

SPECIAL DIRECTIVE 22-07

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN 
District Attorney

SUBJECT: IMMIGRATION POLICY (REVISED)

DATE: December 22, 2022

Over the past year and a half, colleagues in our Office and justice partners have engaged in collaborative discussions focused on evolving our Office’s immigration-related policies. Collectively, we recognized that keeping our communities safe requires public trust in the criminal justice system, including the willingness of victims and witnesses, regardless of immigration status, to report crime and assist in the prosecution of cases. Immigration consequences cannot be a barrier to justice for victims, nor impediments to testimony from witnesses. Immigrant communities must have confidence that our Office affirmatively weighs punitive aspects of immigration consequences when considering plea agreements. In light of these discussions, this Special Directive formally updates our Office’s Immigration Policy¹ (“Policy”).

Under this Policy, our Office will continue to take necessary measures to respect and uphold the rights of immigrant communities, actively pursue protections for immigrant victims of crime, and bring parity between the punishments meted out by the criminal legal system and those that will follow in the immigration system. Deputies have historically incorporated questions of equity and equality when considering the consequences of a particular plea—this Policy proactively elevates mitigating immigration consequences as a formal aspect of plea agreement policies in general. The overarching intent of this Policy is to attempt to avoid additional immigration impact on all parties, both victims and defendants.

I. Helping Immigrant Victims of Crime with Visas

A. Overview and Purpose—Promoting Community Safety

The Victims of Trafficking and Violence Protection Act of 2000 (VTVP) promotes community safety by minimizing adverse immigration consequences for immigrant victims. (See, VTVP, PL 106–386, October 28, 2000, 114 Stat 1464.) VTVP authorized U Visas for immigrant victims of serious crimes and T Visas for victims of human trafficking. These Visas allow foreign victims to remain in the United States to provide law enforcement officials with information helpful in investigating and prosecuting criminal offenders.

¹ This Policy supersedes Legal Policies Manual (LPM) sections 24.16, 17.01.03 and any other sections of the LPM which may conflict with this directive.

In addition to immigrant victim Visas, key witnesses and informants may be eligible for S Visas. S Visas provide permission to remain in the United States for the purpose of cooperating in active investigations or prosecutions.

[Appendix One provides more information about each Visa type.]

B. Application Intake

All applications received for a U, T, or S Visa should be directed to the U Visa Coordinator at uvisa@da.lacounty.gov. The U Visa Coordinator will ensure the application is tracked, directed to appropriate personnel for review, and prepared for a determination.

C. Recommendation of Head Deputy or Deputy-in-Charge

Upon receiving a U Visa application, the U Visa Coordinator shall upload the application to the eFolder² and email the U Visa file to the Head Deputy or Deputy-in-Charge of the responsible office or division for review. The Head Deputy or Deputy-in-Charge shall complete a confidential memorandum analyzing the appropriate response and the applicability of U Visa requirements. The confidential memorandum shall be completed and emailed to the U Visa Coordinator. If the U Visa application is for a victim or witness in an open case, the Head Deputy or Deputy-in-Charge shall ensure that defense counsel is notified of the application.

If the Head Deputy or Deputy-in-Charge does not believe a victim or witness was reasonably helpful, examples of the victim's unwillingness or refusal to cooperate must be provided in the memorandum. The Head Deputy or Deputy-in-Charge shall prepare a draft letter addressed to the applicant and their immigration counsel articulating the examples of unwillingness or refusal to cooperate for the Director's review. The draft letter shall be forwarded as an attachment to the confidential memorandum.

D. Determination by Director

Upon receipt, the U Visa Coordinator will make a preliminary determination on the application and provide the confidential memorandum and other documents to the Director in the chain of command for review and final determination.

If it is determined an applicant was not reasonably helpful, the Director shall finalize and send the letter addressed to the applicant and/or their counsel articulating examples of the unwillingness, refusal to cooperate, or other reason for denying the application for certification. If certification is deemed appropriate, the U Visa Coordinator will forward the certification paperwork to the applicant and/or their counsel and then upload the letter, the confidential memorandum and the certification paperwork to the eFolder. When certification is granted in an

² Only the initial application, memorandum and certification need be uploaded to the eFolder and not subsequent duplicates of the same. If additional versions are needed, they can be requested from the U Visa Coordinator or any of the Directors' secretaries as they have access to the U Visa database in Lotus Notes.

open or pending case, the U Visa Coordinator will also notify the Head Deputy or Deputy-in-Charge of the decision to certify.

