

## THE U VISA: PROPOSED CHANGES TO THE CODE OF FEDERAL REGULATIONS TO AID UNDOCUMENTED ALIEN VICTIMS

### I. INTRODUCTION

Undocumented aliens have long been victims of heinous crimes.<sup>1</sup> For decades an undocumented alien victim faced the choice of reporting a crime committed against him coupled with the possibility of deportation, or suffering in silence in order to remain in the United States. Hope against this double-edged sword was thought to be found for undocumented alien victims in Congress' proposed solution to this problem—the U visa.<sup>2</sup> The U visa was designed to give undocumented aliens a safe harbor in the form of temporary legal status if they reported a crime to law enforcement agencies.<sup>3</sup> In return, law enforcement agencies would receive valuable information about criminal activity that had long gone unreported.<sup>4</sup>

The U visa has been an effective means of protection for some undocumented alien victims. For example, attorney Juan A. Laguna has written of undocumented women who were stabbed, raped, or seriously injured—such as one particular Jane Doe who “was beaten so badly that she almost lost an eye”<sup>5</sup> but then found protection under the U visa regulation.<sup>6</sup> However, the U visa has failed to yield Congress's desired effect. U visa status can be granted to “10,000 principal aliens in each fiscal year.”<sup>7</sup> Yet, despite congressional intent, the implementation of the rules and regulations of the U visa have been chaotic and inconsistent.<sup>8</sup>

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1. See, e.g., Juan A. Laguna, *The “U” Visa: A Tool For Law Enforcement and an “A” Venue of Hope*, 51 ORANGE CNTY. LAW. 27, 28 (2009).

2. *Id.* at 29. “Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes while offering protection to victims of such crimes.” *Id.*

3. See *id.*

4. See *id.*

5. *Id.* at 29.

6. *Id.* at 28-29.

7. Laguna, *supra* note 1, at 32. See also Alien Victims of Certain Qualifying Criminal Activity, 8 C.F.R. § 214.14(d)(1) (West 2009).

8. See Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 375 (2010), for how:

the story of Rose and the legal progression of her U visa case, reveal how regulatory and legal developments over the past nine years have collectively thwarted the dual purposes of the U visa framework that Congress intended—to

Many law enforcement agencies have claimed ignorance to the U visa status, or have simply decided not to cooperate with illegal alien victims.<sup>9</sup>

This Note will discuss Congress' original intent for the U visa, the present effects of the U visa, and the necessity for implementing change in how victims apply for a U visa by either eliminating the requirement that a victim attain a law enforcement certification or demanding that the Department of Homeland Security (DHS) designate a certifying official in each law enforcement agency nationwide. Specifically, Part II outlines the purpose of the U visa, as well as the qualifications for, and the effects of, U visa status and U visa application requirements, and focuses on the third "helpfulness" requirement that involves a certification from a certifying law enforcement agency. Part III analyzes the problematic framework and nature of U visa procedures, and proposes two possible solutions. Finally, in Part IV, this Note concludes that one of the above changes needs to be implemented to aid undocumented alien victims.

## II. BACKGROUND

### *A. The Purpose of the U Visa*

The U visa was enacted as part of the Battered Immigrant Women Protection Act of 2000 (BIWPA),<sup>10</sup> for a dual purpose: to grant protection in the form of lawful temporary immigrant status to alien crime victims, regardless of gender,<sup>11</sup> while simultaneously granting greater authority to "law enforcement agencies to investigate and prosecute such crimes as domestic violence, sexual assault, and trafficking in persons . . . in keeping with the humanitarian interests of

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both strengthen the law enforcement's pursuit of domestic violence cases and to protect victims.

*Id.* at 375.

9. *See id.*

10. USCIS Interim Final Rule: New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status, 72 Fed. Reg. 53014 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274(a) and 299) [hereinafter *USCIS Interim Final Rule*]. Note that "USCIS is 'responsible for the "service" functions previously provided by the INS.' These 'service functions' include adjudicating visa petitions, such as family-sponsored and employment-based petitions, naturalization applications, and asylum and refugee cases." Greta D. Stoltz, Comment, *The U Visa: Another Remedy For Battered Immigrant Women*, 7 SCHOLAR 127, 142 (2004).

11. *See USCIS Interim Final Rule*, *supra* note 10, at 53015.

the United States,”<sup>12</sup> by encouraging the victims of such crimes to serve as helpful witnesses in criminal prosecutions.<sup>13</sup> Through the U visa, Congress attempted to minimize undocumented alien victims’ fear of being deported from the United States if they reported having been the victim of criminal activity to law enforcement authorities.<sup>14</sup> Congress recognized that “it is virtually impossible for state and federal law enforcement . . . to punish and hold perpetrators of crimes against non-citizens accountable if abusers and other criminals can avoid prosecution by having their victims deported.”<sup>15</sup> Thus, the U visa offered protection to increase the reporting of crime.

Specifically, the U visa was enacted to grant lawful temporary immigrant status to nonimmigrants<sup>16</sup> who were or had been subject to abuse or had been “victims of criminal activity.”<sup>17</sup> The U visa was also meant to protect those most vulnerable:

The prevalent U visa crime victim paradigm involves a female domestic or sexual violence victim who will not come forward to denounce her abuser for fear of retaliation or fear of contact with law enforcement. U visa protection was created, in part, to protect victims within traditionally vulnerable immigrant communities.<sup>18</sup>

To qualify for U visa immigrant status, alien victims must cooperate with the investigation of the criminal activity by contributing pertinent information to law enforcement officials.<sup>19</sup> Initially, it was hoped that the enactment of the U visa would advance illegal immigrants’ legalization

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12. *Id.* It was also believed that the USCIS Interim Final Rule would help the U visa become more successful and attain the goals Congress had in mind with its enactment. See Stoltz, *supra* note 10, at 149.

