


SPECIAL DIRECTIVE 16-05

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: JOHN K. SPILLANE 
Chief Deputy District Attorney

SUBJECT: U VISA CERTIFICATION

DATE: MARCH 10, 2016

This Special Directive supersedes Special Directive 10-08 and sets forth the revised policy and protocol of the Los Angeles District Attorney (LADA) with respect to “U nonimmigrant visa” certification requests.

I. U Nonimmigrant Status Certification for Victims of Specified Violent Crimes

In 2000, the United States Congress passed the Battered Immigrant Women Protection Act (BIWPA) which created a new “U nonimmigrant visa” (U visa) category for alien victims of certain crimes, including domestic violence, sexual assault, and specified crimes of violence. The act applies to anyone who is either the direct or indirect victim of a specified crime. This act contains provisions which allow certain alien crime victims to apply for visas to remain in the United States for a period of up to four years. A recipient of a U visa may apply for permanent resident status after three years. In order to obtain a U visa, the alien must submit an application to the United States Customs and Immigration Service (USCIS) that includes a certification from a law enforcement agency that the applicant has been helpful, is being helpful or is likely to be helpful (victim helpfulness) in the investigation and/or prosecution of a qualifying crime. The certification form itself is entitled “Form I-918 Supplement B, U Nonimmigrant Status Certification.”¹

On October 2, 2015, Governor Edmund G. Brown, Jr. signed Senate Bill 674 (SB 674) which imposes additional requirements on law enforcement agencies responding to U visa certification requests that are not included in the BIWPA.² First, the bill requires a certifying official from a law enforcement agency to certify victim helpfulness upon request when the requester was the victim of a qualifying crime and has been helpful to the investigation or prosecution of that crime.³ Second, the bill establishes a rebuttable presumption that a victim has been helpful to the

¹ The same year the United States Congress also passed the Victims of Trafficking and Violence Protection Act of 2000 which establishes a “T nonimmigrant visa classification” (T visa) for victims of human trafficking. In order to apply for a T visa, an applicant must submit a certification to USCIS from a law enforcement agency entitled “Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons.” Most criminal prosecutions for this type of crime are handled federally. In the event that such a case is handled by our office, the procedure for certification is the same as a U visa certification with the exception that the director shall consult with the head deputy of the Organized Crime Division prior to issuing or denying a T visa certification.

² The bill is codified in section 679.10 of the Penal Code and went into effect on January 1, 2016.

³ Under the BIWPA, certifying officials have discretion whether to sign the I-918, Supplement B form.

detection, investigation or prosecution of a qualifying crime “if the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement.” Third, the bill requires the certifying entity to process a certification request within 90 days of the request or within 14 days of the request if the applicant is in removal proceedings.⁴

A. Law Enforcement Certification Required

A U visa application must contain a certification from law enforcement (which includes a prosecutorial agency) that the victim has been helpful in the investigation and/or prosecution of the crime and has not refused or failed to provide information or assistance that has been reasonably requested. In order for our office to grant a certification request, the victim must have been helpful to the prosecution of the case.

SB 674 creates a rebuttable presumption that a victim is helpful to the prosecution “if the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement.”⁵ In order for the presumption to apply, LADA personnel must have made a request for information or assistance from the victim and the victim must have cooperated. If no such request has been made by LADA personnel, there is no foundation for the presumption to arise. In the absence of a request by LADA personnel, there may also be instances when a victim cooperated in the prosecution of a case by offering information or other assistance to LADA that was actually helpful in the prosecution of the charges. In such instances, the requirement of helpfulness is met.

B. Qualifying Crimes

Qualifying criminal activity for U visa certification includes a violation of state law which constitutes one of the following crimes: domestic violence; sexual assault; rape; torture; female genital mutilation; kidnapping; false imprisonment; extortion; human trafficking; prostitution; felonious assault; manslaughter; murder; witness tampering; obstruction of justice; perjury; or the attempt, conspiracy or solicitation to commit any of the above-mentioned crimes.

