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of the NATIONAL LAWYERS GUILD

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February 3, 2006

VIA FAX/EMAIL

Mr. Richard A. Sloane
United States Citizenship and Immigration Services (USCIS)
Regulatory Management Division
111 Massachusetts Avenue, 3rd Floor
Washington, DC 20529

Re: Comments to Proposed Application for Immediate Family Member of U-1 Recipient; and U Nonimmigrant Status Certification; Forms I-918; I-918 Supplement A; and I-918 Supplement B

Dear Mr. Sloane:

We are writing on behalf of the National Immigration Project of the National Lawyers Guild (National Immigration Project) to provide comments to United States Citizenship and Immigration Services (USCIS) for consideration in the agency's development of a form to ensure access to the U nonimmigrant visa for members of law enforcement and to victims of crimes. National Immigration Project is a national legal support and training center dedicated to protecting the rights of immigrants and their family members. National Immigration Project trains private and nonprofit immigration practitioners, the federal and state criminal defense bars, and judges on specialized issues of immigration law, produces multiple immigration legal treatises published by Thomson West, and provides technical assistance each year to thousands of immigration practitioners, state judges, local governments, and nonprofit legal assistance organizations across the country regarding immigrants' rights.

National Immigration Project also supports and joins in the majority of the comments that have been submitted on behalf of the National Network to End Violence Against Immigrant Women.

Thank you for considering our attached comments.

Sincerely,

Dan Kesselbrenner, Director
Paromita Shah, Associate Director
Ellen Kemp, Coordinator

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Introduction

The U forms and instructions should further Congressional findings and goals from the 2000 Violence Against Women Act (VAWA) and the 2000 Victims of Trafficking and Violence Prevention Act (VTVPA).

The U forms should further the Congressional goals, which the most recent U visa memo aptly described:

The goal of the legislation was to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of persons, and other criminal activity of which aliens are victims, while at the same time offering protection to victims of such offenses.

Applications for U Nonimmigrant Status, Revisions to *Adjudicator's Field Manual (AFM)* Chapter 39, Memorandum from Aytes/Sposato to Director, Vermont Service Center, HQPRD 70/6.2, January 6, 2006 (hereinafter "January U Memo")

Congress recognizes with the U visa that it is virtually impossible for state and federal law enforcement, justice system, and government enforcement agency officials to punish and hold perpetrators of crimes against noncitizens accountable if abusers and other criminals can avoid prosecution by having their victims deported. Few crime victims are willing to assist in prosecutions without some form of immigration status that protects them from such retaliation.

Organization of our comments

The comments by the National Immigration Project are organized in the following manner.

General comments – This section provides comments on problems or issues that presented themselves throughout the form. In this section, we discuss concerns including our view of how *ultra vires* requirements may be treated, the impact of VAWA 2005 on the proposed form, the comprehension and readability level of the proposed instructions and forms and the overall law enforcement certification process.

Specific comments – These comments address the form in sections in chronological order and make technical and legal recommendations. We organize our specific comments by instructions to form and forms, including the following:

- 1) Instructions to Form I-918
- 2) Form I-918
- 3) Form I-918, Supplement A
- 4) Instructions to Form I-918, Supplement B
- 5) Form I-918, Supplement B

General Comments

***Ultra vires* Requirements**

The form creates requirements not contained in INA §101(a)(15)(U) or INA §214(p). The form is contrary to the legislative intent of VTVPA. Requirements that violate Congress's plain command must be stricken from the proposed instructions and forms. That the agency proposed requirements that violate Congressional intent raises serious questions about the agency's methodology and assumptions.

Effect of Violence against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005)

Enacted January 5, 2006, the immigration-related provisions of VAWA 2005 amend the statutory requirements for the U nonimmigrant visa. The U.S. Citizenship and Immigration Services

(USCIS) issued the request for comments on its proposed U nonimmigrant visa forms on December 5, 2005, prior to the passage of VAWA 2005. Its proposed forms reflect old law and require significant review and modification in each part. Specifically, the relevant new provisions include a new derivative category for unmarried siblings under the age of 18; the elimination of extreme hardship and certification requirements for derivative family members; the elimination of custody and residence requirements for abused adopted children; and the extension of the duration of the U visa to a four-year period. We will not repeat in our Specific Comments each and every place where VAWA 2005 has impacted the form; we trust that USCIS will modify the instructions and forms appropriately in the many places where VAWA 2005 has made obsolete their instructions and/or questions.

Comprehension and Readability Statistics

We analyzed several paragraphs of the form using the Flesch-Kincaid Grade Level tool and the Flesch Reading Ease Scale. The excerpt analyzed showed that the language of the proposed form targets those with a 12th-grade education. It also scored approximately 21 out of a possible 100 point scale, in which the higher the score, the easier it is to understand the document. In light of this analysis, the agency's estimate of five hours for the completion of a response is inadequate. We suggest that the language be re-worked to be more accessible generally and specifically to provide meaningful access to people with limited English proficiency (LEP), in accordance with Executive Order 13166 (EO 13166, August 11, 2000), "Improving Access to Services for Persons with Limited English Proficiency."

Certification Process

The proposed instructions and law enforcement certification form (Form I-918 Supplement B) contain several sections which are inconsistent with the proper performance of the functions of the USCIS and grossly exacerbate the collection of information burden on those who are to respond. We find the proposed certification process problematic in various respects and we have highlighted it here in our general comments as well as addressing in our specific comments.

USCIS exceeds its authority when it dictates how law enforcement agencies assign duties to their employees. Form I-918 (01/10/06), Page 6, requires that Form I-918, Supplement B *"must be completed by the certifying official of the agency conducting an investigation or prosecution of the qualifying criminal activity of which you are a victim."* The statutes at INA §101(a)(15)(U) and at INA §214(p) do not require one designated "certifying official" in law enforcement offices. The statutes do not dictate that the official signing the certification have been personally involved in the investigation or prosecution of the crime in which the victim was involved. Instead, the statutes offer a broad list of those who may certify, with no chain of command requirement. Certifiers must simply have the authority to investigate criminal activity described in the statute and must state that the applicant has been helpful, is being helpful or is likely to be helpful in the investigation or prosecution of criminal activity described in the statute.

Similarly, Instructions to Form I-918, Supplement B (01/10/06), Page 2, Part 2 – Agency Information (and its corresponding question on Form I-918, Supplement B (01/10/06), Page 1, Part 2 – Agency Information) imposes legally unsupportable and unduly burdensome requirements regarding certifying officials. In relevant part, the proposed instructions and form state that

"A certifying official is the head of the certifying agency or any person who has been specifically designated by the head of the certifying agency to issue a U Nonimmigrant Status Certification on behalf of the agency. If the certification is not signed by the head of the certifying agency, please attach evidence of the agency head's written designation of the certifying official for this specific purpose."

The law enforcement officials who have first-hand knowledge are in best position to certify helpfulness; they are in the best position to develop relationship of trust and rapport with victims necessary to encourage victim participation in the system. The U certification tool must be in their

hands. Chiefs of police and other agency heads rarely have this direct link to victims or know much about their cases. Chain of command is often very long; as practitioners working with U interim relief applicants have discovered, many Chiefs or agency heads prefer to let the officers working on the cases decide whether to certify.

Instead of requiring heads of agencies or their specific designees to sign, replace the text with “or their designees.” This is how police forces generally delegate authority, and it is not the function of DHS to preclude them from broad delegation if this is what they choose to do.

