

The narrative survey data highlights agencies that recognize that immigrant crime victims are eligible for I-918B certifications regardless of when the crime took place, and without imposing additional irrelevant deadlines which would defeat the purpose of the statute. Survey respondents report that many agencies improperly establish time limitations or deadlines unrelated to the statute that are used to determine whether the law enforcement agency is willing to issue a I-918B certification.[80] At least seven survey respondents provided examples of certifying

[75] Best Practices, Narrative 66.
[76] Best Practices, Narrative 67.
[77] *Id.*
[78] Best Practices, Narrative 51.
[79] Best Practices, Narrative 73.
[80] *See* Appendix IV, Problem Practices (*hereinafter* Problem Practices).

agencies that did not arbitrarily established deadlines in accordance with existing guidance.[81]

- One lawyer notes, "Travis County District Attorney's office in Texas provides certifications for cooperative victims of qualifying crimes regardless of the age of the case."[82]

- The Queens County and Brooklyn County District Attorney's office in New York will sign the I-918B certification at anytime, "even if the case is not concluded, as long as the victim has been helpful so far (which sometimes just means calling the police and signing the Complaint)."[83]

- One agency in eastern North Carolina certified a U visa application involving a nineteen-year-old victim who was abused at the age of two. The certifying official remembered the victim and the crime, and signed the certification seventeen years later.[84] Although this example might be extreme in terms of the length of time from the crime to certification, it demonstrates that agencies may recognize the humanitarian benefit to the crime victim and the nurturing of trust between immigrant communities and law enforcement when an I-918B is signed.

- The Webb & Zapata Counties District Attorney's in Texas do not adhere to strict timelines and is willing to certify U visas even when the crimes occurred many years in the past.[85]

- The San Francisco Police Department has also been willing to certify older cases–believing it to be helpful because they will have the information in case if the perpetrator is ever arrested in their jurisdiction. They also understand that the point of the U visa is to overcome the fear that immigrant communities harbor toward the police.[86]

- The St. Paul, Minnesota Police Department takes into consideration the fact that for many victims, it takes some time to gather all the necessary information for a successful U visa application and do not hold victims to unreasonable time limits when seeking a certification.[87]

[81] The DHS U Visa Law Enforcement Certification Guide clearly indicates that there is no statute of limitations regarding the time frame in which the crime must have occurred." Guide at 10.
[82] Best Practices, Narrative 36.
[83] Best Practices, Narrative 27.
[84] Best Practices, Narrative 22.
[85] Best Practices, Narrative 50.
[86] Best Practices, Narrative 44.
[87] Best Practices, Narrative 45.

The data indicates that those certifying agencies that do not impose a time limit demonstrate an understanding of the circumstances that U visa crime victims face. Some agencies understand the trauma and fears associated with crime victimization, the prospect of testifying in court, and the difficulty in making public those circumstances. These agencies are thus likely to construe helpfulness broadly, and offer good examples of the best practices.

v. Certifying agencies which actively seek to build relationships with the immigrant community per purpose of the U visa Program.

Certifying agencies that possess an understanding of the broader circumstances related to immigrant crime victims, the barriers they face in reporting crime, and their need for humanitarian assistance, act to benefit individuals and community policing efforts. Familiarity with the immigrant community creates a better foundation for certification practices that are in line with statutory, regulatory and agency guidance. Survey respondents report:

The narrative survey data highlights the importance of working with agencies which recognize that immigrant crime victims are eligible for certifications without regard to when the crime took place, or without regard to deadlines that are unnecessary, irrelevant to, or would otherwise defeat the purpose of the statute.

- The certifying official with the prosecutor's office in Canyon County, Idaho was particularly helpful as a result of his/her prior experiences with immigrants and thus, had an understanding of and appreciation for their circumstances.[88]

- The District Attorney's Office in Cook County, Illinois will often agree to sign where victims, particularly victims of domestic violence/sex offenses, do not to testify. As a result of their efforts to build relationships with immigrant crime victims, this office is familiar with the hardships they face in navigating the criminal justice system.[89]

[88] Best Practices, Narrative 60.
[89] Best Practices, Narrative 2.

- The District Attorney's Office in Queens, NY is aware of the ways in which perpetrators accuse U visa crime victims of "making up their reports of domestic violence to get immigration status" and make their refusal to buckle to such tactics well known.[90]

- The New York City District Attorney's Office has collaborated closely with advocates representing U visa applicants, particularly with regard to crimes involving immigrant families and immigrant children resulting in enhanced U visa processes.[91]

Three of the survey narratives highlighted police departments with knowledge about the purpose of the U visa and the benefits it brings to the effective use of community policing strategies.

- Advocates in San Francisco noted that law enforcement sign U visa certification in a broad variety of circumstances. They do so according to the belief that "the point of the U visa is to make immigrant communities not afraid of the police" and that fair and even-handed processes will promote such an outcome. [92]

- Some agencies, such as the Lexington, Kentucky Police Department, take the initiative to assist immigrant crime victims and do not wait for a crime victim or her advocate to ask for certification. Rather, they will issue certifications if they believe that the victim might be eligible for a U visa.[93]

Certifying agencies that possess an understanding of the broader circumstances related to immigrant crime victims, the barriers they face in reporting crime, and their need for humanitarian assistance, act to benefit individuals and community policing efforts.

- In another instance, a Sheriff's Office in El Paso, Texas contacts the advocate's office "as soon as a potential U visa case is identified." [94]

[90] Best Practices, Narrative 3.
[91] Best Practices, Narrative 4.
[92] Best Practices, Narrative 44.
[93] Best Practices, Narrative 47. "[The agencies] have provided referrals to the local domestic violence/sexual assault agency and immigration legal service providers when they suspect that someone who has been victimized is undocumented." *Id.*
[94] Best Practices, Narrative 29.

- Certifying officials from the Victim's Witness Program in the District Attorney's Office of Marin County, California demonstrate concern for improved immigrant-law enforcement relations. They often choose to attend USCIS trainings and learn about the many different ways victims can qualify for U visas.[95] When officials are "open to trainings [in order] to learn more about immigrant victims and their barriers seeking safety" victims are more likely to be afforded a fair process in determining whether they are eligible for a U visa certification.[96]

There can be little doubt that in these communities, the beneficial relationship between immigrants and law enforcement is constructive and beneficial to all residents—immigrants and non-immigrants alike.

b. Agencies With Clearly Established Certification Procedures

In addition to certification agencies that fully understand and comport with U visa legal guidance, a second category of "best" or "better" practices highlights agencies that have clearly established policies and procedures related to I-918B certifications. Practitioners note that clients and communities are best served when agencies have a publicized and predicable method by which they consider whether to sign I-918B certifications. Advocates reported that agencies with successful U visa policies i) have clearly identifiable designated officials or U visa contacts; ii) have clear and timely communication with victim advocates and attorneys and iii) have an established and publicized process for issuing I-918B certifications

Practitioners note that clients and communities are best served when agencies have a publicized and predicable method by which they consider whether to sign I-918B certifications.

i. Certifying Agencies with clearly identified U visa Designated Officials or Contacts

[95] Best Practices, Narrative 72.
[96] Best Practices, Narrative 28.

Advocates highlighted agencies that were open and transparent in their communications regarding their U visa policies and the decision-making process. This does not mean that the agency approves all U visa requests. Instead the agencies have established open lines of communication and respond in a direct and timely manner respond to victims and lawyers requesting I-918B certification.

Survey results showed that one element of a well-implemented and fair U visa process that was evident in every narrative: namely, a specific certifying official whose identity and contact information is easily ascertainable. Survey respondents report:

- One practitioner wrote "[When] we receive a client who requires a certification from [the Manchester Police Department in New Hampshire, I can contact the sergeant in charge of the unit by email with the name of the client and other identifying information for the case, and request the certification. The sergeant will let me know by email whether they are willing to sign off on the certification and if signing will mail me the completed signed certification, sometimes with copies of police reports attached (if requested).[97]

- Phoenix City and Mesa City Arizona both have designated point persons who process U visa certification requests and then make a recommendation to the District Attorney whether to issue the I-918B.[98]

- In Orange County, California, the District Attorney's office has "specified the name and contact information for the certifying official (a paralegal)."[99] Similarly, the Queens County District Attorney publicizes the name and email address of the designated Assistant District Attorney (ADA) in charge of handling requests.[100]

- The District Attorney's Office has a designated individual who reviews U visa certification requests,[101] as does the Chief District Attorney at the Family Unit at District Attorney's Office in Philadelphia, Pennsylvania.[102]

[97] Best Practices, Narrative 1.
[98] Best Practices, Narrative 30.
[99] Best Practices, Narrative 31.
[100] Best Practices, Narrative 3.
[101] Best Practices, Narrative 11.
[102] Best Practices, Narrative 28.

- The District Attorney's Office in Tarrant County, Texas has an entire victim's assistance unit which acts as a liaison between the District Attorney's office and victim advocates.[103]

ii. Clear and Timely Communication between Certifying Agency and Victim Advocates

Advocates highlighted agencies that were open and transparent in their communications regarding their U visa policies and the decision-making process. This does not mean that the agency approves all U visa requests. Instead the agencies have established open lines of communication and respond in a direct and timely manner respond to victims and lawyers requesting I-918B certification. The data indicated agencies that effectively communicated with victims and victims' advocates were more likely to have certification procedures that were easy to use and furthered the goals of the U visa statute. The I/HRP Clinic survey responses included multiple instances where advocates discussed a transparent and timely I-918B certification process as a best practice.

- The Police Department in Boise, Idaho was praised for the fact that, "[y]ou can always count on getting a response, in writing, from them. They are prompt and willing to listen to argument."[104]

- The designated contact person in the District Attorney's Office in Portland, Oregon "who promptly checks the status of the request with the District Attorney and responds to [an advocate's] inquiry. The key to a successful U Cert[ification] relationship has been reliable communication." [105]

- The Manchester Police Department in New Hampshire uses email to communicate with U visa applicants and their advocates to facilitate the certification process. [106]

[103] Best Practices, Narrative 33. The Oklahoma Police Department, Douglas County Attorney's Office in Omaha, Nebraska, the Marion County DA's office in Salem Oregon, The Central Falls Police Department, The Intelligence Unit of the Cleveland Police Department ,the Marin County California Victim's Witness Program, and the Orange County District Attorney's Office in Santa Ana, CA all have designated certifying officials. Best Practices, Narrative 52; 54; 59; 62; 72; 31.
[104] Best Practices, Narrative 60.
[105] Best Practices, Narrative 64.
[106] Best Practices, Narrative 1.

- A District Attorney in Nashville. Tennessee created processes for advocates to submit their I-918B certification requests electronically. This office readily accepts requests by e-mail, which are then forwarded to a designated person who reviews each request. Advocates know with whom they are communicating and the status of the certification request.[107]

- The designated certifier for the District Attorney's office in Queens, NY has a designated signer, an Assistant District Attorney, who responds to requests almost immediately. Advocates can submit a U visa request by email with basic case information, such as docket number, and the defendant's name and date of birth. The designated signer will then respond to the advocate by email without delay letting the advocate know whether or not the certification will be signed. If certification is approved, a hard copy of the certification is sent to the advocate within a week.[108]

- The Marion County, Oregon certifying agency has established excellent lines of communication and is readily accessible by phone.[109]

- Another advocate praised the Central Falls police department in Rhode Island for its efficiency: "I [recently] got one back from [a certifier] within a week."[110]

When U visa victims and their advocates are promptly informed about the outcome of their request for an I-918B certification, they are better positioned to determine whether there are other options for the application to go forward and to consider other ways to assist their clients. Furthermore, clear lines of communication allow the victim to make best use of the U visa certification process and to provide additional information to the police when necessary. It also fosters a sense of cooperation and trust between law enforcement and immigrant communities.

[107] Best Practices, Narrative 11. ("She lets me know one way or the other right away, even if afterwards it takes a while to get the signed Supplement B."). *Id.*
[108] Best Practices, Narrative 6.
[109] Best Practices, Narrative 54.
[110] Best Practices, Narrative 59.

Advocates also noted that the U visa process benefitted when a certifying agency offered an explanation if they decided not to issue an I-918B certification.

- One practitioner noted that if there was a decision not to certify, the District Attorney's office in Orange County, California sends a letter explaining the reasons for the denial.[111]

- One advocate stated that if the certifying sergeant of the Intelligence Unit in Cleveland, Ohio questions a particular certification, he calls the advocate to discuss the victim's circumstances. The advocate found the process to be "very reasonable and accessible."[112]

- The Lexington, Kentucky Police Department provides another example of clear lines of communication that facilitates the U visa process. An advocate describes a case in which the police department was unsure about whether there was a documentable injury.[113] The signing official expressed this concern to the lawyer, who then had the opportunity to provide more details and to explain that certification by his agency did not require a determination of injury as that was not an element delegated to certifying agencies. Based on the exchange of information, the police department signed the certification.[114]

Clear lines of communication allow the victim to make best use of the U visa certification process and to provide additional information to the police when necessary. It also fosters a sense of cooperation and trust between law enforcement and immigrant communities.

In the above case, having a transparent process allowed the attorney to discuss the certification process and to explain what was within the province of the agency and what issues were left to USCIS to adjudicate to the agency official. Without a transparent process, there would be little, if any ability to make best use of the U visa statute under the multiple circumstances within which victims find themselves.

Effective and timely communication and transparent processes often lead to strong working relationships between agencies and victims. The survey found that there is a link

[111] Best Practices, Narrative 31.
[112] Best Practices, Narrative 62.
[113] Best Practices, Narrative 47.
[114] Best Practices, Narrative 47.

between having a working relationship with the certifying agency and the communication the agency provides. Survey respondents indicated that law enforcement agencies were also more willing to listen to advocates with whom they had a relationship.[115]

The survey data supports the conclusion that immigrant crime victims are more likely to receive U visa certification when agencies: (1) understand the statutory parameters of U visa certification; (2) foster clear, open communications; and (3) create a dedicated and reliable certification process.

These examples demonstrate the need for the Department of Homeland Security to encourage certifying agencies to communicate and engage in dialogue with victims and advocates. Simple things, like informing a victim about the status of their I-918B certification request or making a certification decision in a timely manner are easy to implement. Effective communication will also lead to strong working relationships between victims and law enforcement officials which is one of the statutory goals of U visa.[116]

Agencies that promote clearly established and well-publicized processes contribute to fairness and usefulness of the U visa program.

iii. Clearly Established and Publicized Processes

Certifying agencies that have clearly established and well-publicized processes contribute to a fair and effective U visa program. Survey respondents reported:

- A District Attorney's office in Philadelphia, Pennsylvania has established a practice of holding meetings with U visa advocates every two weeks for the purpose of reviewing U visa applications received during that period. This regularized process allows advocates to provide clear and up-to-date information and is part of the process by which the DA's office determines whether to sign.[117]

[115] Best Practices Narrative 1; 72; 60.
[116] VTVPA OF 2000, PL 106–386, October 28, 2000, 114 Stat 1464.
[117] Best Practices, Narrative 28.

- The Manchester Police Department in New Hampshire has a well-established and consistently implemented U visa processes that remained in place, even when the designated U visa officer had changed four times.[118]

- The Cook County District Attorney's office in Illinois developed a clear policy along with specific systems for signing I-918B certifications which resulted in a more efficient and prompt process for victims. The process also allowed for victims to self-petition for I-918B certifications without the assistance of an advocate.[119]

- The Sherriff's Department in El Paso, Texas has a proactive process, wherein they contact advocates as soon as a potential U visa case is identified through their own processes and law enforcement practices. After it is confirmed that the client might qualify for a U visa, the advocate then sends a request for an I-918B certification to the Sheriff's office which is already familiar with the case. The Sherriff's office then takes two to three weeks to process the request.[120]

- One advocate stated that the Oklahoma City Police Department's I-918B certification process involves the advocate submitting the request, supporting evidence, and the police report to a particular person at the certifying agency office. The certifying official then gathers the necessary personnel for a conference about whether to sign the I-91B certification. The panel had evaluating factors and following the meeting, an official either sent the signed I-918B certification to the applicant's advocate via email or otherwise sent a brief response explaining why the certification was denied. [121]

The ability to obtain a response to a request for a certification without undue delay allows the crime victim's case to move forward and provides the support intended by the statute.

- The Police Department in Central Falls, Rhode Island has a certifying officer who accepts pre-filled I-918B certifications. He then edits, adds necessary details, prints, signs, and mails the certification back to the advocate. The survey respondent reported that the Central Falls Police department has processed requests within a week using this process.[122]

All of these responses highlight predicable procedures. By knowing whom to contact, practitioners are able to use the systems local agencies have put in place.

[118] Best Practices, Narrative 1.
[119] Best Practices, Narrative 24.
[120] Best Practices, Narrative 29.
[121] Best Practices, Narrative 41.
[122] Best Practices, Narrative 59.

Agencies with predicable and established procedures allow advocates and victims navigate the certification process more easily. This ensures that qualified victims will not be not disadvantaged in the certification process simply because certification policies were unpublished and/or constantly changing.

c. Conclusion: Best Practices

In sum, the survey data supports the conclusion that immigrant crime victims are more likely to receive U visa certification when agencies both demonstrate a familiarity with the statutory parameters of I-918B certification and create a reliable certification process which fosters clear and open communications with advocates. Similarly to the survey's assessment of best practices, problem practices largely fell within two broad categories: (1) agencies that lack familiarity with the legal parameters of I-918B certifications; and/or (2) agencies that lacked clearly established certification policies and procedures.

Problem practices largely fell within two broad categories: (1) agencies that lack familiarity with the legal parameters of I-918 certifications; and/or (2) agencies that lacked clearly established certification policies and procedures.

3. Analysis of Narrative Data: Problem Practices--Lack of Familiarity with Legal Parameters of I-918B Certifications.

Eighty-eight respondents provided narratives that detailed problem practices they had observed or experiences. Survey respondents identified problem practices when local law enforcement agencies do not follow the U visa statute, regulations, and agency guidance in exercising their discretion to issue I-918B certifications. Specifically, advocates reported that a) some certifying agencies that do not demonstrate a sufficient familiarity surrounding the definitions of helpfulness; b) some certifying agencies do not exhibit a sufficient understanding of the definitions of qualifying U visa crimes and eligible

victims; c) some certifying agencies impose ultra vires requirements on the issuance of I-918B certifications; d) other agencies demonstrate a lack of understanding of the U visa statute by categorically denying any and all requests for I-918B certifications; and/or agencies that are unfamiliar with the U visa statute and the immigrant crime victim community.

a. Certifying Agencies that Do Not Demonstrate a Familiarity with the Parameters of Certification regarding Helpfulness.

The survey indicated that some local law enforcement agencies applied a heightened definition of "helpfulness" that did not correspond with legal guidance and statutory purpose. Local law enforcement agencies that applied a narrow definition of helpfulness often did not grant certification. For example, survey respondents reported:

- The New York Police Department will not certify "helpfulness" if an arrest was not made.[123]

- The District Attorney's office in the Bronx, NY will not find a victim helpful and will not certify if the victim failed to visit the complaint room within 24 hours of the arrest, regardless of the reason the complaining witness was unable to come.[124]

- The New York Police Department refused to find a complaining witness helpful, and thus refused to certify because the witness had been hit in the head with a brick and was unable to identify the assailant.[125]

- The Azusa Police Department in California did not find an immigrant crime victim helpful and, "did not need the crime victim's assistance," in investigating the crime even though the victim reported the crime to the police and did not otherwise fail or refuse to cooperate.[126]

- The Police Department in Durham, North Carolina refused to sign a U visa certification request for a 12-year old victim of a gang rape because the investigation did not result in an arrest because the police could not

[123] Problem Practices, Narrative 3.
[124] Problem Practices, Narrative 30.
[125] Problem Practices, Narrative 43.
[126] Problem Practices, Narrative 74.

locate the alleged perpetrators. Thus, the victim was apparently deemed "not helpful."[127]

- A survey respondent reported that the District Attorney's Office in Harris County, Texas refused to provide an I-918B certification in the case of a child rape victim who was raped by her father, and who was convicted for such act, because the family of the child was not cooperative "enough."[128]

b. Agencies that do not certify when the underlying criminal act meets the definition of a crime enumerated under the U visa.

The U visa statute enumerates certain qualifying crimes such as: rape, domestic violence, murder, felony assault, among many others.[129] The UNC I/HRP Clinic survey reveals that some local law enforcement agencies refuse to sign I-918B certifications even when the applicant requesting the form suffered a crime specifically covered by the statute. As legal guidance demonstrates, the U visa statute does not require that the criminal investigation result in a criminal charge, prosecution, or conviction.[130] Despite statutory and agency guidelines, the survey results showed that some local law enforcement agencies refused to provide I-918B certifications: (i) for certain types of qualifying crimes; (ii) for certain types of victims; (iii) if the investigation did not result in a criminal charge, prosecution or a conviction; and/or (iv) if a certain self-imposed time limits had lapsed.

Despite statutory and agency guidelines, the survey showed that some local law enforcement agencies refused to certify: (1) certain types of crimes; (2) certain types of victims; (3) if the investigation did not result in a criminal charge, prosecution or a conviction; and/or (4) if a certain self-imposed time limits had or had not lapsed.

i. Denying certification for certain types of crimes

[127] Problem Practices, Narrative 78.
[128] Problem Practices, Narrative 85.
[129] INA 101(a)(15)(U)(iii)
[130] *See* DHS Guide, *supra* note 8; 8 U.S.C. §1101(a)(15)(U)(i).

Advocates report that some local law enforcement agencies refused to certify U visas for certain types of crimes regardless if the crime was enumerated under the U visa statute. Survey respondents indicated:

- The Dallas Texas Police Department refused to certify for any non-felony crimes.[131]
- The Kansas City, Kansas Police Department will only certify cases that "involve violent or sexual crimes."[132]
- Some agencies refuse to certify for crimes of domestic violence.[133] For example, the Chief of Police in Lexington, Kentucky refused to certify an I 918B where an applicant had been a victim of the crime of domestic violence.[134]
- The police in Sumner, Washington denied the I-918B certification for an applicant who had been a victim of the crime of domestic violence because the victim did not leave the abuser earlier.[135]
- An advocate reported that a local law enforcement agency in Philadelphia, Pennsylvania refused to certify when the crime stemmed for a domestic violence protection order violation and the underlying facts demonstrated that the applicant was a victim of an enumerated crime.[136]
- One respondent states that the sheriff's office in Polk County, Florida has a "limited interpretation of what cases should fall within the statute" and that the agency will only provide I-918B certifications for trafficking crimes.[137]

ii. Denying I-918B certification for certain types of victims

The DHS Guide instructs U visa certifying officials to only consider whether the underlying crime is a qualifying crime and whether or not the crime victim was helpful or will be helpful in the investigation of a crime. However, some local law enforcement

[131] Problem Practices, Narrative 16.
[132] Problem Practices, Narrative 46.
[133] Problem Practices, Narrative 65.
[134] Problem Practices, Narrative 19.
[135] Problem Practices, Narrative 63.
[136] Problem Practices, Narrative 64.
[137] Problem Practices, Narrative 28.

agencies consider victim "type" when making certification decisions. For example, some local law enforcement officials refuse to certify for victims who have been convicted of crimes, or if the petitioner is an indirect victim. Such decisions are sometimes erroneously presented as exercises of discretion; however, certifying agencies are only supposed to examine on the issues of helpfulness and whether the crime was qualified under the statute. The following narratives illustrate the problem of agencies that fail to sign an I-918B certification based on the victim type.

