



# **Achieving a Consistent and Legally Sound U Visa Certification Process in New York Family Courts**

The Intersection of Immigration Status and New York Family Court  
A Follow-up to Modern Courts' 2015 Report<sup>1</sup>

**November, 2016**

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<http://moderncourts.org/files/2014/03/Modern-Courts-Statewide-Report-The-Intersection-of-Immigration-Status-and-the-New-York-Family-Courts.pdf>

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## TABLE OF CONTENTS

PAGE

Introduction

I. National Legal Landscape

II. Confusion Surrounding U Visa Certification in New York Family Courts

A. Confidential Memorandum Circulating in the New York Family Courts

B. Impact of Guidance on Judicial Decisions

1. Proceedings resolved on consent
2. Temporary orders of protection or other non-final actions
3. Lack of involvement in the underlying cases
4. Avoidance of immigration decisions

III. Family Court Judges Decline to Certify Without Legal Basis

A. Statutory Background

B. Certification is Proper in a Wide Variety of Circumstances

IV. Recommendations

A. Training for Judges and Court Personnel

B. Reference Guide for Judges

Conclusion

## INTRODUCTION<sup>2</sup>

Family court judges play a crucial role as certifying officials for victims of crime seeking U Nonimmigrant Status (“U Visa”)<sup>3</sup>, a role which New York has consistently recognized.<sup>4</sup> Congress created the U Visa, as part of the Victims of Trafficking and Violence Protection Act of 2000, to grant immigration status to victims of certain specified crimes, including domestic violence.<sup>5</sup> Family court is particularly important in the U Visa context because it has jurisdiction over family offense proceedings, a route often preferred over criminal prosecution by victims of abuse.<sup>6</sup> In these cases and others,<sup>7</sup> family court judges serve as a critical contact for victims: “A judge may be the first authorized certifying official to detect the existence of underlying criminal activities through testimony, pleadings, emergency orders, or motions during civil proceedings . . . and the only certifying official with whom the victim will encounter that is both language

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<sup>2</sup> The authors of this report include Denise Kronstadt, Esq., Deputy Executive Director and Director of Advocacy at the Fund for Modern Courts in New York, and Amelia T.R. Starr, Esq., partner at Davis Polk & Wardwell LLP, New York office, with the assistance of Davis Polk & Wardwell LLP summer law clerks, including Jana FitzGerald, Stephen Yanni, Emma P. Larson, and Claudia Carvajal Lopez. This report reflects the personal views of the authors affiliated with Davis Polk & Wardwell LLP, but does not reflect any opinion held by, endorsed, or otherwise supported by the firm.

<sup>3</sup> U Nonimmigrant status is commonly referred to as a “U Visa” in the literature and by practitioners. It should be noted that this is a misnomer, as it is not a visa. A visa can only be obtained from outside the U.S. However, in order to be consistent with prevailing terminology, the report will use the term “U Visa”.

<sup>4</sup> See N.Y. STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, *Immigration and Domestic Violence: A Short Guide for New York State Judges* 3 (Apr. 2009), available at <https://www.nycourts.gov/ip/womeninthecourts/pdfs/ImmigrationandDomesticViolence.pdf#page=5&zoom=auto,-157,148>; *infra* note 108 and accompanying text (quoting this resource).

<sup>5</sup> See U.S.C. § 1101 *et. seq.* Judges may certify the I-918 Supplement B certification form, a required application component for a U Visa. See 8 U.S.C. § 1184(p)(1) (2014); *infra* Parts I, III.A (providing further legal background).

<sup>6</sup> See *infra* note 64 and accompanying text (discussing temporary order of protection).

<sup>7</sup> Allegations of abuse may also surface for the first time in the context of family offense, custody, guardianship, and adoption matters and in proceedings seeking an order of protection.

accessible and able to provide assistance.”<sup>8</sup> The legal acumen of family court judges<sup>9</sup> renders them especially qualified to act as neutral evaluators of certification requests.

Issuing a U Visa certification when appropriate is consistent with the New York Family Court’s overriding mission to protect families and the best interests of children.<sup>10</sup> Indeed, the U Visa serves in part to “encourage immigrant victims to work with . . . courts.”<sup>11</sup> But flawed practices and uninformed court and judicial personnel are causing the New York Family Court to fail in its core mission by turning away otherwise qualified U Visa applicants.