Limiting acceptable certifiers creates an unnecessary extra burden on one person in each law enforcement agency. It increases the likelihood that law enforcement agencies would be unwilling or unable to participate or, at a minimum, would create unacceptably long delays in the process. It creates significant hurdles to law enforcement participation in the U process and undermines the dual intent of Congress to increase the efficiency of the criminal justice system and to improve crime victims’ access to immigration status.

USCIS again exceeds its functions when it attempts to impose additional legal burdens not required by statute on law enforcement officials. The instructions and form for Form I-918, Supplement B (01/10/06), Page 3, Part 7, prescribe that law enforcement must notify USCIS if a victim “unreasonably refuses to assist in the investigation or prosecution.” It cites no time frame, indicating this requirement exists in perpetuity. The concept of “unreasonable refusal” is not relevant at this stage and is only considered years later at the adjustment phase. Law enforcement agencies would have to set up a special reminder system for their files and they should not have to do so. These officers already are overworked; this extra-legal requirement will discourage, rather than encourage, them to work with immigrant crime victims, contrary to Congressional intent. If law enforcement wishes to inform USCIS of “unreasonable refusal” in any particular case, it certainly may, but DHS cannot force them to do so.

Recommendation: Language should say “may” not “must.”

To minimize the burden of the collection of information on those who are to respond, USCIS should accept the signed certification forms submitted by those who have already applied for a U nonimmigrant visa via the interim relief process. Interim relief recipients should not be required to submit new certifications or documentation, if the evidence already submitted meets the statutory standards for the U visa. The burden for the agency’s failure to timely promulgate implementing regulations should not fall on the crime victims and law enforcement officials Congress sought to help when it originally created this new form of relief in 2000. We suggest that the instructions and Form I-918 incorporate an additional paragraph stating that interim relief recipients may resubmit evidence used to achieve interim relief status, especially the law enforcement certification.

Another issue with the certification process is the language it contains regarding helpfulness of the victim. The language in the last paragraph of the instructions on helpfulness seems to indicate that DHS intends to substitute its judgment for that of law enforcement. Stating, for instance, that law enforcement’s certification is not presumptive evidence is disrespectful both to law enforcement and to Congress, which said its goal was to help law enforcement help victims of crimes. A certification should be construed as per se qualifying as any credible evidence of helpfulness. Only if fraud or corruption is suspected should DHS question law enforcement’s judgment.

Recommendation: Delete the sentence reading “Your certification will not be considered presumptive evidence of helpfulness” and replace it with “Your certification is only one part of the victim’s application packet, but is extremely helpful to this agency.”

Finally, the certification language precludes eligibility for individuals who were a victim of a qualifying crime that is different from a qualifying crime about which they were helpful. The text

and structure of the INA §101(a)(15) contemplates eligibility for a person who was a victim of an enumerated crime that is different than the enumerated crime about which she was helpful. This restrictive interpretation circumscribes the breadth of protections accorded by the statute, subverts Congressional intent, and is contrary to established principles of statutory construction. The sentence stating “An applicant is considered to possess information concerning qualifying criminal activity of which he or she is a victim...” should be changed to “An applicant is considered to possess information concerning qualifying criminal activity...” In addition, the last sentence of the first paragraph, “Victims with information about a crime of which they are not the victim will not be considered to possess information concerning qualifying criminal activity” should be stricken.

Specific Comments

We organize our specific comments by instructions to form and forms, including the following:

- 1) Instructions to Form I-918
- 2) Form I-918
- 3) Form I-918, Supplement A
- 4) Instructions to Form I-918, Supplement B
- 5) Form I-918, Supplement B

1) Instructions to Form I-918

Page 1, Filing Deadline: Imposing a filing deadline is *ultra vires*, unnecessary, and excessively burdensome.

The statute at INA §101(a)(15)(U) offers no statutory basis for imposing a one-year filing deadline on victims of criminal activity committed prior to October 28, 2000 or for imposing a one-year filing deadline on younger victims reaching their 16th birthday. The agency has failed to timely promulgate U nonimmigrant visa implementing regulations since this new form of relief was created five years ago. Why should the agency now create and impose a higher standard on the crime victims and law enforcement officials Congress sought to help when it created this new form of relief in 2000? Obtaining law enforcement certification signatures has proven to take a significant amount of time. Especially with older crimes, it may take even more time to track down appropriate law enforcement officers to certify. It is unreasonable to expect a seventeen-year old crime victim to know how to access the immigration system and this proposed deadline would target the most vulnerable population of victims (children). Lastly, the proposed filing deadline does not clarify that it does not apply to victims of crimes committed after October 28, 2000.

Page 1, Exceptions to Filing Deadline, Ineffective Assistance of Counsel: Ineffective Assistance of Counsel exception contains an overly legalistic standard.

Although the paragraphs addressing exceptions to the filing deadline and examples describing exceptional circumstances are helpful in part, we object to the standard used in the Ineffective Assistance of Counsel section. The ineffective assistance of counsel description imposes the *Lozada* test which exceeds the ameliorative intent of Congress in passing this form of relief. An example of the test's inadequacy is that it does not address unlawful immigration practice (sometimes referred to as “*notario* fraud”) which is more likely to affect low-income crime victims than attorney incompetence. It imposes needlessly formalistic and burdensome requirements that may be contrary to state law in some cases. For example, in some states, one mistake by an attorney is not the basis for filing a grievance, but said mistake may have caused irreparable harm to a potential U nonimmigrant applicant. The *Lozada* test is only meaningful to persons represented by lawyers. Crime victims should not and cannot be required to have a lawyer to submit an application for relief.

Recommendation: Simply state “Inaccurate legal advice; explain in detail.”

Page 2, Step 1, Column 2: “When Should I Use Form I-918?” – The statute does not preclude U visa eligibility for a person who was a victim of an enumerated crime that is different from the crime about which the person is being “helpful.”

We raise the following concerns about the following instructions: “You possess information concerning the qualifying criminal activity of which you were a victim.” This instruction precludes eligibility for individuals who were a victim of an enumerated crime that is different from an enumerated crime about which they were helpful. This restrictive interpretation circumscribes the breadth of protections accorded by the statute, subverts Congressional intent, and is contrary to established principles of statutory construction.

For the reasons given below, the text and structure of INA §101(a)(15) contemplates eligibility for a person who was a victim of an enumerated crime that is different from the enumerated crime about which she was helpful. INA §101(a)(15)(i) provides:

“(U) (i) subject to section 214(p) [8 USCS § 1184(p)], an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that--

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;”

A literal reading of the language of INA §101(a)(15)(U)(i) and the principles of statutory construction actually support a reading that it can be two different crimes so long as each crime is a "criminal activity described in clause iii." The statutory language permits this bifurcation, and Form I-918 B itself is structured to allow this kind of bifurcated certification.

First, Congress never specified that the criminal activity shall be the same in INA §101(a)(15)(U)(i)(I) and INA §101(a)(15)(U)(i)(III). They are two distinct and separate requirements.

Second, if Congress had meant to require that the criminal activity to be the same in INA §101(a)(15)(U)(i)(I) and INA §101(a)(15)(U)(i)(III), the language in INA §101(a)(15)(U)(i)(III) it would have said "such criminal activity" or the "criminal activity described above."

Third, each requirement is in a different paragraph, which suggests that each is a discrete requirement unto itself.