- The survey showed that victims with a criminal record were most commonly denied an I-198B certification. The New York Police Department refuses I-918B certifications if the "if the victim has been arrested (in unrelated matters)."[138]

- The Lake County State Attorney's office in Illinois refuses to sign a certification if the victim has committed any crime.[139]

- A Texas Chief of Police in Lubbock, Texas refused to sign an I-918B certification for an applicant with prior arrests for a DUI, even though the Chief admitted this applicant was a victim of a qualifying crime and that he was helpful to the law enforcement agency.[140]

- Secondary or indirect crime victims were unable to receive certification in certain jurisdictions. In Lake County Illinois the States Attorney's Office refused to certify for an indirect victim even though such certification is authorized and contemplated under the statute.[141]

iii. Limiting certification to certain categories of case status or disposition.

Some local law enforcement agencies refused to certify U visas based on the disposition of the case. The DHS Guide is very explicit that the U visa statute does not require a specific case disposition and does not condition certification on whether or not

[138] Problem Practices, Narrative 11.
[139] Problem Practices, Narrative 26.
[140] Problem Practices, Narrative 34.
[141] Problem Practices, Narrative 14.

the case is open, closed, pending, or prosecuted.[142] Of the survey responses received, thirteen narratives described problems with agencies that conditioned signing an I-918B certification on whether the case was going to or had gone to prosecution regardless of the helpfulness of the victim or whether she/he had any control in the decision whether the case went forward to prosecution. Furthermore, the survey responses included multiple instances where agencies refused to certify closed cases and would only consider an I-918B certification request when the case was open or pending.[143] Other survey respondents reported:

- In another case in Chandler, Arizona a practitioner represented the victim of a horrific kidnapping. Although the kidnappers were apprehended and convicted with the help of the victim, the police department refused to sign because case was closed.[144]

Some respondents reported that in some jurisdictions the decision to provide a qualified victim with an I-918B certification involved both the prosecutor and the police department. For example:

- One respondent in California indicated "[The] Police Dep[artment] will not consider signing cases that have been referred to the District Attorney's office, even if the District Attorney decides not to prosecute. This means that in cases where there is a [domestic violence] arrest where the victim is helpful but the DA decides not to prosecute, [the] police department will not sign.[145]

- A survey respondent stated that New York City police do not certify after an arrest has been made and the case is passed on to the prosecutor's office. However, because of significant delays in prosecution, the prosecutor often loses contact with the victim who, as a result, is denied any option for certification as a result.[146]

[142] DHS Guide at 4, 10-11.
[143] Problem Practices, Narrative 3.
[144] Problem Practices, Narrative 38.
[145] Problem Practices, Narrative 39.
[146] Problem Practices, Narrative 3.

- Survey results reported that it common for police to refuse to sign an I-918B certification for a case once it has been passed to the District Attorney. As one practitioner notes, "[t]his becomes impossible if there is an arrest in a case where the victim/ applicant was 'helpful' to police and then was never contacted by the District Attorney."[147] In cases where the District Attorney decides not to pursue the case, but the police refuse to sign (since it has gone to the District Attorney's office), a helpful victim is often left without a path to certification.[148]

- Some respondents reported that police departments would not certify a case "unless it's a case they're interested in bringing to the prosecutor."[149] Thus, if immigrants are a victim of a qualifying crime and assist the police, they may be denied certification if there is no desire to prosecute, a matter over which they have no control.

- In Lincoln County, Maine, the District Attorney's office "will not sign a certification until the case is closed."[150]

In some instances, prosecutor's offices will only sign an I-918B certification once the criminal process is finished, i.e., after the prosecution. There seem to be two reasons for this practice: (1) the prosecutors are concerned that the defense attorney will use the I-918B certification this against the victim during trial and potentially damage the victim's credibility [151] and (2) prosecutors are worried that if they sign before the victim testifies, the victim will not later testify if requested.[152] Both of these concerns are legitimate, but the mere promise of a certification raises the same due process concerns as signing it

[147] Problem Practices, Narrative 40.
[148] Another example of this issue is out of Kansas City, KS. The police department either does not "do certifications or that they do not certify where the crime has been forwarded for prosecution." Problem Practices, Narrative 53.
[149] Problem Practices, Narrative 63.
[150] Problem Practices, Narrative 55.
[151] Problem Practices, Narrative 65. The practitioner noted that certifier "is not alone in [waiting until after prosecution]; at least one other area DA's office has taken the same position that they will only sign once the criminal process is complete. I find this policy more understandable due to the potential for the defense using the certification/eligibility for status to undermine victim credibility, but it also has significant impacts on the victim due to delay and is contrary to the way the law is written." *Id.*
[152] Problem Practices, Narrative 87 ("The city attorney is concerned that if the case is still open and the U cert signed that the victim will not later testify if requested."). *Id.*

earlier, and other District Attorneys have reported the earlier the certifications, the more helpful the survivors are.

iv. Agencies that restrict certification by time limits unrelated to the statute, regulations or guidance

The survey included twelve narratives where agencies placed a time limitation on a victim's ability to obtain an I-918B certification. Generally these agency policies limit certification by the age of the case. The DHS Guide emphasizes there are no time limitations on helpfulness, and no requirement for a resulting arrest or prosecution.[153] For example, the survey found instances of agencies which would not certify if a case were:

- over 30 days,[154]
- 60 days,[155]
- a year old,[156]
- 180 days,[157]
- over two years old,[158]
- over three years old,[159]
- over five years old.[160]

[153] *Id.* at 4. The guide states, "A current investigation, the filing of charges, a prosecution, or conviction are not required to sign the law enforcement certification. Many instances may occur where the victim has reported a crime, but an arrest or prosecution cannot take place due to evidentiary or other circumstances . . . There is no statute of limitations on signing the law enforcement certification. A law enforcement certification can even be submitted for a victim in a closed case." *See* DHS Guide, *supra* note 8.
[154] Problem Practices, Narrative 16.
[155] Problem Practices, Narrative 1
[156] Problem Practices, Narrative 41.
[157] Problem Practices, Narrative 32.
[158] Problem Practices, Narrative 56.
[159] Problem Practices, Narrative 34.
[160] Problem Practices, Narrative 64. One agency will not certify for any crimes that happened before 2000. *See* Problem Practice, Narrative 70.

These time limits appear to be unrelated to whether the crime victim was helpful, whether she needed the humanitarian benefits of the U visa, or whether community policing is enhanced or impaired.

In some cases, agencies go "beyond their power" and make I-918B certification decisions on basis of consideration of matters that have not been delegated to them by statute, regulation, or agency guidance.

The narratives suggest that some certifying agencies institute extremely short cutoff periods for certification even if the case was open and active. For example, survey respondents reported:

- In Texas, one police department "would not consider signing the certification" because it had been more than 60 days since the crime had been committed, although the investigation might be underway.[161]

- In another case, the District Attorney refused an I-918B certification because the certification was requested "3 weeks after jury trial ended. The judgment and sentencing date was still pending, but the District Attorney still considered it a closed case."[162]

- Another advocate reported that a local district attorney's office will drop any case if the complaining witness fails to come to the Complaint Room within 24 hours of the arrest." In this case, victims who are unable to come to the Complaint Room within 24 hours for reasons beyond their control, for good and compelling reasons, will be denied an I-918B certification.[163]

The practice of strictly enforced and arbitrary time limits demonstrates the capricious nature of certification processes. As one respondent noted, "[i]t is very upsetting especially when you have [another] DA's office, less than 50 miles away, that do not have restrictions and abide by the [Immigration & Nationality] Act."[164]

c. Agencies that act *ultra vires*, denying certification by acting outside the confines of their delegated authority.

[161] Problem Practices, Narrative 1.
[162] Problem Practices, Narrative 17. In this case, the U visa applicants were the indirect victims (they were 2 mothers of four girls whom were sexually abused). The mothers "cooperated with law enforcement, brought girls to forensic interviews, testified at court, brought girls to testified, spoke to probation officer to give information for pre-sentencing investigative report, wrote victim impact statement." *Id.*
[163] Problem Practices, Narrative 30.
[164] Problem Practices, Narrative 41.

In some cases, certifying agencies go "beyond their power"[165] and make I-918B certification decisions on basis of consideration of matters that have not been delegated to them by statute, regulation, or agency guidance. As indicated above, some law enforcement agencies present their actions as exercises of discretion; however, certifying agencies are only supposed to examine on the issues of helpfulness and whether the crime was qualified under the statute. The survey results reported least twelve instances where the narratives revealed instances where agencies acted *ultra vires*.[166] Advocates reported that:

- Some local law enforcement agencies saw themselves as U visa decision makers, and refused U visas in an attempt to avoid "giving someone legal status."[167]

- One agency would not certify based on the undocumented status of the applicant notwithstanding that undocumented immigrants are the targeted beneficiaries of the U visa statute.[168]

- Relatedly, some local law enforcement agencies refuse to certify for victims who would otherwise qualify but for the fact that the agency believed they had worked without authorization.[169]

- One practitioner reported that a Texas prosecutor's office denied certification because the victim "had been allowed to stay in the U.S. during the prosecution of the crime, so . . . that was enough benefit" for the victim.[170]

- Some agencies decided that the benefit of a U visa is "not 'necessary,'" for the victim.[171] They have decided that although the victim had suffered

[165] In Latin, *ultra vires* literally means "beyond powers."
[166] A few of these narratives overlapped with Subsection C discussing Victim Types. Not permitting an I-918B certification for victims who have a criminal record would also qualify as *ultra vires* and outside the statute.
[167] Problem Practices, Narrative 21.
[168] Problem Practices, Narratives 10, 42.
[169] Problem Practices, Narrative 7.
[170] Problem Practices, Narrative 81.
[171] Problem Practices, Narrative 21. This was a case in Lubbock, Texas. The narrative noted that the "chief of police looked into her case and criminal record and decided to deny the U visa certification because in his words it was not "necessary." He stated that her arrest record (which included 2 DUIs) influenced his decision, as well as the fact that the police report was made in 2009. He also made statements indicating

harm, the she was not "suffering any more than any other victim of a similar crime, citizen or alien," and thus should not receive a U visa.[172]

- One agency refused to certify unless the qualifying victim presented the certification request through an advocate.[173]

- The Orange County Child and Family Services, California agency refuses to certify on behalf of a child victim unless the child has been declared dependent.[174]

- The Lake County State's Attorney (LCSA) office refused to certify for child victim under the age of twenty-one. The victim's attorney advised the LCSA office of USCIS guidance that states, "direct victims of qualifying crimes, under age 21, are considered to be incapacitated due to their status as a child." Instead, the LCSA insisted on using its own definition of incompetency, (i.e., whether the direct victim would have been able to testify at trial) and refused to certify.[175]

Other narratives revealed agencies that denied the victim's request for an I-918B certification because the agency believed that the victim lacked sufficient injury or harm:

- A practitioner from Stockton, California, received a letter from an agency denying a certification because "the victim did not suffer enough to be issued a U visa."[176]

- Another office issued a similar letter to the victim's attorney in Indianapolis, Indiana, denying the U visa. The agency wrote:

  > "While there is no question that [clients] suffered an injury . . . there has been no showing that either of them have suffered, or are suffering, any significant loss as a result of becoming a victim. . . . In other words, neither of them is suffering any more than any other victim of a similar crime, citizen or alien."[177]

---

that he was hesitant to provide relief for an "illegal immigrant" and made it clear that this was completely discretionary." *Id.*

[172] Problem Practices, Narrative 71. Other agencies have also noted that "the victim did not suffer enough[] to be issued a U visa." Problem Practices, Narrative 75.

[173] Problem Practices, Narrative 39.

[174] Problem Practices, Narrative 39.

[175] Problem Practices, Narrative 15. USCIS regulations state that direct victims of qualifying crimes who are under age 21, are considered to be incapacitated due to their status as a child. The means that a parent or guardian must petition on their behalf. See Questions & Answers from USCIS Ombudsman's Teleconferences (October 17, 2008).

[176] Problem Practices, Narrative 75.

[177] Problem Practices, Narrative 71.

Other survey respondents indicated:

- Agencies have also denied I-918B certifications where the victim has cooperated with the police but did not pursue civil remedy.[178]

- Some local law enforcement agencies do not certify for cases of domestic violence when there is no evidence of physical injury. For example, the Chief of Police in Lexington, Kentucky refused to certify an I-918B where an applicant had been a victim of the crime of domestic violence.[179]

- Another local law enforcement agency implemented their own definition of substantial harm, requiring that the victim demonstrate "a significant loss as a result of becoming a victim."[180]

The cases above are all examples of agencies acting outside the scope of their authority under law. These agencies used their role as I-918B certifiers to decide whether the victim was deserving of a U visa, despite the fact that the U visa statute only instructs certifying officials to consider whether or not the underlying crime is a qualifying crime enumerated by statute and if the prosecuting witness has been "helpful, is being helpful, or is likely to be helpful" to an investigation or prosecution of a qualifying crime.[181]

The narratives detailed agencies that never certify. In these cases, agencies are failing to exercise the discretion delegated to them and are simply refusing to sign any and all certification requests.

d. Agencies that have blanket denial policies

In twenty-six instances, the narratives reported that there were law enforcement agencies that never provide I-918B certifications. In these cases, agencies are failing to exercise the discretion delegated to them and are simply refusing to sign any and all certification requests.

[178] Problem Practices, Narrative 75.
[179] Problem Practices, Narrative 64
[180] Problem Practices, Narrative 71.
[181] 8 U.S.C. §1101(a)(15)(U)(i)

- One survey response noted that more and more local law enforcement agencies have a de facto blanket certification denial policy.[182]

- Some agencies that refuse to sign also never issue a denial.[183] When practitioners call to inquire about the status of their requests, they are told that the agencies or entities "do not do certifications . . ."[184]

- In Redmond, Oregon, an advocate reported that the police department has refused to designate someone to sign and has not put procedures in place for qualified victims. As a result, U visa applications submitted to USCIS were denied.[185]

Survey results indicate that because of blanket denial policies, victims suffer by location. One Nebraska practitioner summed up the situation in her area noting, "victims who live and/or were assaulted in South Sioux City, Nebraska, or the rest of Dakota County, Nebraska, are almost certainly not going to be able to obtain a certification from any agency."[186] Survey results also suggested that blanket policies denying I-918B certifications were more prevalent in communities where there anti-immigrant sentiment is prevalent and the agencies refuse to be trained or educated.[187]

In this category, agencies fail to exercise any discretion as they are required under the statute, and instead have instituted a blanket policy to deny all crime victims I-918B certifications.

e. Agencies that are unfamiliar with the U visa statute and the immigrant crime victim community.

[182] Problem Practices, Narrative 24. *See also* Problem Practices, Narratives 22,33, 38, 40, 45, 59, 60, 72, 76, 82, 86.
[183] Problem Practices, Narrative 53.
[184] Problem Practices, Narrative 53.
[185] Problem Practices, Narrative 27.
[186] Problem Practices, Narrative 56.
[187] Problem Practices, Narrative 59.

Survey respondents indicated that many local law enforcement agencies are unfamiliar with the purpose of the U visa statute and the challenges that immigrant crime victims face.

Survey respondents indicated that many local law enforcement agencies are unfamiliar with the purpose of the U visa statute and the challenges that immigrant crime victims face.

- One respondent who practices in Northern California indicated that some local law enforcement agencies were unaware of their role in the U visa process.[188]

- Another respondent in Oregon reported that in their jurisdiction there are judges, local law enforcement agencies, and district attorneys that have never received training on U visas.[189]

- Because local law enforcement agencies in rural Georgia have not received training, they believe that they are "the final step within the U visa process and believe it is up to them to prevent someone from obtaining legal status."[190]

- A survey respondent reported that "there is a serious lack of understanding for the trauma that crime victims suffer" within some local law enforcement agencies.[191]

- One agency refused to certify for a victim of domestic violence because the prosecutor insisted that she help locate the whereabouts of the abuser although it was not safe for the victim to be inquiring about his whereabouts, especially after he violated an order of protection.[192]

- Another practitioner noted an agency refusal to sign simply because "they "do not know what [an I-918B certification] is."[193] Although practitioners and advocates have tried to educate agencies on the U visa process, these agencies "prefer an education from someone they trust and respect, generally Federal or State DOJ [Department of Justice] . . ."[194]

The Department of Homeland Security should focus its in-person training efforts on those locations where there is resistance for training or where there are fewer training

[188] Problem Practices, Narrative 6.
[189] Problem Practices, Narrative 58.
[190] Problem Practices, Narrative 21.
[191] Problem Practices, Narrative 74.
[192] Problem Practices, Narrative 9.
[193] Problem Practices, Narrative 58.
[194] Problem Practices, Narrative 58.

resources. Advocates, in turn, should work with DHS to identify these problematic jurisdictions to ensure that the training and resources can be directed to the jurisdictions most in need.

4. Narrative Reports: Problem Practices--Agencies that Lack Clearly Established Certification Procedures

The survey included at least eleven narratives which described practices involving unclear and undeveloped certification policies. Some agencies lacked clearly identified U visa certification officials and certification processes, while others did not have clear or timely lines of communication between the certifying agency and victim advocates.

a. Agencies that do not have clearly identified designated officials or certification systems

Some agencies seem to have no system or processes for acting on certification requests making it difficult for advocates or immigrant crime victims to know how to go about obtaining an I-918B certification. Other agencies do not have clearly identified staff designated to certify U visa certification requests. Survey respondents reported that when local law enforcement agencies do not have a designated certifying official or a certification process, it is more difficult, if not impossible for eligible immigrant crime victims to obtain certifications. Advocates reported:

- In New York, one practitioner notes that "different types of crimes go to different certifiers and some are completely non responsive. Some agencies may certify within in a few days, yet on other occasions they lose requests and the process lags for months. The inconsistency makes things difficult for victims and their advocates who cannot proceed with any sort assurance that their applications are being considered.[195]

- Survey respondents noted that the New York City Police Department does not have an organizational system to deal with U visa certification requests, resulting in a "nightmare" of a process.[196]

[195] Problem Practices, Narrative 11.
[196] Problem Practices, Narrative 8.

- Some agencies constantly change officer designation resulting in certification requests getting shifted between personnel. As a result, some certifications get lost in the shuffle.[197]

Some survey responses also showed that at times, an I-918B certification policy exists but is not published or otherwise made known to U visa applicants and or their advocates. Some certifying agencies do not publish the name of the certifying official making it difficult to determine who can certify I- 918B requests.[198] Survey respondents also indicated that some jurisdictions fail to clarify who can certify, making it difficult for attorneys to send the request to the right person.[199] Other advocates reported:

- The Sacramento Police use their own internal criteria which they do not share with advocates when determining whether or not they will grant U visa certification requests.[200]

- Another practitioner notes that while the District Attorney's Office in Maricopa County, Arizona has a certification policy, it is not public and seems to be applied on an *ad hoc* basis and many times advocates do not receive a response to a request.[201]

b. Agencies that do not have Clear and Timely Lines of Communication between the Certifying Agency and Victim Advocates

Several advocates reported that clear and timely communication with law enforcement officials is one of the biggest challenges they face in trying to obtain I-918B certifications for their clients. For instance, survey respondents reported that several law enforcement agencies do not communicate at all with victim advocates. For example, survey respondents noted:

[197] Problem Practices, Narrative 18.
[198] Problem Practices, Narrative 61.
[199] Problem Practices, Narrative 61 ("Agencies also haven't made it very clear what their chain of command is as far as who can certify.").
[200] Problem Practices, Narrative 24.
[201] Problem Practices, Narrative 38.

- When police departments in Dakota County, Minnesota refuse to certify they never issue a denial, leaving practitioners without any information. Advocates have to pursue the agency to determine what happened to the request.[202]

- The Police Department in Knoxville, Indiana refused to certify for the victim of a horrific sexual assault and would not speak to the victim advocate or discuss the case.[203]

- One survey respondent reported that some local law enforcement agencies that have blanket denial policies refuse to elaborate when asked about this policy.[204]

Survey respondents also indicated that many local law enforcement agency I-918B certification processes were inefficient and slow.

- A survey respondent described the New York Police Department certification process as "long and arduous."[205]

- The New York City Administration of Child Services, Brooklyn DA, Bronx DA, and New York DA have slow certification turnaround times; a certification process can take over one year.[206]

5. Conclusion: Problem Practices

Survey respondents largely reported problem practices that revealed that: (1) agencies chose to ignore, did not understand and/or follow the statutory parameters of certification; and/or (2) law enforcement agencies lacked clearly established certification policies and procedures. Education of law enforcement by federal and state governments coupled with the advocacy community, as well as further instruction on the limits of discretion would improve the situation. The Department of Homeland Security and advocates should focus its training efforts on educating local law enforcement agencies

[202] Problem Practices, Narrative 53.
[203] Problem Practices, Narrative 31.
[204] Problem Practices, Narrative 59.
[205] Problem Practices, Narrative 8.
[206] Problem Practices, Narrative 11.

The Department of Homeland Security should focus its training efforts on educating local law enforcement agencies on the importance of U visas, the challenges immigrant crime victims face, as well as "best practices" for implementing timely and efficient U visa certification processes. New regulations should be issued to provide clear and specific guidance and instructions so that agencies understand and can thus fulfill their requirements to exercise discretion on a case-by-case basis, according to the dictates of the statute, regulations, and guidance in order to accomplish the purpose and intent of this federal remedy.

on the importance of U visas, the challenges immigrant crime victims face, as well as "best practices" for implementing timely and efficient U visa certification processes. Finally, DHS should issue clarifying regulations to provide clear and specific guidance and instructions so that agencies understand and can thus fulfill their requirements to exercise discretion on a case-by-case basis, according to the dictates of the statute, regulations, and guidance in order to accomplish the purpose and intent of this federal remedy.

