



THE 2019 DHS U VISA CERTIFIER RESOURCE GUIDE

What Practitioners Need to Know

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I. Introduction¹

U nonimmigrant status, often called the “U visa,” is a nonimmigrant (temporary) status that allows noncitizen survivors of crime to stay in the United States, obtain employment authorization, apply for lawful permanent resident (LPR) status, and help certain family members obtain immigration status as well. The U visa is intended to aid law enforcement in the criminal investigation and prosecution of crime and provide humanitarian relief to survivors of serious crimes.²

For an immigrant survivor of crime to qualify for U nonimmigrant status, they must obtain and submit to U.S. Citizenship and Immigration Services (USCIS) a certification of their helpfulness to law enforcement during the detection, investigation, or prosecution of the crime.³ The certification must come from a federal, state, or local law enforcement official, prosecutor, or judge who is investigating or prosecuting the criminal activity. Child Protective Services, the Equal Employment Opportunity Commission, the Department of Labor, and others may also qualify as certifying agencies if they have criminal investigative jurisdiction in their respective area of expertise. The law enforcement agency (LEA) or other certifier⁴ must complete Form I-918, Supplement B, “U Nonimmigrant Status Certification,” attesting to the survivor’s assistance.⁵ This certification is essential to the U nonimmigrant status petition and is required by statute.⁶ Without it, U nonimmigrant status cannot be granted.

Although U nonimmigrant petitioners are required to submit Form I-918, Supplement B, agencies or entities authorized to complete certifications are not mandated to review or sign the form on behalf of victims (unless otherwise instructed by state law; see § IV.A), even if the petitioners are assisting in the investigation or prosecution of the case and qualify for U nonimmigrant status. Some agencies or entities (or individuals within agencies or entities) are resistant to certifying victim helpfulness due to a lack of understanding about the U nonimmigrant application process, a lack of resources, or other reasons.⁷

In July 2019, the Department of Homeland Security (DHS) issued an updated guide to LEAs⁸ that explains the U visa requirements and the U visa certification process and identifies best practices for certifying agencies and officials. The new guide also includes answers to frequently asked questions from judges, prosecutors, LEAs, and other officials. The new guide is more anti-immigrant in tone than former guidance. Nevertheless, parts of it can still be a useful tool for immigrant advocates. This practice advisory describes the 2019 and

previous guidance to LEAs on U visa certification, analyzes the changes in the recently issued guidance, and provides advocacy tips for practitioners involved in the U certification process who wish to utilize the guidance to encourage certifications.

II. Background: The U Visa Law Enforcement Resource Guide

Since 2008, USCIS has provided trainings on U nonimmigrant status and Form I-918, Supplement B, to law enforcement officials throughout the country. In December 2011, DHS issued guidance to LEAs that addresses many of the questions and concerns raised in those trainings; this guide was subsequently updated in January 2016.⁹ This guide was used by immigration practitioners and LEAs alike to assist immigrant survivors of crime in obtaining U visas.

A new guide, called the “U Visa Law Enforcement Resource Guide,” was issued in July 2019.¹⁰ The 2019 guide, which supersedes the prior guidance and is intended for federal, state, local, tribal and territorial law enforcement, prosecutors, judges, and other government agencies involved in U visa certifications, explains the process of certifying and provides examples of what crimes can be certified.

These guides are important resources for advocates and LEAs because they represent DHS’s own guidance to law enforcement on the certification process. What is written in the guide—and what is omitted—can be hugely consequential for immigrant survivors of crime. Although the guide cannot change the U visa law, it can influence the process through which immigrants access the relief.

III. Key Changes in the 2019 DHS Guide as Compared to the 2011 DHS Guide, and Practice Tips

The 2019 DHS Guide contains much of the same information as the 2011 DHS Guide, but is framed in a way that conveys suspicion of immigrant victims, suggests limits and restrictions on certifications, and emphasizes the discretionary nature of the process. Moreover, the 2019 DHS Guide omits critical policy information that the 2011 DHS Guide included. For instance, the 2011 DHS Guide described why immigrants can be particularly vulnerable to crimes and reluctant to contact law enforcement, whereas the 2019 DHS Guide leaves out this background.¹¹ This background is necessary to explain why the remedy and certification process were created in the first place—as a tool to protect survivors who come forward. In turn, the 2011 DHS Guide indicated that immigrants in removal proceedings or with final removal orders may still apply for U visa status, whereas the 2019 DHS Guide does not explicitly discuss the situation of such immigrants.¹² This omission is harmful because certifiers may not realize that these noncitizens are still eligible for the U visa, or may not realize the urgency of requests from petitioners in removal proceedings.

Even with these omissions, many portions of the 2019 DHS Guide can still be helpful in working with law enforcement because they highlight the value of U visa certifications for both the law enforcement community as well as immigrant crime survivors.¹³ For instance, like the 2011 DHS Guide, the 2019 DHS Guide echoes Congress in citing the dual purpose of the U visa: to bolster law enforcement’s ability to detect, investigate, and prosecute serious crimes while also encouraging crime survivors to report crimes and participate in subsequent criminal investigations by offering protections to such victims.¹⁴ In addition, the 2019 DHS Guide promotes an explicitly “victim-centered” approach to combatting crime through providing U visa certifications.¹⁵ This approach includes “practices to minimize victimization and additional trauma” in crime

victims and “equally values[] [t]he identification and stabilization of victims, including providing immigration relief, and [t]he investigation and prosecution of perpetrators of serious crimes.”¹⁶ Although many other suggestions from the 2019 DHS Guide undermine a victim-centered approach, it could be helpful in advocacy to note their stated goal of victim-centering. By contrast, there was no mention of a “victim-centered approach” in the 2011 DHS Guide.