13. See USCIS Interim Final Rule, *supra* note 10, at 53014.

14. *Id.* at 53014-15.

15. Stoltz, *supra* note 10, at 131.

16. Bureau of Investigation (BOI) Policy and Procedure Manual (Mar. 14, 2008) (on file with author).

17. Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 892 (2008).

18. *Id.* at 909.

The U Visa crime victim paradigm is often gendered, as is evident from the types of crimes—rape, sexual assault, trafficking, slavery—for which there is protection. The victim is one who is forced into sex-related activities such as prostitution through indentured servitude or trafficking. This, it seems, is the disempowered, worthy victim the legislation aimed to protect.

*Id.*

19. *Id.* at 892.

process and ultimately author a greater civil rights movement for immigration.<sup>20</sup> However, due to the lack of regulations and enforcement, the U visa was highly unsuccessful from 2000 until 2007.<sup>21</sup> Even though an interim rule was enacted on October 17, 2007 and regulations became effective on January 12, 2009,<sup>22</sup> the U visa requirements remain vague and unknown to many potential qualifying applicants and agencies.

If granted a U visa, an undocumented alien may reside in the United States “for up to four years . . . .”<sup>23</sup> Although this status is temporary, section 1513(f) of the BIWPA empowers DHS with the authority to adjust “temporary U nonimmigrant status to permanent resident status . . . .”<sup>24</sup>

### *B. U Visa Application Requirements*

In order for an alien crime victim to obtain a U visa, he or she must meet four qualifying requirements.<sup>25</sup> First, the undocumented alien must have “suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity.”<sup>26</sup> Second, the undocumented alien must possess “credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her petition is based.”<sup>27</sup> Third, the undocumented alien must

ha[ve] been helpful, [be] helpful, or is likely [] be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is

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20. *Id.* at 907. It has been argued that:

[s]imilar to the African-American civil rights experience, the immigrant civil rights experience may begin with governmentally recognized abolition of labor exploitation and eventually lead to workplace parity. Today’s immigrants recognize that legal status allows for fuller participation in the political, social, and economic life of their communities in the United States . . . . A visa, such as a U visa, does not confer any type of civil right on an individual immigrant.

*Id.*

21. SUZANNE B. SELTZER, SUZANNE TOMATORE, IVY SURIYOPAS & SHONNIE BALL, N.Y. ANTI-TRAFFICKING NETWORK LEGAL SUBCOM., IMMIGRATION RELIEF FOR CRIME VICTIMS: THE U VISA MANUAL, A-iv (Suzanne Tomatore, et al. eds., 2010), available at <http://nyatn.files.wordpress.com/2010/03/u-manual-finald.pdf>.

22. *Id.*

23. *USCIS Interim Final Rule*, *supra*, note 10, at 53015.

24. *Id.*

25. 8 C.F.R. § 214.14(b).

26. *Id.* § 214.14(b)(1).

27. *Id.* § 214.14(b)(2).

based, and since the initiation of cooperation, [have] refused or failed to provide information and assistance reasonable requested.<sup>28</sup>

Finally, “[t]he qualifying criminal activity [must have] occurred in the United States (including Indian country and U.S. military installations) or in the territories or possessions of the United States, or violated a U.S. federal law that provides for extraterritorial jurisdiction to prosecute the offense in a U.S. Federal Court.”<sup>29</sup> The above final requirements vary slightly but not significantly in language from the former proposed interim requirements.<sup>30</sup>

*1. The First Eligibility Requirement—Illegal Alien Victim Suffered Substantial Physical or Mental Abuse*

The first eligibility requirement is met if “the alien has suffered substantial physical or mental abuse as a result of having been a victim of” one or more of the crimes enumerated in the regulations or a crime of similar nature.<sup>31</sup> “The regulations define physical or mental abuse as

28. *Id.* § 214.14(b)(3).

29. 8 C.F.R. § 214.14(b)(4).

30. *USCIS Interim Final Rule*, *supra* note 10, at 53014-53015.

The alien must have suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity; [t]he alien must be in possession of information about the criminal activity of which he or she has been a victim; [t]he alien must be of assistance to a Federal, State, or local law enforcement official or prosecutor, a Federal or State judge, the Department of Homeland Security (DHS), or other Federal, State, or local authority investigating or prosecuting criminal activity; and [t]he criminal activity must have violated U.S. law or occurred in the United States (including Indian country and military installations) or territories and possessions of the United States.

*Id.* at 53015.

31. *See* SELTZER, *supra* note 21, at A-1. The following, in addition to “substantially similar criminal activity,” are enumerated crimes:

Rape[;] Torture[;] Trafficking[;] Incest[;] Domestic Violence[;] Sexual Assault[;] Abusive sexual contact[;] Prostitution[;] Sexual Exploitation[;] Female genital mutilation[;] Being held hostage[;] Peonage[;] Involuntary servitude[;] Slave trade[;] Kidnapping, abduction[;] Unlawful criminal restraint[;] False imprisonment[;] Blackmail, extortion[;] Murder, manslaughter[;] Felonious assault[;] Witness tampering[;] Obstruction of justice[;] Perjury[;] Attempt, conspiracy, or solicitation to commit any of the above . . . .

*Id.* Note “[t]he term ‘any similar activity’ refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.” 8 C.F.R. § 214.14(a)(9).

‘injury or harm to the victim’s physical person, or harm to or impairment of the emotional or psychological soundness of the victim.’”<sup>32</sup> It must be noted that the statutory list of criminal activity is not exclusive; it is merely categorical.<sup>33</sup>

The defining term “substantial” is exercised in “the definition of severity of the injury to the victim and the severity of the abuse inflicted by the perpetrator.”<sup>34</sup> Although a single act may not qualify as “substantial,” the regulations allow an applicant to string together multiple acts in order to meet the “substantial” threshold.<sup>35</sup> Moreover, a “substantially similar crime” to those found in the listed crimes may also satisfy the first requirement.<sup>36</sup> The Code of Federal Regulations clarifies that:

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32. See SELTZER, *supra* note 21, at A-15 to A-16 (citing 8 C.F.R. § 214.14(a)(8)).