C. UNC I/HRP/ASISTA 2013 Survey and Data Findings Conclusion

Understanding the best practices and the problem practices is important for advocates. Survey respondents provided data on both individual agency policies and detailed accounts of personal experiences in working with law enforcement agencies to seek I-918B certifications. The I/HRP Clinic survey found that agencies that are trained and knowledgeable about the purpose of the U visa make better use of the legislative remedy. These agencies employ the U visa to strengthen their relationship with the immigrant community. The best practice agencies also have clearly established I-918B certification procedures. They communicate with victims and advocates in a timely and efficient manner and are transparent in their decision making process. These best practice agencies do not limit certification by time periods. Instead, they certify victims who were

helpful, with little emphasis on the circumstances of victim helpfulness. Throughout the U visa process, these agencies respond quickly to victims and advocates.

The survey also revealed trends and patterns of problem practices across the United States. In some municipalities, law enforcement agencies categorically refuse to exercise any discretion and categorically refuse to sign any and all I-918B certifications. A more widespread phenomenon around the country is that of agencies who chose to sign I-918B certification forms, but according to standards that are unrelated to the statutory purpose and DHS guidance, and in doing so abuse their discretion, and often act *ultra vires*.[207] Some agencies place specific time limits on certifications and will not certify if the case is old or if the certification period has expired. Practitioners also reported denials of certifications for certain types of crimes and for certain types of victims. Narrative accounts in this section illustrate the effects of these policies which essentially automatically disqualify eligible and deserving victims from receiving a U visa remedy. Indeed, the outcome is just the same as that produced by those agencies which categorically refuse to certify any and all I-918B certifications.

These troubling findings implicate legal policy issues including abuse of discretion, *ultra vires* acts, due process and equal protection violations, the lack of review processes, and the undermining of the national policy for uniformity in federal immigration law as it relates to the fair-handed implementation of the statutory requirements for the U visa remedy. The survey revealed multiple instances where agencies relied on victim cooperation for their own law enforcement purposes but denied them the opportunity to apply for a U visa by refusing to sign the I-198B certification form.

[207] *See infra* Section Two, Legal Policy Implications

These findings demonstrate the urgent need for the Department of Homeland Security to help to ameliorate these unlawful practices and inequities so that eligible U visa applicants nationwide may fairly seek access the U visa remedy. Advocates and the Department of Homeland Security can use the survey data to highlight problem practices and correct them by encouraging certifying agencies to implement better certification practices such as: (1)establishing clear procedures within the agency; (2) developing systems for ongoing and transparent communication between victims and advocates; and (3) engaging in education and training to better understand when and how to exercise discretion according to the dictates of the statute, regulations, guidance, and the purpose and intent of this federal remedy. Additionally, advocates can use survey data and additional data to be gathered to request that the Department of Homeland Security issue revised regulations guidance to provide more appropriate instruction and direction to certifying agencies.

These findings demonstrate the urgent need for the Department of Homeland Security to help to ameliorate these unlawful practices and inequities so that eligible U visa applicants may fairly seek to access the U visa remedy.

SECTION TWO: LEGAL POLICY IMPLICATIONS

INTRODUCTION

The survey findings and other data demonstrate that I-918B certifications[208] are often arbitrarily denied or for reasons based on considerations outside of the statutory, regulatory, and administrative guidelines. These findings raise a number of legal policy considerations, demonstrating the need for corrective action and reform at the federal, state, and local levels. If the U visa program is to meet its objectives, it must be applied fairly, consistently, and in keeping with Congressional purposes.

USCIS has delegated discretion to law enforcement and other certifying agencies and individuals to determine questions of fact, that is, to decide whether to provide an immigrant victim with a I-918B certification based upon the issues of helpfulness and whether a qualifying crime occurred.[209] Yet some agencies refuse to provide an I-918B certification based on a misunderstanding of the law, perhaps because of antipathy toward the U visa, or for other reasons unrelated to the U visa legal standards. [210] Other certifying agencies simply refuse to consider any request for an I-918B certification, and thus fail to exercise any discretion.[211] However, the Vermont Service Center and the Administrative Appeals Office at USCIS are precluded from exercising their decision-making and review authority when a certifying agency refuses to provide an I-918B

[208] The law enforcement certification, referred to herein in this section as the I-918B certification, is the document required by 8 U.S.C. § 1184(p)(1), which states that "[t]he petition filed by an alien under section 101(a)(15)(U)(i) [8 USCS § 1101(a)(15)(U)(i)] 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 101(a)(15)(U)(iii) [8 USCS § 1101(a)(15)(U)(iii)]." This certification requirement is formalized in the I-918B form, required by USCIS as part of the U visa application process.
[209] 8 U.S.C. § 1184(p).
[210] *See supra* Section One
[211] *Id.*

certification even if the refusal is incongruent with the existing guidance and rules.[212]

The above situations raise a number of legal concerns. First, certifying agencies should not be making decisions about eligibility requirements not assigned to them by Congress. Second, inconsistent certification practices raise federal preemption issues and thus conflict with Supreme Court rulings requiring national uniformity in immigration law. Third, advocates report that some certifying agencies may refuse to certify in ways that violate the Equal Protection Clause of the U.S. Constitution and Title VI. Fourth, DHS has failed to address the *ultra vires* practices committed by certifying agencies, and has not issued sufficient regulations and agency guidance. Fifth, survey responses indicate that local governments may have to oversee certifying agencies to assure that they act in compliance with the U visa statute. As a result of these legal concerns, USCIS should consider revisions to its regulations and guidance concerning the I-918B certification program and create a mechanism to review petitions that do not contain I-918B certifications.[213] Additionally, many petitioners may have a right to judicial review of I-918B certification decisions.

The statutory and regulatory language makes clear that certifying agencies must exercise discretion in determining whether or not to sign an I-918B form, and that such discretion must be exercised according to the purposes and the meaning of the statute.

I. ABUSE OF DISCRETION

A. Statutory and Regulatory Language Defining the Parameters of Discretion

The statutory and regulatory language makes clear that certifying agencies must

[212] *See* DHS Guide, *supra note* 8.

[213] USCIS has taken the position that the statutory authority allowing it to provide an I-918B certification discussed *infra*, only allows it to provide certification when it is the investigating agency. However, as discussed the statutory language surrounding the I-918B certification requirement is ambiguous. Because of this, USCIS could choose to rely on this authority to develop an certification review process and provide I-918B certifications to petitioners who were unfairly denied by certifying agencies. Such a regulatory scheme would survive a *Chevron* test, because it would be a reasonable interpretation of an ambiguous statute.

exercise discretion in determining whether or not to sign an I-918B form, and that such discretion must be exercised according to the purposes and the meaning of the statute. Guidance regarding the use of discretion in determining whether to provide an I-918B certification may be found in a number of sources.[214]

In order to better understand the discretion afforded to certifying agencies, it is useful to consider the statutory language governing the purpose and intent of the I-918B certification. The I-918B certification is not directly referenced in 8 U.S.C. § 1101(a)(15)(U), which simply requires that the petitioner "has been helpful, is being helpful, or is likely to be helpful."[215] The requirement that the petitioner submit the I-918B certification is found in 8 U.S.C. § 1184(p)(1), the statute outlining the application procedures for a U visa.[216] This section does not directly command the petitioner to obtain an I-918B certification, but instead merely states that the petitioner's application must contain an I-918B certification, a difference *with* distinction.[217] Notably, the statute gives USCIS the power to provide the I-918B certification,[218] and commands that USCIS "shall consider any credible evidence" submitted by the petitioner.[219] Looking at the structure of the two statutes – one creating the U visa and describing the eligibility requirements, the other merely describing the application process and evidentiary standards – it is clear that the I-918B certification was intended to be an evidentiary requirement only. The I-918B certification is not intended to provide local agencies with the power to decide whether or not a petitioner "deserves" a U visa; it is only intended to serve as evidence that the petitioner met the "helpfulness" standard of the statute.

---

[214] *See e.g.,* DHS Guide, *supra* note 8.
[215] 8 U.S.C. § 1101(a)(15)(U)(III); INA §101(a)(15)(u)
[216] 8 U.S.C. § 1184(p); INA §214(p)
[217] 8 U.S.C. § 1184(p)(1).; INA §214(p)(1)
[218] *Id.*
[219] 8 U.S.C. § 1184(p)(4). INA §214(p)(4)

The I-918B certification form is not created by the statute; as with implementation of any eligibility requirement, it is regulatory creation of USCIS in an attempt to standardize the certification process.[220] The statutes and regulations do not contain any *per se* mandatory language directed at certifying agencies. However, the statutes and their history suggest that agencies should exercise proper discretion when presented with an I-918B certification request, and the discretion should be exercised in a way that furthers the humanitarian and community policing purposes of the U visa.

The interim U visa rules, published in 2007, provides some explanation of the administrative intent in awarding discretion to law enforcement agencies to verify certain elements of the U visa application.[221] The interim rules state, "USCIS determined that since the certifying agency is the primary point of contact between the U visa petitioner and the criminal justice system, the certifying agency is in the best position to verify certain *factual* information."[222] This factual information includes whether there exists a qualifying crime, a victim with information regarding the crime and, helpfulness (or potential for helpfulness) from the petitioner.[223] In developing

The I-918B is not intended to provide local agencies with the power to decide whether or not a petitioner "deserves" a U visa; it is only intended to serve as evidence that the petitioner met the "helpfulness" standard of the statute.

[220] 8 C.F.R. § 214.14(c).
[221] *See* 72 Fed. Reg. 53,023, codified at 8 C.F.R. § 214.14. The full text of the interim U visa regulations are available online at http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-123038/0-0-0-133528/0-0-0-137708.html.
[222] New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 FR 53014-01 (September 17, 2007). Regulatory language may not be as binding on federal courts regarding interpreting the level of discretion which is accorded to an agency. Courts must analyze the statutory language, rather than the regulatory language, "to determine whether a decision or action is left to the discretion of the Attorney General or Secretary of Homeland Security." *Ordonez Orozco v. Chertoff*, WL 5155728, *2 (S.D. Tex. 2008) (citing *Ayanbadejo v. Chertoff*, 517 F .3d 273, 276 (5th Cir. 2008)).
[223] *Id. See also* 8 CFR 214.14(c)(2)(i) which states the six factors the certifying official must affirm in the certification as, the person signing the certificate is 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 is a Federal, State, or local judge; the agency

By allowing law enforcement agencies to decide, without review, whether to sign an I-918B, USCIS' authority is, in effect, usurped.

the I-918B certification, USCIS was primarily concerned with identifying the entity which would be most knowledgeable about the specific crime perpetrated on the victim, and in the cases of crimes occurring outside of the United States, whether extraterritorial jurisdiction exists.[224] Under USCIS' regulatory framework, the I-918B certification remains as an evidentiary part of the U visa application process. Law enforcement officials cannot adjudicate U visa applications. Yet when law enforcement agencies abuse their discretion in denying or refusing to sign I-918B certifications, USCIS' authority to adjudicate these applications, in effect, is usurped.

The U visa interim rules further identify the parameters within which certifying agencies may exercise their discretion. It encourages "certifying agencies to develop internal policies and procedures so that certifications are properly vetted."[225] By encouraging agencies to develop procedures in vetting I-918B requests, USCIS established a structure for agencies to exercise discretionary decisions. While it is true that the DHS Guide states that a "law enforcement officer[ ] cannot be compelled to complete a certification," a certifying agency should still conduct a fair review of an I-918B certification request within the bounds of legal guidance. Certifying agencies still

---

is a Federal, State, or local law enforcement agency, or prosecutor, judge or other authority, that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity; the applicant has been a victim of qualifying criminal activity that the certifying official's agency is investigating or prosecuting; the petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity; and the qualifying criminal activity violated U.S. law, or occurred in the United States, its territories, its possessions, Indian country, or at military installations abroad.

[224] *Id.* (elaborating that "USCIS does not believe that petitioners are in the best position to know the specific violation of U.S. law the certifying agency is investigating or prosecuting, or what specific statute provides the certifying agency with the extraterritorial jurisdiction to investigate or prosecute criminal activity that occurred outside the United States.")

[225] *Id.*

should review the specific factual circumstances under which an I-918B certification is requested and then make a proper discretionary decision as to whether or not to complete the certification.

B. Federal Court Rulings on the Exercise of Discretion for I-918B certifications

There are several reported cases where federal courts have been asked to act as certifying officials and provide an I-918B certification. [226] These cases provide guidance on the issue of the exercise of discretion in the issuance of I-918B certification. In ruling on these requests, federal courts have made a determination based on at least four elements of prima facie eligibility for a U visa certification: 1) petitioner status as victim of a qualifying crime; 2) petitioner possesses information about the crime by which he or she was victimized; 3) helpfulness to law enforcement; and 4) existence of an investigation.[227]

Court decision language strongly implies that every time an agency is presented with an LEC request, it must exercise its discretion and evaluate the request in a non-ministerial fashion.

Garcia v. Audubon serves as a useful example identifying the relevant issues for I-918B certifications. There, when the alien plaintiff in a civil suit moved to request the court to provide an I-918B certification, defendant perpetrators urged the court to consider an inquiry into the harm suffered by the victims.[228] The Eastern District Court of

[226] *See Garcia v. Audubon Cmtys. Mgmt.*, LLC, 2008 U.S. Dist. LEXIS 31221, 2008 WL 1774584 (E.D. La. 2008); *Torres-Lopez v. Scott*, 2013 U.S. Dist. LEXIS 91422 (N.D. Tex. 2013); *Agaton v. Hospitality & Catering Servs.*, 2013 U.S. Dist. LEXIS 46966, 2013 WL 1282454 (W.D. La. 2013); *Villegas v. Metro. Gov't of Nashville & Davidson County*, 907 F. Supp. 2d 907, 2012 U.S. Dist. LEXIS 135498, 2012 WL 4329235 (M.D. Tenn. 2012); *United States v. Biao*, 2011 U.S. Dist. LEXIS 44626, 2011 WL 607087 (S.D. Cal. Feb. 10, 2011).

[227] *See Garcia v. Audubon Communities Management L.L.C.* WL 1774584 *2 -*4 (E.D. Louisiana 2008); see also *United States v. Biao*, WL 607087 *1 (S.D. California 2011). In *Garcia* the court noted that "prima facie" was defined as both "sufficient to establish a fact or raise a presumption unless disproved or rebutted," and "at first sight, on first appearance but subject to further evidence or information." *2 n.4.

[228] *Audubon*, WL 1774584 *3. Petitioners raised the issue of harm suffered in the emergency motions for U visa Certification in efforts to demonstrate a prima facie eligibility for U visa status. See Memorandum of Law in Support of Plaintiffs' Second Emergency Motion for U visa Certification at 2, 6-7, *Garcia v. Audubon Communities Management L.L.C.* WL 1774584 (E.D. Louisiana 2008).

Louisiana confirmed that issue of substantial harm is not one for certifying entities to determine.[229] The court therefore refused to entertain an independent review of the element of harm other than making a finding that the victims had made a prima facie showing of substantial mental and physical suffering, and held that for purposes of the I-918B certification, such allegations were sufficient.[230] The district court looked to the legislative intent of the U visa in deciding upon the test of prima facie eligibility for an I-918B certification. Further, the court held that the criteria of helpfulness was not dependent upon an "on-going criminal investigation . . . because the regulations contemplate the future helpfulness of the applicant(s)."[231]

No agency will be considered to have acted lawfully, even where it has been granted a fair amount of freedom in decision-making, if the decision lacks substantial evidence to support it, or if the decision is clearly erroneous.

This reasoning was followed in *Villegas v. Metropolitan Government of Nashville*, where a federal court judge found the petitioner to have met the standard of prima facie eligibility according to the test articulated in *Audubon* and held that an on-going investigation was not a necessary prerequisite to providing an I-918B certification.[232]

Additional guidance on the requirement that reviewing agencies exercise

[229] Decisions regarding substantial harm are matters to be determined by USCIS and certifying agencies have no authority to make any determinations in this regard. See 8 U.S.C. §1101(a)(15)(U)(i)

[230] *Audubon*, WL 1774584 *4.

[231] *Audubon*, WL 1774584 *3. A review of reported cases shows that federal district courts have split on several issues when asked to act as certifying agencies, most notably the issue of whether or not an actual investigation was necessary. For example, in Garcia and Villegas, the judges determined that while no criminal charges had been filed, the plaintiffs had made a prima facie showing that they had been victims of qualifying crimes and might be helpful in the future. Other courts have disagreed with this approach, and refused to sign I-918B in the absence of a past or current investigation. See, e.g., *Torres-Lopez* at 3 (noting that the petitioners "have apparently not even notified law enforcement" of the defendants' alleged crimes, and thus refusing to issue an I-918B certification); *Bi Rong Li v. Holder*, 2012 U.S. Dist. LEXIS 7695, 2012 WL 208197 (W.D. Wash. 2012) (denying plaintiff's request to order law enforcement agency to issue an when plaintiff had not filed a criminal complaint of the ordeal). This split may be partially explained by the specific facts of the individual cases. For example, in *Bi Rong Li*, over a decade had passed between the alleged criminal activity and the case, and the petitioner had not sought U visa status prior to being arrested by ICE.

[232] WL 43299034 *6 (M.D. Tenn. 2012).

discretion can be found in *Orosco v. Napolitano*.[233] While the petitioner in *Orosco* lost his petition for a writ of mandamus,[234] the case underscores the fact that while the decision to provide an I-918B certification is discretionary, such discretion must be exercised each time a request for a certification is presented. The case provides helpful language for an abuse of discretion claim (as opposed to a writ of mandamus claim) against a certifying agency that has denied a petitioner an I-918B certification because of non-statutory considerations,[235] clearly requiring that an agency must exercise discretion "every time" an I-918B certification is requested. As the court stated:

> [f]urthermore, the content of the law enforcement certification itself requires an exercise of discretion every time one is issued. The law enforcement certification must state that the petitioner "'has been helpful, is being helpful, or is likely to be helpful' in the investigation or prosecution of criminal activity." Whether or not an alien has been "helpful" is not an objective determination that can be made ministerially.[236]

Law enforcement agencies which categorically refuse or wrongfully fail to sign U visa certifications have strayed from the purpose of the U visa.

This language strongly implies that every time an agency is presented with an I-918B certification request, it should exercise its discretion and evaluate the request in a non-ministerial fashion. An agency with a blanket policy of denying I-918B certification requests or denying them except in narrow circumstances is not complying with the spirit of the U visa program.

Guidance regarding the proper exercise of discretion in U visa certifications may also be found in cases outside of the U visa context where courts have considered whether an agency acted in an arbitrary manner or otherwise abused its discretion. These

[233] 598 F.3d 222 (5th Cir. 2010).
[234] *Id.*
[235] For example, an agency with a blanket policy of denying all I-918B certification requests, or only providing certifications within categorical limits that are not provided for in the statute. See *supra* Section One.
[236] 598 F.3d at 226 (citations omitted).

cases have arisen in circumstances involving delegation of powers by administrative agencies as well as when discretion is delegated expressly or impliedly by statute.[237] For example, a review of decisions of federal magistrates who are statutorily empowered to try certain offenses and assist the district court judge with pretrial matters demonstrates that delegated authority—even authority that is afforded great deference—must be exercised in ways that are neither arbitrary nor inconsiderate of the evidence.[238] These cases have held that certain agencies will not be considered to have acted lawfully, even where it has been granted a fair amount of freedom in decision-making, if the decision lacks substantial evidence to support it, or if the decision is clearly erroneous.[239] These cases have held that agency exercise of discretion must "consider all factors made relevant by the statute."[240] Furthermore, agencies have been found to have abused their discretion if they stray from established policies or relevant factors.[241]

The DHS Guide emphasizes that there are no time limitations on helpfulness, and no requirement for a resulting arrest or prosecution. These agency guidelines show the parameters of proper discretion. Law enforcement agencies who act outside of these parameters are failing to follow these guidelines with regard to the exercise of their discretion.

The above guidance makes clear that law enforcement agencies which categorically refuse or that only sign I-918B certifications in narrow circumstances have

[237] *See e.g., Gulf South Pipeline Company v. Federal Energy Regulatory Commission*, 876 F. 2d 431 (5th Cir. 1989); *Chevron, U.S.A. Inc, v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984).
[238] *See e.g., In re Establishment Inspection of Kelly–Springfield Tire Co.*, 13 F.3d 1160, 1165 (7th Cir.1994).
[239] *See Star Fruits S.N.C. v. US*, 393 F.3d 1277, 1281 (holding abuse of discretion occurs when the decision is based on erroneous interpretation of the law or on fact findings not supported by substantial evidence; *Berroteran-Melendez v. INS*, 955 F. 2d 1251, 1255 (reviewing fact-finding under substantial evidence test).
[240] *Arent v. Shalala*, 70 F.3d 610, 620 (1995) J. Wald, concurring.
[241] *See e.g., Diaz-Resendez v. INS*, 960 F. 2d 493, 495 (holding abuse of discretion when the decision was made without rational explanation or departs from established policies); Henry v. INS, 74 F. 3d 1, 4 (holding abuse of discretion occurs when agency does not consider a significant factor that appropriately bears on the discretionary decision, attaches weight to a factor that does not appropriately bear on the decision, or considers all of the proper factors but "nonetheless makes a clear judgmental error in weighing them.")

strayed from the purpose of the U visa. Moreover, when a victim of a crime that is enumerated in the U visa statute contacts law enforcement, or assists in providing information to help with the investigation of the crime, or is willing to and does cooperate with prosecutors, a certifying agency's decision not to certify is contrary to the spirit of the law and is erroneous.[242] Finally, given the need for uniformity in the availability and application of the U visa statute across the country, certifying agencies must be held to standards that are clear and predictable to avoid disparate results for crime victims similarly situated.[243] Indeed, as courts have articulated in related matters pertaining to other abuse of discretion claims, there is a need for flexibility "to permit efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from the uncontrolled, arbitrary power in the hands of administrative officials."[244]

C. Department of Homeland Security Guidance

In addition to the instructions provided by the regulations, the DHS Guide provides guidance for law enforcement agencies regarding what constitutes "helpfulness" or "enough cooperation."[245] It states clearly that helpfulness should be determined based on whether "since the initiation of cooperation, the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement."[246] The DHS Guide goes further to emphasize that there are no time limitations on helpfulness,

[242] *See Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 216 (2d Cir. 1991) (discussing review of asylum and withholding of deportation decisions made according to the substantial evidence standard of review, in comparison to the second step of the analysis, which is abuse of discretion of the Attorney General's decision.).
[243] *See Bunnell Hill Development Co., Inc. v. Bay County Road Com'n*, No. 02-10250-BC, 2003 WL 23142192 (E.D. Mich., Dec. 23, 2003). *See* Section Two Part II, *infra*.
[244] *Bunnell Hill Development Co.* at 4.
[245] *See* DHS Guide, *supra* note 8.
[246] *Id.*

and no requirement for a resulting arrest or prosecution.[247] These agency guidelines show the parameters of proper discretion. Law enforcement agencies who act outside of these parameters are failing to follow these guidelines with regard to the exercise of their discretion.