Fourth, the canon of statutory construction provides that when a remedial statute is capable of two readings, it should be read generously to achieve the remedial goal and objective of the statute.

Lastly, from a policy standpoint, one of the purposes of the statute was to provide another tool for law enforcement agencies to seek prosecutions of bad actors. The reading under the current instruction would prevent law enforcement from punishing serial perpetrators, especially when criminal actions are separated by a number of years.

An example illustrates this argument.

Example: A father involved in a custody dispute kidnaps his youngest child, Ellen, from her school. Ellen calls her sister, Gail, who is now 19, and tells her where she is. Gail calls the police, who uses the information she's provided to find Ellen and arrest the father. Ellen is eligible for a U visa as a victim of kidnapping, but Gail is not, even though she possesses useful information and was very helpful in the investigation. In the course of the kidnapping investigation, however, Gail reveals that she was repeatedly sexually abused by her father when she lived with him. Unfortunately, the statute of limitations has now run on that abuse. The prosecutor charges the father with kidnapping and signs a certification form for Ellen as a victim of kidnapping who possessed useful information and was helpful in the investigation and prosecution of her father. She also signs a form for Gail, certifying that she was a victim of sexual abuse and possessed useful information and was helpful in the investigation and prosecution of the kidnapping.

The statutory language permits this reading. While the vast majority of cases will not involve such facts, the Instructions should not preclude such a reading when necessary. From a legal point of view since the U visa is a remedial form of relief and the statute contemplates the crimes being different, the Form is inconsistent with the longstanding principle of construing remedial statutes generously.

Recommendation: Modify the instruction to – “You possess information concerning the qualifying criminal activity.”

Page 3, Step 1, Column 1, Section Regarding Employment Authorization Document (EAD): Use more accessible language and clarify who must or must not file a form I-765.

In the description of the work authorization process for the principal applicant that reads “If your application is approved, you will be employment authorized incident to status and USCIS will send you an Employment Authorization Document as evidence of that authorization,” add another sentence that clarifies that the principal applicant does not need to file employment authorization form I-765. Clarify that the process of obtaining employment authorization for derivatives is different from that of principal applicants and requires that the derivative applicant submit form I-765.

Page 3, Step 1, Column 1 (bottom), Inadmissibility and Waivers: Simply language and connect legal concepts to questions on form, and correct incomplete information about waivers.

The agency's proposed instructions must simplify the language and connect legal concepts in the instructions to the actual questions on the form. Instead of simply referring to INA §212(a), reference the relevant questions on Part Five of Form I-918 that go to inadmissibility (see additional suggestions for improving that section of the form, below) and include a basic explanation of the concept of inadmissibility.

The agency's proposed instructions must also reflect legal accuracy in order to enhance quality, utility, and clarity of the information presented. The description of the inadmissibility waiver under INA §212(d)(3) is severely incomplete. This section must also mention the special inadmissibility waiver designed by Congress especially for U nonimmigrant visa applicants at INA §212(d)(14). A waiver under INA §212(d)(14), if approved, waives all grounds of inadmissibility except participation in Nazi persecution, genocide, torture and extrajudicial killing. Please also note that Form I-192, Application for Advance Permission to Enter as Nonimmigrant Pursuant to Section 212(d)(3) of the INA, is not an adequate form to apply for the waiver under INA §212(d)(14). USCIS must propose an adequate application form for a waiver under INA §212(d)(14).

Recommendation: Adopt the proposed modifications of the National Network to End Violence Against Immigrant Women striking the current paragraph on waivers and replacing it with the paragraph below in italics.

“If you checked one of the boxes in part 5, you may be inadmissible and we strongly encourage you to talk to an experienced immigration advocate or attorney before filing this application. Being inadmissible means you can only receive a U visa if USCIS grants a waiver of inadmissibility under section 212(d)(14) or section 212(d)(3) of the immigration laws. The 212(d)(14) waiver requires that you convince USCIS that it is in the national or public interest to grant you status, despite the actions that made you inadmissible. Those who participated in Nazi persecution, genocide, torture or extrajudicial killings are not eligible for this waiver. USCIS also may grant waivers under 212(d)(3), except for those who plan to engage in espionage, sabotage, other unlawful criminal activity, attempting to overthrow the US government, whose admission would have adverse foreign policy consequences and those ineligible for the 212(d)(14) waiver.”

NEW INSERTION NECESSARY - Step 1, “When Should I Use Form I-918?” – “The Form must explain what is expected of those who have received U interim relief.

Interim relief recipients should NOT be required to submit new certifications or documentation, if the evidence already submitted meets the statutory standards for the U visa. The burden for the agency’s failure to timely promulgate U visa implementing regulations should not fall on the crime victims and law enforcement officials Congress sought to help when it created this new form of relief in 2000. As noted below, the form must state that interim relief recipients may resubmit evidence used to achieve interim relief status.

Recommended insertion:

U Interim relief recipients should use this form to ensure they receive full U status. We encourage you to submit additional evidence to comply with all the U requirements, but you may also resubmit the evidence used to obtain interim relief. Where it is not possible to obtain new evidence, such as a new law enforcement certification or new evidence of substantial physical or mental abuse, please briefly explain why this is not possible.

Page 3, Step 1, Insert New Section: Explicitly mention the “any credible evidence” standard.

The instructions and forms mention “credible” evidence in several parts, but does not explain that a special “any credible evidence” standard applies, per INA §214(p)(4). We suggest that Step 1 explain this special standard and its general rule that the agency will review “any credible evidence” submitted.

Page 3, Step 2, Complete Forms I-918, I-918, Supplement A and I-918, Supplement B, Section A, Part 1 – Basis for Filing: Insert a filing category for recipients of U nonimmigrant visa interim relief.

Instead of promulgating implementing regulations when Congress created the U visa in 2000, the agency designed an interim relief program for U nonimmigrant visa applicants under which hundreds or thousands of applicants may have already applied. The instructions and form fail to address this class of applicant. The agency should clarify and specify how those applicants who have received U nonimmigrant interim relief should apply.

To minimize the burden of the collection of information on those who are to respond, the agency should accept the previously signed law enforcement certification forms submitted by those who have already applied for a U nonimmigrant visa via the interim relief process. Interim relief recipients should not be required to submit new certifications or documentation, if the evidence already submitted meets the statutory standards for the U visa. The burden for the agency’s failure to timely promulgate implementing regulations should not fall on the crime victims and law

enforcement officials Congress sought to help when it originally created this new form of relief in 2000. We suggested that the instructions and Form I-918 incorporate an additional paragraph stating that interim relief recipients may resubmit evidence used to achieve interim relief status, especially the law enforcement certification.

Page 4, Step 2, Complete Forms I-918, I-918, Supplement A and I-918, Supplement B, Section A, Part 3 – Information About You: Comment on email and safe addresses and the need for additional category for transgendered individuals

We commend the Department of Homeland Security for incorporating sections requesting information on safe telephone numbers and address. However, email addresses are not secure forms of communication. We recommend that the instructions clarify that email addresses are optional. To respect the dignity and pride of all applicants, we suggest that you have a box for transgendered individuals.

Page 4, Step 2, Complete Forms I-918, I-918, Supplement A and I-918, Supplement B, Section A, Part 4 – Additional Information: Answering “yes” to these questions may implicate immigration bars about which applicants know nothing. The form should suggest that anyone who answers “yes” should consult a nonprofit agency as mandated in INA §214(p)(3)(A).