33. *Id.* at A-16.

34. *Id.*

35. See *USCIS Interim Final Rule*, *supra* note 10, at 53018.

The statutory provision does not make clear, however, whether the standard of ‘substantial’ physical or mental abuse is intended to address the severity of the injury suffered by the victim, or the severity of the abuse inflicted by the perpetrator. USCIS has concluded that it is reasonable to consider both. Rather than define what constitutes abuse that is ‘substantial,’ however, USCIS believes that a better approach would be to make case-by-case determinations, using factors as guidelines.

*Id.*

Additionally, DHS officers may not make an adverse determination of admissibility or deportability of a non-citizen applying for U nonimmigrant status based upon information provided by ‘the perpetrator of the substantial physical or mental abuse and the criminal activity.’ This means that the abusive partner cannot call DHS and claim that his significant other is lying about the crime or abuse. Moreover, DHS employees are also subject to disciplinary action and fines up to \$5,000 if they disclose any information relating to the application.

Stoltz, *supra* note 10, at 135.

36. See *USCIS Interim Final Rule*, *supra* note 10, at 53018.

This interim rule adopts the statutory list of criminal activity and further defines what constitutes ‘any similar activity.’ The rule provides that for a criminal activity to be deemed similar to one specified on the statutory list, the similarities must be substantial. USCIS bases this definition on the fact that the statutory list of criminal activity is not composed of specific statutory violations. Instead, the criminal activity listed is stated in broad terms. The rule’s definition of ‘any similar activity’ takes into account the wide variety of state criminal statutes in which criminal activity may be named differently than criminal activity found on the statutory list, while the nature and elements of both criminal activities are comparable.

*Id.* at 53018 (citation omitted).

Whether abuse is substantial is based on a number of factors, including but not limited to: The nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.<sup>37</sup>

An undocumented alien must also be "a direct or indirect victim" of a crime to meet the first requirement.<sup>38</sup> A direct victim of crime is defined by USCIS as "[a person] who has suffered direct harm or who is directly or proximately harmed as a result of the commission of a crime."<sup>39</sup> An indirect victim is defined by United States Citizenship and Immigration Services (USCIS) as a "[q]ualifying family member[] of murder victims, manslaughter victims, and victims who are incapacitated or incompetent . . . ."<sup>40</sup>

## *2. The Second Eligibility Requirement—The Undocumented Alien Victim Must Have Possession of Criminal Information*

In combination with being a direct or indirect victim, the alien victim must also "possess information concerning qualifying criminal activity of which he or she was a victim if he or she has knowledge of the details (i.e., specific facts) concerning the criminal activity that would assist in the investigation or prosecution of the criminal activity."<sup>41</sup> According to USCIS, the alien's information about a crime must relate to the alien being a victim of a specific crime.<sup>42</sup> Thus in the Code of Federal

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37. 8 C.F.R. § 214.14(b)(1). The Code of Federal Regulations further states that "[n]o single factor is a prerequisite to establish that the abuse suffered was substantial. Also, the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was substantial." *Id.*

38. See SELTZER, *supra* note 21, at A-12.

Both direct and indirect victims are eligible to apply for U status. A direct victim is a person who has suffered direct harm or who is directly or proximately harmed as a result of a criminal activity.

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USCIS also has the discretion to consider bystanders as direct victims, if they suffered unusually severe harm as a result of having witnessed the criminal activity.

*Id.* at A-13.

39. See USCIS *Interim Final Rule*, *supra* note 10, at 53016.

40. See SELTZER, *supra* note 21, at A-13.

41. See USCIS *Interim Final Rule*, *supra* note 10, at 53018.

42. *Id.* at 53015.

Regulations, “[t]he alien must possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity.”<sup>43</sup> USCIS mandates this to meet congressional intent to aid law enforcement authority.<sup>44</sup>

*3. The Third Eligibility Requirement—Helpfulness of the Illegal Alien Victim*

The third eligibility requirement demands that the undocumented alien victim “has been, is being, or is likely to be helpful to a government official or authority in the investigation or prosecution of the qualifying criminal activity.”<sup>45</sup> In order to apply for U nonimmigrant status, the victim must obtain a U Nonimmigrant Status Certification, on Form I-918, Supplement B, with a certifying official’s signature. Note that,

[t]he certification must state that[] 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 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 . . . .”<sup>46</sup>

The regulations insist that “helpful,” as shown above, be interpreted as “assisting law enforcement authorities in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim.”<sup>47</sup> Clearly, this is a plain meaning interpretation of the statutory text.<sup>48</sup> The alien must be willing to help government officials or authority

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43. 8 C.F.R. § 214.14(b)(2). Note that “[i]n the event that the alien has not yet reached 16 years of age on the date on which an act constituting an element of the qualifying criminal activity first occurred, a parent, guardian or next friend of the alien may possess the information regarding a qualifying crime.” *Id.* Also, “if the alien is incapacitated or incompetent, a parent, guardian, or next friend may possess the information regarding the qualifying crime . . .” *Id.*

44. *See USCIS Interim Final Rule, supra* note 10, at 53018.

45. *Id.* at 53019.

46. 8 C.F.R. § 214.14(c)(2)(i).

47. *See USCIS Interim Final Rule, supra* note 10, at 53018.