II. FEDERAL PREEMPTION AND UNIFORMITY

A. Preemption

The concept of federal preemption is based in Article VI of the United States Constitution, which states,

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.[248]

In cases interpreting the Supremacy Clause, the Supreme Court has defined two general ways in which federal law may preempt state law: through express preemption or implied preemption.[249] Generally speaking, express preemption occurs when Congress "indicate[s] pre-emptive intent through a statute's express language or through its structure and purpose."[250] Implied preemption, on the other hand, may occur even though Congress has not passed a law that explicitly preempts state action when (1) the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left

---

[247] *Id*. at 4. The guide states, "A current investigation, the filing of charges, a prosecution, or conviction are not required to sign the law enforcement certification. Many instances may occur where the victim has reported a crime, but an arrest or prosecution cannot take place due to evidentiary or other circumstances…. There is no statute of limitations on signing the law enforcement certification. A law enforcement certification can even be submitted for a victim in a closed case."

[248] U.S. Const. art. VI, § 2.

[249] *See* Mary J. Davis, *The "New" Presumption Against Preemption*, 61 Hastings L.J. 1217, 1220-22 (2010) (providing an overview of express and implied preemption).

[250] *See Altria Group, Inc. v. Good*, 555 U.S. 70 (2008) (quoting *Jones v. Rath Packing Co*.,430 U.S. 519, 525 (1977)).

no room for the States to supplement it,"[251] (2) the federal interest is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,"[252] (3) compliance with both the state and federal statute is impossible,[253] or (4) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[254]

Because the "[p]ower to regulate immigration is unquestionably exclusively a federal power,"[255] only the federal government may establish policies to determine "who should or should not be admitted into the country."[256] Two recent cases effectively exemplify the limits on state and local action affecting immigration. In *Villas at Parkside Partners v. City of Farmers Branch*,[257] the Fifth Circuit Court of Appeals invalidated a city ordinance that required non-citizen residents to provide an identification number to obtain an occupancy license.[258] The ordinance required the building inspector to "verify with the federal government whether a non-citizen is 'an alien lawfully present in the United States.'"[259] Under the ordinance, "[t]he Building Inspector [would] revoke the occupancy license of an alien . . . unlawfully present" in the United States.[260] In striking down the ordinance, the court highlighted that the federal government has acted broadly to regulate immigration law, occupying the field and preempting a great deal of analogous state and local action.[261] The court stated:

---

[251] *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).
[252] *Id*.
[253] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).
[254] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).
[255] *De Canas v. Bica*, 424 U.S. 351, 354 (1976).
[256] *Id*. at 355.
[257] *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, 804 (2012).
[258] *Id*.
[259] *Id*.
[260] *Id*.
[261] *Id*. at 811.

> Indeed, Congress has exercised its exclusive power by enacting the Immigration and Nationality Act ("INA"), which "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'"[262]

The Supreme Court came to a similar conclusion in its recent decision in *Arizona v. United States.*[263] In that case, the Supreme Court struck down sections of an Arizona statute that imposed additional state penalties on employers and immigrants who violated already proscribed federal immigration laws.[264] In invalidating sections of the statute, the Court stated: "Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system . . . within the Nation's borders."[265] If the Arizona statute were upheld, "every State could give itself independent authority to prosecute federal registration violations, 'diminish[ing] the [Federal Government]'s control over enforcement' and 'detract[ing] from the "integrated scheme of regulation" created by Congress.'"[266]

Regardless of whether local certifying agencies are enacting affirmative ordinances or operating under informal policies, their approach may impermissibly conflict with federal law if their I-918B certification policies result in circumvention of the federal law**.** If discretion results, for instance, in failure to implement the federal law then one could argue such an approach is both an abuse of discretion and a constructive

---

[262] *Id*. (quoting *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011) and *De Canas v. Bica*, 424 U.S. 351, 353 & 359 (1976)).
[263] *Arizona et al. v. U.S.*, 567 U.S. ___ (2012).
[264] *See Arizona et al. v. U.S.*, 567 U.S. ___, 1-2 (2012). Three provisions of the Arizona law were preempted: (1) A provision making "failure to comply with federal alien registration requirements a state misdemeanor," (2) a provision "mak[ing] it a misdemeanor for an unauthorized alien to seek or engage in work in the state," and (3) a provision "authorize[ing] officers to arrest without a warrant a person 'the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States.'" *Id.*
[265] *Id*.
[266] *Id*. (quoting *Wisconsin Dept. of Industry v. Gould Inc*., 475 U.S. 282, 288-89 (1986)).

pre-emption of the federal mandate. Informal policies[267] have the same effect as officially adopted ordinances of denying the possibility of a U visa to those for whom eligibility is contemplated by the statute. Such policies frustrate the Congressional intent of the U visa, thwart the purposes of the U visa, and thus present a conflict with federal law. Since Congress intended only for USCIS to decide whether or not an individual should be granted a U visa, when agencies presented with a request for an I-918B certification refuse to fairly consider the request, they arguably usurp the adjudication authority expressly granted to USCIS by Congress.

As stated in *Arizona*, state and local actions should not "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[268] When a certifying agency adopts a policy of refusing to certify or certifying only in extremely narrow circumstances, that agency creates an obstacle to the fulfillment of the public safety and humanitarian objectives of the U visa statute. Clearly, poor certification practices could create a substantial preemption issue that needs a remedy.

When a certifying agency adopts a policy of refusing to certify or certifying only when certain non-statutory standards are met, that agency creates an obstacle to the fulfillment of the public safety and humanitarian objectives of the U visa statute. Clearly, poor certification practices create a substantial preemption issue that needs a remedy.

B. Uniformity

Related to the issue of preemption is the issue of uniformity of immigration law. Regulation of immigration is a power held solely by the federal government.[269] The

[267] For example, categorical refusal to certify U visas or to only certify in limited circumstances not contemplated by the statute, as discussed *infra* in Part 1.
[268] *Id.* at 8 (quoting *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941)).
[269] *De Canas v. Bica*, 424 U.S. 351, 354, 96 S. Ct. 933, 936 (1976) (stating that that the power to regulate

Court recently reaffirmed this principle in *Chamber of Commerce v. Whiting*, a 2011 case dealing with an Arizona law regulating "unauthorized alien employment."[270] Several rationales justify the reservation of immigration power for the federal government and the need for a single, uniform immigration scheme. First, immigration law must be nationally uniform because of its ability to "affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."[271] Second, immigration law must be uniform so that "foreign countries concerned about the status, safety, and security of their nationals in the United States [can] confer and communicate on this subject with one national sovereign, not the 50 separate States."[272]

The U visa certification practices of law enforcement agencies around the country are not uniform. Because of this, the LEC requirement, discretion granted to local agencies in the certification process, and lack of mandatory regulations directed towards certifying agencies combine to transform the U visa into a remedy entirely dependent upon the geographical location of the petitioner rather than the federal standards enunciated in the statute.

In addition to *Whiting*, other recent Supreme Court cases have continued to affirm the importance of uniformity in immigration law. For example, in *Lopez v. Gonzalez*, the Court rejected a statutory interpretation that would have resulted in geographically divergent consequences for deportation decisions.[273] Additionally, in *Arizona*, the Court based its decision to strike down three sections of Arizona's S.B. 1070, in part, on the importance of national uniformity in immigration laws.[274] Citing a

---

immigration "is unquestionably exclusively a federal power").

[270] *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1975 (2011).

[271] *Arizona et al., v. United States*, 567 U.S. ___, 3 (2012) (citing *Harisiades v. Shaughnessy*, 342 U. S. 580, 588–589 (1952)).

[272] *Id*. (citing *Chy Lung v. Freeman*, 92 U. S. 275, 279– 280 (1876)).

[273] *Lopez v. Gonzales*, 549 U.S. 47 (2006).

[274] *See Arizona*, 567 U.S. ___, 3.

provision of the Immigration Reform and Control Act, the Court stated that "the immigration laws of the United States should be enforced vigorously and uniformly."[275]

Foreign consulates provide immigrants and visitors from their countries with a great deal of information regarding U.S. visas and the availability of other immigration remedies. The lack of uniformity among U visa certification practices makes it nearly impossible for consulates to provide this service to their citizens.

The U visa certification practices of law enforcement agencies around the country are not uniform.[276] Because of this, the U visa is a remedy entirely dependent upon the geographical location of the petitioner rather than the federal standards enunciated in the statute. Absent express intent (which is lacking here) such a non-uniform result could not be intended by Congress when the importance of immigration law uniformity is so often reiterated by the courts.[277]

Federal U visa regulations and guidelines also suggest that certifying agencies should "develop internal policies and procedures so that certifications are properly vetted."[278] Furthermore, uniformity in U visa certification practices furthers the policy reasons underlying the requirement for uniformity in immigration law.[279] The "perceptions and expectations of aliens in this country who seek the full protection of its laws"[280] are undoubtedly affected by the availability of an immigration remedy for

[275] *Id.* at 19 (citing Immigration Reform and Control Act, § 115, 100 Stat. 3384). The quote from the Immigration Reform and Control Act included by the Supreme Court in the Arizona decision clearly demonstrate that Congress, as well as the courts, have stressed the importance of the uniformity of immigration law.
[276] *See* Section One, Part I, II.B.
[277] *See supra* notes 93-99 and accompanying text.
[278] *See* 72 Fed. Reg. 53,023, codified at 8 C.F.R. § 214.14. The full text of the interim U visa regulations are available online at http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-123038/0-0-0-133528/0-0-0-137708.html.
[279] *See supra* notes 51, 52.
[280] *Arizona et al., v. United States*, 567 U.S. ___, 3 (2012).

victims of serious crimes.[281] Law enforcement agencies that decide certification requests based on *ultra vires* requirements foster distrust between immigrants and law enforcement. These harmful policies damage immigrant communities' relationship with local law enforcement, making immigrant victims less likely to seek out or trust police. This then prevents immigrants from receiving adequate protection of the law.

III. EQUAL PROTECTION AND TITLE VI

Refusals to sign I-918B certification may give rise to claims under the Equal Protection Clause of the Constitution and Title VI of the Civil Rights Act. The data from the national and local surveys demonstrate that some agencies with the authority to certify U visas may often refrain from doing so based on discriminatory attitudes about immigrants in general, and at times specifically discriminatory attitudes about undocumented immigrants of particular racial and/or national origin. The U visa remedy was designed to assist undocumented crime victims; the statute does not instruct agencies to consider national origin, race, or immigration status when making certification decisions. Further, doing so would violate the Equal Protection Clause of the Constitution and Title VI of the Civil Rights Act.

[281] Analogously, the geographic variance in the availability of U visas inhibits "foreign countries concerned about the status, safety, and security of their nationals in the United States" from ensuring their citizens are fully protected within the United States. *Arizona*, at 3. Some foreign consulates provide immigrants and visitors from their countries with a great deal of information regarding U.S. visas and the availability of other immigration remedies Some foreign consulates provide immigrants and visitors from their countries with a great deal of information regarding U.S. visas and the availability of other immigration remedies. , *e.g.*, Accion Diferida: Información Para Jovenes Mexicanos en Estados Unidos, Secretaria de relaciones exteriores, (last visited May 3, 2013), http://www.sre.gob.mx/acciondiferida/ (providing information from the Mexican consulate on the Deferred Action for Childhood Arrivals program, meant to help Mexican citizens living in the United States to determine their eligibility for the program). The lack of uniformity among U visa certification practices makes it nearly impossible for these consulates to provide this service to their citizens.

A. The Equal Protection Clause and U visa Certification Denials

Certifying agencies that deny I-918B certification requests due to the applicant's race, national origin, or immigration status likely violate the Equal Protection Clause of the Constitution. The Constitution provides "that no State shall 'deny to any person within its jurisdiction the equal protection of the laws."[282] Under the Equal Protection Clause, "the Constitution prohibits selective enforcement of the law based on considerations such as race" or national origin.[283] While immigration status is not a protected class subject to strict scrutiny like race or national origin discrimination, discrimination based on immigration status is subject to rational basis review.[284]

Refusals to sign I-918B certification may give rise to claims under the Equal Protection Clause of the Constitution and Title VI of the Civil Rights Act. The data from the national and local surveys demonstrate that agencies with the authority to certify U visas often refrain from doing so because of discriminatory attitudes about immigrants in general, and, at times, specifically discriminatory attitudes about undocumented immigrants of particular racial and/or national origin.

Those law enforcement agencies that discriminatorily deny I-91B certifications are vulnerable to three types of equal protection challenges based on: (1) national origin or racial animus; (2) immigration status animus; and (3) the subclass of immigrant crime victims that is created when a state or local agency denies a crime victim an opportunity to avail themselves of a federally recognized benefit that would be available to an otherwise similarly situated immigrant crime victim seeking certification from a different and non-discriminatory agency. This last type of Equal Protection challenge generally arises when

[282] U.S. Const. amend. XIV, § 1.
[283] *Whren v. United States*, 517 U.S. 806, 813 (1996).
[284] *Plyler v. Doe*, 457 U.S. 202, 223-224 (U.S. 1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' . . . . In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs . . . can hardly be considered rational unless it furthers some substantial goal of the State."

immigrant crime victims were victims in places where local law enforcement agencies harbored anti-immigrant, national origin, or racial animus compared with similarly situated immigrant victims who were victims in places where local law enforcement agencies did not harbor or act on such sentiments.[285] For example, a domestic violence crime victim who calls the police, and fully cooperates with the criminal investigation would be denied certification in a county where the local law enforcement agency discriminates based on national origin and believes that "immigrants in the US without papers should be sent back to their countries."[286] Meanwhile, in a neighboring county, a different victim of the very same crime, who was equally cooperative and helpful to law enforcement, would receive a signed certification because the local law enforcement agency did not discriminate on the basis of national origin. Finally, as explained below, local law enforcement agencies are vulnerable to an equal protection challenge when they enact and enforce blanket I-918B certification denial policies.[287]

Although the national and local surveys on U visa practices did not explicitly seek evidence from advocates or applicants about issues of racism and intentional discrimination, nonetheless, such evidence surfaced.[288] These instances of discrimination

[285] This form of discrimination was found to violate Equal Protection in *Plyler v. Doe*, 457 U.S. 202, 235 (1982) ("Here, however, the State has undertaken to provide an education to most of the children residing within its borders."); *Graham v. Richardson*, 403 U.S. 365, 367-368 ("[W]e hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause."). In addition to violating Equal Protection, states and localities that deny individuals access to a federal derived benefit also violate preemption and uniformity. *See Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (holding "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.").

[286] *See* Problem Practices, Narrative 42.

[287] *See infra* Section Three, III A.

[288] It should be noted that the survey did not prompt respondents for evidence regarding discriminatory animus or ask questions related specifically to equal protection claims. Nonetheless, respondents when describing practices that were not in compliance with the purposes of the U visa statute, offered evidence of discriminatory attitudes towards undocumented immigrants based on their national origin and/or race.

were often manifested when agencies stated the basis for their refusal to issue an I-918B certification but may also arise from a totality of circumstances. Certifying agencies which exhibit institutional bias and discriminatory animus towards immigrant victims preclude them from obtaining U visa relief and thus deprive them of equal (or any) protection of the law. The following sections will discuss the types of equal protection violations that may arise in U visa certification practices.

1. Race and National Origin Discrimination

a. Intent Doctrine: Proving Discrimination

The Equal Protection Clause of the Fourteenth Amendment states that "No state shall . . . deny any person within its jurisdiction the equal protection of the laws." [289] Further, the Equal Protection Clause requires that "all persons similarly circumstanced shall be treated alike."[290] In *United States v. Armstrong* the Supreme Court held that when there is a facially neutral law, that is, where the law does not classify or discriminate based on protected class status, a successful equal protection challenge generally requires both a showing of discriminatory purpose and discriminatory effect.[291] "Discriminatory purpose" is understood to mean that the decision maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[292] This is generally known as "intent doctrine."

There are additional sources of discriminatory animus on the part of various certifying agencies throughout the country that have surfaced on other professional law-related listservs and in the national discourse generally. Additional research that focused squarely on issue of violations of the equal protection clause would likely contribute to U visa claims and should be undertaken in the near future.

[289] U.S. CONST. amend. XIV, **§1.**

[290] *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

[291] 517 U.S. 456, 465 (1996).

[292] *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (citations omitted).

Law enforcement agencies can violate the Equal Protection Clause even in cases where discriminatory intent is not the decision maker's sole motive.[293] All that is required to prove a violation of the Equal Protection Clause is evidence showing that "racial animus was one of several factors that, taken together, motivated the discriminatory acts."[294] *Arlington Heights v. Metropolitan Housing Development Corporation*[295] set forth an "intent test" to determine when invidious discrimination is a motivating factor in a state action. The Supreme Court found evidence of invidious discrimination when: (1) "there is a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face;" (2) there is a history of a series of official actions taken for invidious purposes; and (3) the administrative and legislative history of a state action is indicative invidious discrimination.[296]

In *Arlington Heights*, the Court relied on *Yick Wo v. Hopkins*[297] to demonstrate how a state actor can violate the Equal Protection Clause by adopting a neutral policy with a discriminatory impact or a policy with a discriminatory effect.[298] *Yick Wo* dealt with a municipal ordinance in San Francisco which regulated the licensing of laundries in the city. The code imposed heightened requirements on the operation of laundries, which were predominately owned by individuals of Chinese heritage. The Court struck down the regulations stating that when the administration of regulations by a state is "directed

[293] *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982) (showing that racial discrimination can exist in officials' desire to block housing projects).
[294] *Orgain v. City of Salisbury*, 305 F. App'x 90, 98 (4th Cir. 2008) (noting that "the Equal Protection Clause does not require Plaintiffs to prove that the challenged action rested solely on racially discriminatory purposes").
[295] 429 U.S. 252 (1977).
[296] 429 U.S. at 276-68.
[297] 118 U.S. 35 (1886).
[298] *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996).

so exclusively against a particular class of persons as to warrant and require the conclusion, that . . . they are applied by the public authorities charged with their administration . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws . . . ."[299] The Court stated that even though the law was facially neutral, the fact that it was "applied and administered by public authority with an evil eye and an unequal hand" the regulation violated equal protection because the regulations made "unjust and illegal discriminations between persons in similar circumstances, material to their rights."[300]

Race and national origin discrimination are subject to strict scrutiny. Racial and national origin classifications will only be allowed if the state can show that the classification is necessary in order to accomplish a "compelling government purpose." [301] Further, the classification must be "narrowly tailored" to the compelling government interest.[302]

b. Evidence of Race and National Origin Discrimination in U visa Certification Denials

In the case of U visa I-918B certifications, there is evidence that some law enforcement agencies may base their decision not to sign a certification because of the victim's race and/or national origin.

- Survey respondents have identified racial and national origin animus and/or bias as one the reasons that local law enforcement agencies do not sign U visa certifications.[303]

[299] *Yick Wo*, 118 U.S. at 373.
[300] *Id.*, at 374.
[301] *See Korematsu v. United States*, 323 U.S. 214 (1944) (holding "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . courts must subject [these laws] to the most rigid scrutiny."
[302] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[303] *See* Problem Practices, Narrative 13, Problem Practices, Narrative 23; Problem Practices, Narrative 35.

- Advocates who are exposed to the attitudes of public officials with certification authority and work day-to-day in communities where law enforcement are often unwilling to sign U visa certifications perceive racism and national origin discrimination as underlying reasons for their refusal to certify.[304]

- Survey results highlighted that some advocates believed law enforcement agencies performed substandard criminal investigations for immigrant crime victims due to their national origin.[305]

Other national media and advocacy reports have called attention to local immigration initiatives throughout the country and provide examples of how some local law enforcement agencies engage in race and national origin discrimination. For example, the ACLU filed suit against the Maricopa County Sherriff's Office (MCSO) alleging that the MCSO violated equal protection by instituting a pattern and practice of targeting Latino drivers and passengers in Maricopa County during traffic stops. On May 24, 2013, Federal Court Judge G. Murray Snow found that the MCSO had engaged in a pattern and practice of racial discrimination against Hispanic drivers and enjoined the MCSO from "[u]sing race or Latino ancestry as a factor in determining to stop any vehicle in Maricopa County with a Latino occupant."[306] Notably, survey respondents identified Maricopa County as evidencing problematic U visa Certification practices.[307]

---

[304] Eloy Tupayachi, *Se traban peticiones de visas U*, QUE PASA (Mar. 14, 2013), http://charlotte.quepasanoticias.com/noticias/inmigracion/inmigracion/113353-se-traban-peticiones-de-visas-u.

[305] Problem Practices, Narrative 13.

[306] *Melendres v. Arpaio*, 2013 U.S. Dist. LEXIS 73869, 141 (D. Ariz. May 24, 2013). Additionally, in May of 2012 the Department of Justice sued the Maricopa County Sherriff's Office for race and national origin discrimination Additionally, in May of 2012 the Department of Justice sued the Maricopa County Sherriff's Office for race and national origin discrimination. The Department of Justice Complaint alleged that Maricopa County Sherriff, Joe Arpaio, in his official capacity as head of the Maricopa County Sheriff's Office and the Maricopa County Sheriff's Office routinely discriminated against Latinos by: instructing MCSO deputies unlawfully target Latino drivers for traffic stops, Latino drivers were found to have been stopped four to nine times more often than similarly situated non-Latino drivers; fostering a culture of bias by using anti-Latino epithets; and filings "baseless administrative actions, civil actions and criminal cases against its perceived critics in an attempt to chill free speech." Press Release, Department of Justice, Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio (May 10, 2012),

Given the concerns routinely expressed by immigrant advocates about discriminatory animus and its impact on U visa certifications, advocates around the country are well-advised to begin to gather and publicize additional evidence that would, sadly, demonstrate additional egregious equal protection violations.

These examples are illustrative of the substandard and unlawful ways that state agencies discriminate against crime victims on the basis of national origin and/or race.