Practice Tip: Advocates should hold DHS to this “victim-centered approach” vis-à-vis LEAs who seem reluctant to certify or who are overly intrusive of clients who are requesting U certifications, by pointing certifiers to the “victim-centered” language in the 2019 DHS Guide, which also includes a link to a DHS website with more resources.¹⁷ Practitioners who are trying to encourage LEAs that have refused to provide certifications in the past of the value and scope of U nonimmigrant status certifications could also promote DHS’s “victim-centered approach.”

Nevertheless, the tone of the 2019 DHS Guide is markedly different from that of the 2011 DHS Guide, using language and underscoring certain topics that suggest a baseline level of suspicion of immigrant crime victims seeking U visa certification, like fraud detection, background checks for applicants, and LEAs’ authority to withdraw certifications. In other words, although these topics were also mentioned in the 2011 DHS Guide, the 2019 DHS Guide places more emphasis on them. These changes align with a broader shift in USCIS policies and practice in recent years towards a more enforcement-oriented approach.¹⁸

Advocates representing U visa petitioners should be aware of the new framework of the 2019 DHS Guide as they request certifications on clients’ behalf. Below, we outline the key changes in the 2019 DHS Guide as compared to the 2011 DHS Guide and offer practice tips for advocates navigating these changes in client work.

A. Fraud Detection

Alongside LEAs’ role in identifying and assisting victims, the 2019 DHS Guide emphasizes the role of LEAs, prosecutors, judges, and other government officials in “supporting the integrity of the application process for U nonimmigrant status.”¹⁹ Although the 2011 DHS Guide also mentioned USCIS’s efforts to detect fraud,²⁰ the 2019 DHS Guide is more aggressive, claiming that it “will refer” anyone who commits fraud for prosecution,²¹ and encouraging LEAs to set up internal systems to detect fraud and report it to USCIS.²² This framework suggests an overall distrust of immigrant victims, and seems a disproportionate response to the low level of fraud present in the U visa program.²³

Practice Tip: Advocates can do their part to maintain their reputation, and the reputation of the U visa program, by being prepared to answer questions law enforcement officials may have about the U visa certification and application process. Work to eliminate fraudulent cases being submitted to law enforcement for certification by educating the immigrant community about possible scams perpetrated by unscrupulous lawyers, *notarios*, and other immigration representatives.

Advocates can also help educate certifiers about the numerous checks already in place to prevent fraud in U visa petitions. The I-918B certification process itself is designed to be a fraud deterrent. Only heads of agencies or supervisors designated by the heads of agencies are permitted to fill out the certification.

B. Background Checks for Applicants

Unlike the 2011 DHS Guide, the 2019 DHS Guide highlights that LEAs may choose to run “background and criminal history checks”²⁴ on immigrant crime victims before signing U visa certifications, instructing certifying agencies to share with USCIS the details of any such searches, including “any criminal or national security concerns identified.”²⁵ The 2019 DHS Guide provides such direction while simultaneously noting that criminal history does not bar individuals from U visa status but that “criminal history is relevant to *USCIS’ analysis* of eligibility and admissibility”²⁶ (emphasis added).

The 2011 DHS Guide, by contrast, made no mention of law enforcement agencies running background checks on individuals as part of the U visa certification process, instead describing the “thorough background investigation” that USCIS conducts as part of its adjudication process.²⁷ The 2011 DHS Guide merely mentioned that USCIS would consider “[a]ny evidence that law enforcement and immigration authorities possess” when adjudicating U visa petitions, including “the person’s criminal history, immigration records, and other background information.”²⁸

The repeated suggestion to certifiers in the 2019 DHS Guide to consider performing background checks on immigrant crime victims before signing certifications (and to report concerns to USCIS, who in turn will run its own background checks) implies that background checks are relevant to certifications. On the contrary, a person’s criminal history does NOT affect whether they were indeed the victim of a serious crime and cooperated in its detection, investigation, or prosecution. These repeated reminders also suggest unnecessary and burdensome scrutiny of individuals seeking U visa certification and bely USCIS’s purported “victim-centered approach”²⁹ by implicitly asking LEAs to engage in U visa evidence-gathering on behalf of USCIS.

Practice Tip: Remind the LEA of their discrete role in the certification process. The LEA’s role is only to respond to the questions in the certification form, not to decide whether the person should receive U nonimmigrant status. You can remind them, citing to the 2019 DHS Guide, that “Form I-918B does not confer any immigration benefits or status.”³⁰ You may also wish to emphasize to the LEA, again citing to the 2019 DHS Guide, that “[t]he fact that a victim has a criminal history does not automatically preclude approval of U nonimmigrant status”³¹ and that your client’s “criminal history is relevant to *USCIS’ analysis* of eligibility and admissibility”³² (emphasis added) for the U visa. If an LEA still refuses to sign on account of someone’s criminal history, consider trying to call to advocate on behalf of your client, explaining the purpose of the U visa, the person’s helpfulness in the case at hand, and any mitigating factors regarding the person’s criminal history. If your jurisdiction has a policy in place that requires the LEA to respond to certification requests, invoke that policy.