48. *See id.*



until he or she is no longer of assistance to them.<sup>49</sup> If the undocumented alien victim wants to succeed in applying for U visa status, he or she has no independent choice but to “provide reasonably requested information and assistance . . . .”<sup>50</sup> Further, the regulations require “that the official or authority receiving the assistance be a ‘certifying agency’”<sup>51</sup> and within the certifying agency, the certification must usually be signed by a “certifying official.”<sup>52</sup>

*a. The Certifying Agency*

To be eligible to meet the “helpfulness” requirement, the alien victim must provide assistance “to a ‘certifying agency.’”<sup>53</sup> Under the federal regulations, an alien victim must receive a certification on the basis of his or her petition proving that “since the initiation of the cooperation, [the alien victim] has not refused or failed to provide information and assistance reasonably requested.”<sup>54</sup> The regulations state that a certifying agency is “one of the government officials and [/or] entities identified in the statute that is investigating or prosecuting qualifying criminal activity.”<sup>55</sup> A potential “certifying agency” could be any of the following:

A [f]ederal, [s]tate, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of the qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.<sup>56</sup>

The regulatory terms “investigation” and “prosecution,” “includ[e] the detection or investigation of a qualifying crime or criminal activity,

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49. See SELTZER, *supra* note 21, at A-14.

50. See USCIS *Interim Final Rule*, *supra* note 10, at 53019.

51. *Id.*

52. 8 C.F.R. § 214.14(c)(2)(i). However, there are two exceptions to the “‘helpfulness requirement’: (1) alien victims who are under 16 years of age [and, or,] (2) individuals who are incapacitated or incompetent.” USCIS *Interim Final Rule*, *supra* note 10, at 53019.

53. 8 C.F.R. § 214.14(b)(3).

54. *Id.*

55. USCIS *Interim Final Rule*, *supra* note 10, at 53019.

56. 8 C.F.R. § 214.14(a)(2).

as well as the prosecution, conviction, or sentencing of the perpetrator of such crime or criminal activity.”<sup>57</sup>

Presently, “a law enforcement agency must individually certify each applicant’s victim status and [his or her] willingness to cooperate.”<sup>58</sup> If the certifying agency chooses to grant a certification, the certification must show that the undocumented alien victim “‘has been helpful, is being helpful, or is likely to be helpful’ in the investigation or prosecution of the qualifying criminal activity.”<sup>59</sup> It must be remembered that while this certification is a requirement of the certification process, it is only one aspect of the process.<sup>60</sup> Not only does the alien victim need this certification, he also needs to submit an entire application to USCIS to determine whether or not he qualifies for U visa relief.<sup>61</sup> Thus, the certifying official’s choice to grant a certification is not the ultimate decision in an undocumented alien’s attempt to attain U visa status.<sup>62</sup> However, the attitude and willingness of law enforcement officials to help immigrant crime victims is vital to the success of the U visa.

#### *b. A Certifying Official*

All Certifying Agencies must designate a person to be the certifying official.<sup>63</sup> The certifying official is “[t]he 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.”<sup>64</sup> USCIS uses a certifying official to aid in the reliability of

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57. *USCIS Interim Final Rule*, *supra* note 10, at 53020. Note, this language does not appear in the federal code of regulations, but is explanatory in its definition of the terms.

58. *See Saucedo*, *supra* note 17, at 946.

59. *See USCIS Interim Final Rule*, *supra* note 10, at 53015. Additionally, “[t]he BIWPA further directs DHS to provide aliens who are eligible for U nonimmigrant status with referrals to nongovernmental organizations (NGOs) to advise the aliens regarding their options in the United States. Further, USCIS is required to provide U non immigrants with employment authorization.” *Id.* “Following the passage of BIWPA in October 2000, USCIS implemented procedures to ensure that those aliens who appeared to be eligible for U nonimmigrant status under BIWPA would not be removed from the United States until they had an opportunity to apply for such status.” *Id.*

60. 8 C.F.R. § 214.14.

61. *See Abrams*, *supra* note 8, at 381. Law Enforcement or certifying agencies are only completing one of the four requirements for a U visa application. It is not their decision to determine whether the applicant suffered sufficient harm or is termed a victim. *Id.* at 382.

62. *See* 8 C.F.R. § 214.14.

63. *Id.* § 214.14(a)(2)(i).

64. *Id.*

the certification.<sup>65</sup> USCIS also claims that the necessity of a certifying official “should encourage certifying agencies to develop internal policies and procedures so that certifications are properly vetted.”<sup>66</sup> In the certification,

the certifying official must affirm . . . (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 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. The certification also should provide relevant, specific details about the nature of the crime being investigated or prosecuted and describe, in detail, the petitioner’s helpfulness to the case.<sup>67</sup>

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65. See *USCIS Interim Final Rule*, *supra* note 10, at 53023.

66. *Id.*

67. *Id.* at 53023-53024 (citation omitted).

USCIS determined that since the certifying agency is the primary point of contact between the petitioner and the criminal justice system, the certifying agency is in the best position to verify certain factual information. In addition, 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.

*Id.* at 53024.

*4. The Fourth Eligibility Requirement—Criminal Activity that Violated the Laws of the United States or Occurred in the United States*

Finally, the fourth eligibility requirement is met if “the qualifying criminal activity occurred in the United States (including Indian country and U.S. military installations) or in the territories or possessions of the United States, or violated a U.S. federal law that provides for extraterritorial jurisdiction to prosecute the offense in a U.S. federal court.”<sup>68</sup> USCIS simply construes this to mean that qualifying criminal activity is “criminal activity that occurred in the United States that is in violation of U.S. law.”<sup>69</sup>

*C. Certifying Agencies in Detroit, Michigan*

The Wayne County Prosecutor’s Office serves as a certifying agency in Detroit, Michigan. In the year 2010, the Prosecutor’s Office reported that it issued ten to twelve U visa certifications.<sup>70</sup> The Wayne County Prosecutor’s Office has elected the head of the Domestic Violence Unit as its certifying official for Domestic Violence Crimes and has done the same with its other units.<sup>71</sup> Significantly, the Prosecutor’s Office is not aware of any other certifying agency in the Detroit area. The Detroit Police Department has yet to acknowledge that the U visa regulations and rules exist, and thus has not issued any certifications to potential U visa applicants.<sup>72</sup> This is permissible under the current statute. Thus, if the undocumented alien is a victim of a crime that is prosecuted—resulting in the Wayne County Prosecutor’s Office becoming involved—he or she will have an opportunity to receive a law enforcement certification (LEC); however, if no charges are filed in the crime the victim has reported, the Prosecutor’s Office does not become involved and thus cannot issue a certification.<sup>73</sup>

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68. 8 C.F.R. § 214.14 (b)(4).