As noted above, it is important to note that the survey did not ask respondents to provide information that might indicate that U visa certification denials were a result of race or national origin discrimination. Notably, survey respondents supplied this information without being solicited or prompted to do so.[308] Given the concerns routinely expressed by immigrant advocates about such discriminatory animus and its impact on U visa certifications, advocates around the country are advised to begin to gather and publicize additional evidence that would, sadly, demonstrate additional egregious equal protection violations.

c. Race and National Origin Discrimination in the Context of U visa Certification Denials Does Not Pass Constitutional Muster

If a certifying agency engages in racial or national origin discrimination, that action is subject to judicial review under strict scrutiny. Discriminatory acts will only be

---

http://www.justice.gov/opa/pr/2012/May/12-crt-602.html.

[307] The Maricopa County Attorney's Office does not have a public, transparent U visa certification process, nor does the MCAO have dedicated personnel in charge of U visa certifications. The UNC I/HRP-ASSISTA 2013 survey respondent also noted that most of the time U visa Certification requests are never responded to at all. *See* Problem Practices, Narrative 38. While the UNC I/HRP-ASSISTA 2013 survey did not identify the Maricopa Sherriff's Office as a local law enforcement agency that engaged in problem U visa certification practices, this may be due to the fact that immigration practitioners do not approach the Sherriff's office for certification due to their public anti-immigrant stance. The close relationship between the Maricopa Attorney's Office and the Sherriff Department has been documented, as both agencies worked closely to implement a state law designed to sanction employers who hired undocumented workers. Additionally, the Attorney's Office pursued identity theft charges against immigrant workers who were arrested in immigration raids led by MCSO Sherriff Joe Arpaio. *See* Valeria Hernandez, *Immigrants in Arizona face resistance to getting visas after being victims of crimes*, PUBLIC RADIO INTERNATIONAL (Oct. 27, 2012, 10:30 PM), http://www.pri.org/stories/politics-society/government/immigrants-in-arizona-face-resistance-to-getting-visas-after-being-victims-of-crimes-11902.html.

[308] These examples of self-reporting illustrate the need for more national surveys and fact gathering that address the presence of national origin and racial animus in U visa certification denials. *See supra* note 7.

upheld for a "compelling government interest" and the policy must be "narrowly tailored" so that the said discrimination is substantially related to the government's compelling interest.[309] Racial and national origin discrimination in the context of U visa denials do not support a compelling government interest. Indeed, the U visa was created to protect immigrants who "are often targeted to be victims of crimes committed against them in the United States."[310] By contrast, local law enforcement agencies that discriminate are actively contravening Congress' intent of protecting immigrant crime victims. Further, a policy of denying U visa certification requests based on racial or national origin animus would be an over-inclusive policy and would not be "narrowly tailored."[311]

d. Local Law Enforcement Agencies that Engage in Patterns and Practices of Discrimination Violate Equal Protection

Arlington Heights requires that plaintiffs prove racial and/or national origin animus in order to bring a successful equal protection claim. As noted above, the UNC I/HRP-ASISTA 2013 survey uncovered advocate reports of racial and national origin discrimination in U visa certification denials without soliciting information about such practices and there are likely many more examples that were not captured in the survey.[312] Even without "smoking gun" evidence of discrimination, law enforcement agencies that discriminate on the basis of race or national origin would be subject to challenge because they result in a pattern or practice of discrimination.

[309] *Plyler v. Doe*, 457 U.S. 202 (1982). *See* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 Yale L.J. 2, 34(2008) (observing that in the area of equal protection, among other constitutional doctrines, statutes must be "'narrowly tailored"').
[310] 8 USC § 1513(a)(1)(A)
[311] *See supra* note 309 and accompanying text.
[312] *See supra* Sec. III A(1)b.

Absent such "smoking gun" evidence, a court would look at "facially neutral" policies that result in a pattern or practice of discrimination against a protected class. A court applying the *Arlington Heights* would likely find intent where there is a practice of denying U visa certifications to Mexicans, or any other ethnic or racial minority, because a "a clear pattern, unexplainable on grounds other than race," would emerge. Additionally, *Arlington Heights* instructs court to look at historical examples of invidious discrimination. While there might not be a clear pattern, or a blanket policy of rejecting all U visa certification requests from a given national, ethnic, or racial group, local law enforcement agencies are nonetheless open to an equal protection claim if there is a history on invidious discrimination within the agency.[313]

Agencies that deny I-918B certification requests due to the applicant's race, or national origin likely violate the Equal Protection Clause of the Constitution because these denials are unable to withstand strict scrutiny. In addition to the specific evidence of unlawful discriminatory practices, many U visa advocates will be able to rely on evidence that demonstrates patterns of discrimination and historical examples of invidious discrimination within the agency.

2. Immigration Status Discrimination

a. Undocumented Crime Victims are Entitled to Equal Protection

The UNC I/HRP-ASISTA 2013 survey also provided evidence that some local law enforcement agencies regularly denied U visa certifications based on the applicants immigration status. Undocumented immigrants are "persons" under the Equal Protection

[313] For example, the invidious discrimination documented in the Department of Justice Complaint against the Maricopa Sherriff's Office could meet the intent test set forth in *Arlington Heights. See supra* section III(A)(1)(a).

Clause of the Constitution and are protected from discrimination.[314] The Supreme Court, in *Plyler v. Doe* [315] and *Graham v. Richardson, [316]* provided guidance about the relationship between the protections offered by the Equal Protection Clause and undocumented immigrants.

In *Plyler*, the Supreme Court ruled that a Texas law barring undocumented students from public schools was unconstitutional as a violation of the Equal Protection Clause. The Court first found that even though undocumented aliens' presence in the United States (and subsequently in Texas) was unlawful, these students were still "within the jurisdiction" of the state and thus the Equal Protection Clause extended to them.[317] Although the Court found that the undocumented school children could not be a "suspect class" under the Equal Protection clause, the Court ultimately found that the state's discriminatory policy could "hardly be considered rational unless it furthers some substantial goal of the State."[318] The Court also noted that denying the children an education would "impose a lifetime hardship" on the undocumented children. Finally, the Court describes a subclass that would be created by allowing some young children to receive education and while restricting the education of other children, based on their immigration status.[319]

---

[314] *Wong Wing v. United States*, 163 U.S. 228, 242-243 ("The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic . . . The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar --- in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.").
[315] 457 U.S. 202 (1982).
[316] 403 U.S. 365, 367 (U.S. 1971).
[317] *Plyler v. Doe*, 457 U.S. 202, 215, (1982) (noting that undocumented school children "may claim the benefit of the Fourteenth Amendment's guarantee of equal protection"). *Id.*
[318] 457 U.S. at 224.
[319] *Id.* at 229 (noting that"[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries."). *Id.*

Also instructive to the issue here is the decision in *Graham v. Richardson*[320] where the Supreme Court struck down state statutes that conditioned receipt of state health benefits on immigration status and residency requirements as a violation of equal protection. [321] The Court declared unconstitutional the statute holding "a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause."[322] While U visa applicants may or may not have lawful status, and the *Graham* plaintiffs were characterized as being "lawfully admitted," as *Graham* made clear, state based alienage classifications as well as national origin discrimination are nonetheless subject to strict scrutiny, stating that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[323]

b. Evidence of Discrimination on the Basis of Immigration Status in U visa Certification Denials

In the case of I-918B certification, there is evidence that some law enforcement agencies base their decision not to sign a certification because of the victim's immigration status. UNC I/HRP-ASISTA 2013 survey respondents provided examples of

[320] 403 U.S. 365, 367 (U.S. 1971).
[321] 403 U.S. at 367.
[322] 403 U.S. at 367-377. The Court also held that the laws violated preemption stating, "[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government." *Graham*, 403 U.S. at 378.
[323] 403 U.S. at 372. In 1996 the Personal Responsibility and Work Opportunity Reconciliation Act (commonly referred to as the Welfare Reform Act) allowed states to deny a wide range of public benefits to permanent resident aliens. *See* Ryan Terrance Chin, *Moving Toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 494-495 (2011). *Graham* and the Welfare Reform Act were reconciled in *Mathews v. Diaz,* which held that *federal* welfare rules that distinguish between non-citizens and citizens are constitutional. *See Mathews v. Diaz*, 426 U.S. 67, 86-87 (1976) (holding that the federal government's exclusive power to regulate immigration must be balanced against equal protection concerns and that such a balancing results in rational basis review when federal laws distinguish between citizens and non-citizens). On the other hand, the Court concluded that when *states* discriminate between citizens and non-citizens, those actions should be analyzed under strict scrutiny. *Id.* at 84-87.

when local law enforcement agencies discriminated on the basis of the crime victim's immigration status. For example, advocates reported,

- A Chief of Police in Lubbock, Texas refused to sign a U visa certification because he did not want to help "illegal immigrants."[324]
- In Owyhee County, Idaho, a prosecutor refused to sign I-918B certifications, explaining that he "did not want his office to help an illegal immigrant."[325]
- The Redmond Police Department in Redmond, Oregon denied I-918B certification, for the same reason: they did not want to help an "illegal alien."[326]
- A Maiden County, North Carolina Police department put it somewhat differently when refusing to sign a I-918B Certification stating that "immigrants in the US without papers should be sent back to their countries."[327]

To deny undocumented immigrants their ability to avail themselves of the statute of which they are the targeted beneficiary is to deny them equal protection of the law.

c. Immigration Status Discrimination in the Context of U visa Certification Does Not Pass Constitutional Muster

The U visa statute was designed to assist vulnerable undocumented immigrants. Law enforcement agencies are sworn to uphold the law and it is reasonable to presume that they do so for other classes of persons within their jurisdiction. To deny undocumented immigrants their ability to avail themselves of the statute of which they are the targeted beneficiary arguably denies them equal protection of the law. Just as the *Plyler* Court found that discriminating against school children based on their immigration status would not be "rational" and would violate equal protection, so too would discriminating against U visa applicants seeking I-918B certification based of their immigration status. Therefore, certifying agencies that discriminate based on applicant's immigration status

[324] Problem Practices, Narrative 34.
[325] Problem Practices, Narrative 66.
[326] Problem Practices, Narrative 27.
[327] Problem Practices, Narrative 42. *See also* Problem Practices, Narrative 7, 10, 23, 28, and 71.

may be violating the Equal Protection Clause of the Constitution as the agency could not withstand rational basis review.

3. "Geography Roulette" and Equal Protection: Creating a Sub-class of Undocumented Immigrants

Some certifying agencies' discriminatory attitudes about undocumented immigrants create a subclass of U visa applicants: those that are denied the benefit of a U visa who would otherwise qualify but for the prejudices and predilections harbored by such agencies. This, is in and of itself, constitutes a separate Equal Protection violation as this subclass of immigrants is denied a benefit to which other identical victims in other locations can take advantage. U visa applicants who reside in such localities are treated differently from those who reside in places where agencies may not harbor such sentiments. These victims suffer from a denial of equal protection because they cannot avail themselves of a federal remedy due to discriminatory sentiments, whereas other similarly situated but differently located crime victims may benefit from U visa relief.

Discriminatory attitudes about undocumented immigrants create a subclass of U visa applicants: those that are denied the benefit of a U visa who would otherwise qualify but for the prejudices and predilections harbored by such agencies. They suffer from a denial of equal protection because they cannot avail themselves of a federal remedy due to discriminatory sentiments, whereas other similarly situated but differently located crime victims may benefit from U visa relief.

Plyler helps to map out claims of discrimination for individuals who are denied a U visa in localities where law enforcement agencies harbor anti-immigrant sentiments or racial or national origin animus. In that case, the Supreme Court found that although there

was no fundamental right to education, undocumented children were protected against being singled out and denied a fundamental benefit provided to other children.[328] Similarly, U visa applicants have no "right" to an I-918B certification.[329] However, they too are protected from the discriminatory denial of the ability to avail themselves of a federal remedy.

The U visa survey narratives highlight cases where in some localities, immigrants are being singled out and treated differently than others based on discriminatory animus against them on account of their undocumented status, which is the very status the U visa statute is designed to remediate. The UNC I/HRP Clinic-ASISTA 2013 survey respondents suggest that some agencies may deny I-918B certification because of their immigrant, race or national origin status, while another agency in a different county might regularly certify an identical application. Thus two virtually identical victims are treated differently, based on their protected status. Crime victims denied I-918B certifications are analogous to the school children in *Plyler* in that school enrollment for undocumented children was entirely based upon the local school district in which he child happened to live. Instead, the *Plyler* Court found that a system that allowed for certain school children to receive a different set of protections or privileges then other similarly situated school children was untenable because it would violate the 14th Amendment's guarantee of Equal Protection. The Court relied on the 14th Amendment's legislative history and cited the congressional debate surrounding the amendment which stated that the broad implications of the amendment was to abolish "all class legislation

[328] *Plyler v. Doe*, 457 U.S. 202, 235 (1982) ("Here, however, the State has undertaken to provide an education to most of the children residing within its borders.").
[329] See discretionary language above.

in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another."[330]

This issue of I-918B certification, like *Plyler*, involves a right worthy of equal protection: some immigrants are being uniformly denied the opportunity to invoke a federal statutory remedy that was created by federal law specifically for them, solely on the basis of the institutional bias of some certifying agencies.[331] Furthermore, while some differentiation and classifications based on immigration status may pass muster at the federal level, those very classifications when made on a state level have been deemed unacceptable.[332]

a. Discriminating Against Immigrants: State vs. Federal Action

The *Plyler* Court notes that there is a difference between state and federal action under the Equal Protection clause.[333] The federal government has the power to "establish a uniform Rule of Naturalization."[334] Thus Congress has the broad authority "governing admission to our Nation and status within our borders."[335] Unlike the federal government, states "enjoy no power with respect to the classification of aliens."[336] The Court also notes, that while it is "routine and normally legitimate" for the federal government to use immigration status for classification, "only rarely are such matters relevant to legislation by a State."[337] Although states do have some authority to make distinctions based on alien status, it is limited to instances where "such action mirrors federal objectives and

[330] *Plyler v. Doe*, 457 U.S. 202, 215 (1982).
[331] VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, PL 106–386, October 28, 2000, 114 Stat 1464.
[332] *See* Hiroshi Motomura, *The Rights of Others*: *Legal Claims and Immigration Outside the Law*, 59 Duke L. J. 1723, 1734 (2010)
[333] *Plyler v. Doe*, 457 U.S. 202, 217 (1982).
[334] *Id.* at 225 (quoting Art. I., § 8, cl. 4). *See supra* Section Two, II.
[335] *Id.*
[336] *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941)).
[337] *Id.*

furthers a legitimate state goal." [338] The Court cited *De Canas v. Bica*[339] as an example of state action that mirrors a federal goal.[340] In *De Canas*, the state's program reflected Congressional intent to prohibit employment by aliens not possessing work authorization.[341] In that case, the Supreme Court held that the state's action was in accordance with a congressional policy and thus was permissible.[342] Recently, in *U.S. v. Arizona* the Court reaffirmed the *De Canas v. Bica* [343] presumption against pre-emption when there is no comprehensive federal scheme relating to the state law at issue and the state law is one of "traditional state powers." [344]

The argument regarding the limits of state action seems readily applicable to denials of I-918B certification based on a victim's immigrant status. The Congressional intent in this area is clear: to provide relief for nonimmigrant crime victims and aid law enforcement in immigrant cooperation with investigations. In sum, the discriminatory attitudes toward immigrants and the disparate outcomes that result from agency to agency with regard to the issuance of an I-918B certification cannot pass legal muster under the Equal Protection Clause.

4. Blanket Denial Policies and Equal Protection Claims

---

[338] *Id.* (citing *De Canas v. Bica*, 424 U.S. 351 (1976)).
[339] 424 U.S. 351 (1976).
[340] *Plyler v. Doe*, 457 U.S. 202, 225 (1982).
[341] *De Canas*, 424 U.S. at 361 (1976).
[342] *Id. See also Arizona et al. v. U.S.*, 567 U.S. ___, 1-2 (2012) (holding unconstitutional sections of an Arizona statute that imposed additional state penalties on employers and immigrants who violated already proscribed federal immigration laws).
[343] 424 U.S. 351 (1976).
[344] *Arizona,* 132 S. Ct. 2503 ("When there was no comprehensive federal program regulating the employment of unauthorized aliens, this Court found that a State had authority to pass its own laws on the subject."). *See Also* Brittney M. Lane, *Testing the Borders: The Boundaries of State and Local Power to Regulate Illegal Immigration*, 39 PEPP. L. REV. 483, 542-543 (2012) (arguing that *De Canas* holds that there is a presumption *against* preemption even when the pre-emption challenge is implied and the outside state statute is one of traditional state policing powers).

The UNC I/HRP-ASISTA 2013 survey data shows that some local law enforcement agencies have blanket U visa certification denial policies, meaning that they routinely and indiscriminately deny all requests for U visa certification. Although these policies to not appear to target any particular immigrant or immigrant group, such a policy harms immigrant crime victims and local law enforcement agencies that engage in such practices also commit equal protection violations.

a. Evidence of Blanket Denial Policies in the UNC I/HRP-ASISTA 2013 survey data

The UNC I/HRP-ASISTA 2013 survey data shows that at least twenty-six of the survey respondents identified local law enforcement agencies which have blanket U visa certification denial policies. The following survey responses indicate possible equal protection claims.

- The Waco Police Department has a policy of refusing to sign U visa certification requests.[345]

- The Merced County, California District Attorney's Office, and all city jurisdictions within the county, "flatly refuse" to certify U visas.[346] Another survey respondent stated that the Wilmar, Minnesota Police Department has a blanket refusal policy as well.[347]

While these examples of blanket denial policies do not openly target individuals or groups on the basis of race, national origin, or immigration status, they are nonetheless subject to an equal protection challenge on the basis of impact. Since immigrant crime victims are the only class of people statutorily eligible for a U visa, U visa certification

[345] Problem Practices, Narrative 83.
[346] Problem Practices, Narrative 76.
[347] Problem Practices, Narrative 9. *See also* Problem Practices, Narratives 22, 33, 38, 40, 45, 59, 60, 72, 82, 86.

denials would only impact immigrant crime victims and therefore qualify as an equal protection violation under *Arlington Heights.* [348]

b. Blank Denial Policies and Strict Scrutiny or Rational Basis Review

It would be unlikely that a blanket denial policy with regard to I-918B certifications could withstand strict scrutiny or rational basis review[349] because a policy that indiscriminately denies certifications to *all* immigrant crime victims is not reasonably tailored.[350] Further, a blanket denial policy directly disregards the legislative intent of the U visa statute, which is to promote cooperation between law enforcement and undocumented immigrants. Local law enforcement agencies would be hard pressed to argue that blatant disregard of legislative intent is a "compelling government interest."

Even though the aforementioned blanket denial policies may appear neutral, they may still be motivated by invidious discrimination and disproportionately impact a protected class.[351] Advocates may be able to levy successful equal protection claims against blanket denial policies by demonstrating that the policies are not narrowly tailored and disproportionately harm immigrant crime victims on the basis of a protected status such as race or national origin.

---

[348] While this analysis looked at the impact of a denial policy on immigrants, a denial policy could also disproportionately impact racial or ethnic minorities, and/or women, and therefore subject to heightened review.

[349] State based discrimination against immigrants is subject to strict scrutiny. *See Mathews v. Diaz*, 426 U.S. 67, 86-87 (1976).

[350] Local law enforcement agencies may suggest that they do not have a blanket denial policy, but instead have a narrowly tailored, case-by-case analysis that results in individual denial decisions. However, impact evidence could demonstrate that there is a pattern or practice of denying all U visa Certification requests. Further, local law enforcement agencies may argue that immigrant crime victims are never "helpful" as required by statute. However, it would be irrational for a law enforcement agency to argue that without case-by-case consideration, crime victims can never be "helpful" to the criminal investigation to which the victims themselves are a party.

[351] *Plyler v. Doe*, 457 U.S. 202, 223-224 (U.S. 1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' . . . In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs . . . can hardly be considered rational unless it furthers some substantial goal of the State."

B. Claims under Title VI

Denials of I-918B certifications based solely on, race, color or national origin might also give rise to a Title VI claim. Any state agency that receives federal funding is subject to compliance with Title VI and cannot deny U visa certifications on the basis of race, color, or national origin status.[352]

1. The law under Title VI

Title VI was enacted in 1964 and was designed "to make sure that the funds of the United States are not used to support racial discrimination."[353] In order to achieve that goal, Title VI provides that "[n]o person in the Unites States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[354] The statute defines "program or activity" as the operations of departments, agencies, instrumentalities, and other sectors of state or local governments.[355] Local law enforcement agencies, such as police departments or sheriffs' offices, which administer U visa certifications, are subject to Title VI because they are "programs or activities" that receive federal financial assistance.[356] It is likely that virtually all certifying agencies receive some federal funds and are thus subject to Title VI requirements and obligations. Additionally, the regulations specifically prohibit "criteria or methods of administration" that exert a discriminatory effect on the basis of race, color, or national origin.[357] Further, Title VI specifically prohibits "[d]eny[ing] an individual any disposition, service,

[352] 42 U.S.C. § 2000d.
[353] 110 Cong. Rec. 6544 (Statement of Sen. Humphrey).
[354] 42 U.S.C. § 2000d.
[355] 42 U.S.C. § 2000d–4a(1).
[356] Even if local law enforcement budgets consist of both state and federal funds, Title VI nonetheless applies because the agency still receives federal funding, even if it is just a fraction of their budget. See http://www.justice.gov/crt/about/cor/coord/vimanual.php#C. Complaints Sec. VI.A
[357] 28 C.F.R. § 42.104(b)(2).

Denials of I-918B Certifications based solely on, race, color or national origin might also give rise to a Title VI claim. Any state agency that receives federal funding is subject to compliance with Title VI and cannot deny U visa certifications on the basis of race, color, or national origin status.

financial aid, or benefit."[358] Below, the scope of Title VI's coverage will be discussed in greater detail.