Page 4, Step 2, Complete Forms I-918, I-918, Supplement A and I-918, Supplement B, Section A, Part 5 – Processing Information: Answering “yes” to these questions may implicate immigration bars about which applicants know nothing. The form should suggest that anyone who answers “yes” should consult a nonprofit agency as mandated in INA §214(p)(3)(A).

Page 4, Step 2, Complete Forms I-918, I-918, Supplement A and I-918, Supplement B, Section A, Part 6 – Information About Spouse and/or Children: Clarify which family members principal applicant is required to list on Form I-918.

The proposed instructions indicate that principal applicants must list all immediate family members on the application form. There is no statutory basis for listing all family members and current locations on the form if said family members are not seeking to benefit from the relief. Imposing an additional requirement goes beyond the statute and would discourage undocumented victims from reporting crime to the criminal justice system and participating in the U nonimmigrant visa process. We suggest amending this proposal to conform with the parallel instructions in the T nonimmigrant context. The T form, Form I-914, states instead: *“Provide the requested information about each of your family members for whom you now wish to seek immigration benefits. You may also file for a family member at a later date, rather than on your initial application.”*

Page 5, Step 2, Complete Forms I-918, I-918, Supplement A and I-918, Supplement B, Section B, Completing Form I-918, Supplement A Application for Qualifying Family Member of U-1 Recipient – Introductory Paragraphs: Requiring a new form and fee for a principal who subsequently files for a derivative is onerous and discourages applicants from legalizing family members. A copy of the original approved U visa for the principal applicant plus proof of the qualifying relationship should suffice.

Recommendation: DELETE this section.

Page 6, Step 2, Complete Forms I-918, I-918, Supplement A and I-918, Supplement B, Section C, Completing Form I-918, Supplement B, U Nonimmigrant Status Certification: The agency imposes legally unsupportable and unduly burdensome requirements regarding certifying officials and their duties.

We reiterate our objections to the “certifying official” language. See our General Comments section. We recommend adopting the replacement language suggested in the comments of the National Network to End Violence Against Women.

Page 6, Step 3, Submit Your Application: Fee waivers must be available to U visa applicants

Because the purpose of the statute was to encourage immigrant crime victims to assist law enforcement in the investigation and prosecution of enumerated crimes, this statute is a remedial one. As such, it should not require any fees at all.

At a minimum, the fee section must include a fee waiver eligibility section. If not, many immigrant crime victims will be precluded from seeking U visa relief because they are unable to afford the fees for themselves and derivative beneficiaries. This will also lessen law enforcement’s ability to investigate and prosecute crime. In addition, victims who suffer long-term trauma or injury face significant barriers in attaining economic stability in a short time frame. The section should include easy-to-understand language about what kind of proof is required to show economic necessity.

Page 6, Step 3, Submit Your Application, Section 3, Evidence to Support Application for U Nonimmigrant Status – Personal Statement: The statute does not require a personal statement and indeed such a requirement violates the “any credible evidence” standard dictated at INA §214(p).

Congress mandated a special evidentiary standard for U nonimmigrant visa applicants at INA §214(p). The “any credible evidence” standard has been explored and defined in other contexts, including the I-360 self-petitioning context. USCIS issued a guidance memorandum written by then General Counsel Paul Virtue addressing “any credible evidence” standard.¹ The Virtue memorandum describes the any credible evidence standard in the self-petitioning context as follows:

*This requirement stems from section 204(a)(1)(H) of the Act, which requires the Service to consider “any credible evidence which is relevant to the petition” before reaching a decision. **A self-petition may not be denied for failure to submit particular evidence.** [Emphasis added by commenter.] It may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility. It is within the Service’s sole discretion to determine what evidence is credible and to determine what weight to give that evidence.*

Recommendation: Replace “You must provide a personal narrative statement” with “We encourage but do not require that you provide a personal narrative statement. This section should also mention that the Personal Statement may include information that the applicant possesses about the criminal activity, and any explanations of “yes” answers to questions in Parts 4 and 5 of Form I-918.

Page 7, Step 3, Submit Your Application, Section 3, Evidence to Support Application for U Nonimmigrant Status – Certification: We renew our objections to the instruction contained in this paragraph that we have previously commented upon: “...or have been helpful in the investigation or prosecution of the qualifying criminal activity of which you were a victim.” As stated earlier, the text and structure of the INA §101(a)(15) contemplates eligibility for a person

¹ Virtue, Office of the General Counsel, “Extreme Hardship” and Documentary Requirements Involving Battered Spouses and Children, Memorandum to Terrance O’Reilly, Director, Administrative Appeals Office, INS mem. HQ 90/15-P, HQ 70/8-P (Oct. 16, 1998), *reprinted in* 76(4) *Interpreter Releases* 162 (Jan. 25, 1999).

who was a victim of an enumerated crime that is different from the enumerated crime about which she was helpful.

Page 7, Step 3, Submit Your Application, Section 3, Evidence to Support Application for U Nonimmigrant Status - Evidence of Substantial Physical or Mental Abuse: The agency has provided a very useful, clear description of evidence relating to substantial physical or mental abuse.

The description of evidence of substantial physical or mental abuse is very well done. Please improve layout of text with better spacing, however, as this description provides a critical explanation of how applicants may meet a statutory requirement.

Page 8, Step 3, Section 4, Form I-918, Supplement A, and evidence to establish derivative U nonimmigrant status: Birth certificates for children should not require showing both parents, as long as the qualifying parent is listed.

The agency's proposed instructions about credible documentation of a claimed family relationship are inconsistent with general standards in family-based immigration visa processing. Specifically, compare the proposed instructions with the following excerpt from instructions for a Petition for Alien Relative, Form I-130:

"Child and you are the mother - Submit a copy of the child's birth certificate issued by a civil authority showing both parents' names." (Form I-918, Supplement, proposed instructions)

"A child and you are the mother: Submit a copy of the child's birth certificate showing your name and the name of your child. (Form I-13, official form instructions)

No one must be denied status because their birth certificate did not mention a parent not involved in the U process. Similarly, in the stepparent/stepchild context, requiring the names of both parents on a child's birth certificate is unnecessary and does not go to establishing the claimed stepparent relationship. The birth certificate need only evidence proof of relationship to the parent whose marriage to stepparent underlies the stepparent relationship.

To require more violates the language and purpose of the statute. Similarly, there is no reason school records must show the names of both parents, as long as they include the name of the principal U nonimmigrant qualifying parent.

Pages 8 and 9, Step 3, Section 4, Form I-918, Supplement A, and evidence to establish derivative U nonimmigrant status: VAWA 2005 eliminated the two-year custody and residency requirement for abused adopted children.

Section 805(d), Protecting Victims of Child Abuse, of VAWA 2005 amends INA §101(b)(1)(E)(i) and eliminates the two-year custody and residency requirement for abused adopted children. The description of the evidence to establish derivative U nonimmigrant status in an adoptive relationship should include a sentence clarifying that adopted children subjected to battering and extreme cruelty are exempted from having to provide evidence going to the two-year custody and residency requirement.

Page 10, Processing Information, Form I-918, Supplement B, U Nonimmigrant Status Certification, Privacy Act Notice: Privacy Act Notice should include special confidentiality provisions guaranteed under §384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (8 USC 1356).