69. See *USCIS Interim Final Rule*, *supra* note 10, at 53020.

70. Interview with Piper Fakir, Principal Attorney, Domestic Violence Division, Wayne County Prosecutor’s Office (Jan. 21, 2010) (on file with author).

71. This information came from Michal Terebelo, Attorney at Law, Lakeshore Legal Aid, in Detroit, Mich. (Nov. 9, 2010) (on file with author).

72. *Id.* This information also came from author’s attempt to contact the Detroit Police Department in January-February of 2011, and being transferred from employee to employee who denied any knowledge of the U visa.

73. See Terebelo, *supra* note 71.

Additionally, the Wayne County Prosecutor's Office and the Detroit Police Department are not the only agencies in the Detroit area that could be certifying agencies for U visa purposes.<sup>74</sup> Examples of other potential certifying agencies in the Detroit area would include local judges, prosecutors, suburban law enforcement agencies, child protective services, and others,<sup>75</sup> however, as of 2010, these potential certifying agencies do not issue LECs.

The Wayne County Prosecutor's Office uses a five-page memorandum from the Oakland Police Department of California for guidance in determining which victims qualify for a U visa certification.<sup>76</sup> The memorandum explains how to fill out the Form I-918, Supplement B, for agency certification,<sup>77</sup> and essentially is a shortened version of the Code of Federal Regulations regarding the U visa.<sup>78</sup>

*a. Disconnect Found between Potential Certifying Agencies and the U Visa Statutory Guidelines in Detroit, Michigan and Other Major Cities*

As previously mentioned, the Domestic Violence Unit of the Prosecutor's Office granted between ten and twelve certifications in 2010.<sup>79</sup> Significantly, the requests for all but one of the certifications were received from the same Detroit area attorney.<sup>80</sup> The number of certifications issued by the Detroit Police Department as of January

74. See 8 C.F.R. § 214.14 (describing the various types of certifying agencies).

75. *Id.* § 214.14(a)(2).

76. See Bureau of Investigation, *supra* note 16.

77. *Id.* at 265.

78. *Id.* See also 8 C.F.R. § 214.14. The Memorandum advises the certifier of what must be shown by the circumstances of the victim's particular case:

[that the] non-resident foreign victim has been, is being, or is likely to be 'helpful' to an OPD investigation . . . by: 1. Possess[ing] and furnish[ing] vital information about a qualifying crime; 2. Demonstrat[ing] continual cooperation during the investigation and/or prosecution; 3. Assist[ing] investigators with gathering additional vital information; and 4. Mak[ing] him/herself available to investigators.

Bureau of Investigation, *supra* note 16. The alien must also be a victim of "an actual crime . . . [that] took place in the United States or its territories, or occurred outside the U.S. but [still] violates U.S. extraterritorial law." *Id.* The memorandum lists the same enumerated crimes that are listed in the Code of Federal Regulations for the U visa. *Id.*

79. Fakir, *supra* note 70. Fakir does expect the number of certifications she signs to increase as the community learns about the U visa. *Id.* However, the U visa has been implemented for almost the past decade, and the Detroit community still seems largely unaware of its capabilities. Thus, how will the Detroit community gain knowledge of the U visa?

80. *Id.*

2011, is believed to be zero,<sup>81</sup> and in area research,<sup>82</sup> no other certifying agencies or certifications were located.<sup>83</sup> This problem, specifically the lack of information regarding the U visa, and its requirements, is not unique to Michigan.<sup>84</sup> It was reported that in the state of Idaho, evidence suggested that “neither the federal or state law enforcement agencies had been informed about U visa certifications, or that if the information had been provided, it had not been done so in an effective or systematic manner.”<sup>85</sup> Thus, the U visa process cannot meet Congress’s expectations in the states of Michigan or Idaho, when law enforcement agencies ignore or are not informed of its existence.

### III. ANALYSIS

#### *A. The Problematic Nature of the Helpfulness Requirement of the U Visa Regulations*

Although there are four technical requirements that attempt to ensure that the congressional intent behind the U visa is met, there is no certainty in how the third “helpfulness” requirement is enforced, or, more importantly, if it is even necessary. A problematic factor of the third “helpfulness” requirement is that there are no standards mandating that a “certifying agency” issue a certification, but rather only that “a U visa applicant . . . [shall] obtain a law enforcement certification (‘LEC’) from a law enforcement official . . . .”<sup>86</sup> The Act is extremely vague. In the words of Saucedo:

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81. The author’s attempts to contact the Detroit Police Department in January-February of 2011 resulted in a finding that no employee understands what the U visa stands for or had knowledge of whether a certification had been issued by the Detroit Police Department.

82. See Terebelo, *supra* note 71; Fakir, *supra* note 70; Detroit Police Department, *supra* note 72.

83. See Terebelo, *supra* note 71; Fakir, *supra* note 70; Detroit Police Department, *supra* note 72.

84. See Laguna, *supra* note 1; Abrams, *supra* note 8; Stoltz, *supra* note 10; Saucedo, *supra* note 17; SELTZER, *supra* note 21.