2. Relevance of Title VI Claims to U visa applicants

Title VI is a powerful tool to enforce the Civil Rights Act's mandate of equality and any person can file a Title VI complaint, regardless of immigration status. Claimants with and without lawful status may bring a private cause of action under Title VI of the Civil Rights Act if they experience intentional discrimination.[359] On the other hand, if a claimant alleges disparate impact discrimination, she or he does not have standing to sue in federal court but instead may file an administrative complaint with the federal agency administering the funds, such as the Department of Justice, which can investigate and file disparate impact Title VI complaints in federal court. It is also important to reiterate that while Title VI does not cover immigrant status per se, it does protect undocumented immigrants who are victims of discrimination based on race, color, or national origin.

a. Undocumented Crime Victims and Title VI

Undocumented crime victims are protected by Title VI. Because undocumented individuals are considered "persons" under both the Fourteenth and Firth Amendments,[360] *Regents of the University of California v Bakke* [361] held that Title VI protections, at the very least, are analogous to the minimum protections guaranteed by the Fifth and Fourteenth Amendments. Therefore, Title VI protections are not limited to

[358] 28 C.F.R. § 42.104(b)(1).
[359] *See Sandoval*, 532 U.S. at 278.
[360] See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *Mathews v. Diaz*, 426 U.S. 67 (1976).
[361] 438 U.S. 265 (1978).

citizens. The following sections will discuss the scenarios in which advocates for undocumented crime victims may consider bringing suit or filing an administrative complaint under Title VI.

b. Crime Victims Who Experience Intentional Discrimination

Intentional discrimination occurs when an individual is intentionally excluded from participation in, denied the benefits of, or subjected to discrimination under any federal assistance program on the basis of race, color, or national origin. With respect to Title VI, intent to discriminate must be shown by either direct or circumstantial evidence. Because direct evidence of discrimination can be difficult to attain, the courts will allow for an "inference of discrimination" to be made in certain scenarios.[362] As demonstrated in the survey data, as well as other national advocacy and media reports, some local law enforcement agencies manifest explicit race and national origin discriminatory animus contrary to the obligations under Title VI.[363] In these cases, private actors may bring Title VI complaints. For example, a police department would likely violate Title VI by engaging in national origin discrimination if one could prove that they refused to certify a specific U visa certification request *because* the applicant was from Mexico. In this scenario, the applicant may have a private right of action to sue the police department for Title VI violations.

[362] In order to make a prima facie claim of intentional discrimination under Title VI, the courts follow the test for intentional discrimination set forth in *McDonnell Douglas*, a Title VII employment discrimination case. The test requires that: (1) the claimant is a member of a protected class; (2) the claimant applied for, and was eligible for, a federally assisted program; (3) that despite the claimant's eligibility, he or she was rejected; and (4) that the recipient of federal funds selected applicants of the complainant's qualifications. If there is sufficient evidence to prove those four factors, the investigating agency will then investigate if the recipient agency can "articulate a legitimate, nondiscriminatory reason for the challenged action." McDonnell Douglas, 411 U.S. at 802. If the recipient cannot articulate a nondiscriminatory reason, or if the investigating agency determines that the reason is pretext, the investigating agency will likely find that the recipient agency violated Title VI.

[363] *See supra* section III (A)(1)(b).

The UNC I/HRP Clinic-ASISTA 2013 survey revealed multiple instances of certifying officials denying certification on the basis of immigration status.[364] For example, a survey respondent indicated that a police chief in Lubbock, Texas refused to certify a U visa request because he did not want to "help illegal immigrants."[365] Although the aforementioned example may not, by itself, demonstrate a colorable claim under Title VI, immigration status discrimination may often be a proxy for national origin discrimination when combined with other racial or national origin discriminatory statements or practices, and thus, may point to Title VI violations.[366] When certifying officials state that they don't certify because they don't want to help "illegals" combined with other disparaging remarks and practices about national origin, they may be found to have equated immigration status with national origin.[367]

By way of analogy to Title VII which prohibits discrimination in employment, the Supreme Court in *Espinoza v. Farrah Manufacturing Co.*[368]made this point clear. The Court held that national origin discrimination does not encompass immigration status discrimination[369] and is, instead, synonymous with "ancestry," or where a person was born.[370] Despite this holding, the Court left open a door for Title VII discrimination claims in instances when alienage discrimination masks national origin discrimination

[364] *See* Problem Practices Narrative 66, 27, 42.
[365] *See* Problem Practices Narrative 34. *See also* Problem Practices, Narratives 7, 10, 23, 28.
[366] Leticia M. Saucedo, *National Origin, Immigrants, and the Workplace: The Employment Cases in Latinos and the Law and the Advocates' Perspective*, 12 HARV. LATINO L. REV. 53, 70 (2009) (arguing that the *Espinoza v. Farah Manufacturing Co.* Court allowed for claims of national origin discrimination in the guise of immigration status discrimination).
[367] Legal scholars have argued that immigration status discrimination often serves as a proxy for national origin discrimination and therefore legitimates "the common assumption that part of Latina/o ancestry or heritage is illegal immigration."
[368] 414 U.S. 86 (1973).
[369] *Espinoza*, 414 U.S. at 95.
[370]*Espinoza*, 414 U.S. at 92 ("The term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza*, at 88.

and "has the purpose or effect of discriminating on the basis of national origin."[371] Advocates should consider documenting statements by local law enforcement agencies that demonstrate "purpose or effect" of discrimination on the basis of national origin as these statements could be used in Title VI claims.

c. Crime Victims Who Experience Disparate Impact Discrimination

In instances where an immigrant crime victim cannot prove that he or she was the victim of intentional discrimination, but instead can only show disparate impact discrimination, he or she may file a Title VI complaint as noted above.[372] Only the government agency administering the funds, and not the individual impacted by the discrimination, may bring suit against the discriminating agency under Title VI.[373] In the case of I-918B certification decisions, the primary administering agency of local law enforcement agency funding is the Department of Justice. Therefore, the Department of Justice would investigate Title VI complaints and then have the discretion to bring suit against local law enforcement agencies for Title VI disparate impact claims.

Disparate impact discrimination occurs when a facially neutral policy disproportionately and adversely impacts a protected class.[374] A distinguishing feature of Title VI disparate impact claims is that a finding of intentional discrimination is not required.[375] Nonetheless, the agency must still show a "causal connection" between the

[371] "In some instances, for example, a citizenship requirement might be but a wider scheme of unlawful national-origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination. Certainly Tit. VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."). Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and Latcrit Theory*, 55 Fla. L. Rev. 511, 523 (2003)
[372] http://www.justice.gov/crt/about/cor/coord/vimanual.php#C. Complaints Sec. 10. C.
[373] In *Alexander v. Sandoval* the Supreme Court held that individuals do not have a private right of action to enforce disparate-impact regulations put forth by federal agencies under **Title VI.** 532 U.S. 275, 285-287 (2001).
[374] See 28 C.F.R. § 42.104(b)(2).
[375] *Lau v. Nichols*, 414 U.S. 563 at 568 (1974).

"facially neutral policy and the disproportionate and adverse impact on a protected Title VI group."[376] Additionally, disparate impact analysis requires showing that the recipient agency's facially neutral practice "lacks a substantial legitimate justification."[377] Because Title VI disparate impact analysis is more concerned with impact versus intent, a broader range of complaints might be brought under Title VI than under the Equal Protection Clause. For example, advocates may attempt to document that local law enforcement agency certification policies disproportionately and adversely impact Latino crime victim immigrants versus similarly situated crime victims who are white, or that Mexicans are specifically disadvantaged by denials over other immigrant groups. Advocates may be wise to urge the Department of Justice to take action against local law enforcement agencies that discriminate by filing complaints with the Federal Coordination and Compliance Section of the Department of Justice.

IV. AGENCY AND REGULATORY PROBLEMS: SOME CERTIFICATION PRACTICES ARE *ULTRA VIRES*

The U visa statute, regulations, and DHS Guide clearly set out that **only** USCIS may decide eligibility for a U visa. Upon receiving a U visa application, specifically designated and trained USCIS adjudicators review applications in their entirety to assess whether all the eligibility requirements have been met. While only USCIS may ultimately make a determination as to whether the petitioner has been the victim of a qualifying crime, USCIS relies on the certifying agency to provide information to support its decision through the I-918B certification. To assist certifying agencies with this

[376] The Eleventh Circuit has held that causation is required. *See United States v. Lowndes Cnty. Bd. of Educ.*, 878 F.2d 1301, 1305 (11th Cir. 1989). http://www.justice.gov/crt/about/cor/coord/vimanual.php#B. Disparate Impact/Effects.
[377] http://www.justice.gov/crt/grants_statutes/legalman.php#Disparate

determination, the DHS Guide serves as legal guidance and the I-918B certification form provides a comprehensive list of qualifying crimes.[378]

While the language of the statute and regulations make it clear that the ultimate adjudicatory decision lies with USCIS, and despite efforts on behalf of the Department of Homeland Security through video trainings and clear language in the DHS Guide,[379] the data reveals that multiple agencies are acting outside of their statutorily designated responsibilities.[380] In addition to the petitioner's helpfulness, some certifying agencies are considering *ultra vires* factors such as a petitioner's current immigration status, national origin status, previous immigration record, or employment history.[381] They are, in effect, acting as the final adjudicators of the entire U visa process by denying any chance for USCIS to review a petitioner's U visa application.

A. The I-918B Form

The I-918B serves as the official form certifying agencies use to submit to USCIS with an I-918B certification.[382] As noted in the DHS Guide, the I-918B certification form

[378] *See* Guide, *supra* note 8, at 3, and 918 Supplement B, listing: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, felonious assault, being held hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, torture trafficking, witness tampering, unlawful criminal restraint, other related crimes that include "similar activity where the elements of the crime are substantially similar" and "also includes attempt, conspiracy, or solicitation, to commit any of the above and other related crimes."

[379] *Id.* at 8, Frequently Asked Questions. Question 1 specifically goes to the correlation between a signed 918 Supplement B form and a U VISA. The manual specifically states that "there are many additional eligibility requirements that USCIS evaluates based on a victim's U visa petition, including whether the victim 'substantial physical or mental abuse,'" further, the response to question 1 discusses additional categories that are considered in determining U VISA status eligibility. Question 9 (bottom of page 10) specifically states that USCIS will make the "determination on whether the victim has met the 'substantial physical or mental' standard on a cases by case basis during its adjudication of the U visa petition." (emphasis added) Further, the response to question 9 states that "certifying law enforcement agencies do not make [the determination on whether a victim has suffered substantial physical or mental abuse]." The handbook instructs certifying agents to provide any information the agency deems relevant to USCIS as accompaniments to the form.

[380] *See supra* Section One.

[381] *Id.*

[382] 8 C.F.R. § 214.14(c).

is "a required piece of evidence to confirm that a qualifying crime has occurred and that the victim was helpful, is being helpful, or is likely to be helpful in the detection, investigation or prosecution of a criminal activity."[383] Because USCIS does not consider a U visa application that doesn't include an I-918B certification,[384] In many cases it has become the most difficult obstacle for individuals seeking a U visa remedy given that so many certifying agencies have problematic certification policies.[385]

The regulations and Part 4 of the I-918B certification form refers to the helpfulness requirement of the petitioner.[386] The DHS Guide, the statute, and the regulations corresponding to the U visa all explain helpfulness to mean that "the victim was, is, or is likely to be assisting law enforcement in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim."[387] Beyond the "was, is, or is likely to be" language, certifying agencies are left to fill out a small checklist on the I-918B which seeks to ascertain whether the petitioner had knowledge of the qualifying criminal activity, the petitioner's helpfulness in the investigation or prosecution of the designated criminal activity, whether the petitioner refused to provide ongoing assistance, and information pertaining to ongoing requests for further assistance in the investigation or prosecution.[388] Additional guidance in the form on this might be helpful, perhaps incorporating useful language from the DHS' Guide.

Another place where incorporating language from the DHS Guide would be

---

[383] *See* DHS Guide, supra note 8.
[384] *See* American Bar Association, U visas at a Glance, 17 ("USCIS will not budge" on the LEC requirement), available at http://www.americanbar.org/content/dam/aba/administrative/gpsolo/_____/immigration_cle_materials.authcheckdam.pdf.
[385] American Bar Association, *supra* note 76 at 17 ("Obtaining the [LEC] is often the single most difficult part of the U-Visa application process . . . .").
[386] I-918 Supplement B, U Nonimmigrant Status Certification; See also 8 CFR 214.14(b)(3)
[387] See DHS Guide, *supra* note 8, at 3.
[388] I-918 Supplement B, U Nonimmigrant Status Certification, Part 4

helpful is in the Instructions to the form. They could, for instance, be clearer that law enforcement is not determining eligibility for status, but only certain elements required to achieve that status. For example, an advocate reported that some certifiers "believe they are the final step within the U visa process and believe it is up to them to prevent someone from obtaining legal status" and observed that "many rural counties in Georgia think that if they sign a certification they are giving someone legal status."[389] As observed in both the results of the UNC-ASISTA 2013 survey and pre-existing data on behaviors and policies of certifying officials, certifiers reference their authority to refuse to provide U visa status to petitioners as a reason to not certify.[390]

The I-918B form should be revised to provide greater clarity and encourage best practices with regard to standards for certification.

Similarly, the Instructions should incorporate language from the DHS Guide explaining in more detail the ability of law enforcement to certify cases in which there was no prosecution, which were closed years ago, or which are only in the beginning stages.[391] Law enforcement agencies often have information that is relevant to the determination of the nature of the crime, and other evidentiary considerations in addition to the core issue of helpfulness, the latter which is delegated to them to determine. If a certifier can provide evidence that the victim has suffered substantial harm (a determination assigned to USCIS), contributing such information would also be useful. Incorporating language from the DHS Guide on law enforcement's role (or lack of role) in establishing substantial harm to survivors might resolve some of the problems caused by law enforcement opining on lack of harm, or determining not to sign certifications

[389] *See* Problem Practices, Narrative 21.
[390] *See supra* Section One.
[391] *See DHS Guide supra* note 8, at 10.

because of apparent lack of harm.[392]

B. Update Guidance to Certifying Agencies

To its credit, DHS has published information and training videos in an attempt to help certifying officials and agencies understand their role in the I-918B certification process. However, given the data regarding problems with certification policies, more guidance and training is needed. The White House, the Department of Justice and the Department of Homeland Security should encourage law enforcement to use the U visa. All those involved in training and providing guidance to law enforcement must emphasize that they should be able to articulate the reasons underlying their exercise of discretion, both in individual cases and in policy-making. DHS should continue to use its Guide as a way of updating and answering law enforcement questions about its authority and role.

V. STATE AND LOCAL GOVERNMENT OVERSIGHT

Federal authority governs the U visa certification process, but certifying agencies also have state and local authorities to which they are responsible. In examining how extra-statutory certification policies might be overcome, it is important to consider the powers of these local and state authorities and to examine whether they are doing all they can to assure that residents of their communities benefit from the public safety and humanitarian benefits of the U visa statute and regulations.

A. Power of Local Government Action

1. Local funding for Law Enforcement Agencies

In many cases, local law enforcement agencies are dependent on appropriations of funding from other local governing bodies. For example, in numerous localities around

[392] *Id.* at 10-11.

the country, local police departments rely on city councils to appropriate funding and sheriff's departments rely on funding from county commissioners.[393] An example is Durham, North Carolina, where the City Council handles local budgetary decisions and appropriates funding for the Durham Police Department on a yearly basis.[394] Like many other cities, Durham also has a city department responsible for "preparing, implementing, and monitoring the City's annual operating budget," called the Budget and Management Services Department.[395]

City councils, if motivated to do so, could condition the appropriation of funds on certain actions by the agencies they oversee. City councils draft and consider yearly budgets, and using this power, are able to suggest or compel certain performances by certifying agencies. Through funding power, local governments might compel or encourage local law enforcement agencies to implement better certification policies, as described in Section Three, Part IV.

2. Hiring and Firing

Local government also exercises a significant amount of control over the hiring and firing of law enforcement officials, including chiefs of police, and in some cases, county sheriffs. The hiring process for chiefs of police typically involves significant input from the city council or city manager. In Durham, North Carolina, for example, the city council begins its search by accepting applications for the position and pares those applications down to a few qualified candidates before involving public input.[396] The

[393] *See, e.g.*, Kevin Bohn, Police Face Cuts As Economy Falters, CNN, Oct. 23, 2008, available at http://www.cnn.com/2008/CRIME/10/23/police.economy/.
[394] *See* Yearly Budgets and CIPs, City of Durham, (last visited May 3, 2013), http://durhamnc.gov/ich/as/bms/Pages/Yearly-Bud-CIP.aspx.
[395] *See* Budget and Management Services, City of Durham, (last visited May 3, 2013), http://durhamnc.gov/ich/as/bms/Pages/Home.aspx.
[396] *See* Michael Biesecker, Durham Police Chief Search Set, News & Observer, July 18, 2006, available at

city council holds public forums in which citizens may raise issues involving the candidates or express concerns or preferences.[397] Once public comment is received and considered, the council selects and hires the chief that they feel will best serve the community. This hiring power provides local governments with an opportunity to support or discourage particular policies within the police department by vetting candidates and selecting them based on the community's and council's priorities.

Along with the power to hire police chiefs, many local governments possess a congruent power to fire or remove the chief. This power is exercised in different ways around the country—by vote of the town council, by decision of a city manager or mayor, etc.[398] The local government officials possessing the power to fire the police chief might also exert pressure encouraging the chief to resign. Last year in East Haven, Connecticut, for example, Police Chief Len Gallo resigned in response to allegations of harassment of Latinos.[399] Gallo had been "accused of blocking efforts by [a] police commission to investigate misconduct" of "four officers [involved in] an alleged campaign of harassment against Latinos, including assaults and intimidation."[400] Faced with pressure from other local officials due to his anti-immigrant sentiment and actions, the chief was

---

http://www.newsobserver.com/2006/07/18/79046/durham-police-chief-search-set.html; *see also* Durham Makes Conn. Cop Its New Police Chief, WRAL, July 19, 2007, available at http://www.wral.com/news/local/story/1608179/.

[397] *See* Request to Appear Before Counsel, City of Durham, (last visited May 3, 2013), http://durhamnc.gov/ich/cc/Pages/request_to_appear.aspx.

[398] For examples of the mayor possessing power to remove the police chief from office, see John MacCormack, Border Police Chief Fired, MySanAntonio, Mar. 6, 2103, available at http://www.mysanantonio.com/news/local_news/article/Border-police-chief-fired-4330442.php; and Jim Mustian, It's Official: Mayor Holden Fires Police Chief White, Feb. 19, 2013, available at http://theadvocate.com/home/5195608-125/holden-police-chief-dismissal-decision. For an example of city managers possessing power to remove the police chief from office, see Sanford Police Chief Fired in Wake of Trayvon Martin Case, CNN, Jun. 21, 2012, available at http://www.cnn.com/2012/06/20/justice/florida-martin-case-police-chief.

[399] *See* Police Chief at Center of Anti-Latino Harassment Probe Resigns, Jan. 30, 2012, available at http://latino.foxnews.com/latino/news/2012/01/30/embattled-connecticut-police-chief-resigns/.

[400] *Id*.

forced to leave office. In the context of U visa certification policies, local governments may be able to take similar steps to either fire or encourage resignation of recalcitrant police chiefs. As explained above, some certifying officers have stated explicitly anti-immigrant or racially motivated reasons for refusing to certify.[401] In such cases, it would be within the power of many local governments to seek to remove the chief from office.

Typically, local governments do not possess any direct power to hire sheriffs. In nearly every state, sheriffs are elected by the residents of the county or jurisdiction where they serve.[402] In some states, including Florida, North Carolina, Louisiana and Michigan, among others, the sheriff is a constitutionally created office.[403] Analogously, local governments have little power to fire sheriffs. Instead, sheriffs are accountable to voters. If voters are unsatisfied with the policies of the elected sheriff or sheriff's office, they may vote to replace him or her. This local voting power could be used to encourage sheriff's offices to follow good U visa certification practices, as discussed below and encourages advocacy on a broader scale to assure that the community understands the purposes and benefits of the U visa.

3. Local government directives and guidance.

Some local law enforcement agencies, like the Anne Arundel County Police Department in Maryland, drafted Special Directive on U visa certifications which outline that it is their policy to ensure that all U visa certifications requests should be reviewed to

---

[401] *See* Section One, Part II.B.

[402] *See* Preserve the Office of Sheriff by Continuing the Election of Our Nation's Sheriffs, NATIONAL SHERIFFS ASSOCIATION, *available at* http://www.sheriffs.org/sites/default/files/tb/Preserving_the_Office_of_Sheriff_Through_Election.pdf.

[403] *See* FLORIDA CONST. art. VIII, § 1(d), *available at* http://www.leg.state.fl.us/statutes/index.cfm?submenu=3; N.C. CONST. art. VII, § 2, *available at* http://www.ncga.state.nc.us/legislation/constitution/ncconstitution.html; LOUISIANA CONST. art. V, § 27, *available at* http://senate.legis.state.la.us/documents/constitution/Article5.htm#§27; MICHIGAN CONST. art. VII, § 4, *available at* http://www.legislature.mi.gov/(S(sukqfrvrrfuwkp55uqwsvz45))/documents/mcl/pdf/mcl-chap1.pdf.

determine whether a qualifying crime occurred and whether the victim was helpful, is being helpful, or is likely to be helpful in the detection, investigation or prosecution of criminal activity. [404]

B. State government action

While local government tends to work most closely with many certifying agencies, state governments often possess powers—like funding and, firing—that could be used to encourage better certification practices.

1. State funding for LEAs, sheriffs' offices, DA's offices

States provide a great deal of funding for certifying local law enforcement agencies. Especially in the context of district attorneys' offices, states could do more to exercise the power of the purse to encourage agencies to exercise "best practices" in considering whether to certify a U visa case. In North Carolina, for example, the General Assembly, through appropriations legislation, grants the state Department of Public Safety funds to provide to various district attorneys' offices around the state.[405] Other states have similar structures that give funding power over district attorneys, either entirely or in substantial part, to the state.[406] Using this appropriations power, state governments possess a substantial power to encourage district attorneys to use the U visa as a public safety and humanitarian tool by exercising responsible discretion when

[404] See Certification of U Nonimmigrant Status, Index Code 608. Anne Arundel County Police Department. Available at: http://www.aacounty.org/Police/RulesRegs/Sections01-06/0608UVisaNonImmigrant.pdf

[405] *See, e.g.*, 2011 N.C. Sess. Law 145, *available at* http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H200v9.pdf (providing a recent example of the N.C. state legislature appropriating funds for District Attorneys' offices).

[406] *See* Rebecca Walker, *Underfunded District Attorney Offices are Facing Further Cuts*, ALABAMA WOMEN'S RESOURCE NETWORK, May 9, 2010, *available at* sea *also* District Attorney: Mission Statement/Overview, Kenosha County, Wisconsin, (last visited May 4, 2013), http://co.kenosha.wi.us/index.aspx?nid=148; District Attorney: Section H, (last visited May 4, 2013), http://www.co.sutter.ca.us/pdf/bos/proposed_budget/08-09_section_h.pdf; District Attorney, CLARK COUNTY, NEVADA, (last visited May 4, 2013), http://www.clarkcountynv.gov/depts/district_attorney/Pages/default.aspx.

considering certification.