C. Completing U Visa Certifications as Discretionary for LEAs

Like the 2011 DHS Guide, the 2019 DHS Guide explains that completing and signing U visa certifications is not obligatory for LEAs under federal law.³³ However, the 2019 DHS Guide repeats this advisal more frequently, inserting language throughout to remind LEAs of the discretionary nature of certification according to federal requirements.³⁴ It also provides examples of situations where a certifying agency might decline to certify.³⁵ By contrast, the 2011 DHS Guide mentioned the discretion LEAs have to certify U visa cases only twice, each time noting that without a signed certification, an immigrant crime victim cannot obtain a U visa.³⁶

In emphasizing the discretionary nature of the U visa certification process, the framework of the 2019 DHS Guide seems to embolden LEAs to decline to certify immigrants' cases if they so choose. This is notwithstanding that state certification laws may in fact require LEAs to review certification requests, and if certain criteria are met, to sign them. The 2019 DHS Guide states that LEAs' decision not to sign must be "consistent with U.S. laws and regulations,"³⁷ but fails to mention the growing number of state certification laws specifically. This failure is noteworthy given that the state laws trump the 2019 DHS Guide, and exist in fifteen states.³⁸ See § IV.A below.

Practice Tip: If your client resides in a state that has adopted a U visa certification law that imposes time limits or guidelines for LEAs to respond to certification requests, be sure to bring this law to the attention of the certifier, particularly if you are having difficulty securing your client's certification. These state laws are not superseded by the 2019 DHS Guide; they remain valid state laws and can be a tremendous resource to aid survivors of crime in obtaining U visa certifications. See § IV.A below. In jurisdictions without such policies, advocate with your LEA to explain the purpose of the U visa, the person's helpfulness in the case at hand, and the benefit of working together with community members to detect crime.

D. Relevance of the Statute of Limitations

There is no statute of limitations for signing U visa certifications under the federal U visa law or U visa regulations. Nevertheless, the 2019 DHS Guide suggests that whether the statute of limitations has passed on initiating legal proceedings from the date of the alleged offense "may be relevant" to certifiers' determination of the victim's helpfulness—specifically, whether the victim is, has been, or will be helpful given that the statute of limitations has passed or that a significant amount of time has passed since commission of the crime.³⁹ This language is misleading. The statute of limitations is NOT relevant to an individual's U visa eligibility. This framework implies that LEAs may consider denying requests where the crime did not occur recently. There is no reason to suggest this limitation on eligibility. It conflicts with the U visa statutes and regulations, as well as many state laws, some of which include presumption of helpfulness provisions. See § IV.A below.

Practice Tip: If LEAs express reluctance to certify your clients' cases because a lengthy span of time has passed since the commission of the crimes, remind the LEAs, pointing to language in the 2019 DHS Guide, that the "U visa regulations do not set a specific statute of limitations for signing the Form I-918B."⁴⁰ Also remind them of how your clients have already helped law enforcement in the investigation and/or prosecution of the crimes of which they were victims, such as by reporting the crimes, expressing a willingness to further aid law enforcement (which is sometimes documented in the police report), or other acts conveying helpfulness, like sharing photos of injuries with LEAs. Emphasize that victim helpfulness does not need to reach a certain "level" to be sufficient for a U visa certification; rather, helpfulness is an ongoing obligation on the part of the crime victim that extends even after the LEA has signed the certification. Also, remind the LEA that they are welcome to contact your client to request further assistance in investigating or prosecuting the crime.

E. LEAs' Authority to Withdraw Certifications

LEAs have always had the authority to withdraw certifications.⁴¹ But the 2019 DHS Guide emphasizes this option. For example, the 2019 DHS Guide indicates that one of the "roles and responsibilities" of LEAs is to

tell USCIS if crime victims unreasonably refuse to cooperate,⁴² and names as two of the “Top Six Things to Know About Form I-918B” that 1) a crime victim has an ongoing responsibility to assist law enforcement while in U visa status⁴³ and 2) LEA certifiers can withdraw their certifications at any time after signing, both of which relate to certification withdrawals.⁴⁴ This framework suggests, without basis, that immigrant crime victims frequently fail to cooperate with law enforcement. The language unnecessarily paints victims in an evasive, negative light, and in turn, encourages LEAs to withdraw U visa certifications. If victims have already cooperated and submitted an application, withdrawal after the fact deprives the victim of the opportunity to access immigration relief and places them at great risk of being referred to immigration court when the application is denied.

