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Gail Pendleton on Winning U Visas After the Regulations

Seven years after Congress created the U visa,¹ the Department of Homeland Security (DHS) issued the implementing regulations.² During the interim, Citizenship and Immigration Services (CIS) created an “interim relief” process that allowed eligible crime victims to gain work authorization and deferred action.³

This article provides practice pointers on how to prepare winning U visa applications, based on the author’s experience working with Congress to create the U visa, with CIS to implement its interim relief process, and with practitioners in the field who have won interim relief for noncitizen victims of crime.⁴ It only touches the surface; future articles will explore specific aspects in more depth. First, a little context helps explain what Congress intended when it created U visas, how they are viewed by the special CIS unit that adjudicates them, and what approaches may persuade law enforcement to help noncitizens eligible to receive them.

The U Context: VAWA Self-Petitioning and Trafficking

The U visa was included in a package of amendments to the Immigration and Nationality Act (INA) presented by the National Network to End Violence Against Immigrant Women (Network) to Congress as part of the larger bill addressing human trafficking noted above. This built on the Network’s work with Congress to create special routes to status for victims of violence in 1994, in the Violence Against Women Act (VAWA),⁵

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1. Victims of Trafficking and Violence Protection Act of 2000, [Pub. L. No. 106-386](#), div. A, § 1513, 114 Stat. 1464 (Oct. 28, 2000) (“VTVPA”).
 2. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, Interim Rule, [72 Fed. Reg. 53,014](#) (Sept. 17, 2007) (codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, 299), *reprinted at* 12 Bender’s Immigr. Bull. 1366, 1376 (App. A) (Oct. 1, 2007) (“U regulations”).
 3. Michael A. Cronin, Acting Executive Associate Commissioner, Office of Programs, HQINV 50/1, *Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 – “T” and “U” Nonimmigrant Visas* (Aug. 30, 2001) (available on the Asista website, <http://www.asistaonline.org/index.asp>, and at 7 Bender’s Immigr. Bull. 213 (Feb. 15, 2002)).
 4. If you have clients with interim relief and need guidance on how to file now for the visa, check the “U Visa Q & A with CIS” on the Asista website, www.asistaonline.org, or contact the author, gpendleton@earthlink.net.
 5. Violence Against Women Act of 1994, [Pub. L. No. 103-322](#), tit. IV, subtit. G, 108 Stat. 1953–55 (codified at INA §§ 201, 204, 216 & note, former 244, [8 U.S.C. §§ 1151, 1154, 1186a](#) & note, former [1254](#)) (hereinafter VAWA).

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when Congress created a special self-petitioning process for victims of domestic violence married to U.S. citizens or lawful permanent residents.⁶ To ensure the law was implemented uniformly, legacy INS created a special unit to handle these cases, which resides at the Vermont Service Center.⁷ That unit now also handles all U⁸ and T visa applications.⁹

The U was an attempt to create a route to status for victims of violence whose abusers lacked status or with whom the victim had no family relationship; it also provided an opportunity to help victims of other crimes. The list of crimes in the U statute represents the product of a negotiation process proving the truth of the sausage-making analogy for lawmaking (see list of crimes below).

At the same time that the Network was negotiating the content of the U, Congress also was creating the new T visa, one piece of its effort to address human trafficking noted above. The result of this confluence is a hybrid. The structure of the U resembles that of the T, but its eligibility requirements derive from experience working with noncitizen survivors of domestic violence, sexual assault, and stalking, and with implementing the self-petitioning process with CIS.¹⁰ The U requirements are, therefore, in some ways more strict than those for the T, and in some ways more lenient.

Most importantly, practitioners must understand that the U has a dual purpose. Congress intended it both to provide humanitarian relief to victims of crime *and* to help law enforcement attempting to investigate and prosecute the crimes against this most vulnerable population.¹¹ Although it agreed to a self-petitioning process for U crime victims, it also insisted that only those who provided certifications of their helpfulness to the criminal system would qualify.¹² Unlike for the T visa,¹³ there is no alternative to showing

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6. See, e.g., INA § 204(a)(1)(A)(iii)-(viii) & (B)(ii)-(v), [8 U.S.C. 1154](#)(a)(1)(A)(iii)-(viii) & (B)(ii)-(v) for current versions.
 7. Paul Virtue, Acting Executive Associate Commissioner, Office of Programs, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997) (available from the Asista website: <http://www.asistaonline.org>).
 8. William R. Yates, Associate Director, Operations, *Centralization of Interim Relief for U Nonimmigrant Status Applicants, Memorandum for Director Vermont Service Center* (Oct. 8, 2003) and Form I-918 (both available from the Asista website: www.asistaonline.org; memo reprinted at 8 Bender's Immigr. Bull. 1717, 1720 (App. B.) (Nov. 1, 2003)).
 9. Form I-914.
 10. See Virtue, *supra* note 7.
 11. Findings and Purpose, [VTVPA](#) § 1513(a).
 12. INA § 214(p)(1), [8 U.S.C. § 1184](#)(p)(1).