E. Appeals to the District Attorney or Designee

The Director of Prosecution Support Operations has been appointed as the District Attorney's Designee for appeals of U Visa certifications. Any applicant may appeal a denial of certification to the Director of Prosecution Support Operations in writing with articulable reasons why the applicant believes the certification was inappropriately denied. The District Attorney's Designee shall also be available to consult with Directors upon request on any issues relating to certification.

F. Withdrawing Certification

U Visa certification may be withdrawn if an applicant refuses to provide information or assistance when reasonably requested. (§ 629.10, subd. (l).) Withdrawing U Visa certification requires approval from the Chief of Staff.

G. Guidelines for Reviewing U Visa Applications

1. Penal Code section 679.10

Penal Code section 679.10 sets forth the legal requirements for a U Visa certification. The following portion of the Policy integrates the requirements of section 679.10 and provides further guidance to those assigned to review U Visa applications.

2. No Statute of Limitations for U Visas

There is no statute of limitations for U Visa eligibility. (See, § 629.10, subd. (k)(2).) If the investigation for the qualifying crime was submitted to our Office for evaluation at any point in time, the Office shall review a certification request, regardless of whether the case was declined or filed, or the case is currently pending or has been closed.

U Visa certifications are valid for six months. The Office shall re-issue certifications upon request if the certification expires.

3. Certification Timelines

By express statutory provision, U Visa certifications must be issued no later than 30 days after a request is made or seven days if the person is in removal proceedings. (§ 629.10, subd. (j).) All persons participating in the review and certification process shall be informed of the certification deadline for the specific U Visa application when assigned for review or certification.

4. Qualifying Persons - Victims Defined³

U Visa certifications may be provided to Direct Victims, Indirect Victims, and Bystander/Witness Victims.

- a) Direct Victim: any person who has suffered direct harm or who is directly and proximately harmed as a result of the criminal activity.
- b) Indirect Victim: qualifying family members of a Direct Victim if the Direct Victim is incompetent, incapacitated or deceased (murder or manslaughter victim), including, (1) spouses, (2) unmarried children under the age of 21, (3) parents, if the victim was under the age of 21, and (4) siblings under the age of 18, if the victim was under 21 years of age. Indirect Victims must cooperate in the investigation or prosecution—such as a parent encouraging an underage child to provide testimony or a spouse providing a victim impact statement at sentencing—but are not required to possess information about the crime itself.
- c) Bystander/Witness Victim: any individual who was not the direct target of a crime, but who nevertheless suffered “unusually direct injury as a result of the qualifying crime.” Certifying agencies may provide any information they deem relevant regarding injuries or abuse on the Form I-918B. However, USCIS (not the certifying agency) makes the determination as to whether the victim has met the “substantial physical or mental abuse” standard on a case-by-case basis during its adjudication of the U Visa petition.

5. Qualifying Crimes or Criminal Activity

The Office shall issue certification to victims of qualifying crimes where crimes are expressly enumerated below, or any similar criminal activity, including the attempt, conspiracy, or solicitation to commit any of the following:

Rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, stalking, or fraud in foreign labor contracting.

(§ 629.10, subds. (c) & (d).)

³ These definitions are set forth in the United States Department of Homeland Security, U Visa Law Enforcement Resource Guide for Federal, State, Local Tribal and Territorial Law Enforcement, Prosecutors and Judges and other Government Agencies, at page 7. This guide is available online at: https://www.uscis.gov/sites/default/files/document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf.

6. Substantial Harm Showing Not Required to Issue Certification

U Visa applicants must show substantial physical or mental abuse to U.S. Citizenship and Immigration Services as a part of the U Visa petition process, but that showing is not a requirement to issue a U Visa certification.

Under this Policy, failure to show substantial harm shall not be grounds for denial of U Visa certification. The certification shall note the harm or injury the applicant sustained, if known. If harm or injury is not noted in any records related to the qualifying criminal activity, but the applicant otherwise qualifies for certification, the U Visa certification shall be issued.

7. Description of Helpfulness

Reviewers shall prepare a description of the applicant's helpfulness to law enforcement and prosecutors. Under this Policy, victims shall not be required to provide evidence of helpfulness as part of the initial request. The certification shall document all helpfulness on the part of the applicant, if known.

Notably, victims who were threatened with further acts of violence, or who are able to show evidence of other compelling circumstances—such as homelessness, illness, etc.—that prevented cooperation may be able to prove that their decision to stop providing assistance—or inability to—was not unreasonable and, therefore, remain eligible for a U Visa certification. These details shall be provided.