Practice Tip: Work with your LEAs to make sure they understand the value of the U visa in encouraging cooperation and providing protection to victims. Advocate for LEA policies that limit withdrawals, or at least provide notification to the victims and an opportunity to respond before an LEA withdraws a certification. Similarly, work with clients to make sure that they realize LEA withdrawal is a possibility, and that they have the information they need to make an informed choice about whether to continue cooperating. Advise your clients that if they feel law enforcement officers’ requests for assistance are unreasonable, to inform you of the requests so you know what is going on and can mitigate the situation or intervene, such as by asking the LEA to clarify their requests for aid from your client.⁴⁵

F. Qualifying Criminal Activity

The 2019 DHS Guide made several changes to its discussion of various qualifying crimes for the U visa. One big challenge for many U petitioners is trying to prove that the crime they suffered was indeed a qualifying crime. The 2019 DHS Guide provides several examples that can help practitioners with these arguments. First, the 2019 DHS Guide explicitly indicates that “robbery” may be considered substantially similar to the qualifying crime of “felonious assault” in certain circumstances.⁴⁶ This example can potentially help the many robbery victims who must show that robbery is a qualifying crime for the U visa.

Second, the 2019 DHS Guide explains when child abuse and elder abuse can be considered as “domestic violence,” a qualifying crime for the U visa: specifically, when the perpetrator/victim relationship and the abuse experienced by the child or elder meets the statutory elements of domestic violence under the relevant federal, state, or local statute, depending on the case.⁴⁷ This clarification, which was not included in the 2011 DHS Guide, is helpful for crime victims who could potentially fall into these categories.

Lastly, the 2019 DHS Guide explains when a person may be considered to be a victim of the qualifying crimes of “witness tampering,” “obstruction of justice,” and “perjury.” The 2019 Guide states that a person may be considered a victim of one of these crimes if they can “reasonably demonstrate that the perpetrator principally committed the offense as a means to avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring him or her to justice, or to further his or her abuse, exploitation of, or control over the immigrant through manipulation of the legal system.”⁴⁸ This change in DHS guidance, which mirrors regulatory language qualifying U visa crimes,⁴⁹ can potentially help advocates whose clients are requesting certification as victims of “witness tampering,” “obstruction of justice,” or “perjury” insofar as it fleshes out some of the components of those qualifying crimes for certifiers. At the same time, the addition of this explanation, which includes multiple legal elements presented in fairly technical terms, may confuse some certifiers and/or cause them to reject certification requests for these crimes unnecessarily.

Practice Tip: If your client is a victim of robbery, child abuse, elder abuse, witness tampering, obstruction of justice, or perjury, cite the 2019 DHS Guide’s specific references to these crimes in communications with certifiers, where useful, in support of arguments that these are qualifying crimes.

G. Certification Process

The 2019 DHS Guide made several changes regarding its discussion of the U visa certification process as compared to the 2011 DHS Guide. First, the 2019 DHS Guide clarifies judges’ role as certifiers by explaining some of the circumstances under which judges can certify cases. The Guide states that “[a] judge may sign the certification based on having conducted the sentencing in a criminal case,” or “based on having detected a qualifying crime during a proceeding (criminal or civil) over which he or she presided.”⁵⁰ This is useful information for crime victims, practitioners, and the certifier community to be aware of in that the Guide makes clear that a certifying judge does not have to be presiding over a criminal court case in order to detect a qualifying U visa crime. At the same time, the way this information is presented in the 2019 DHS Guide suggests that judges’ authority to certify U visa cases is limited to these circumstances—which is not true. For instance, while the Guide names judges presiding over criminal or civil proceedings as individuals eligible to certify, it does not explain that judges, magistrates, and other judicial officers in *any* forum that decides legal matters may sign certifications as long as they were involved in detecting, investigating, prosecuting, convicting, or sentencing any of the qualifying criminal activities.⁵¹ This could include family court judges and juvenile delinquency judges, for instance.

Second, the 2019 DHS Guide instructs certifiers to “[a]nswer [q]uestions [c]ompletely” on the Form I-918B, noting that if information is missing from the signed form, USCIS may reject the certification and the immigrant crime victim may need to request a replacement from law enforcement.⁵² This advisal, which the 2011 DHS Guide lacked, is helpful for certifiers to know, and for practitioners and clients to cite, insofar as it explains a reason why a victim might require a new certification. But it is an alarming harbinger that USCIS may be rejecting I-918Bs that it does not deem complete. In fact, on June 30, 2020, USCIS updated its website to alert U petitioners that their certification may be rejected if it has any fields left blank.⁵³ This practice is onerous on certifiers, victims, and their representatives and unnecessary. If any fields are left blank, certifiers must begin the certification process anew and delay the time to obtaining U visa status. Likewise, USCIS’s policy will unnecessarily tax LEAs if U visa applicants who already secured certifications from them must start the entire certification process over.

Third, while the 2011 DHS Guide made no mention of the regulatory filing deadline for the U visa certification, the 2019 DHS Guide emphasizes that USCIS must receive the complete U visa petition within six months of the date the certifying agency signed the Form I-918B.⁵⁴ The 2019 DHS Guide also explains what happens if USCIS receives a U visa petition after the six-month deadline, i.e., that the Form I-918B “expire[s] and will not be accepted” by USCIS.⁵⁵ In turn, the 2019 DHS Guide helpfully notes that “[i]n these situations, the victim must request a newly executed I-918B to support their petition.”⁵⁶ This is useful for certifiers to know since it makes them aware of why they might receive an additional U visa certification request from the same crime victim. Likewise, it is helpful for advocates and clients, who, if they find themselves in this situation, can cite to the guide in support of their renewed request.