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helpfulness, so learning to work with your local law enforcement agencies is crucial to making the U work. An upcoming article will address best practices in working with law enforcement, based on the author's experience working with law enforcement people and developing and implementing curricula for training them.¹⁴

Using the Regulations

The regulations are the product of much discussion within DHS. Most of the eligibility interpretations reflect CIS' understanding of the victim's experience, drawn from its work on VAWA self-petitioning, T visas, and U interim relief. The restrictive requirements on law enforcement certifiers are based on agency concerns with fraud. The requirement that a supervisor or head of agency sign a certification¹⁵ is not in the statute.¹⁶ The Network is working with CIS to find a solution short of litigation to ensure quality control over certifications while allowing law enforcement the flexibility Congress intended.¹⁷

It is worth reading the preamble to the regulations.¹⁸ Use language there to bolster arguments for your client's eligibility. This is especially important now, when the adjudicators at the VAWA unit are just beginning to implement the regulations and may need reminding about what the preamble says the regulations intend. Also download the "U Visa Q & A" with DHS from the Asista website (www.asistaonline.org). This is information formally provided by CIS to the Network, originally at a November 2007 conference, and confirmed and supplemented via email with Asista.

U Eligibility Basics: What Do You Need?

To win a U visa, your client must provide¹⁹

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13. Compare lack of "shall" requirement at INA § 101(a)(15)(T), [8 U.S.C. 1101\(a\)\(15\)\(T\)](#), with INA § 214(p), [8 U.S.C. § 1184\(p\)](#).
 14. The curricula, power points, and handouts for these trainings are available for your use on the Asista website: <http://www.asistaonline.org/>. Contact the author for help in strategizing how to reach and work with law enforcement or provide training in your area: gpendleton@earthlink.net.
 15. [8 C.F.R. § 214.14\(c\)\(2\)\(i\)](#).
 16. INA § 214(p)(1), [8 U.S.C. § 1184\(p\)\(1\)](#).
 17. See Network Comments on U Regulations on the Asista website: <http://www.asistaonline.org/>.
 18. U regulations, *supra* note 2.
 19. The law also provides relief for indirect victims of crimes. A later article will explore what this means and how to prove it.

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- a declaration describing her case,²⁰ most importantly showing:
 - she is a victim of an enumerated crime,
 - she possesses information about that crime,²¹
 - she suffered substantial mental or physical abuse as a result of the crime,²² and
 - she is helping or was helping law enforcement in the crime’s investigation or prosecution;²³
- a certification that she “has been, is being or is likely to be helpful” in investigating or prosecuting an enumerated crime;²⁴
- any additional documentation available supporting her declaration’s claims;²⁵
- identification of inadmissibility grounds and why she meets the waiver standard;²⁶ and
- applications for any derivatives she wishes to include.²⁷

“Any credible evidence” is the evidentiary standard.²⁸ From the self-petitioning experience, this means:

20. [8 C.F.R. § 214.14\(c\)\(2\)\(iii\)](#).

21. [8 C.F.R. § 214.14\(b\)\(2\)](#).

22. [8 C.F.R. § 214.14\(b\)\(1\)](#).

23. [8 C.F.R. § 214.14\(c\)\(2\)\(ii\)](#).

24. [8 C.F.R. § 214.14\(c\)\(2\)\(i\)](#).

25. [8 C.F.R. § 214.14\(c\)\(2\)\(ii\)](#).

26. [8 C.F.R. § 214.14\(c\)\(2\)\(iv\)](#).

27. [8 C.F.R. § 214.14\(f\)](#).

28. INA § 214(p)(4), [8 U.S.C. § 1184\(p\)\(4\)](#); [8 C.F.R. § 214.14\(c\)\(4\)](#).

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- Provide any “primary” evidence you can, e.g., system documents.
- Explain why your client doesn’t have those, if she doesn’t.
- Provide anything else you, your clients, or the advocates helping you can find that supports eligibility.
- Explain why these sources are credible (Remember: Hearsay is acceptable in immigration cases, and credible if the source is credible).

What Crimes?