Victims of crimes applying for U nonimmigrant visas are covered by the same special confidentiality provisions that cover survivors of domestic violence which are codified at §384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as amended by

the Victims of Trafficking and Violence Protection Act of 2000. The proposed paragraph on Privacy Act Notice should include a statement referencing that provision which prohibits DHS from sharing information except in limited circumstances.

Page 10, Processing Information, Form I-918, Supplement B, U Nonimmigrant Status Certification, Paperwork Reduction Act Notice: Estimates of application preparation and assembly time involved are unrealistically low.

Very few applicants will be able to complete the U nonimmigrant visa process in a total of five hours. For example, simply obtaining the required law enforcement certification form will take days if not longer. Five hours is perhaps a more accurate reflection of organizing the documentation and evidence once weeks have been spent obtaining them.

Page 10, Processing Information, Form I-918, Supplement B, U Nonimmigrant Status Certification, Check List:

The checklist is a commendable addition to the form instructions. However, we have identified several confusing items requiring clarification and several necessary additions. We recommend the following:

Recommended changes:

Third item – “qualifying” is misspelled

Fourth item - delete reference to qualifying family members because certifications are not required for them.

Sixth item - Reference the previously identified fee cap in this section.

Recommended additions:

Fee waiver - If you are filing a fee waiver request, did you provide proof of economic necessity? Be aware that your application is not “properly filed” until your fee waiver request is granted.

Inadmissibility waivers - If you are filing a waiver under INA §212(d)(3) or INA §212(d)(14), did you include the proper form and supporting documentation?

End of comments addressing Instructions to Form I-918

2) Form I-918

Page 1, Part 1 - Basis for Filing, A, B, C

The burden for the agency’s failure to timely promulgate implementing regulations should not fall on the crime victims and law enforcement officials Congress sought to help when it originally created this new form of relief in 2000. Instead of promulgating implementing regulations, the agency designed an interim relief program for U nonimmigrant visa applicants under which hundreds or thousands of applicants may have already applied. The instructions and form fail to address this class of applicant. The agency should clarify and specify how those applicants who have received U nonimmigrant interim relief should apply.

To minimize the burden of the collection of information on those who are to respond, the agency should accept the previously signed law enforcement certification forms submitted by those who have already applied for a U nonimmigrant visa via the interim relief process. Interim relief recipients should not be required to submit new certifications or documentation, if the evidence already submitted meets the statutory standards for the U visa. The burden for the agency’s failure to timely promulgate implementing regulations should not fall on the crime victims and law enforcement officials Congress sought to help when it originally created this new form of relief in

2000. We suggest that the instructions and Form I-918 incorporate an additional paragraph stating that interim relief recipients may resubmit evidence used to achieve interim relief status, especially the law enforcement certification.

The form must include a category for those who receive U Interim Relief.

Recommendations:

We suggest two more categories:

- * I filed for and received U interim relief.
- * I have filed for but have not received a decision on an application for U interim relief.

We also recommend that the category/box labeled “I have received U status” box be clarified to explain that the box is meant for persons filing for derivative beneficiaries.

Page 1, Part 3 - Information about you: Recognizing the benefits of safe addresses and use of email address is commendable. We recommend including a category for transgendered individuals.

We commend the Department of Homeland Security for incorporating sections requesting information on safe telephone numbers and address. Use of email facilitates communication, but is not always secure, especially for survivors of domestic violence. We recommend that the instructions clarify that email addresses are optional. To respect the dignity and pride of all applicants, we suggest that you have a box for transgendered individuals.

Page 2, Part 4 - Additional information

Answering “yes” to these questions may implicate immigration bars about which applicants know nothing. The form should suggest that anyone who answers “yes” should consult a nonprofit agency as mandated under INA §214(p)(3)(A). We reiterate our objections to requiring a personal statement from Page 6, Step 3, Submit Your Application, Section 3, Evidence to Support Application for U Nonimmigrant Status – Personal Statement. The statute does not require a personal statement and indeed such a requirement violates the “any credible evidence” standard dictated at INA §214(p).

Page 2, Part 4, Question 5: The language of the question does not track the statute and the agency should make it accurate.

The language of the form poses the Yes/No question as “The crime of which I am a victim occurred in the United States or violated the laws of the United States.” The statute at INA §101(a)(15)(U)(i)(IV) reads describes the criminal activity as violating the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States. Question 5 does not track the language of the statute nor the form instructions. A prospective U visa applicant may incorrectly perceive that eligibility for relief only extends to violations of U.S. law only. It is contrary to Congress’ explicit statutory instruction of extending relief to laws that include territories and possessions of the United States.

Recommendation: Replace with “The crime of which I am a victim violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States.”

Page 2, Part 4, Questions 8 and 9: The questions are irrelevant to basic eligibility for the U nonimmigrant visa and should be eliminated from Part 4.

Questions 8 and 9 seem better suited to the inadmissibility-related content of Part 5. We recommend deleting them from Part 4. Question 8 is already covered by Question 12 in Part 5. Question 9 asks applicants to list each date, place of entry and status under which they entered the United States during the five years preceding the filing of this application. This question exceeds the scope of the statute in ascertaining the manner and type of entry of applicant. Because the statute does not impose any continuous presence requirement, the agency should clarify why it seeks information about the applicant's entry history "during the five years preceding the filing of the application." We suggest moving Question 9 to Part 5 and ensuring it covers all periods that may be implicated by unlawful presence.

Page 3, Part 5 - Processing Information – The questions do not address all inadmissibility grounds.

This section attempts to address relevant inadmissibility grounds and provide applicants with an opportunity to identify and clarify any inadmissibility barriers posed to their U nonimmigrant status. Some of the questions, however, do not appear to be tied to any existing ground of inadmissibility, and some important grounds of inadmissibility are missing. For example, among the missing grounds are INA §212(a)(1) (health grounds), INA §212(a)(2)(C) (illicit trafficker), INA §212(a)(4) (public charge grounds), INA §212(a)(6)(D) (stowaways), INA §212(a)(6)(C)(ii) (false claims to U.S. citizenship), INA §212(a)(9)(B) and (C) (unlawful presence). These examples do not constitute an exhaustive list of the grounds of inadmissibility. Applicants should not be penalized for not responding appropriately to questions that are not asked.

Page 3, Part 5 - Processing Information: – Criminal grounds: Instructions fail to account for precedent immigration and federal law on convictions and criminal activity and do not include all inadmissibility grounds.

The introductory paragraph fails to account for precedent immigration and federal law regarding juvenile dispositions, the Federal First Offender Act, and recipients of pardons. The instructions in the introductory paragraph should be modified to reflect existing case law.

In addition, as noted in our comments on the Instructions, since this is a very complicated area of the law, the form should encourage those who check "yes" boxes to consult an immigration expert before attempting to explain or answer questions raised by flagging potential inadmissibility. Despite this encouragement, however, many applicants will not consult an attorney before filing for financial or other reasons precluding access to such assistance.

To be truly comprehensive the form must capture all the exceptions such as those embodied by the good moral character bars. We suggest making these questions shorter and simpler, and allowing USCIS to resolve the details through the Request For Evidence (RFE) process.

Recommendation for introductory paragraph in Processing Information : INSERT

"If you check a Yes box below, we strongly encourage you to consult an immigration advocate or attorney with expertise in immigration consequences of crimes. If USCIS needs more information to determine whether you are eligible for U status, it will give you the opportunity to provide this information before denying your application."