85. Tahja L. Jensen, *U Visa “Certification”: Overcoming the Local Hurdle In Response to a Federal Statute*, 45 IDAHO L. REV. 691, 701 (2009). Here, a practicing attorney sent out a letter to “all enforcement agencies and prosecuting attorneys offices in the state of Idaho. This letter appears to be the first notification given to many state law enforcement agencies.” *Id.* Interestingly, however, “practitioners dealing in the interim process had success in getting certifications from sources that are non-traditional arms of law enforcement . . . [f]or example . . . Child Protective Services, the Department of Labor, and the Equal Employment Opportunity Commission (EEOC).” *Id.*

86. See Saucedo, *supra* note 17, at 913.

The Act . . . does not define law enforcement agency nor does it specify which law enforcement agencies are qualified to provide the needed law enforcement certification to U visa applicants. The interim regulations identify the head of the certifying agency or a designated official as the appropriate person to sign the LEC, presumably in an attempt to regulate the flow of visa certifications.<sup>87</sup>

Thus, it comes as no surprise that “some agencies may lack understanding about U visas and the role of certification.”<sup>88</sup> However, it must also be considered that other agencies may use this alleged lack of understanding as a justification to not grant certification.<sup>89</sup> This is problematic as the statute simply leaves the certification process up to the various certifying agencies’ discretion.<sup>90</sup> More importantly, law enforcement agencies are not even under a legal obligation to issue a certification to an alien victim who aids in an investigation.<sup>91</sup> It has been argued that:

[t]he addition of the ‘no legal obligation’ language found on the Form I-918B instruction sheet undermines the U statute. Furthermore, this language is not reflected in the regulation, which advises the law enforcement certifier to provide a fact-specific account of the crime and how the petitioner has been, is being, or is likely to be, helpful in the investigation or prosecution of that crime.<sup>92</sup>

This is problematic because even if the alien victim aids in the investigation or prosecution of the qualifying criminal activity, the government official or authority is not obliged to issue a certification.<sup>93</sup> Thus, the U visa applicants’ attempt to obtain a certification is left to

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87. *Id.* at 914.

88. SELTZER, *supra* note 21, at A-15.

89. This appears to be true for the Detroit Police Department.

90. As seen by the author’s research in the Detroit area.

91. See Jenson, *supra* note 85, at 701. See *USCIS Interim Final Rule*, *supra* note 10, at 53019. “An agency’s decision to provide a certification is entirely discretionary; the agency is under *no legal obligation* to complete a Form I-918, Supplement B, for any particular alien. However, without a completed Form I-918 B, Supplement B, the alien will be ineligible for U nonimmigrant status.” *Id.*

92. Jenson, *supra* note 85, at 702. Thus, a lot of time is wasted by attorneys trying to locate a certifying official for an alien victim. *Id.*

93. See Alien Victims of Certain Qualifying Criminal Activity, 8 C.F.R. § 214.14 (West 2009) (not mandating that an LEC be given to a U visa applicant).

luck as the victims must rely on the discretion of the Detroit Police Department or another law enforcement agency.<sup>94</sup>

*1. Proposed Solutions to the Helpfulness Requirement that Have Not Been Effective in Detroit, Michigan*

A number of solutions have been proposed as to how to correct the vagueness and problematic nature of the U visa certification process.<sup>95</sup> For example, some scholars have argued that there need not be a specific certifying official in any agency.<sup>96</sup> Thus, anyone representing the agency would be able to sign the certification. In order to encourage greater cooperation, others have tried to analyze why law enforcement officials are not cooperating with alien victims, but to no avail.<sup>97</sup> Another author has advocated for the "U language [to] be changed to reflect what advocates and attorneys have been asserting all along—the 'certification' requirement, as written, is burdensome on both law enforcement agencies and immigrant victims and needs to be changed to reflect a more flexible 'certification' process."<sup>98</sup> However, simply stating that the system needs to be more "flexible" and only changing one word on the B certification is not an enlightening or sufficient response to this serious problem. Other recommendations include correcting Form B by removing discretionary language, and having explanations about how education needs to take place "at the local, state, and federal level."<sup>99</sup>

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94. See Terebello, *supra* note 71.

95. See Abrams, *supra* note 8; Stoltz, *supra* note 10; Saucedo, *supra* note 17; Jensen, *supra* note 85.

96. See Jensen, *supra* note 85, at 701. It is believed that the requirement of the certifying official undermines "both the statute and the purpose of the law." *Id.* at 702. See USCIS Interim Final Rule, *supra* note 10, at 53019. "An agency's decision to provide a certification is entirely discretionary; the agency is under *no legal obligation* to complete a Form I-918, Supplement B, for any particular alien. However, without a completed Form I-918 B, Supplement B, the alien will be ineligible for U nonimmigrant status." Jensen, *supra* note 85, at 701.

97. *Id.* Some have gone so far as to say that "no federal statute should assist undocumented victims in coming forward and cooperating with law enforcement . . . [and] '[n]ot everybody who applies is entitled to [a U visa] and that [j]ust being a victim is certainly not enough.'" Jensen, *supra* note 85, at 704. Thus, it is clear that there is still much prejudice in American society toward alien immigrants that extends so that those who are victimized will not be aided.

98. See Jensen, *supra* note 85, at 712.

99. See *id.* at 707. Some have argued that the word "discretionary" should be taken off of the Form B, thus making the instructional language, that law enforcement and prosecutorial certification is mandatory, mandatory. *Id.* Some believe this would then better align with the regulation and statute. *Id.*



However, although these ideas have been written about, no action has been taken to implement the suggested changes.<sup>100</sup>

Moreover, when DHS blatantly states that the issues involving the U visa are simply not worth solving, it is difficult to suggest solutions.<sup>101</sup> Undocumented alien victims' lack of importance to DHS was clearly revealed in its reaction to the chaos of the U visa:<sup>102</sup> instead of attempting to implement procedures to correct the dysfunction in the U visa, DHS stated that "U visas are very complicated, and we have to work with law enforcement agencies to make sure that the people are qualified."<sup>103</sup> This may seem to be a fitting solution; however, there has been inadequate education on the U visa certification process,<sup>104</sup> and the education that has taken place most definitely has not reached Detroit, Michigan.<sup>105</sup> In other areas of the United States, some non-profit organizations have begun pairing alien victims with local attorneys trained in the U visa rules and regulations.<sup>106</sup> Clearly this helps spread