C. Qualifying Victims

Victims must possess information about the qualifying crime and be helpful to the prosecution. If the victim was under the age of 16 when the crime occurred or was incapacitated and unable to provide the required assistance to law enforcement, a parent, guardian or “next friend” of the victim may provide the required assistance.

An “indirect victim” may qualify where the actual victim of a crime is deceased as a result of the qualifying crime, incompetent or incapacitated, or under the age of 18 and where there is “proximate harm” to the indirect victim as a result of the crime. The indirect victim must have information about the crime and must be helpful to law enforcement in the investigation and/or prosecution of the qualifying crime. Indirect victims include the alien spouse, unmarried children under 21 years of age and, if the victim is or was under 21 years of age, parents and unmarried siblings under 18 years old.

⁴ BIWPA does not require a certification within a specified period of time. Previously, it was the policy of LADA to only grant requests for certification upon the conclusion of a criminal case.

⁵ Evidence Code section 600(a) provides that “[a] presumption is an assumption of fact that the law requires to be made from another fact or group of facts.... A presumption is not evidence.”

D. Evidence to Be Considered in Evaluating Victim Helpfulness

Evidence to be considered in determining whether the victim has been, is being or is likely to be helpful to law enforcement includes the recollection of involved deputy district attorneys and victim witness advocates, police reports, witness statements, transcripts, court documents, attorney notes in the District Attorney file, and the Disposition Report. Applicants for U visa certifications should include documentary proof of their cooperation as part of the request for certification.

II. Los Angeles County District Attorney Policy Regarding U Visa Certification

In order to promote uniformity in the processing of U visa certification requests presented to the LADA, the revised policy is as follows:

A. Designated Official

The head of a certifying agency or a designee in a supervisory role is authorized to issue such certification. Bureau directors are designated by the District Attorney as those authorized to issue U visa certifications on behalf of the District Attorney for cases prosecuted within their respective bureaus.

B. Foundational Requirements

A certification request will only be considered with regard to cases that have been filed by the LADA. Certification requests for cases that the LADA has declined to prosecute shall be returned to the victim or requesting party with the instruction that the certification be submitted to the law enforcement agency that investigated the alleged crime. An exception will be made when the victim has been helpful by participating in a pre-filing interview with a deputy district attorney but the case is not filed for reasons other than victim credibility or refusal to prosecute.

C. Receipt of U Visa Request by a Deputy District Attorney

The LADA will only consider a request for a U visa certification that is received from a victim or his or her representative. The LADA will not accept requests that are forwarded from other law enforcement agencies as they are also certifying entities under BIWPA and SB 674.

Upon receipt of a request for a U visa certification, the deputy district attorney shall notify his or her head deputy or deputy-in-charge (DIC) and immediately forward the original request to his or her bureau director. Within the time prescribed below, a deputy district attorney who is familiar with the case shall prepare a memorandum to the director, through the head deputy or DIC. The memorandum shall include the following information, if available:

- 1) The name, date of birth, AKAs and alternate dates of birth of the victim as listed in the police reports, the LADA file, PIMS and Bureau of Victim Services (BVS) records;
- 2) A brief summary of the facts, including the victim's role and any injuries sustained by the victim;
- 3) Whether any requests for information or assistance from the victim have been made by the LADA or at the direction of the LADA;
- 4) Facts supporting the victim's helpfulness, or lack thereof, to the prosecution;
- 5) A statement from BVS as to whether an advocate was assigned to the victim and whether he or she possesses any additional information regarding the victim's helpfulness;
- 6) The victim's criminal history and/or gang membership;

- 7) The original charges filed;
- 8) The charges upon which the defendant was ultimately convicted;
- 9) The stage of the proceeding during which the conviction occurred; and
- 10) The sentence imposed.

The LADA file should be obtained and examined during the process of creating the memorandum to the director. BVS should also be contacted to determine whether the victim was assigned an advocate as the advocate may be able to provide additional information regarding the victim's helpfulness.