Fourth, whereas the 2011 DHS Guide omitted information about Form I-918B requests at the U visa adjustment of status stage, the 2019 DHS Guide incorporates explanation of when and why a crime victim

might request “re-certification” from an LEA when applying for lawful permanent residency as a U visa holder.⁵⁷ This addition is helpful for certifiers, who might otherwise be surprised to receive a certification request from a U visa holder. In turn, it is helpful for practitioners and immigrant crime victims, who can use this language if they do request re-certification from LEAs at the time of adjustment.

Practice Tip: When applying for lawful permanent residency as a U visa holder, victims must provide evidence to prove that they did not unreasonably refuse to assist in the criminal investigation or prosecution after being granted U nonimmigrant status.⁵⁸ Although U visa holders may request a new, signed Form I-918B to document this requirement,⁵⁹ doing so is not mandatory. Many practitioners prefer to submit other documentation to satisfy the requirement, to decrease the burden on LEAs and help preserve LEA resources for certifying new U cases. As a simple alternative to a re-certification request, U visa adjustment of status applicants can include a statement in their declaration that they did not unreasonably refuse to provide ongoing assistance to law enforcement.⁶⁰ Applicants can also submit other evidence that the criminal case was complete, and therefore there was no ongoing assistance required, by the time the Form I-918B was signed. Evidence of this may include a copy of the original Form I-918B with the completed box in Part 2 checked to indicate that the status of the case was already closed at the time the initial certification was signed.

Finally, unlike the 2011 DHS Guide, the 2019 DHS Guide recommends that LEAs maintain records of signed I-918B certifications for use in potential future inquiries by USCIS to “verify information” on submitted forms.⁶¹ This recommendation is alarming, as it implies DHS is planning on contacting LEAs for verification. This would be a new, onerous, and unnecessary process, as it places a bureaucratic burden on LEAs and increases the amount of resources needed to process U visa certification requests. On top of that, the change suggests an additional layer of U visa certification work by certifiers, since it implies that USCIS will be spending more time reaching out to LEAs to review application information. This suggestion is in line with anecdotal reports from practitioners that USCIS has already been reaching out to some certifiers to ask for records of prior certifications. This change is troubling, as many LEAs do not currently maintain certification records, and it suggests USCIS is second-guessing information on the certifications it has already received.

H. Victim

The 2019 DHS Guide also includes changes to the discussion of qualifying “victims” for U nonimmigrant status as compared to the 2011 DHS Guide. For instance, while the 2011 DHS Guide did not describe the situation of a “bystander” victim, the 2019 DHS Guide defines “direct victim” to include “bystander” victims, stating that “[b]ystanders who suffer an unusually direct injury as a result of a qualifying crime” may qualify for a U visa as direct victims even though they did not suffer “direct and proximate harm as a result of the commission of qualifying criminal activity.”⁶²

Also, while the 2011 DHS Guide explained that USCIS generally does not approve a U visa petition if the victim was “complicit or culpable in the qualifying criminal activity of which he or she claims to be a victim,”⁶³ the 2019 DHS Guide explains this and additionally notes the special situation of domestic violence victims as a potential exception.⁶⁴ Specifically, the 2019 DHS Guide states that “[v]ictims of domestic violence are occasionally accused of committing domestic violence themselves by their abusers as part of the abuser’s attempts to assert power and control over the victim.”⁶⁵ The Guide continues, elaborating that false allegations

by an abuser against the victim of domestic violence is a circumstance in which a crime victim who is accused of the same crime “does not preclude the victim from qualifying for U nonimmigrant status.”⁶⁶

Both of these changes are positive for immigrant crime victims and their advocates, who, if they are bystander victims or domestic violence victims being accused of committing domestic violence, can cite this guidance as support in trying to obtain certifications from LEAs.

IV. Additional Advocacy Approaches to Obtain U Visa Certifications with Law Enforcement Agencies

A. Seeing the 2019 DHS Guide as a Tool

Although the 2019 DHS Guide undermines the goals of the U visa in many ways, as discussed above, there are some limited positive changes in the new guidance and other helpful passages that advocates can use to bolster clients’ requests for U visa certifications. Despite the negative tone of much of the 2019 DHS Guide, it can still be used strategically as a tool to collaborate better with LEAs. For example, the 2019 DHS Guide, as with the 2011 DHS Guide before it, can assist practitioners who are attempting to:

- Convince LEAs that already provide certifications in a narrow range of cases to expand the scope and number of certifications they issue;
- Educate new LEAs about the value and scope of U nonimmigrant status certifications;
- Persuade LEAs that have refused to provide certifications in the past of the value and scope of U nonimmigrant status certifications;
- Provide support for LEAs that already certify helpfulness as broadly as the statute permits, so that such agencies can justify the time needed to administer the certification process and advocate that other partner agencies similarly adopt broad U nonimmigrant status certification policies; and
- Educate elected officials and media outlets about the value and scope of U nonimmigrant status certifications so that they can support local efforts to encourage LEAs to certify victim helpfulness for U visa status applications.