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100. Jensen described: one plan formerly precisely laid out was for the DHS to model the training of the U visa implementation after the ICE training structure. *Id.* at 710. In the past USCIS has had one training of law enforcement officials in 2008, and states that it plans to do more in the future. *Id.* at 710. However, it is presently 2012, and the same problems are still occurring. Another problem with training is that it still will not cure undocumented victims' fear of the police. There are many factors that cause this fear, including:

negative experiences in their home countries and because of racism and prejudice that they have encountered in the United States. Ignorance of American laws and a poor command of the English language also keep immigrants from coming forward with information related to criminal activity. In addition, religious and cultural upbringing can factor into a woman's choice not to report crime, even when she has been the victim of abuse. For instance, many cultures and religions disapprove of challenges to male domination. For many immigrants, family is the revered social unit and divorce brings great shame.

Stoltz, *supra* note 10, at 132-33.

101. *See generally* Jensen, *supra* note 85.

102. *Id.*

103. *See id.* at 702. The Department of Homeland Security did not seem to mind that this "may mean delayed relief for many undocumented victims who must rely on local or federal law enforcement certifications in order to submit their U visa petitions." *Id.* at 704.

104. *See* Fakir, *supra* note 70.

105. *Id.*

106. *See* Jensen, *supra* note 85, at 705. For instance,

[a]s part of an effort to educate law enforcement and prosecuting attorneys across the state, the Idaho Coalition Against Sexual & Domestic Violence sent out letters to each county sheriff and prosecuting attorney explaining the purpose of the U visa, the role of certifying, and some guidelines for 'establishing a protocol [within the agency] for reviewing requests for U Nonimmigrant Status Certifications.'

knowledge of U visa status to a small population of people, but has not solved the lack of knowledge in Detroit.

Further, although education is a noble idea, a simple cost-benefit analysis may overrule it directly. Thus, why pay the enormous cost of time and money to educate certifying agencies and certifying officials, if certifying agencies and officials need not even be part of the process?

*2. The Seriousness of Certifying Agencies' Mistaken Belief that They Must Determine Whether a U Visa Applicant is Worthy of a Certification*

Additionally, some certifying agencies are under the mistaken belief that it is their job to determine how much harm the victim has suffered and whether he or she is worthy of a certification.<sup>107</sup> This belief is

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*Id.* at 705-706. Other potential certifying agencies are under the misunderstanding that granting a certification means that the alien victim will then be able to attain a U visa. Although the certification is part of the alien victim's application process, it is only one out of four large steps. Thus, this is a very false fear. *Id.* at 706. Finally a distinction was made in:

the Eastern District of Louisiana [which] required that a magistrate certify Form B. This requirement is consistent with the regulation . . . . The court held that only a minimal *prima facie* showing was sufficient to require the court to certify Form B. More importantly, the court distinguished 'certification' of Form B from granting of the U visa petition.

*Id.* at 709. More importantly:

[w]hile domestic violence does not occur more often within one racial group or socio-economic class, immigrant victims of domestic violence are more adversely affected when abuse occurs. For instance, they are usually reluctant to report offense to authorities for fear of deportation . . . . Moreover, women who are financially dependant on their abusive partners would only be acting against their own economic interests if they reported their abusive husbands to the authorities.

Stolz, *supra* note 10, at 132.

107. See Abrams, *supra* note 8, at 395-96. However, the distortions are still occurring: following the terrorist attacks of 9/11, for example, prosecutors in New York refused to sign the certification based on their own determinations about whether the victim had suffered 'substantial physical or mental abuse,' a question statutorily retained by USCIS decision-makers . . . . Law enforcement personnel have [also] refused to issue certifications or balked before signing where they did not see evidence of substantial harm to the petitioner, where they determined that the petitioner was not a 'continuing victim,' where they decided that the circumstances did not merit one of the 10,000 visas available each year, where they decided that the particular claim was not meritorious, where they concluded that the crime was past the statute of limitations, where they concluded there was no ongoing investigation, or where they concluded that the assailants could not be identified—all improper considerations in the certification determination.

misplaced.<sup>108</sup> Statutorily, a certifying agency must sign a certification stating that the alien victim “assist[ed] in the investigation or prosecution of qualifying criminal activity . . . .”<sup>109</sup>

Although an alien victim may also include other evidence of helpfulness in her application along with the required I-918B “such as ‘trial transcripts; court documents; police reports; news articles; copies of reimbursement forms for travel to and from court, [and] affidavits of other witnesses or officials,’”<sup>110</sup> USCIS has stated that the “LEC would receive ‘significant weight’ in the U visa determination.”<sup>111</sup> Yet, USCIS has given no rationale for allowing the LEC to have such “significant weight.”<sup>112</sup> Thus, the regulation allows, and moreover encourages, an alien victim’s fate to ride on the shoulders of a U visa certifying official who likely does not have any idea what the purpose of the U visa truly is or how to best fulfill his professional obligations.<sup>113</sup>

In evaluating an application and determining whether to grant U visa nonimmigrant status, USCIS has instructed:

the Attorney General to make that decision based on all of the evidence taken as a whole. Factors the Attorney General should consider include general law enforcement, prosecutorial, and judicial practices; the assistance asked of other victims of

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*Id.* at 395.

108. *See id.* This was not the goal of the U visa. Ironically, it was the opposite:

[i]n addition to prosecuting crimes committed against non-citizens, Congress likewise hoped that creating this new nonimmigrant classification would encourage law enforcement officials to better serve immigrant crime victims. Many of the crime victims Congress hope[d] to help [were] battered women. ‘Domestic violence occurs in more than one-quarter of all marriages, and an estimated 4 million American women are battered each year by their partners or husbands . . . .’