U Visa applicants must show helpfulness to law enforcement to U.S. Citizenship and Immigration Services as a part of the U Visa petition process, but under subdivision (h) of section 629.10, they are presumed to have been helpful for purposes of issuing U Visa certifications. ((§ 679.10, subd. (h).) If the applicant's helpfulness is not noted in any records related to the qualifying criminal activity, but the applicant otherwise qualifies for certification, the U Visa certification shall be issued.

8. Factors Not to be Considered

The following factors shall not be considered when reviewing a U Visa application: the age of the crime or the victim's criminal, gang, or immigration history.

H. T Visas

In determining if a T Visa certification is to be issued, deputies must follow the same guidelines listed above. The Office will strictly comply with all aspects of Penal Code section 679.11, including the presumption that a trafficking victim is cooperative, has been cooperative, or is likely to be cooperative in the investigation or prosecution of human trafficking, at the time of reviewing a T Visa certification request.

II. Charging

Using the procedures set forth in Legal Policies Manual 6.02 for presenting mitigating evidence, or via written correspondence with supporting documentation, any person who is under investigation by a law enforcement agency may directly or through their counsel present information concerning adverse immigration consequences to our Office prior to a filing decision. Where an adverse immigration consequence can reasonably be determined from the information provided, the Head Deputy or Deputy-in-Charge of the division or office responsible for charge evaluation shall oversee the charge evaluation process and ultimately approve the charging decision in the case. All charging determinations shall be undertaken with the goal of avoiding or mitigating the adverse immigration consequences of a decision when known, possible and time permitting. Under these circumstances and when, consistent with public safety and alternatives to filing charges exist, those alternatives shall be pursued.

III. Diversion

Expanding access to pretrial diversion programs can help mitigate against deportation and other immigration consequences in addition to opening critical pathways for meaningful treatment that addresses the root causes of criminal conduct.⁴ For immigrants, post-plea diversion programs that require an admission of guilt will lead to a “conviction” for immigration purposes, even after the charge is subsequently dismissed under criminal law. Even pre-plea diversion programs that require an admission of guilt or a stipulation of criminal conduct will be considered a “conviction” for immigration purposes.

Pre-arrest, pre-charge, and pre-plea diversion programs allow noncitizen defendants access to important treatment services, which may be unavailable if they enter the justice system. By expanding the use of pre-plea diversion programs that do not require an admission of criminal conduct, we can avoid immigration consequences while advancing public safety interests.

IV. Plea Bargaining

In accordance with the requirements of California Penal Code section 1016.3, subdivision (b), it is in the interests of justice to endeavor to avoid or mitigate immigration consequences of criminal convictions whenever possible. The following is a list of examples of alternatives that should be considered:

- A. Devising an alternative plea agreement that is factually based and of a similar nature and consequence as the originally charged offense, but minimizes the defendant’s exposure to adverse immigration consequences when adverse immigration consequences can be reasonably verified);

⁴ In striving to mitigate adverse immigration consequences, diversionary offers remain subject to the exclusions set forth in Special Directive 20-07.

- B. Allowing for flexibility in sentencing including adjusting a sentence to preserve access to immigration relief, allowing defendants to waive credit for time served, and splitting sentences across counts to run consecutively;
- C. Allowing for flexibility in sentencing at the time of a probation violation to charge a new count rather than requiring a sentence on the violation;
- D. Allowing flexibility in sentencing to avoid enhancements that would turn an otherwise immigration neutral offense into an immigration damaging one;
- E. Permitting a stipulation that a factual basis exists rather than requiring the defendant to plead to specific conduct that could be damaging if cited as part of the immigration file; and
- F. Stipulating to a motion to vacate in post-conviction proceedings if it is determined that, had the consequences been raised affirmatively in the initial proceedings, a different resolution would have been reached pursuant to this policy.

Defense counsel may make a written request that any offer be reviewed by the Head Deputy or Deputy-in-Charge of the office, division or unit responsible for the case. The result of any such review shall be provided to defense counsel and can be appealed up the chain of command to the Bureau Director for the division, office or unit. (See, LPM 11.19.)

V. Post-Conviction Relief

Section 1473.7, subdivision (a)(1) states that an individual who is no longer in criminal custody may file a motion to vacate a conviction or sentence on the following ground:

The conviction or sentence is legally invalid due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.