B. Using State Law

The 2019 DHS Guide (and the 2011 DHS Guide before it) is an important resource for advocates and LEAs because it represents DHS’s own guidance to law enforcement on the certification process. The included—and omitted—information can therefore have significant consequences for immigrant crime victims pursuing U visas. While the 2019 DHS Guide can affect the certification process, the guidance is *not* a law, and it cannot change or supersede existing U visa laws on the books—including federal and state laws and requirements.

In recent years, many states have enacted U visa certification legislation to aid eligible immigrants in obtaining certifications. These laws sometimes provide time limits for responding to a certification request; establish procedures for responding to a certification request; create a rebuttable presumption of helpfulness; provide reimbursement for the agencies’ time and resources spent in completing certifications; and/or clarify LEAs’ role in the process, among other provisions.⁶⁷ These state laws can be helpful to advocates in approaching an LEA new to U visas, or an LEA with a certification policy that is narrower than its state law provides. Regarding the latter scenario, if it seems that an LEA’s certification policy is based on or similar to the 2019 DHS Guide

in particular, remember that your state certification law overrides the DHS guidance on any conflicting material. Advocates in such states may need to educate their LEAs that some parts of the 2019 DHS Guide or their own certification policies may violate state laws. For instance, the emphasis on the discretionary nature of certifications for LEAs in the 2019 DHS Guide may violate or come into tension with state U visa certification laws like those in California and Nevada that require a response to a certification request (whether it be approved or denied).⁶⁸

Advocates may also wish to draw on guidance from their State Attorney General’s office in crafting arguments about the limitations of the 2019 DHS Guide vis-à-vis state U visa certification laws. For instance, in California, State Attorney General Xavier Becerra recently issued a bulletin to all California law enforcement agencies on new state certification law A.B. 917, effective January 1, 2020, underscoring that “[u]nlike federal law, which provides certifying state and local agencies and officials with discretion in deciding whether and when to complete [] [U visa] certification[s], California’s new law mandates that state and local agencies and officials submit certifications within 30 days in most cases.”⁶⁹ The bulletin points out consistencies and differences between California law and federal law, reminds agencies that they are subject to California law on points of difference, and encourages LEAs to establish and implement U visa certification policies and protocols that are consistent with California law and the guidance in the bulletin

C. Resources

We encourage practitioners to seek out further resources on U visa certification policies and practice. Some examples of useful resources include the following:

- **Immigration Center for Women and Children (ICWC), U Visa Zoho Database:** ICWC created and maintains a detailed database to help streamline efforts to contact LEAs with a U visa certification request. The database contains crowdsourced information that pools the field’s collective knowledge on who the certifying officers are at the various LEAs around the country, where to send requests, and updated policies and practices nationwide. More information about this database, including who can join and rules for participation, is available on ICWC’s website at <https://www.icwclaw.org/icwc-u-visa-zoho-database/>. For practitioners who are not familiar with a certain certifier, this resource is an excellent place to start to learn about the certifier’s practices and what special requirements they might have. The database could also provide insight into certifiers’ practical implementation of the 2019 DHS Guide, i.e., how much the new Guide is informing certification practices on the ground.
- **National Immigrant Women’s Advocacy Project (NIWAP), U Visa Certification Toolkit for Federal, State and Local Judges, Commissioners, Magistrates and Other Judicial Officers:** NIWAP’s helpful toolkit for judges and magistrates covers the role of judges in U visa certification. It includes background material on the statutory and regulatory framework for the U visa, applying for the U visa, and the U visa certification requirement, as well as an application flow chart, a quick reference guide for judges, frequently asked questions regarding U visa certification, and sample certification-related documents. The toolkit, which was last updated in November 2019, is available at <http://niwaplibrary.wcl.american.edu/u-visa-certification-toolkit-judges>.
- **ILRC and ASISTA report, In Harm’s Way: The Impact of President Trump’s Actions on Immigrant Survivors of Gender-based Violence:** This report, available at <https://www.ilrc.org/in-harms-way-report>, documents the impact of President Trump’s administrative actions on immigrant survivors of gender-based violence,

including U visa applicants and U visa holders. It also examines how the Trump administration has empowered abusers of immigrants to use institutions and systems to silence survivors.

- **ASISTA, Policy Update: DHS Publishes Harmful New U Visa Law Enforcement Resource Guide:** This policy update argues that the 2019 DHS Guide seeks to undermine the goals of the U visa program by highlighting several examples of barriers it creates for survivors to access U visa certification. The update, from August 2019, is available at <https://asistahelp.org/dhs-publishes-new-and-harmful-u-visa-law-enforcement-resource-guide/>.
- **ILRC, The U Visa: Obtaining Status for Immigrant Victims of Crime:** The ILRC's U visa manual, now in its sixth edition (2019), guides practitioners through the entire process of handling an immigration case for a U visa petitioner. The manual includes numerous practice pointers and samples to help you in all aspects of a client's case, including the U visa certification process. For ordering information, see <https://www.ilrc.org/the-u-visa>.
- **ILRC practice advisory, A Guide to State Laws on U Visa and T Visa Certifications:** This practice advisory, published in April 2020, provides a summary of the current and pending state statutes regarding U and T visa certification to assist eligible immigrants in obtaining law enforcement certifications. Advocates representing U visa petitioners should be familiar with any legislation governing U visa certification in their home states, particularly insofar as it could help counter restrictive LEA certification policies or practices preventing clients' certifications from being signed. To access the practice advisory, visit <https://www.ilrc.org/guide-state-laws-u-visa-and-t-visa-certifications>.