State governments also hold some funding power over other local certifying agencies, like sheriff's departments and police departments. Much of state funding for local law enforcement come through grants, either provided directly by the state, or through federal funding divvied out by a state agency. In North Carolina, for example, the Governor's Crime Commission of the Department of Public Safety is "the primary pass-through agency for federal criminal justice funding to state and local criminal justice agencies."[407] Following a model applied by numerous other states around the country, the agency reviews grant requests submitted in applications made by local law enforcement agencies and determines how to provide funding in a way that will best advance that agency's objectives.[408] As with federal grant programs, the power to control these objectives and determine which grant applications receive funding gives the state tremendous power to encourage good certification practices. States should use this power to its full potential to ensure that certifying agencies carry out the intentions of the federal U visa statute and regulations.

2. Hiring and Firing

While local governments seldom have the power to fire sheriffs, some state governments may do so in limited circumstances. For example, in North Carolina, N.C. Gen. Stat. § 128-16 states:

> Any sheriff or police officer shall be removed from office by the judge of the superior court, resident in or holding the courts of the district where said officer is resident upon charges made in writing, and hearing thereunder, for . . . willful or habitual neglect or refusal to perform the

[407] Grant Funding Opportunities, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, (last visited May 4, 2013), https://www.nccrimecontrol.org/index2.cfm?a=000003,000011,001462.
[408] *Id.*

duties of his office . . . .[409]

A sheriff or officer may be subjected to removal upon petition of other local or state officials, and the petition is brought in the name of the state.[410] While N.C. Gen. Stats. § 162-13-26, which outlines the duties of a sheriff, do not include any language explicitly requiring sheriff's to consider U visa certifications, or more broadly, to uphold the intent of federal law, the state legislature could pass such a law, making sheriffs around the state subject to removal from office for refusing to participate in U visa certification.[411]

VI. THE FEDERAL STATUTORY SCHEME

The U visa certification problems described in Section One are largely the result of the certification requirement found in the federal statute. The U visa provisions in the Immigration and Nationality Act creates a process whereby it is possible that some immigrant victims who meet the statutory elements are successful in obtaining the signed I-918B certification form and, ultimately, the U visa while others with virtually identical fact patterns may be denied certification by agencies whose policies run contrary to the Congressional intent in establishing the U visa program. The statutory scheme does not allow an applicant to demonstrate helpfulness regardless of other evidence she may possess to establish this U-visa requirement. Unlike victims of trafficking who seek a trafficking or "T" visa, who may submit a either a law enforcement agency endorsement (Form I-914B) or "credible secondary evidence and affidavits to otherwise establish the requirement that the applicant complied with any reasonable request for assistance in the

[409] N.C. Gen. Stat. § 128-16, *available at* http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_128/GS_128-16.html.
[410] N.C. Gen. Stat. § 128-17, *available at* http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_128/GS_128-17.html.
[411] N.C. Gen. Stat. § 162-13 -25, *available at* http://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_162/Article_3.html.

investigation or prosecution of that severe form of trafficking in persons," [412] U visa applicants **must** produce a I-918B certification form with their application for immigration relief. [413]

The U visa statute thus may disadvantage some victims Congress otherwise intended to assist. It countenances agencies that arbitrarily refuse to certify, or act *ultra vires* and prevent otherwise eligible applicants from receiving the U visa. As described in Section Three, changing the statute to allow victims to supply other evidence when law enforcement will not certify will protect eligible applicants from arbitrary certification policies or racial animus.

[412] Immigration and Nationality Act §214 (o)(6); See also 8 CFR 214.11(f); 8 C.F.R. §214.11(h)(2)
[413] 8 CFR 214.14(c)(2)(i).

SECTION THREE: RECOMMENDATIONS AND ADVOCACY STRATEGIES

The U visa legal framework currently authorizes certifying entities involved in the investigation or prosecution of a crime to sign the I-918B certifications because Congress sought to create a tool that would be useful to law enforcement, and assumed that these agencies would be the most familiar with the nature and circumstances of a victim's helpfulness, whether past, present, or ongoing cooperation. Further, this arrangement was also intended to foster closer relationships between the undocumented immigrant community and law enforcement. In many places it has achieved this goal, or is in the process of doing so. In many others, however, failure of law enforcement to fully embrace the law is harming both individual crime survivors and the communities that fear accessing the criminal system. The current legal framework has been implemented by certifying agencies in a variety of ways, some jurisdictions creating very successful programs while others creating very problematic ones. In response to the problems encountered by U visas applicants, and the analysis of the legal policy implications that ensue from such problems, advocates may wish to consider the following recommendations for reform strategies that include legislative changes, administrative and regulatory changes, litigation, state and local government action, and other efforts to bring greater compliance with the statute and uniformity with the U visa certification process.

I. CONGRESSIONAL ACTION

The most obvious way to remedy the problem of "geographic roulette" in U visa certification is to change the legislation that invites the problem in the first place. By

amending the statute, changing the regulations or through other federal action, Congress and the Department of Homeland Security could remove the problem completely.

One effective way to amend the statute would be to provide an alternative helpfulness proof standard when victims can't get certifications, similar to T visa processes.

A. Amending the INA

The most effective fix to the problem of non-uniform certification practices would be for Congress to amend the Immigration and Nationality Act (INA). As discussed above, the INA currently requires a U visa applicant to receive a certification from an agency investigating the crime at issue in their case.[414] The statute states:

> The petition filed by an alien under section 101(a)(15)(U)(i) *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 101(a)(15)(U)(iii).* 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 101(a)(15)(U)(iii).[415]

Because of the language in the INA, an applicant who is refused certification may not receive a U visa, regardless of the wealth of other evidence demonstrating helpfulness that they may possess. One effective way to amend the statute would be adopt the same standard that applies to victims of trafficking who seek a trafficking or "T" visa to demonstrate helpfulness. [416] To fulfill this helpfulness requirement, a T visa petitioner may submit a law enforcement agency endorsement (Form I-914B); however, such endorsement is not a requirement. If a law enforcement certification is not available, T-visa petitioners may submit "credible secondary evidence and affidavits may be

[414] Immigration and Nationality Act, 8 U.S.C. § 1184(p)(1).
[415] *Id* (emphasis added).
[416] Immigration and Nationality Act §214 (o)(6); See also 8 CFR 214.11(f)

submitted to show the nonexistence or unavailability of the primary evidence and to otherwise establish the requirement that the applicant comply with any reasonable request for assistance in the investigation or prosecution of that severe form of trafficking in persons." [417]

The "any credible evidence" standard is used often in other contexts within the INA[418], and it permits the Attorney General to determine "what evidence is credible and the weight to be given that evidence."[419] If implemented like the T visa, such a statutory change would permit USCIS to consider other evidence of helpfulness like police reports, trial transcripts, etc., when applicants are unable to get law enforcement certifications.

Additionally, a statutory fix to the certification problem would have a number of advantages over other methods. First, it would be a uniform solution to the problem. Although the determination of whether the evidence submitted is sufficiently credible will be made on a case-by-case basis, providing U visa petitioners with the opportunity to demonstrate their helpfulness within the meaning of the statute levels the playing field for immigrant crime victims. Under the "any credible evidence" standard, local law enforcement agency involvement in the U visa process would remain an essential part of the process for demonstrating helpfulness, but agencies that arbitrarily refuse to certify, or act *ultra vires* could no longer prevent otherwise eligible applicants from receiving the benefit. The U visa is conceived as an important tool for law enforcement agencies to encourage cooperation and public safety; thus, completely cutting local law enforcement out of the process would be neither a feasible nor desirable result. Changing the statute to allow victims to supply other evidence when law enforcement will not certify would

[417] 8 C.F.R. §214.11(h)(2)
[418] *See* 8 U.S.C. § 1154(a).
[419] *Id.*

Congress could provide incentives through certain federal funds granted to local law enforcement agencies based on reporting on U visa certification practices

strike a good balance between maintaining the important functions the visa serves for local law enforcement and protecting eligible applicants from arbitrary certification policies or racial animus. Most importantly, it would be a very powerful and durable solution to the problem. Unfortunately, however, failed efforts to include such a change in VAWA 2013 reveal that changing the statute is unlikely to occur in the foreseeable future.

B. Encouraging Best Practices through Congressional and Federal Agency Action

Congress might also solve the problem of arbitrary certification policies by requiring local law enforcement to implement certain considerations or standards in their exercise of discretion. One manner in which Congress could enact such a requirement is through appropriations legislation, or other legislation controlling federal funding for local law enforcement agencies.[420] Congressional appropriations "provide funding for numerous activities, for example, national defense, education, and homeland security, as well as general government operations."[421]

Such an approach could be highly effective due to the reliance of many local law enforcement agencies on federal funding. A great deal of federal funding goes directly from the federal government to local law enforcement agencies**.** Community Oriented Policing Services (COPS), a program of the U.S. Department of Justice, for example,

[420] Jessica Tollestrup, *The Congressional Appropriations Process, An Introduction*, CONGRESSIONAL RESEARCH SERVICE 2, Feb. 23, 2012, *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%260BL%2BP%3C%3B3%0A.

[421] *Id.* One important issue when considering possible federal action to encourage or compel better U visa certification practice is that such action could amount to federal commandeering in certain circumstances. Federal commandeering occurs when the federal government compels a state government "to implement, by legislation or executive action, federal regulatory programs." *See Printz v. United States*, 521 U.S. 898, 925, 117 S. Ct. 2365, 2380 (1997). However, monetary incentives do not typically raise a commandeering concern, within certain restrictions. *See South Dakota v. Dole*, 483 U.S. 203, 203, 107 S. Ct. 2793, 2794 (1987).

distributed over $300m in grants to local law enforcement agencies in 2011.[422] Providing funding and other incentives to certifying agencies who implement "best practices" could encourage many agencies to change their U visa certification policies. The U.S. Department of Justice also funds a Community Policing Development (CPD) grant program. That program is designed to "advance community policing practices by supporting the development of innovative community policing strategies, applied research, guidebooks, and best practices that are national in scope," goals that are particularly applicable to programs involving U visa certification policy.[423] By altering the requirements or decision-making criteria for these and other federal grants, the Department of Justice and other federal agencies could encourage better U visa certification practices among law enforcement agencies that would want to remain eligible or competitive for federal funding. The federal government also funds local law enforcement agencies more indirectly, by providing funding to state governments that then appropriate those funds to local governments. As discussed below, this provides state governments with significant power as well to encourage better U visa certification practices with the power of the purse.[424]

It seems likely that Congress could premise certain federal funds granted to local law enforcement agencies on the implementation of improved U visa certification

[422] *U.S. Department of Justice Office of Community Oriented Policing Services*, U.S. DEPT. OF JUSTICE, *available at* http://www.cops.usdoj.gov/pdf/2011GrantProgram.pdf
[423] *Community Policing Development*, U.S DEPT. OF JUSTICE, (last visited May 4, 2013), http://www.cops.usdoj.gov/Default.asp?Item=2450.
[424] *Id*. The Supreme Court has stated that, incident to its tax power, Congress may "attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.' Because of the limitations of Congress' spending power, the Court has also stated that "the exercise of the spending power must be in pursuit of 'the general welfare.'"

practices without running into a commandeering problem.[425] Congress articulated the social goals of the U visa when it created it; enhancing public safety is one of the key reasons for, and benefits of, the remedy.[426]

II. ADMINISTRATIVE AND REGULATORY ACTION

Remedies involving administrative or regulatory changes may be more feasible. Regulations and guidance avoid some of the challenges of mustering political will that are inherent to encouraging changes in legislation through Congress. Also, proposed guidance provides opportunity for public comment[427], so advocates have ready opportunities to argue for the consideration of U visa certification policies in proposed grant criteria.

A. Agency Guidance Reform

DHS/USCIS can issue new and/or revised policy memoranda and guidance to give clarity and greater definition as to the scope of authority of certifying agencies. For instance:

- The DHS Guide could provide more examples of "helpfulness" that has resulted in U visa approvals. This could demonstrate the breadth of activity that law enforcement may determine is helpful to them, while illustrating that discretion allows law enforcement to consider both the helpfulness of individuals and the broader goal of developing trust with immigrant communities.

- The DHS Guide could quote law enforcement officers on how the I-918B certification is a useful tool for law enforcement to build cooperation with undocumented immigrant crime victims.

---

[425] *See supra* note 421.

[426] *See generally* National Immigrant Women's Advocacy Project at American University Washington College of Law, *Report: The Importance of the U visa as a Crime Fighting Tool for Law Enforcement Officials – Views from Around the Country* (Dec. 3, 2012), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/february-15-2013-collaborating-with-le/The%20Importance%20of%20the%20U visa%20as%20a%20Crime-Fighting%20Tool%20for%20Law%20Enforcement%20-%20FINAL%2012.3.12.pdf.

[427] *Regulations*, (last visited May 4, 2013), www.regulations.gov (explaining that the public should submit comments on proposed regulations).

Furthermore, the DHS' Council on Combating Violence Against Women[428] could coordinate a stakeholder meeting that includes representatives from law enforcement, the DOJ's Office on Violence Against Women, and national groups that work with immigrant survivors. Such a group could make recommendations for:

- Encouraging education of law enforcement on the U visa as a useful tool for them.
- Providing examples of the many kinds of helpfulness that may qualify victims for a U visa, in a variety of contexts and addressing a variety of U crime "categories."
- Explaining that while certifying is discretionary, discretion should be applied responsibility and in a way that furthers the Congressional goals underlying U visa.
- Advising that the certifying agency should focus their review on whether a petitioner has been the victim of a qualifying crime and whether they have been, are being, or are likely to be helpful to the investigation process.
- Providing examples of certifications in a variety of contexts that have helped USCIS in their adjudications.
- Emphasizing that the certifying agency is not reviewing a petitioner's eligibility for a U visa, and that certifying an I-918B certification is not equivalent to approving a U visa.

B. Revising the I-918B Form

As noted above, the I-918B form could be revised to incorporate language from the DHS guide. Additional information could be incorporated into the instructions to the form including, for example:

- Clarifying that a signed certification form does not, by itself, determine eligibility for U visa status.
- Explaining in detail the ability of law enforcement to certify cases in which there was no prosecution, where the case was closed years ago, or which are only in the beginning stages.
- Explaining that a certifier can provide evidence that the victim has suffered substantial harm (a determination assigned to USCIS), and that contributing such information would be useful, but that USCIS, not the certifying agency, makes this determination of substantial harm during its adjudication of the U visa petition

[428] For more information on the DHS Council, visit http://www.dhs.gov/blog/2013/08/28/working-together-combat-human-trafficking-violence-against-women (last visited April 18, 2014).

III. LITIGATION STRATEGIES

A. The Right to a Remedy: Private Right of Action

The U visa statute creates an implied private right of action. A private right of action to enforce a federal law must be created by Congress.[429] The statute must show a Congressional intent to create both a private right and a private remedy; however, these can be implied in the statute rather than explicitly stated.[430] When looking to the existence of a private remedy, statutory intent "is determinative."[431]

A careful examination of the statutory intent shows the Victim of Trafficking and Violence Protection Act clearly gives petitioners a private right to apply for a U visa and have their application considered by USCIS if the petitioner meets the statutory criteria. Although the statutory framers intended this to be a helpful tool for law enforcement, as well as providing relief to noncitizen victims of crimes, it is unlikely Congress envisioned local law enforcement undermining the law by arbitrarily refusing to certify eligible victims, or by using criteria that constructively result in eliminating U visas for crime victims in their jurisdictions.

The existence of a remedy depends on Congressional intent to create an implied remedy, determined by the factors set out in *Cort v. Ash*.[432] These factors are: (1) is the plaintiff a member of the class for whose benefit the statute was enacted, (2) is there indication of legislative intent to create or deny a remedy, (3) is the remedy consistent with the underlying purposes of the legislative theme, and (4) is the cause of action typically relegated to state law, making it inappropriate to infer a cause of action based on

---

[429] *See, Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).
[430] *Id.*
[431] *Id.*
[432] 422 U.S. 66, 78 (1975).

state law.[433]

The *Cort* factors weigh in favor of an implied private remedy. First, petitioners who meet the 1101(a)(15)(u) eligibility standards clearly fall within the class for whose benefit the VTVPA was enacted.[434] Primarily, the statute was enacted to protect victims of serious crimes who had been helpful or were likely to be helpful to law enforcement. Petitioners who are eligible for a U visa are necessarily of the class for whom the statute was enacted. Second, the statute specifically contemplates that only USCIS, who employs specially trained personnel to review U visa applications, is allowed to make a determination of whether or not to grant a petitioner a U visa. Congress must have intended there be a remedy for petitioners who were arbitrarily denied U visas, including those denied for lack of an I-918B certification. Although Congress intended for law enforcement to determine whether a petitioner has been helpful, they presumably intended that such determinations would be made based on the facts of each case and in a way that furthers the goals of the statute: to help victims who are helpful to law enforcement and to provide a tool for law enforcement to encourage victims to come forward. Law enforcement abuses its discretion and undermines the law and its goals when it explicitly or constructively denies access to status through its certification practice. Crime victims should be able to challenge this subversion of Congressional intent by those who are supposed to protect them in their communities.

The third *Cort* factor weighs heavily in favor of an implied remedy as well. The contemplated remedy, discussed further below, would be an order directing the certifying

---

[433] *Id*.

[434] Generally, these are victims of serious crimes who have been helpful to law enforcement. *See* 22 U.S.C.S. § 7101(a) (discussing the purpose of the VTVPA as protecting victims from trafficking and violent crime, and creating effective prosecution methods).

agency to fairly consider the petitioner's I-918B certification request articulating its reasoning if it denies a certification and, where jurisdictions refuse to provide any certifications, to articulate how such a practice furthers the goals of the statute. Finally, there is no conflict with traditional state law schemes. The federal government has totally excluded states from enacting immigration policy.

B. Standing and Alleged Injury

As a threshold matter, a claim against the certifying agency can be framed to demonstrate standing. In order to have standing, the plaintiff must show an injury in fact, that the injury must be causally connected to the conduct complained of, and that it is likely that the injury will be redressed by a favorable decision.[435]

It is true, as noted above, that courts have been reluctant to order the issuance of an I-918B certification due to the discretion afforded law enforcement agencies in determining whether to sign an I-918B certification.[436] Additionally, the granting of a U visa itself is a discretionary action by USCIS. However, because arbitrary and/or *ultra vires* policies and practices of the many law enforcement agencies function to deny eligible applicants *the right to apply* for a U visa, they may seek redress for such denial and for the denial of their right to have their I-918B certification request fairly considered. That is, by demonstrating the denial of a meaningful right to apply for the U visa, denied victims may establish injury in fact, and may be able to show injury must be "actual or imminent, not conjectural or hypothetical."[437]

---

[435] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
[436] *See Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 2008 U.S. Dist. LEXIS 103304 (N.D. Cal. 2008) (aff'd *Catholic Charities CYO v. Napolitano*, 368 Fed. Appx. 750, 2010 U.S. App. LEXIS 4020 (9th Cir. Cal. 2010)); *Orozco v. Chertoff*, 2008 U.S. Dist. LEXIS 98800, 2008 WL 5155728 (S.D. Tex. 2008) (aff'd *Orosco v. Napolitano*, 598 F.3d 222, 2010 U.S. App. LEXIS 4307 (5th Cir. 2010)); *Zhiqiang Wu v. Duffy*, 2011 U.S. Dist. LEXIS 44064 (S.D. Cal. 2011).
[437] *Lujan* at 560 (internal quotations omitted).

By making the proper claim that an applicant has been denied a right to apply for U visas because of arbitrary and extralegal policies and practices, claimants may avoid the problems faced in cases including *Catholic Charities CYO v. Chertoff* [438] and *Orosco v. Napolitano*.[439] Indeed a denial of the right to apply for a U visa would establish standing.[440]

Under these circumstances, the petitioner who meets the eligibility requirements set forth in 8 U.S.C. § 1101(a)(15)(u) can argue her right to apply for the U visa and have her application considered by USCIS has been denied by law enforcement. Certifying agencies may not constructively block the right to apply right by arbitrarily and wrongfully refusing to certify the I-918B certification. In *Catholic Charities* the court seemed to accept a claimed "right to apply" as a basis for standing.[441]

C. Possible Litigation Claims

1. Claims Against Certifying Agencies

An action against the local certifying agency has the benefit of providing the most immediate relief to an individual petitioner. If the case were brought against the certifying agency, the requested remedy would either be an injunctive order or a writ of mandamus ordering the certifying agency to review the petitioner's I-918B certification request and articulate the reasons for its decision, if it denies the certification. A review

[438] 622 F. Supp. 2d 865, 878 (N.D. Cal. 2008). In *Catholic Charities*, numerous plaintiffs brought suit alleging various injuries under the U visa statute. Most of the plaintiffs alleged that USCIS' failure to timely promulgate regulations had caused them injury. However, four plaintiffs argued that they had been injured by being denied LECs. The plaintiffs had sought LECs from a different division of the defendant agency than had actually performed the investigation, and the division had denied them LECs.

[439] 598 F.3d 222 (5th Cir. 2010). Ordonez Orosco, the plaintiff, had entered the United States illegally with the help of smugglers. *Id.* at 224. The smugglers had abandoned him and his brother in the desert, and his brother had died. *Id.* Orosco, on being apprehended by Border Patrol officials had informed him of his brother's death, and subsequently sought and been denied an LEC. *Id.*

[440] This claim is based on a petitioner who had their LEC request denied by a certifying agency because of the agency's blanket refusal to certify or the agency's consideration of non-statutory or regulatory factors in denying the LEC.

[441] 622 F. Supp. 2d 865, 878.

of some of the reported cases would seem to indicate that a mandamus action or request for injunctive relief will not work for a petitioner seeking an I-918B certification.[442] However, all of these cases failed because the petitioners sought to mandate the certification itself and thus failed to properly frame their injuries and requested relief to avoid the discretionary nature of the I-918B certification.

One strategy would be to consider seeking plaintiffs from municipalities in which all certifying agencies in the jurisdiction have a blanket policy against certifying. Such plaintiffs encounter multiple agencies that refuse to exercise discretion, and with due acknowledgement of and appreciation for the high standard required to demonstrate abuse of discretion, have strong claims. Applicants who are crime victims in any region or area of the country where a law enforcement agency refuses to provide I-918Bs certifications are left without recourse or remedy. It is reasonable to assume the courts would find a law intended to provide remedy rendered unavailable to some, but not others, based on wholly arbitrary factors to be a meaningless remedy, and a situation that ought not to be countenanced. Such claims could be distinguished from those suits where plaintiffs argued that a defendant certifying agency had to provide him with an I-918B certification because he met the statutory requirements for a U visa.[443]

---

[442] *Orozco v. Chertoff*, 2008 U.S. Dist. LEXIS 98800, *12 (S.D. Tex. Dec. 8, 2008) ("Since a mandamus action cannot be used to compel the performance of a discretionary act, mandamus relief is not available to the Petitioner in seeking the issuance of a LEC.") (aff'd *Orosco v. Napolitano*, 598 F.3d 222, 2010 U.S. App. LEXIS 4307 (5th Cir. 2010)). The plaintiffs in Catholic Charities sought injunctive relief to try to force the agency to provide LECs. *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 875 (N.D. Cal. 2008). However, the outcome was the same - like a writ of mandamus, injunctive relief was not available to compel a discretionary action. Id. at 887 ("[D]enial of LECs is a discretionary act and not subject to judicial review.").