Furthermore, the long list of subparts to Question 1 is confusing, intimidating, and unnecessary. Most people won't know the meaning of the questions and may unwittingly fail to answer correctly, thereby committing fraud.

Question 1(a): These questions exist on other forms and capture the primary issues that raise inadmissibility concerns in this area. However, these questions are not consistent with inadmissibility language on other form documents. For example, Form I-485 requires one KNOWINGLY commit an offense whether arrested or not. Question 1(a) should reflect that knowing requirement and not ensnare applicants who are unaware that their

actions may have violated the law. In addition, the disposition chart is an excellent innovation and should, by itself, provide much of the information USCIS will need to determine the answers to the rest of the questions in this section.

Recommendation: **REPLACE** “Committed” with “Knowingly committed.”

Questions 1(c) – 1 (f), 1(h), and 1(i): For instance, the definition of “conviction” in Question 1(d) is a complicated legal term of art for immigration purposes, one that changes over time due to court and Congressional interpretations. Alternative sentencing/rehabilitative programs in 1(e), suspended sentences/probation/parole 1(f), pardons/amnesty/etc. (g), and diplomatic immunity (h) may not be “convictions.” These concepts are understandable to those intimately familiar with the criminal system.

Recommendation: **DELETE** Questions 1(c) – 1 (f), 1(h), and 1(i).

Page 3, Part 5, Question 3 “Processing Information – Prostitution” – Questions 3(a) and 3(b) misstate current law and must be changed to comport with the statute.

The prostitution inadmissibility ground incorporates conduct committed in the last ten years. Question 3(a) fails to incorporate the ten-year time frame. In addition, Question 3(b) misstates the inadmissibility ground barring conduct involving commercialized vice/gambling by including past conduct. The current statute denies inadmissibility for planning to engage in gambling in the US.

Recommendation for Question 3(a): After “Engaged in prostitution or procurement of prostitution” **INSERT** “within the past 10 years.”

Recommendation for Question 3(b): **DELETE** “Ever engaged in” and **REPLACE** with “Intend to engage in.”

Pages 4-5, Part 5, Question 5, “Processing Information – Terrorism” Question 5 misstates the terrorism inadmissibility ground and should be modified

This question is inconsistent with INA §212(a)(3)(F) which requires “material support” be provided to a terrorist organization, not support. Support is unconstitutionally nebulous and overbroad. It would, for instance, include children who feed terrorist family members, whether they supported their relatives’ terrorist activity or not. Mere “association” is similarly impermissibly overbroad and not supported by the statute. Under the statutory language, only those found by the Secretary of State, after consultation with the Attorney General, or vice versa, to be associated with a terrorist organization AND intent on engaging in activities that endanger the welfare, security or safety of the United States are inadmissible. See INA section 212(a)(3)(F).

The undesignated terrorist definition does not include subgroups who engage in terrorist activity; the statute requires that the group of two or more individuals engage in it themselves. Nor does it cite the material support section of the statute. See INA §212(a)(3)(B)(vi)(III), citing subparts (I), (II) & (III) of (iv), the engaging in terrorism definition; (VI) contains the material support definition. Subpart 4 of this section once again would make many gun owners terrorists. This list is unnecessarily repetitive in any case.

Recommendations for introductory paragraph: In the introductory paragraph to Question 5, **DELETE** “been associated with” and **DELETE** “provided support for.” **REPLACE** with “material support for, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons explosive or training.”

Recommendation for Question 5(b): To comply with the statute and make the form simpler, **DELETE** “or has a subgroup which has engaged in” and **DELETE** subparts (1) through (6) and the colon that precedes them and **REPLACE** with “any activity described in Question 4 above.”

Page 5, Part 5, Question 6, “Processing Information – Security Grounds”: This question misstates the inadmissibility bar for national security concerns.

To be properly subject to the inadmissibility grounds in INA §212(a)(4), the overthrow of the US government must be done by “force, violence or other unlawful means.” To comply with the statutory language????

Recommendation to Question 6(b): **ADD** before the question mark: “by force, violence or other unlawful means.”

Page 5, Part 5, Question 9, “Processing Information – Genocide and Torture” : Question 9 is ultra vires of current statutory requirements

The italicized directive in Question 9 is an incorrect statement of law. Direct participation in genocide or torture render an applicant inadmissible. *Indirect* participation does not.

Questions 9(c) – 9(e) must be deleted because there is no other statutory basis for including them. For example in Question 9(c), individuals in the military may have killed people as part of their legitimate duties. Question 9(d) is overly vague. For example, does it include requiring Muslim, Jewish and Atheist children to say Christian prayers in school? The persecution of others standard, while heinous, is derived from the asylum context and is not a bar to U status. USCIS may not import or create new obstacles to U status unsanctioned by Congress. To comport with the statute.

Recommendation for Question 9: **DELETE** the italicized “either directly or indirectly.” **DELETE** 9(c), 9(d) and 9(e).

Page 5, Part 5, Questions 10 & 11, “Processing Information”

Questions 10 and 11 do not reference bases of inadmissibility or U visa ineligibility. If the intention is that the language is supposed to go to physical or mental abuse, the questions are overly broad and inartfully crafted and they should be deleted. As noted above, USCIS may not create barriers to status unsanctioned by Congress. These questions, moreover, will intimidate victims who have lived in violent homes and situations and who may believe, incorrectly, that their experience will make them ineligible for a U visa. They should not fear accessing justice because of these ultra vires questions. The National Immigration Project will share these concerns with Congress and the Courts should they remain in the final form.

Recommendations for Questions 10 & 11: **DELETE** Questions 10 & 11.

Page 6, Part 5, Question 12: “Processing information - Immigration Proceedings” – Subparts of Question 12 are irrelevant and fail to refer to existing inadmissibility grounds.

Specifically, Question 12(e), which asks about denials of nonimmigrant visas, and 12(f), which requests information about the applicant’s failure to comply with voluntary departure, do not reflect existing inadmissibility grounds. Being denied a visa does not trigger an inadmissibility ground. Persons are denied nonimmigrant visas all the time with no prejudice to filing again. Failing to comply with a voluntary departure order becomes relevant only at the adjustment phase; it does not preclude obtaining a U visa. Failure to attend removal proceedings, on the other hand, is a ground of inadmissibility not adequately captured by the current questions.

Recommendations: **DELETE** Questions 12(e) & (f) and **ADD** “Have you ever failed to attend an immigration hearing?”

Page 6, Part 5, Question 14: “Processing information - Fraud” – Question 14 misstates current inadmissibility ground relating to fraud.

The current question misstates the law; the “for” before “entry” changes the meaning of this section and is not supported by the statutory language or case law.

Pages 6-7, Part 6 - Information about spouse and/or children: Requiring principal applicant to list all family members regardless of whether they are seeking derivative status is *ultra vires* of statutory requirements, unduly intimidating, and violative of the will of Congress. Clarify which family members principal applicant is required to list on Form I-918.