For more information about U nonimmigrant status and advocacy, please review the ILRC's website and resources at <https://www.ilrc.org/u-visa-t-visa-vawa>.

End Notes

¹ Thank you to Susan Bowyer, Former Deputy Director at the Immigration Center for Women and Children, for authoring previous versions of this advisory.

² See Victims of Trafficking and Violence Prevention Act, Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000). For more information about U nonimmigrant status, see *The U Visa: Obtaining Status for Immigrant Victims of Crime* (ILRC 2019), <https://www.ilrc.org/the-u-visa>.

³ INA § 101(a)(15)(U)(i)(III), 8 U.S.C. § 1101(a)(15)(U)(i)(III); 8 C.F.R. § 214.14(a)(5).

⁴ 8 C.F.R. §§ 214.14(a)(2), (a)(5).

⁵ Form I-918, Supplement B, and its corresponding instructions, are available on the USCIS website at <https://www.uscis.gov/i-918>.

⁶ INA § 214(p)(1).

⁷ See *The U Visa: Obtaining Status for Immigrant Victims of Crime* (ILRC 2019), <https://www.ilrc.org/the-u-visa>, for further discussion of this topic.

⁸ Because the guide is entitled “U Visa Law Enforcement Resource Guide,” we refer to the guidance in relation to “law enforcement agencies” (or “LEAs”) in the remainder of this practice advisory. However, the title page of the guide indicates that it is “for federal, state, local, tribal and territorial law enforcement, prosecutors, judges, and other government agencies,” and some of the guidance in the document is specifically directed towards non-law enforcement entities and agencies, like prosecutors and judges. Thus, the content of this practice advisory is applicable to all potential U visa certifiers, including but not limited to law enforcement agencies.

⁹ DHS, *U Visa Law Enforcement Resource Guide* (2011), available at https://www.dhs.gov/xlibrary/assets/dhs_u_visas_certification_guide.pdf [hereinafter “2011 DHS Guide”].

¹⁰ DHS, *U Visa Law Enforcement Resource Guide 7* (2019), available at https://www.dhs.gov/sites/default/files/publications/19_0731_uscis_u-visa-law-enforcement-resource-guide.pdf [hereinafter “2019 DHS Guide”].

¹¹ See 2011 DHS Guide at 2.

¹² See 2011 DHS Guide at 9. Other examples are that 1) the 2011 DHS Guide includes examples of the “many instances” where crime victims have reported a crime but an arrest or prosecution cannot take place due to evidentiary or other circumstances, to underscore that a current investigation, the filing of charges, a prosecution, or a conviction are not required for LEAs to sign certifications (see 2011 DHS Guide at 4) and 2) the 2011 DHS Guide notes that U visa certification can be initiated by the LEA itself or by the crime victim (see 2011 DHS Guide at 5) while the 2019 DHS Guide, in response to the Frequently Asked Question, “Who decides whether a victim should apply for a U visa?” emphasizes that it is “a victim” who “makes the decision” to apply for a U visa, stating that “[n]either USCIS nor law enforcement determines whether a victim should apply for a U visa” (see 2019 DHS Guide at 13).

¹³ See, e.g., 2019 DHS Guide at 1, 13.

¹⁴ See *id.*; 2011 DHS Guide at 2–3.

¹⁵ 2019 DHS Guide i.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See, e.g., Amanda Baran & Cecelia Friedman Levin, “In Harm’s Way: The Impact of President Trump’s Actions on Immigrant Survivors of Gender-based Violence” 10–11 (June 2, 2020), available at <https://www.ilrc.org/in-harms-way-report>; Joshua Breisblatt, “USCIS Is Slowly Being Morphed Into an Immigration Enforcement Agency” (Jul. 9, 2018), available at <https://immigrationimpact.com/2018/07/09/uscis-guidance-immigration-benefit/#.XsL9P2hKg2w>; Richard Gonzales, “America No Longer a ‘Nation of Immigrants,’ USCIS Says” (Feb. 22, 2018), available at <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says>; ILRC, “USCIS Fraud Tip Form Fact Sheet and Template Comment” (Aug. 29, 2019), available at <https://www.ilrc.org/uscis-fraud-tip-form-fact-sheet-and-template-comment>.

¹⁹ See 2019 DHS Guide at 1, 2.

²⁰ See 2011 DHS Guide at 15.

²¹ See 2019 DHS Guide at 2.

²² See *id.* at 3, 11, 12.

²³ See, e.g., Matthew La Corte & Judith Teruya, “The ‘Law and Order Visa’: How the U-Visa Unites Law Enforcement and Immigrant Communities for Public Safety” (2019), available at https://www.niskanencenter.org/wp-content/uploads/old_uploads/2019/08/Niskanen-Policy-Brief_-U-Visa-2019.pdf (highlighting that “[t]he number of fraudulent U visa applications is so small, the Department of Homeland Security does not publish data on U visa fraud.”); William Kandel, “Immigration Provisions of the Violence Against Women Act (VAWA)” (May 15, 2012), available at <https://fas.org/sgp/crs/misc/R42477.pdf>

(Congressional Research Service report finding only scant empirical support for fraud allegations associated with applications and petitions under VAWA).