[443] *Zhiqiang Wu v. Duffy*, 2011 U.S. Dist. LEXIS 44064 (S.D. Cal 2011). *Orosco v. Chertoff*, 2008 U.S. Dist. LEXIS 98800. *See also Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 2008 U.S. Dist. LEXIS 103304 (N.D. Cal. 2008) where the court denied claims based on a refusal to exercise discretion on a finding that the agency was not the investigating agency and furthermore, that the agency did exercise discretion.

Further, an action against a certifying agency could succeed on a preemption claim. Certifying agencies with *ultra vires* practices are implementing their own policies that affect immigration rights. As discussed in Subsection II, above, non-federal actors are absolutely prohibited from implementing laws or policies that structure immigration rights. Therefore, a petitioner who has been injured by the denial of his right to apply for a U visa can request that a court enjoin the certifying agency from applying its *ultra vires* I-918B certification policy, on the grounds that such policy is preempted by federal immigration law. Since a blanket refusal will also constitute a preempted *ultra vires* practice, the agency will have to provide a reasonable review of the I-918B certification request within the USCIS guidelines.

For petitioners who are seeking review of state agencies, such as the State Highway Patrol or the Department of Social Services for states in which Social Services is a statewide agency, there may be direct administrative review available under the APA.

(a) State Administrative Procedure Act

There are potential claims for petitioners in state court under the corresponding state's Administrative Procedure Act (APA). For petitioners who are seeking review of state agencies, such as the State Highway Patrol or the Department of Social Services for states in which Social Services is a statewide agency, there may be direct administrative review available under the APA. For example, in North Carolina, the APA provides broad scope of review for agency action:

> Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, *unless adequate procedure for judicial review is provided by another statute*, in which case the review shall be under such other statute.[444]

[444] N.C. Gen. Stat. § 150B-43 (2012).

Indeed, in order for petitioners to seek judicial review under the APA, they must only allege abuse of discretion: "allegations of arbitrary and capricious conduct or of *abuse of discretion* on the part of [a state agency] render the issue subject to judicial review" (emphasis added).[445]

Courts review claims of error alleged under abuse of discretion according to the APA under the whole record test.[446] The court reviews "all competent evidence, including evidence that detracts from the [agency's] conclusions, to determine if the [agency's] decision has a rational basis in the evidence."[447] Under this test, a certifying agency's decision would have to have a rational basis founded in the evidence which the agency had to demonstrate that a U visa petitioner did not meet the elements of needed to provide an I-918B certification. A reviewing court could look to any evidence which the petitioner or the agency put forth to demonstrate that the petitioner refused to assist the agency in the investigation at any point. The agency would be still be accorded a significant amount of discretion, as, " '[t]he whole record test' does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo.*"[448] Therefore the court would not be making a determination of whether or not an agency should sign a certification, but rather would be looking to whether or not the agency abused its discretion in choosing not to sign.

[445] *Dept. of Transportation v. Overton*, 111 N.C.App. 857, 859 (1993).
[446] N.C. Gen.Stat. § 150B–51 (c) (2011); *see also Butler v. Charlotte-Mecklenburg Bd. of Educ.*, 725 S.E.2d 923 (N.C. Ct. App. 2012).
[447] *Beauchesne v. Univ. of N.C. at Chapel Hill*, 125 N.C.App. 457, 465 (1997)
[448] *Butler v. Charlotte-Mecklenburg Bd. of Educ.*, 725 S.E.2d 923 (N.C. Ct. App. 2012).

The North Carolina APA does not apply to local governments.[449] The majority of certifying agencies are under the umbrella of local governments; thus, petitioners may not be able to bring direct APA claims for judicial review against such agencies. However, the standard of review for which North Carolina courts assess state agencies for abuse of discretion is instructive for petitioners seeking review of any certifying agency through other actions.

U visa applicants who have evidence that their requests for LECs were denied on the various grounds that violate equal protection may bring suits under the Equal Protection Clause if they can demonstrate intentional discrimination, or may file administrative complaints with the Department of Justice where the discrimination has a disparate impact on certain groups of immigrants.

2. Claims Under the Equal Protection Clause and Title VI

(a). Equal Protection

As described above in Section Two, Part III, U visa applicants who have evidence that their requests for I-918B certifications were denied on the various grounds that violate equal protection may bring suits to under the Equal Protection Clause if they can demonstrate intentional discrimination, or may file administrative complaints with the Department of Justice where the discrimination has a disparate impact on certain groups of immigrants. First, if certifying agencies refuse to sign I-918B certifications because of the immigrant's race, national origin, and in some circumstance because they are undocumented, it would be a potential violation of the Equal Protection Clause. The *Plyler* case does not give undocumented immigrants the status of a "suspect class" and thus discriminating because of their immigration status, itself, is not a violation of the

[449] *See* Karen Cochrane Brown, *Rule Making Under the APA: A Primer for Members of the Joint Regulatory Reform Committee*, North Carolina Bar Association, (Nov. 18, 2011) *available at* http://www.ncbar.org/media/21145793/2011regulatoaryreformprimer.pdf

Equal Protection clause.[450] However, it does set the stage for equal protection claims on the basis of discriminatory animus and the creation of different categories of otherwise similarly situated immigrant crime victims without a rational basis. Second, advocates can argue that this is state action and thus the policies by state agencies should be limited.

(b). Title VI

U visa applicants denied U visa certifications who seek to make a claim of discrimination may also pursue remedies under Title VI. As noted above in Section Two Part III, practitioners might be able make specific claims based on national origin, including a failure to provide linguistic access in the U visa process, or race. Title VI provides that "[n]o person in the Unites States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[451] The regulations that implement Title VI specifically prohibit "[d]eny[ing] an individual any disposition, service, financial aid, or benefit."[452] The statute defines "program or activity" as the operations of departments, agencies, instrumentalities, and other sectors of state or local governments.[453] Title VI applies to any sort of federal funding.

Making a general claim under Title VI is straightforward. Although Title VI does not apply to the operations of the federal government and thus claims against federal agencies such as the U.S. Department of Justice will not be entertained, state and local

[450] *Id.* at 223
[451] 42 U.S.C. § 2000d.
[452] 28 C.F.R. § 42.104(b)(1).
[453] 42 U.S.C. § 2000d–4a.

agencies may be challenged through the statute.[454] There is a strong case to be made that agencies with discriminatory policies as set forth in Section Two Part III are in violation of Title VI.

3. Remedial Action via State and Local Government Action

While federal action might be the most effective because the U visa is created from federal law, advocates should also pursue strategies engaging state and local governments to exercise their powers over various certifying agencies, explained above in Section Two, Part VI. By increasing state and local government awareness of the certification problem and encouraging those governments to support the federal intent of the statute and regulations, advocates can effectively pressure certifying agencies to implement better policies.

(a) State Action

(1). State legislative action

One manner in which state government might help encourage local law enforcement agencies to implement "best practices" in certifying helpfulness for U visa applications is by passing a resolution urging agencies to develop policies that better embrace the parameters and rationales of the federal law.

The efficacy of advocating for a statewide symbolic resolution will depend on the local political environment. First, because of the politicization of immigration issues around the country, the strategy may only be politically realistic in some states. Second, in some small localities, U visas remain relatively unknown, and U visa certification has

[454] *Wise v. Glickman*, 257 F. Supp. 2d 123, 132 (D.D.C. 2003) (holding that Title VI claim could not be brought when the USDA actually administered the program).

Advocates should also pursue strategies engaging state and local governments to exercise their powers over various certifying agencies.

not become a highly recognized or politicized topic.[455] Advocates must work closely with all facets of the community to determine whether and how symbolic resolutions can improve U visa certification processes in communities where there is strong anti-immigrant sentiment.

Statewide resolutions have enormous potential benefits. First, they can provide powerful persuasion from an authority with which local law enforcement agencies have a closer relationship compared with federal government or executive agencies. In some locales, agencies are discouraged from certifying U visas because they are reluctant to participate in a program that they see as being imposed upon them by the federal government. Second, statewide resolutions provide a persuasive argument for advocates to present to certifying law enforcement agencies, both in the state where the resolution was passed and nationally. With both federal and state officials encouraging individually exercised discretion and best-practices, it may become more difficult for local agencies to contravene the intent of the U visa statute and refuse to certify.

(2). Attorney General Advisory Opinion

Another effective state-level tool for persuading local law enforcement agencies to improve their certification policies is an advisory opinion issued by the state Attorney General. Advisory opinions are usually made "at the request of other public officials," and they are meant to articulate the suggested policy of the state justice department.[456] U visa advocates could encourage other public officials, particularly chiefs of police or

[455] *See, e.g.*, Scott McVarish, *From Victim of Crime to Work Permit and U visa*, IMMIGRATION LAW OFFICE OF LOS ANGELES, P.C., Sept. 4, 2012, http://www.immigrationhelpla.com/Immigration-Blog/2012/September/From-victim-of-crime-to-work-permit-U visa.aspx.
[456] *See* The Attorney General, NORTH CAROLINA DEPT. OF JUSTICE, (last visited May 4, 2013), http://www.ncdoj.com/About-DOJ/The-Attorney-General.aspx.

district attorneys, to request such an opinion to articulate the Attorney General's opinion on certification practices and the extent of the discretion granted to local law enforcement. Like a statewide resolution, an advisory opinion might help convince reluctant or recalcitrant certifying agencies to reconsider their policies, or it might put increased political pressure on those agencies to do so. Advocates may, however, face an Attorney General that is not amenable to immigrants or federal immigration policy, so they must carefully analyze the political climate of their state when considering the option.

(b). Local Government Action

Like state governments, local governments have a number of methods to exert pressure and influence over certifying agencies to encourage changes in certification practices. Local governments have analogous powers to hire and fire some certifying officials, to appropriate funds for law enforcement agencies, and to pass non-binding resolutions in support of U visa certification "best practices."

(1). Local Law Enforcement Training

Local governments may also be especially well situated to provide certification training to local law enforcement agencies. While the Department of Homeland Security already offers trainings for certifying agencies,[457] local government trainings, done in conjunction with victim advocates, may be just as, if not more effective. Some law enforcement agencies are skeptical of federal training, and personal relationships and familiarity with local government officials may make reluctant local certifying officials more amenable to learning about best practices. Additionally, some law enforcement agencies may be unaware of the training materials available to them from USCIS. Local

[457] *See* DHS Guide, *supra* note 8, at 15.

governments have fewer agencies to worry about, and thus, they may be able to more effectively deliver information to those agencies. U visa advocates should encourage local governments to engage certifying agencies in U visa training. Local governments will likely not even need to develop their own training program—rather they can more effectively deliver existing federal materials from a more familiar and more trusted voice.

(2). Power to Hire and Fire

As described in Section Two, Part V, local governments often possess a great deal of power of the hiring and firing of local law enforcement officials. This power provides U visa advocates with a useful route to engage local officials in supporting good certification practices through these processes. U visa advocates should make themselves heard at all stages of the hiring process for new police chiefs. When a city council is considering applicants and holding public forums, for example, advocates should be present, arguing for good U visa certification practices and explaining to the council members and the public its usefulness to the community for both public safety and humanitarian reasons. Advocates should encourage the council members, city manager, or whoever else is ultimately responsible for hiring the new agency head, to consider willingness to participate in the U visa program as an important factor in their hiring decision. If possible, advocates should exert similar pressure on cities considering removing law enforcement agency officials.

(3). Local Ordinances and Resolutions

a. Local Budgeting

In addition to encouraging training and influencing hiring, U visa advocates should encourage local governments to pass local legislation and resolutions favorable to U visa certification. As explained above in Section Two, Part V, local governments

typically control a significant portion of operational funding for local law enforcement agencies. Advocates should encourage local elected officials to consider making certain law enforcement funds conditional on the implementation of U visa certification practices that fulfill the intent of the law.

Local government could encourage law enforcement agencies to improve certification practices through local funding appropriations in one of two ways. First, advocates could encourage local government to use "the stick" approach— i.e. threatening to remove funding unless the agency brings its certification policy into compliance with federal intent. This approach would be powerful, but would likely be politically difficult due to the importance of local law enforcement funding for general public safety. A second approach, "the carrot", may be more palatable for some local governments. By this method, local governments could offer certifying agencies additional funding to allow them to set up a system for handling U visa certification requests. They could also condition existing funding on a report about U visa certification practices. Another required condition should be the inclusion of local stakeholders in the development and review of such policies. This process would allow U visa advocates to participate in crafting the certifying agencies' policies by working with city councils or other local governing bodies and teaching their members about U visa "best practices."

b. Symbolic Resolutions

Another local government strategy that should not be discounted by advocates is the power of city councils or county commissions to pass symbolic resolutions. While a symbolic resolution has no direct power to affect the certification practices of local law enforcement agencies, such a resolution can have tremendous influence as a publicity and

organizational tool. As such, these resolutions are a beneficial tool for advocates to pursue, even in jurisdictions where most or all certifying agencies embrace the intent of the statute and regulations in their practices.

To encourage local governments to adopt symbolic resolutions in favor of U visa certification "best practices," advocates should take a proactive role in the drafting and presentation of such resolutions. Depending on where the resolution will be brought, advocates should research the certifying agencies under the jurisdiction of the local government and seek to understand their certification policies. By understanding the policies, advocates can draft a resolution that seeks to remedy the specific problems those policies might have. For example, a common arbitrary policy in certifying agencies around the country is to refuse to certify U visas if the criminal case giving rise to eligibility has been closed.[458] Advocate could include resolutions excerpts from DHS' Guide that elucidate the many contexts in which law enforcement may sign certifications. Advocates should also include information specific to the jurisdiction, such as percentage of foreign born population, crime statistics, etc. This information will demonstrate to the local governing body, as well as to certifying agencies reading the resolution, why the U visa is an important tool in that jurisdiction specifically. As an example of a completed resolution, the resolution passed by the Chapel Hill City Council is provided below, as Appendix V.

Equal care should be taken in the presentation of a symbolic resolution to a city council. Most city councils provide a regular time for public comment, and advocates could use that time to present and argue for a symbolic resolution. Advocates should also

[458] Law enforcement agencies often justify this policy by arguing that after the case is closed, the U visa is no longer a useful tool for them because there is no further benefit to encouraging the applicant to be helpful in the investigation or prosecution. *See* Section One, Part I & II.B.

Advocates may improve their work with law enforcement by developing relationships with agencies or decisionmakers trusted by law enforcement, such as political and religious leaders and domestic violence, sexual assault and other organizations with whom they already work on improving community policing and holding perpetrators accountable.

provide useful reference materials for elected officials to use while considering the resolution. These materials should explain the importance of the U visa as a public safety tool, as a humanitarian benefit for victims, and as a method to improve relationships between immigration communities and law enforcement.[459] Finally, an advocate should strategically decide in which jurisdiction to present the symbolic resolution for consideration. Clearly, a symbolic resolution would have the most direct impact when passed by a city council in a jurisdiction with a law enforcement agency that refuses to issue U visa certifications in all or some circumstances. Again, however, the important collateral impacts of symbolic resolutions should not be discounted. A symbolic resolution passed in a city whose local law enforcement agencies follow U visa certification "best practices" may garner media coverage that will be seen in adjacent or nearby cities that may have less desirable practices. Additionally, city councils in cities with "best practice" local law enforcement agencies may be less fearful of internal confrontation and more amenable to passing such a resolution.

In Chapel Hill, North Carolina, for example, certifying agencies like the local police department and district attorney's office employ good certification practices that adjudge requests on an individual basis, following the discretionary guidelines laid out by

[459] The DHS Guide, *supra* note 8 is a useful resource. The UNC Immigration/Human Rights Policy Clinic provided this resource as Appendix V to the resolution submitted to the Chapel Hill Town Council in April 2013.

the statute and regulations.[460] The UNC Immigration/Human Rights Policy Clinic brought a resolution before the Chapel Hill Town Council asking that council to publicly acknowledge the importance of the U visa, to praise its local law enforcement agencies for their good practices, and to encourage those agencies to continue those practices into the future.[461] After receiving positive feedback from the Chapel Hill Chief of Police, Christopher Blue, the council unanimously adopted the resolution.[462] The text of that resolution is included in Appendix V, and may be used as an example for advocates seeking to encourage cities to adopt similar provisions. Ideally, resolutions such as that passed in Chapel Hill will increase the visibility of U visa certification problems around the country and assist in encouraging movement from other local governments both within North Carolina and nationally.

4. Expanding the Realm of Certifiers

Advocates may look for additional potential certifying agencies in situations where there is no other recourse; this may be a good practice in general, since Congress designed the U visa to help all aspects of criminal system. For example, recently a U visa petitioner successfully obtained a U visa certification from a probation officer.[463] Applicants who are victims of family-related criminal matters may also wish to explore whether a guardian ad litem or court appointed special advocate could certify the helpfulness of the victim. A guardian ad litem who acts in cases of abuse, neglect, and dependency may have investigatory authority in some states pursuant to statute and

[460] *See* Council Meeting Summary, TOWN OF CHAPEL HILL, Apr. 22, 2013, http://www.townofchapelhill.org/index.aspx?page=22&recordid=6245&returnURL=%2findex.aspx%3fpage%3d84.
[461] *See* Appendix V.
[462] *See* Council Meeting Summary, *supra* note 460.
[463] Monterrey Probation Office qualified as a certifying agency in a case filed in January 2013 (information on file with the authors).

appointment orders. As with judges and offices such as the EEOC and DOL, they may "detect" U qualifying crimes and therefore be legitimate certifiers. The laws and orders governing guardians at litem vary by state. In North Carolina, guardian ad litem cases of abuse and neglect are authorized by statute to investigate all matters relevant to the case.[464] The statutory duties of a guardian ad litem include investigating to determine facts, and offering evidence and examining witnesses at adjudication.[465] A guardian ad litem works in a similar investigatory role to social services, and both are represented by an attorney in court. As USCIS regularly accepts I-918Bs signed by the Department of Social Services, advocates may make a strong case that a guardian ad litem has a sufficient role in the detection and/or investigation of the crime to act as a certifier. In North Carolina a guardian ad Litem is supervised by staff of the Administrative Office of the Courts in each jurisdiction.[466] Such staff could act as designated certifying officials. Identifying a guardian ad litem as certifying officials is also advantageous for advocates in cases where social services refuses to certify, as a guardian litem is independent from social services and may have a different understanding of victimization and cooperation.

5. Enhancing Individual Advocacy Strategies

Not all problems with obtaining certifications arise solely from law enforcement attitudes. As experience working with law enforcement on peer training reveals, advocates and attorneys would benefit from considering the perspective of law enforcement. A "questionnaire" that ASISTA regularly poses to attorneys at legal

[464] N.C. Gen. Stat. § 7B-601
[465] Administrative Office of the Courts, Guardian ad Litem Advocacy: The Program, Roles, and Responsibilities, §8.4 Responsibilities of the Guardian ad Litem Team, 300 (2007) *available at* http://www.nccourts.org/Citizens/Gal/Documents/Manual/chapter08.pdf.
[466] *Id.* at 301.

conferences is intended to illustrate the problems they face when they approach law enforcement on their own:

- What do you think the American public thinks of lawyers?
- What do you think police think of lawyers?
- What do you think police think of immigration lawyers?

Much of the effective work done with law enforcement entails employing social psychology and political organizing strategies. Who is the best "messenger" for reaching law enforcement? Whose opinion do they trust? Who do they *have* to listen to? These strategies are addressed in other articles and training materials; the authors strongly encourage readers to consult these materials if you are at the initial stages of encountering problems with law enforcement.[467] Resolving problems through organized stakeholder advocacy and targeted "best messenger" persuasion takes time and organizing skills, and may be profitably used with some of the larger "systems" suggestions noted above.

The U visa statute embodies important humanitarian values while providing meaningful opportunities to strengthen "the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes." The right to apply for a U visa cannot be left to the uninformed, arbitrary, capricious, or discriminatory policies of a local certifying agency.

[467] For more information about training and working with Law Enforcement, visit: http://www.asistahelp.org/index.cfm?nodeID=68156&audienceID=1

CONCLUSION

The U visa statute embodies important humanitarian values while providing meaningful opportunities to strengthen "the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes."[468] The U visa process relies on a range of federal, state, and local agencies and officials for implementation. The data demonstrates, however, that geography plays a "gatekeeper" role in whether law enforcement actually uses it as a tool for working with immigrant communities, whether immigrant crime victims feel safer about accessing justice in their jurisdictions,, and whether all communities enjoy greater safety and security.. The right to apply for a U visa should be undermined by uninformed, arbitrary, capricious, or potentially discriminatory policies of local certifying agencies.

Advocates should continue to press for amendments to the Immigration and Nationality Act while pressing their law enforcement agencies to implement the law as Congress intended. They should continue to collect data on arbitrary, *ultra vires*, and discriminatory policies and document policies that do not comply with the law. Litigation strategies may hold promise as an additional tool for convincing law enforcement to employ rational and helpful certification practices, as may efforts to persuade state and local authorities to encourage certifying agencies to implement policies in accordance with the statutory purposes.

Immigrant crime victims who qualify for the U visa but who were victimized in locations where certifying agencies do not implement fair and lawful policies have a right to remedy. We hope this report helps readers consider new ways to ensure the U visa is

[468] VTVPA, 8 USC § 1513(a)(2)(A).

helping *all* the survivors of crimes Congress intended to benefit from this experiment in encouraging immigrant communities to seek justice without fear of deportation.

See Appendices

Appendix I: http://www.law.unc.edu/documents/clinicalprograms/uvisa/appendix1.pdf

Appendix II: http://www.law.unc.edu/documents/clinicalprograms/uvisa/appendix2.pdf

Appendix III: http://www.law.unc.edu/documents/clinicalprograms/uvisa/appendix3.pdf

Appendix IV: http://www.law.unc.edu/documents/clinicalprograms/uvisa/appendix4.pdf

Appendix V: http://www.law.unc.edu/documents/clinicalprograms/uvisa/appendix5.pdf