The proposed instructions indicate that principal applicants must list all immediate family members on the application form. There is no statutory basis for listing all family members and current locations on the form if said family members are not seeking to benefit from the relief. Imposing an additional requirement goes beyond the statute and would discourage undocumented victims from reporting crime to the criminal justice system and participating in the U nonimmigrant visa process. We suggest amending this proposal to conform to the parallel instructions in the T nonimmigrant context. The T form, Form I-914, states instead: *“Provide the requested information about each of your family members for whom you now wish to seek immigration benefits. You may also file for a family member at a later date, rather than on your initial application.”*

End of comments addressing Form I-918

3) Form I-918, Supplement A, Application for Qualifying Family Member of U-1 Recipient

**Page 1, Part 1, Question 1 “Family member(s) relationship to you (the principal)”:
Additional categories must be included.**

Several categories of eligible U visa applicants and derivatives have been omitted from this form. Siblings, derivatives who received U status before they aged out or married, unmarried sibling under 21, spouse who received U interim relief, child who received U Interim relief, child over 21 who received interim relief before turning 2, and married children who received interim relief before marriage should be included.

Page 1, Part 3, “Information about you - Gender,” Transgendered individual categories should be included.

To respect the dignity and pride of all applicants, we suggest that you have a box for transgendered individuals.

Page 2, Part 4, Question 7, “List your family member’s spouse and children”: The section appears to request irrelevant and unnecessary information.

The agency should clarify why it is necessary to require information about the derivative beneficiary’s spouse and children. If the derivative beneficiaries are not applying for U visas, the requested information is not relevant for purposes of applying for benefits. There is no need for this section to exist.

Page 3, Part 4 - “Additional Information about your family member – Introductory paragraph and Questions 8-26” : Previous recommendations for inadmissibility bar questions for Form I-918 should be incorporated and principal applicants should only be able to attest to information “to the best of their knowledge.”

Applicants should not be penalized if they are unaware of a particular ground of inadmissibility barring a family member from U visa benefits. It is unreasonable to expect that a principal applicant can speak to information or facts beyond their knowledge. Adding language that suggests that answers are provided “to the best of one’s knowledge” better comports with the purposes of the statute. In addition, recommendations provided to the inadmissibility questions for Form I-918 should be incorporated in these sections.

End of comments addressing Form I-918, Supplement A

4) Instructions to Form I-918, Supplement B, U Nonimmigrant Status Certification

Page 1, Eligibility: The agency uses a definition of victim that is inadequate. The definition should look also to state penal codes.

Definitions of victim used in the state criminal systems should be the touchstone, since the goal is to help those criminal systems help victims of crimes. Under Victim of Crime Act compensation systems, victims may be a larger group than the limited categories which the proposed instructions suggest. Denying access to U visas to those the states view as victims violates the statutory language and will of Congress. The instructions should reference state criminal definitions of victim, as well as those definitions supplied here. The “nexus” requirement comes close to this, but it is essential that the agency recognize that the states are the experts here.

Page 1, Eligibility: The paragraph stating that a person who is culpable for the qualifying criminal activity being investigated or prosecuted is excluded from being recognized as a victim is legally inaccurate.

There is no statutory basis for the culpable ineligibility bar, nor does the statute include a good moral character eligibility requirement. In reality, victims of crimes such as domestic violence are often convicted of crimes, because they fought back, or because the perpetrators are adept at manipulating them and the criminal justice system.

Page 1, NOTE: The language used discourages law enforcement from completing the certification form and places them in a potentially adversarial position to the victim.

Saying that a law enforcement agency is under no legal obligation to complete a certification form may discourage law enforcement from completing it. Instead of saying that certifiers are under no obligation to sign, include a paragraph explaining that (1) the intention of the law is to help law enforcement investigate and/or prosecute perpetrators and to help immigrant victims of crimes, and (2) obtaining a signed law enforcement certification is a necessary part of a victim’s U nonimmigrant visa application, but the certification itself does not confer immigration status on the applicant. USCIS will still make a final determination whether to grant the applicant immigration status.

Page 2, Part 2 - Agency Information: The “name of the certifying official” is *ultra vires* of the U visa statute and must be stricken.

We commend the agency for providing a thoughtful description of agencies that are qualified to provide certifications.

The description of who qualifies as a certifying official is legally unsupportable and *ultra vires* of the statute. The statute provides that a certification can be obtained from “a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority.” INA §214(p)(1). Nothing in the statute provides that the certifying official be the “head of a certifying agency.”

Law enforcement offices often grant general authority to all officers in the field with the phrase “the head of the agency or his designee.” Identification of the individual and the methodology of certification within the law enforcement agency must be left to the *discretion* of the law enforcement agencies themselves. Congress has not granted USCIS the authority to limit the choices of law enforcement agencies in these matters. As noted above, the National Immigration Project will bring to the attention of Congress and the Courts any *ultra vires* limitation on law enforcement certification.

Page 2, Part 3 - Criminal Acts: The two paragraphs describing “Criminal Acts” contain inaccurate language.

The first paragraph refers to crimes “that your agency is investigating, prosecuting or sentencing.” The statute does not require a current investigation and previous agency guidance in the context of U nonimmigrant interim relief acknowledges this fact.² Please correct the verb tenses to reflect that the investigation, prosecution or sentence of the qualifying crime could also have occurred in past. We applaud USCIS on an accurate description of any “similar activity.” The nexus between victim and investigation is not supported by the statutory language, however. We suggest adding a final sentence to this first paragraph that reads: “*You may investigate both qualifying and non-qualifying crimes. If the victim was helpful in the investigation or prosecution of any qualifying crime (or a similar criminal activity), then she or he may be eligible for a U visa.*”

Please amend the second paragraph to read “Indicate whether the qualifying criminal activity occurred within the United States (*including in Indian country and military installations*) or the territories and possessions of the United States.

Pages 2-3, Part 4 – Helpfulness of the victim/witness: This section confuses and conflates the victim requirement with the helpfulness requirement. Moreover, the last two sentences of the last paragraph are completely unauthorized by the statute, violating both its language and intent.

“Indicate whether the victim possess information about the crime(s).” This section misstates the statutory language and incorporates a highly restrictive reading of the statute that is contrary to Congressional intent.

First, the law enforcement officer may investigate both qualifying and non-qualifying crimes. If the applicant was helpful in the investigation or prosecution of a qualifying crime, she or he may be eligible for a U visa, whether the perpetrator was ultimately charged, prosecuted, or convicted of that crime or a different, nonqualifying crime.

Second, the statute does not require that the applicant possess knowledge of the qualifying criminal activity. Individuals who are traumatized or individuals with mental disabilities may not “personally possess” knowledge in the way that USCIS suggests.

Third, this instruction precludes eligibility for individuals who were a victim of a qualifying crime that is different from a qualifying crime about which they were helpful. The text and structure of the INA §101(a)(15) contemplates eligibility for a person who was a victim of an enumerated crime that is different from the enumerated crime about which she was helpful. This restrictive interpretation circumscribes the breadth of protections accorded by the statute, subverts Congressional intent, and is contrary to established principles of statutory construction. The sentence stating “An applicant is considered to possess information concerning qualifying criminal activity of which he or she is a victim...” should be changed to “An applicant is

² Yates, Office of Associate Director of Operations, Department of Homeland Security, Citizenship and Immigration Services, Centralization of Relief for U Nonimmigrant Status Applicants, Memorandum for Director, Vermont Service Center, (Oct. 8, 2003). Available at: www.nationalimmigrationproject.org

considered to possess information concerning qualifying criminal activity...” In addition, the last sentence of the first paragraph, “Victims with information about a crime of which they are not the victim will not be considered to possess information concerning qualifying criminal activity” should be stricken.

“Provide an explanation of the victim’s helpfulness to the investigation or prosecution of the criminal activity.” Because nothing in the statute requires “ongoing” helpfulness, these instructions are *ultra vires*.