Here are the enumerated crimes, organized somewhat by category:

Rape	Holding hostage	Blackmail	Manslaughter
Torture	Peonage	Extortion	Murder ²⁹
Trafficking	Involuntary servitude	Witness tampering	Felonious assault
Incest	Slave trading	Obstruction of justice	
Domestic violence	Kidnapping	Perjury	
Sexual assault	Abduction		
Prostitution	False imprisonment		
Female Genital mutilation			

and attempt, conspiracy, or solicitation to commit any of these crimes.³⁰

29. This is where indirect victims, such as children of murdered mothers, or vice versa, are most likely to qualify. See [8 C.F.R. § 214.14\(a\)\(14\)](#) (Victim of qualifying criminal activity).

30. INA § 101(a)(15)(U)(iii), [8 U.S.C. § 1101\(a\)\(15\)\(U\)\(iii\)](#); [8 C.F.R. § 214.14\(a\)\(9\)](#).

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What Should You Do?

The most important job for lawyers in these cases is identifying inadmissibility. Much of the other work in preparing the claim can be done by advocates working with your client while addressing his or her other issues as a victim. You then double-check their work, help your client fill out the forms, and present any legal arguments necessary, such as why your client deserves the special inadmissibility waiver.

Overcoming Inadmissibility

The U visa waives all grounds of inadmissibility except for those who are Nazis or perpetrators of genocide, torture, or extrajudicial killing.³¹ If you can show it is in the national or public interest for your client to stay here, you can overcome false claims to citizenship, aggravated felonies, and other inadmissibility grounds that generally bar status. Remember, however, that it is in the VAWA unit's discretion to decide whether it's in the national or public interest for someone to stay here despite inadmissibility.

Based on the self-petitioning experience with good moral character and T inadmissibility, you are in a much better position if you are straightforward about your client's inadmissibility now.³² If the agency later discovers inadmissibility that you did not flag, your client will likely be found to lack credibility and end up deported.

The Network is still discussing the contours of the "national or public interest" standard with the VAWA unit (the regulations did not give details). A future article will provide an update. In the meantime . . .

- Flag the grounds triggered at INA § 212, [8 U.S.C. § 1182](#).
- Start marshalling positive equities, as you would for good moral character.
 - How is she or he being helpful to the community?
- Show why this ground should be waived generally for victims of crimes.

31. INA § 212(d)(14), [8 U.S.C. § 1182\(d\)\(14\)](#).

32. See also U Visa Q & A, *supra* note 4.

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- Show why your client and perhaps his or her children should be allowed to stay here instead of being deported.
 - Marshall factors related to being a victim of crime.

Although extreme hardship is obviously a different standard, the VAWA unit is familiar with using special factors tailored to victims of domestic violence³³ and trafficking.³⁴ To generalize, these either look at the connection between the crime and the victim's experience or juxtapose what the victim and his or her children need here versus what would happen if they returned to their home country. To the degree you can tie these to doing something that enriches the applicant's community or our society generally, the more persuasive your arguments will be.

Partnering with Advocates

If you are working with a victim of domestic violence or sexual assault, you should partner with an advocate with experience working with this population. Advocates from these arenas can help you and your client

- do the safety planning necessary for each individual case,³⁵
- ensure your client is accessing any civil and criminal remedies he or she needs,
- monitor what is happening in the civil and criminal systems that may affect your client's immigration options,
- provide a "trusted" connection to law enforcement to pursue U visas (the advocates often have existing relationships with allies in the system),

33. See Paul W. Virtue, General Counsel, INS, HQ 90/15-P, HQ 70/8-P, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children, Memorandum to Terrance O'Reilly, Director, Administrative Appeals Office (Oct. 16, 1998), available at [1 INS and DOJ Legal Opinions § 98-14](#) (lexis.com).

34. [8 C.F.R. § 214.11](#)(i)(1).

35. An extremely helpful guide for attorneys working with domestic violence victims generally is the new *ABA Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases* (2007), available for free download at <http://www.abanet.org/domviol/docs/StandardsCommentary.pdf>. Make sure you get the version with commentary. Though designed for those in civil courts, the rules and guidelines apply with equal force or by analogy to those representing noncitizens victims of domestic violence.

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- help your client navigate the various systems she or he encounters, which otherwise may revictimize the client or send her or him to ICE, and
- work with your client to collect and prepare the documentation you need, including your client's declaration and supporting evidence on substantial physical or mental abuse.

Safety planning is crucial. Contacting law enforcement and filing for status are acts that may trigger violent behavior by perpetrators. Unless you are trained in working with survivors of violence, advocates must help you and your client identify risks and dangerousness. Unlike with other most other immigration cases, your client may end up dead if you take actions without preparing for the possible consequences.³⁶

If your client is a victim of other crimes, try to find parallel support services for them. As noted above, one reason to do this is that these providers may already have contacts in the criminal justice system.