In 2022, the language “immigration consequences of a conviction or sentence” replaced the prior limiting language of “immigration consequences of a plea of guilty or *nolo contendere*.” California Assembly Bill No. 1259 (2021-2022) clarified that Section 1473.7, subdivision (a)(1) does not apply exclusively to pleas of guilty or no contest. “Assembly Bill 1259 makes clear defendants whose convictions derive from a trial are eligible for relief under section 1473.7.” *People v. Singh*, 81 Cal. App. 5th 147, 150 (2022). “The language ‘conviction or sentence’ has no qualifiers, so the plain language indicates an intent to apply section 1473.7 to all defendants whose ‘conviction or sentence’ is legally invalid, regardless of the source of the conviction.” *Id.* at p. 152.

All Section 1473.7, subdivision (a)(1) motions shall be forwarded to the Head Deputy or Deputy-in-Charge of the responsible office, unit or division for review and determination of the Office's position.

In considering defense motions under section 1473.7, subdivision (a)(1), Head Deputies and Deputies-in-Charge shall adhere to the following guidelines:

- A. In cases where it is clear in the moving papers that the defendant was unable to “meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences” of their plea, the prosecutor should respond swiftly and concede the motion.

- B. There shall a be a presumption of non-opposition on the following class of cases:
 - 1. All marijuana cases that have been dismissed as part of the mass marijuana record clearance;
 - 2. Sentence modification motions to bring a sentence down from 365 to 364 days;
 - 3. “Post-plea” deferred entry of judgment cases, where the defendant successfully completed the program;
 - 4. Prop 36 cases where the defendant successfully completed the program; or
 - 5. Where the individual has served in the military and has been honorably discharged.

In consideration of all post-conviction motions to vacate due to immigration consequences, deputies shall consider the following:

- A. Stipulating to a motion to vacate in post-conviction proceedings if it is determined that, had the consequences been raised affirmatively in the initial proceedings, a different resolution would have been reached pursuant to this policy; or

- B. Factors in mitigation, including but not limited to, the age of the conviction, whether the individual was a juvenile when convicted, the facts of the specific case, the severity of the underlying crime, family ties in the locality, work history, and contributions to the community.

Defense counsel may make a written request that a Bureau Director review any failure to concede or stipulate as well as any decision to object when inconsistent with this directive.

VI. Sharing Information with Federal Immigration Authorities

Consistent with state and local laws, all personnel are prohibited from sharing information, including an individual's immigration status, or assisting federal immigration authorities in any manner with the investigation or enforcement of any federal civil immigration law. (See California Senate Bill 54; Government Code section 7284 through 7284.10.)

dt/hb

Appendix One - Visa Types

U Visas

U Visas provide relief from deportation and allow foreign victims to acquire temporary non-immigrant legal status. They can provide an eventual path to securing long-term lawful permanent resident status if law enforcement certifies that the victim would be of assistance in an investigation or prosecution. Applicants must demonstrate that they: (1) have suffered substantial physical or mental abuse as a result of being the victim of a qualifying criminal activity; (2) possess information concerning the qualifying criminal activity; (3) have been helpful, are being helpful, or are likely to be helpful in the investigation or prosecution of the criminal act; and (4) are “admissible” or eligible for a waiver of inadmissibility. (See 8 U.S.C. section 1101(a)(15)(U)(i); 8 U.S.C. section 1182(d)(14).)

T Visas

A victim of a severe form of human trafficking may also be eligible for a T Visa which provides relief similar to that accorded by a U Visa. To qualify for a T Visa, the victim must: (1) be in the United States or at a port of entry because of trafficking; (2) show they would suffer “extreme hardship involving unusual and severe harm” if removed from the United States; and (3) have complied with any reasonable request for assistance from law enforcement in the investigation or prosecution of human trafficking (or is a minor, or is unable to cooperate due to physical or psychological trauma). (8 U.S.C. § 1101(a)(15)(T).)

S Visas

Key witnesses and informants may be eligible for S Visas which provide permission to remain in the United States for the purposes of cooperating in an active investigation or prosecution. To qualify for an S Visa, the informant or key witness must: (1) possess critical reliable information concerning a criminal organization or enterprise; (2) be willing to supply, or have supplied, such information to a federal or state Law Enforcement Agency and (3) be essential to the success of an authorized criminal investigation or successful prosecution of an individual involved in the criminal organization or enterprise. (8 C.F.R. § 214.2(t).) A federal or state Law Enforcement Agency must affirmatively apply for an S Visa, in contrast with the T or U Visas.