There may be requests for U visa certification where there is insufficient evidence available to determine whether a victim was helpful in a prosecution or to give rise to the rebuttable presumption. As the certification of helpfulness is made under penalty of perjury, requests without sufficient evidence of helpfulness will be denied. In these cases, the request for certification shall be returned to the victim or requesting party with the instruction that the certification be submitted to the law enforcement agency that investigated the criminal offense.

D. Receipt of U Visa Request by the Director

U visa certification requests are routinely sent to the director by the victim or the victim's legal representative. When a U visa request is initially received by the director, the director will forward an inquiry to the head deputy or DIC of the office where the prosecution took place. The head deputy or DIC shall cause the appropriate deputy district attorney to obtain the LADA file and/or other necessary documentation and prepare a memorandum to the director through channels, as set forth above. Directors are required to maintain a database of all U visa requests which includes the date received, the name of the victim and defendant, the case number, whether certification was granted or denied and the date such action occurred. Pursuant to SB 674, the directors shall make an annual report to the Legislature of the number of victims that requested U visa certifications, the number of certifications that were signed, and the number of certifications that were denied.

E. Time Requirement

SB 674 requires that a request for certification be granted or denied within 90 days from the date the request was received. If the applicant is in removal proceedings, SB 674 requires that the request be granted or denied within 14 days from the date the request was received. The memorandum described above shall be prepared and provided to the director within 60 days from the receipt of the request for certification or within 10 days from the receipt of the request for certification if the requestor is in removal proceedings. It is the obligation of the applicant to provide documentation that he or she is in removal proceedings.

Because of this new requirement, a certification request may be granted prior to the conclusion of the criminal case. A copy of the memorandum prepared by the handling deputy shall be placed in the LADA file. If the victim subsequently refuses or fails to provide information and assistance, the handling deputy shall prepare an additional memorandum to the director, through channels, describing the details regarding the victim's failure to cooperate. The director shall notify USCIS of the victim's failure to cooperate.

F. Request for Updated Certification

Occasionally, after a request for certification has already been granted, the LADA will receive a request for an updated certification from an applicant who failed to submit his or her application to the USCIS in a timely manner or from recipients of U visas who are filing for permanent resident status. In these instances, a supplemental memorandum to the director, through the head deputy or DIC, shall be prepared by a deputy district attorney who is familiar with the case. The supplemental memorandum shall include the following information:

- 1) Whether any additional requests for information or assistance from the victim have been made by the LADA or at the direction of the LADA since the date of the original memorandum;
- 2) Any additional facts regarding the victim's helpfulness, or lack thereof, to the prosecution since the date of the original memorandum;
- 3) Any additional statements from BVS as to whether an advocate was assigned to the victim and whether he or she possesses any additional information regarding the victim's helpfulness;
- 4) Updated information regarding the victim's criminal history and/or gang membership; and
- 5) Any changes in the status of the criminal case since the date of the original memorandum.

G. Discovery Obligations

Brady v. Maryland mandates that potentially exculpatory evidence be provided to the defense. A request for U visa certification by a victim or the victim's representative during the pendency of the case is considered discoverable pursuant to our constitutional obligations and Penal Code section 1054.1(e). If a request for certification is made during the pendency of the case to the LADA or the handling law enforcement agency, this information must be disclosed to the defense. Any decision regarding the request for certification must also be disclosed. The handling deputy shall document the request for certification and all disclosures to the defense in the LADA case file. In an abundance of caution, if the victim requesting U visa certification in a current case was previously the victim of the same defendant in a prior case for which the victim also requested a U visa certification, it is recommended that such information be disclosed to the defense.⁶

Post-conviction certification requests do not need to be disclosed to the defense. In *United States v. Mills* (2009) 334 Fed.Appx. 946, a federal court affirmed the proposition that the prosecution's failure to disclose the post-trial issuance of a Special Public Benefit Parole Visa to an informant who testified at trial is not a *Brady* violation and would not require a new trial because the document did not exist prior to trial. The court also held that even if the post-trial issuance of the visa could be considered *Brady* evidence, its impeachment value in that case was not material to the outcome of the trial.

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⁶ Admissibility of such evidence may be the subject of a motion pursuant to Evidence Code section 402.