What Is Substantial Physical or Mental Abuse?

The regulations provide a broad definition.³⁷ Although your client's declaration will be the first document the unit reviews, you should collect other documentation of your client's suffering. This is where advocates who work with victims of crimes may be extremely helpful. They are considered "experts" by the VAWA unit,³⁸ and their own declarations, based on working with your clients, are extremely helpful. They can "interpret" and frame what your client says in her declaration from the perspective of someone who has seen a lot of victims and knows when they are suffering. This will be especially important when there is no physical impairment.

The regulations say that the VAWA unit should look at impairment of emotional or psychological soundness. Factors include:

- the nature of the injury;

36. Don't assume all advocates are culturally competent, however. Contact the Network for advocates in your area who work with noncitizen victims of violence: Monica Arenas, monica@endabuse.org; Joanne Picray, Joanne@asistaonline.org; Ana Manigat, ana@nationalimmigrationproject.org.

37. [8 C.F.R. § 214.14\(b\)\(1\)](#).

38. Author's discussions with VAWA unit adjudicators and supervisors during trainings at VSC and for the field.

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- the severity of the perpetrator's conduct;
- the severity of the harm suffered;
- the duration of the infliction of harm;
- any permanent or serious harm to appearance;
- health and physical or mental soundness; and
- aggravation of a victim's pre-existing conditions.³⁹

Getting the Cert

You will probably be working mostly with police departments or district attorneys or both. Note, however, that the regulations recognize that other agencies, such as Child Protective Services, the Department of Labor, and the Equal Employment Opportunity Commission, may sign certifications.⁴⁰ Judges are most likely to sign certifications after a case is over, since otherwise they risk appearing biased.⁴¹ Form I-918, Supplement B is the form the certifier must use.

A Few Practice Pointers

Advocates who work with victims of crimes are likely to already have connections with law enforcement and know which allies to approach. Law enforcement people are much more likely to respond favorably to a request from an advocate they know than to a request from an unknown attorney. Think about what their experience with attorneys is likely to have been and apply basic social psychology to your dealings with them. Whom do they already trust? What can you offer them that would help them (your client, explanations of immigration law, etc.)? Try to understand their priorities (prosecuting perpetrators and keeping communities safe, not just helping your client). Realize that they see the worst sides of our society and the violence humans commit on each other every

39. [8 C.F.R. § 214.14\(b\)\(1\)](#).

40. [8 C.F.R. § 214.14\(a\)\(2\)](#).

41. Note that civil protection orders against domestic violence or stalking often become criminal in nature when the perpetrator violates them.

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day. If they appear cynical, jaded, or suspicious, it's based on experience that those of us not in law enforcement rarely encounter.

Resources and Future Offerings

Future articles will explore how to

- work with law enforcement;
- present persuasive client declarations and supporting evidence;
- show substantial physical/mental abuse;
- flag and overcome inadmissibility;
- file while in proceedings or with a final order of removal;
- present claims for child victims, indirect victims and derivatives abroad; and
- respond to Requests for Evidence and Notices of Intent to Deny.

In the meantime, check the Asista website for samples, red flags for inadmissibility, other guidance, and “Q & As” with CIS and ICE. Join the free VAWA Updates list serve,⁴² where we send out the latest practice pointers, suggestions and guidance from the VAWA unit, legislative updates, and strategies that have worked in the field.

Additional information

Evangeline Abriel, *Protecting the Victims: The T Non-immigrant Visa*, 7 Bender's Immigr. Bull. 499 (May 1, 2002)

Evangeline Abriel, *VAWA Then and Now: A Legislative Update on the 2005 Reauthorization of Violence against Women Act*, 11 Bender's Immigr. Bull. 431 (May 1, 2006)

42. Contact the people listed in footnote 36.

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Bob Free & Penny Fields, *Representing the Most Vulnerable*, 9 Bender's Immigr. Bull. 67 (Jan. 15, 2004)

Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, [Immigration Law and Procedure §§ 28.02, 41.05](#)

About the Author. Gail Pendleton is co-founder and Co-Chair of the National Network to End Violence Against Immigrant Women and Co-Director of ASISTA, a national immigration law technical assistance project funded by the federal Office on Violence Against Women. Formerly Associate Director of the National Immigration Project of the National Lawyers Guild, where she worked for twenty years, she is now an independent consultant, providing innovative multi-disciplinary training on immigration options for immigrant survivors of domestic violence, sexual assault, and trafficking. She received the American Immigration Lawyers Association's Human Rights Award in 2001. She received her J.D. in 1985 from NYU School of Law and her A.B. from Harvard/Radcliffe College in 1981.