Stoltz, *supra* note 10, at 131.

109. *See USCIS Final Interim Rule, supra* note 10, at 53019.

110. Abrams, *supra* note 8, at 390.

111. *Id.*

112. However, there was no explanation given for why the LEC is of such great importance to the overall application, other than the underlying rationale of the U visa which has the dual intent of aiding law enforcement’s knowledge of crime and aiding alien victims of crime that would otherwise go unreported. Back in 2004, obtaining an LEC was also the most difficult part of the U visa application process. *See Stoltz, supra* note 10, at 136.

113. It was reported that “[m]any law enforcement personnel [were] likewise unaware that this type of relief [was] available.” *Id.* However, in some ways the situation seemed better in 2004 in terms of the LEC as it was also stated that “[i]t seems that as long as the practitioner presents the certification letter in a simple and straightforward manner, most enforcement personnel are willing to cooperate.” *Id.* at 136.

crimes; the nature of the requested assistance; the nature of the victimization; the victim and witness assistance guidelines; the specific circumstances of the victim; and the 'age and maturity of the applicant.' Petitioners may demonstrate reasonable cooperation by either submitting a signed newly executed certification or an affidavit describing that the petitioner either meets the requirements or that law enforcement's requests were unreasonable.<sup>114</sup>

Clearly there are factors independent of the LEC that the Attorney General is required to evaluate when considering a U visa application. Thus, there is no real need for the LEC to be a part of the U visa application.

*B. Two Proposed Solutions to the Code of Federal Regulations*

The complications of the U visa likely stem back to the problematic U visa framework. Although a noble idea, the balance the U visa was implemented to create has not been achieved. One response to this failure may be eliminating the LEC certification altogether. In the victims' defense, a strong argument has been made that:

[t]he increased regulatory power given to law enforcement personnel in the regulations, combined with the heightened power of local law enforcement, fatally alter the symbiotic balance that Congress envisioned—a balance that was already teetering after the interim regulations took effect. While the U visa framework was supposed to empower victims to come forward to law enforcement and ensure that the justice system had the necessary tools to enforce crimes committed against all, including undocumented immigrants, the resulting framework thwarts both statutory purposes and undermines the efficacy of the framework entirely.<sup>115</sup>

However, the problem with this proposed solution is that the U visa was enacted in large part to aid with law enforcement's knowledge, investigation, and prosecution of crime.<sup>116</sup> If the LEC certification requirement was eliminated, and the decision of whether or not to grant a U visa application was given solely to the discretion of the attorney

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114. Abrams, *supra* note 8, at 391-92.

115. *Id.* at 392.

116. See Laguna, *supra* note 1.

general, there may be little to no aid given to law enforcement in solving crime.

Thus, it may be wiser for Congress to consider splitting the dual purpose of the U visa. For the betterment of the undocumented alien victims, the U visa status could be granted without the need for local law enforcement certification; however, alien victims would still need to prove “helpfulness” by submitting other documentation. This would solve the humanitarian conflict presently found in the lack of U visas being issued.

Alternatively, if Congress is unwilling to split the purpose of the U visa in two, a second solution would be to have DHS name a certifying official for each law enforcement agency. Although this would be time consuming, it would be a quicker way to make sure each law enforcement agency knew about the U visa, rather than the alternative of a nationwide educational program which could still be ignored by potential certifying agencies. This would allow for the dual purpose of the U visa to be met while still addressing the congressional intent behind the U visa.

Regardless of whether Congress eliminates the LEC certification, or begins assigning certifying officials to each law enforcement agency, action needs to be taken. The U visa’s purpose is clearly not being met in Detroit, Michigan. After contacting the Detroit Police Department and being transferred to four various sectors, each sector knowing nothing about what a U visa even stood for, and hearing from a Detroit area attorney’s experience that the Detroit Police Department is either completely ignorant or simply too busy to handle U visa applicants’ request for LEC certification,<sup>117</sup> the hope originally thought to accompany the U visa for abused alien victims has been absent thus far in Detroit, Michigan.

#### IV. CONCLUSION

Thus, the history of the U visa enactment, interim rules, and final rules and regulations has neither been publicized nor made clear to potential certifying agencies in Detroit, Michigan. It would appear that the humanitarian aspect behind the intent of the U visa is currently a complete and utter failure. Law enforcement agencies are under no obligation to issue an LEC to a U visa applicant and this simply cannot be allowed to continue.

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117. See Fakir, *supra* note 70.

One of the proposed solutions of either splitting Congress' intent for the U visa by eliminating the LEC requirement, or requiring DHS to name a certifying official in each law enforcement agency across the nation needs to occur. Change must be implemented. The numerous women who have been stabbed, shot, or forced into prostitution rings and have feared reporting these crimes due to their undocumented alien status deserve to be treated as human beings and deserve the right to report criminal activity. A recent article discussed the complications arising from the U visa, and the controversial attitudes Americans display toward undocumented aliens, but more importantly, it discussed the positive life-changing effect U visa status has had on the life of two alien victims, Rosa Aguilar and Mardoqueu Silva.<sup>118</sup> Other undocumented alien victims deserve the same opportunity Rosa Aguilar and Mardoqueu Silva received.

Therefore, Congress must either eliminate the requirement of the LEC for U visa status or require DHS to designate a certifying official in each law enforcement agency. Then, the hope for this statute would be that problems would arise from the 10,000 per year U visa statutory cap, and not from the application process.

SARAH WIXSON

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118. *The 'crime visa': How 18,000 illegal immigrants got legal status by being the victim of a crime*, MAIL ONLINE, (March 20, 2011, 5:31 PM), <http://www.dailymail.co.uk/news/article-1367986/Crime-visa-How-18k-illegal-immigrants-got-legal-status-America.html>.