The last two sentences of the last paragraph appear to be attempts to implement the “unreasonably refused to provide assistance” test for lawful permanent residence. Passing this test, however, is not relevant to obtaining a U visa, nor does Congress place the burden for meeting it on law enforcement. Compare INA §245(m) (where it exists) with §101(a)(15) and §214(p) (where it does not).

Nothing in the statute requires “ongoing helpfulness.” As a reminder, Congress specifically said: “Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status.” It did not say, “reporting and ongoing cooperation” or “reporting and allowing an investigation to move forward.” Requiring more than reporting violates the explicit intent of Congress. Such a requirement implies that the U visa requires as much prosecution as possible, which is neither what the law says nor what Congress intended. When it passed the law, Congress was well aware that vast numbers of investigations never lead to prosecution, for multiple reasons. Rather, it acknowledged that applicants may be helpful in a variety of ways and encouraged participation in the criminal system whether investigations lead to prosecutions or not, hence the investigation OR prosecution language.

An “ongoing helpfulness” requirement also establishes an explicit quid pro quo situation (prosecutors promise to sign the form in exchange for cooperation) which perpetrators and defense lawyers will use against victims and prosecutors. This is why Congress made the U visa a self-petition, not a petition controlled by law enforcement.

Congress has made clear that it views those investigating and prosecuting crimes as the experts on the qualifying crimes, not USCIS. It is not law enforcement’s job to explain or educate USCIS about its choices, and Congress did not require law enforcement to bear this burden. USCIS cannot look behind the certification when all that is required is the certification itself.

The language in the proposed paragraph indicates that USCIS intends look behind the certification and substitute its judgment for that of law enforcement. Stating, for instance, that law enforcement’s certification is not presumptive evidence is disrespectful both to law enforcement and to Congress, which said its goal was to help law enforcement help victims of crimes. USCIS should construe a certification as per se credible evidence of helpfulness.

Page 3, Part 6 - Family members implicated in criminal activity: The agency has imposed an *ultra vires* ineligibility bar.

USCIS instructions state that it will not grant an immigration benefit to a family member who has participated in the victimization of the principal applicant. We adopt the comments and position of the National Network to End Violence Against Immigrant Women. Like the ineligibility for “culpable” victims noted above, this is a completely *ultra vires* ineligibility bar. Furthermore, INA §101(a)(15)(U) does not include a good moral character requirement for victims of crimes.

Page 3, Part 7 – Certification: This requirement is *ultra vires* and is contrary to the purposes of the statute.

The U visa statute does not create a penalty system for those who are deemed to be “unreasonably refusing to cooperate.” This instruction goes far beyond the scope of the statute and is contrary to its remedial purposes.

The statute does not require that law enforcement make a later report on unreasonably refusing to cooperate, a requirement that is in no way related to the U visa process, only to the later process of adjustment of status. DHS cannot compel law enforcement to report actions to USCIS. In addition, this requirement creates additional burdens for law enforcement which would be forced to develop methods of tracking cooperation to meet the USCIS requirement. Imposing on an overstretched and overburdened law enforcement this unrealistic and unnecessary burden is contrary to the purposes of the statute, which sought to facilitate and ease the obstacles facing law enforcement when dealing with immigrant crime victims. This requirement will discourage, rather than encourage, them to work with immigrant crime victims, contrary to Congress’ intent. This section should be eliminated.

End of comments addressing Instructions to Form I-918, Supplement B, U Nonimmigrant Status Certification

5) Form I-918, Supplement B, U Nonimmigrant Status Certification

Page 2, Question 3 - Criminal Acts:

The statute does not require a current investigation and previous agency guidance in the context of U nonimmigrant interim relief acknowledges this fact.³ Please correct the question to reflect that the investigation or prosecution of the qualifying crime could also have occurred in past.

Page 2, Questions 5 and 6: The proposed form imposes an unduly burdensome requirement on law enforcement officers to provide written explanations which violate the any credible evidence standard.

Including open-ended questions violates the any credible evidence standard. These questions should be eliminated entirely or clearly marked “optional.” There is no statutory requirement that a certifier attach, for example, reports, which are generally considered primary documentation. Law enforcement certifiers may choose to do so, but requiring it adds extra burdens to those certifying and violates the special any credible evidence standard afforded to U nonimmigrant visa applicants, as we explained in our earlier comments.

Page 2, Part 4, Questions 1-5 – Helpfulness of the victim: Requiring written explanations violates the any credible evidence standard and is unduly burdensome. Several questions require information far beyond the statute’s requirements. To avoid violating the statute and Congressional intent they must be deleted.

Question 2: The statute does not require that law enforcement provide an explanation that the U visa applicant was helpful, only that they were, have been, or are likely to be helpful. Requiring further explanation implies that USCIS seeks to look behind the certification and substitute its judgment for the judgment of the law enforcement authority. This was not what the statute contemplated and it violates the any credible evidence standard. Moreover, requiring written explanations is unduly burdensome and may result in deprivation of benefits to persons with meritorious cases.

Recommendations for Question 2: DELETE entire question and REPLACE with

³ *Ibid.*

“Certifiers are encouraged to fill out the check-list below, attach a written statement describing the victim’s helpfulness or provide a self-explanatory report describing the applicant’s helpfulness or any combination of these options. Note that being helpful in an investigation OR prosecution suffices, and that no particular form of helpfulness is statutorily required.

The applicant was helpful, is being helpful or is likely to be helpful in the following ways. Select one or more of the following categories.

- Providing information for a police report; and/or
 - Identifying or attempting to identify the perpetrator(s); and/or
 - Providing information leading to other witnesses or sources of information; and/or
 - Providing information leading to further investigation; and/or
 - Otherwise cooperating with the investigation; and/or
 - All of the above; and/or
 - Other (explain)
-
- Providing information for prosecution review; and/or
 - Providing information leading to criminal charges; and/or
 - Providing information useful to prosecution; and/or
 - Providing information useful at trial; and/or
 - Testifying at trial; and/or
 - Otherwise cooperating with prosecution; and/or;
 - Other (explain)

Please provide any other information you think would be useful on a separate sheet of paper. We encourage you to include relevant reports and findings.”

Questions 3 & 4: These questions are ultra vires requirements.

These extra tests are not mandated by Congress and should be deleted. See also I-918, Supplement B instructions comments.

Recommendation: Delete Questions 3 & 4.

Page 3, Part 6 - Family members involved in criminal activity: The agency has imposed an ultra vires ineligibility bar.

The proposed form asks if any of the victim's family members are believed to have been involved in the criminal activity of which he or she is a victim. Again, we adopt the comments and position of the National Network to End Violence Against Immigrant Women. Like the ineligibility for “culpable” victims noted above, this is a completely *ultra vires* ineligibility bar. Furthermore, INA §101(a)(15)(U) does not include a good moral character requirement for victims of crimes. We suggest deleting Part 6 entirely.

Page 3, Part 7 – Certification: The limits on who can certify and the subsequent reporting requirement impose impermissible and onerous extra-legal requirements on law enforcement. See our comments to I-918, supplement B instructions.

Recommendations: **DELETE** “I am the person in the agency who has been designated by the head of the agency” and **REPLACE** with “I am an official in the agency with authority.” In addition, **DELETE** the last sentence on reporting unreasonable refusals.

End of comments addressing Form I-918, Supplement B, U Nonimmigrant Status Certification.

END