²⁴ See 2019 DHS Guide at 14.

²⁵ See *id.* at 12; see also *id.* at 4, 11, 14, 15.

²⁶ See *id.* at 11, 14.

²⁷ See 2011 DHS Guide at 5.

²⁸ *Id.*; see also 2011 DHS Guide at 8.

²⁹ See 2019 DHS Guide at i.

³⁰ See *id.* at 2.

³¹ See *id.* at 14.

³² See *id.* at 11.

³³ See 2011 DHS Guide at 3, 5–6.

³⁴ See 2019 DHS Guide 2, 3, 4, 9, 13.

³⁵ See *id.* at 9 (the examples include “if [they] believe the case will not require assistance from the victim, if the victim has not clearly demonstrated his or her intent to assist as needed, or if the victim’s case does not meet [their] local certifying agency’s requirements for signing the form.”)

³⁶ See 2011 DHS Guide at 3, 5–6.

³⁷ See 2019 DHS Guide at 4.

³⁸ See Alison Kamhi & Sarah Lakhani, *A Guide to State Laws on U Visa and T Visa Certifications* (Apr. 2020), <https://www.ilrc.org/guide-state-laws-u-visa-and-t-visa-certifications>.

³⁹ See 2019 DHS Guide at 6, 10.

⁴⁰ See *id.* at 6; see also *id.* at 10, 11.

⁴¹ See, e.g., 2011 DHS Guide at 4, 10, 11, 12.

⁴² See 2019 DHS Guide at 3.

⁴³ Note that the 2019 DHS Guide recognizes that requests for assistance from certifiers must be reasonable, as required by statute. See 2019 DHS Guide at 4; see also INA § 245(m)(1).

⁴⁴ See 2019 DHS Guide at 4.

⁴⁵ By law, all law enforcement requests for assistance from immigrant crime victims must be “reasonable.” INA § 245(m)(1); 8 C.F.R. § 245.24(a)(5).

⁴⁶ See 2019 DHS Guide at 7.

⁴⁷ See *id.* at 6.

⁴⁸ *Id.*

⁴⁹ See 8 C.F.R. § 214.14(a)(14)(ii)(B) (“A petitioner may be considered a victim of witness tampering, obstruction of justice, or perjury, including any attempt, solicitation, or conspiracy to commit one or more of those offenses, if ... [t]here are reasonable grounds to conclude that the perpetrator committed the witness tampering, obstruction of justice, or perjury offense, at least in principal part, as a means to avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or [t]o further the perpetrator’s abuse or exploitation of or undue control over the petitioner through manipulation of the legal system.”)

⁵⁰ See 2019 DHS Guide at 6.

⁵¹ See INA §§ 101(a)(15)(U)(i)(III), 214(p)(1); 8 C.F.R. §§ 214.14(a)(2), (5); see also National Immigrant Women’s Advocacy Project, *U Visa Certification Toolkit for Federal, State and Local Judges, Commissioners, Magistrates and Other Judicial Officers* 4–6, 9, 10, 17 (last updated Nov. 11, 2019), available at <http://library.niwap.org/wp-content/uploads/2015/U-Visa-Toolkit-for-Judges-11.11.19-final.pdf>.

⁵² See 2019 DHS Guide at 5.

⁵³ See USCIS, *I-918, Petition for U Nonimmigrant Status* (June 30, 2020), <https://www.uscis.gov/i-918>.

⁵⁴ *Id.*; see also *id.* at 13.

⁵⁵ See *id.* at 5; see also *id.* at 13.

⁵⁶ See *id.* at 5; see also *id.* at 13.

⁵⁷ See *id.* at 10, 13.

⁵⁸ See Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75547 (Dec. 12, 2008); 8 C.F.R. § 245.24(a)(5).

⁵⁹ See 8 C.F.R. § 245.24(e)(1).

⁶⁰ See 8 C.F.R. § 245.24(e)(2).

⁶¹ See 2019 DHS Guide at 11.

⁶² See *id.* at 8 (defining “direct victims” as “[t]he person against whom the crime was perpetrated and who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity. Bystanders who suffer an unusually direct injury as a result of a qualifying crime may also qualify.”).

⁶³ See 2011 DHS Guide at 12, 14.

⁶⁴ See 2019 DHS Guide at 7, 14.

⁶⁵ See *id.* at 7.

⁶⁶ *Id.*

⁶⁷ See Alison Kamhi & Sarah Lakhani, *A Guide to State Laws on U Visa and T Visa Certifications* (Apr. 2020), <https://www.ilrc.org/guide-state-laws-u-visa-and-t-visa-certifications>.

⁶⁸ *Id.* at 6–7.

⁶⁹ See Xavier Becerra, *Update to Information Bulletin No. 2015-DLE-04: New and Existing State and Federal Laws Protecting Immigrant Victims of Crime* (Apr. 1, 2020), 2020-DLE-01, available at https://oag.ca.gov/sites/all/files/agweb/pdfs/info_bulletins/2020-dle-01.pdf.



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.