The Fund for Modern Courts, a nonprofit organization, offers recommendations and proposes reforms in an effort to improve New York State courts. Last year, it issued a memorandum addressing the intersection of immigration status and the family court.<sup>12</sup> Modern Courts reported that the New York City Family Court was relying “on incorrect

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<sup>8</sup> Alan F. Pendleton, Anoka Cnty. Dist. Court, *Immigrant Crime Victims & U-Visa Certification* 3 (July 8, 2015), available at <https://blogpendleton.files.wordpress.com/2015/07/national-judicial-training-update-15-13-immigrant-crime-victims-u-visa-certification.pdf> (hereinafter Pendleton, Certification Guide) (internal quotation marks omitted). Given that “the certifying agency [in this instance, the judge] is the primary point of contact between the petitioner and the criminal justice system, the [judge] is in the best position to verify certain factual information.” 8 C.F.R. § 214.14(c)(2)(A).

<sup>9</sup> See Leslye E. Orloff, et al., NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT AT AM. UNIV. WASHINGTON COLL. OF LAW (NIWAP), *U Visa Certification Tool Kit for Federal, State and Local Judges, Commissioners, and Magistrates* 17 (last updated Feb. 3, 2014), available at <http://www.lsc.gov/sites/lsc.gov/files/LSC/pdfs/March%207,%202014%20-%203%20-%20%20NIWAP%20Appendix%20B%20-%20U%20Visa%20Toolkit.pdf> (hereinafter Orloff, U Visa Certification Tool Kit) (“Judges are in a unique position as neutral finders of fact to assess whether the criminal activity occurred and whether the victim has been helpful in the detection, investigation or prosecution of that activity.”).

<sup>10</sup> Though children may seek immigration relief through Special Immigrant Juvenile Status (SIJS), see Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.) (establishing SIJS), the U Visa is also an avenue by which child victims of abuse routinely seek immigration relief.

<sup>11</sup> DEP’T OF HOMELAND SEC., *Information for Law Enforcement Officials: Immigration Relief for Victims of Human Trafficking and Other Crimes*, available at [http://www.uscis.gov/sites/default/files/USCIS/Resources/Humanitarian%20Based%20Benefits%20and%20Resources/TU\\_QAforLawEnforcement.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Humanitarian%20Based%20Benefits%20and%20Resources/TU_QAforLawEnforcement.pdf) (hereinafter DHS, Information for Law Enforcement Officials).

An applicant must submit the following to DHS to complete the U Visa application: (1) petition for U Nonimmigrant Status (Form I-918); (2) certification (Supplement B); (3) inadmissibility waiver, if necessary; (4) “personal statement describing the criminal activity to which [the applicant was] a victim; and (5) “[e]vidence to establish each eligibility requirement.” *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-non-immigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last visited July 17, 2015).

<sup>12</sup> See THE FUND FOR MODERN COURTS, *The Intersection of Immigration Status and the New York Family Courts* (Feb. 2015) (hereinafter Fund for Modern Courts Report).

legal guidance” regarding the proper evidentiary bases for issuing a U Visa certification in connection with proceedings resolved on consent.<sup>13</sup> For several years, a confidential legal memorandum circulated among the judges of the New York City Family Court, which to the best of our knowledge asserted, incorrectly, that U Visa certification should not be granted based on evidence in a proceeding resolved on consent<sup>14</sup> and that family offense petitions do not constitute “investigations” under the statute.<sup>15</sup> Reliance upon these assertions has had harmful effects on victims seeking U Visa certifications in family court, and is symptomatic of a general lack of information and training for family court judges, court attorneys, and clerks on immigration issues, particularly regarding the standards to be applied when U Visa certification is sought.

Recently, New York has taken steps to address this confusion. In October of 2015, Chief Administrative Judge Lawrence Marks established an Advisory Council on Immigration Issues in Family Court (the “Advisory Council”) to develop new judicial rules, propose legislative reforms and generate training programs for Family Court judges and staff in managing proceedings involving immigration-related issues.<sup>16</sup> The Advisory Council is in the process of addressing many of the issues diagnosed by the 2015 Modern Courts memorandum.

Progress is also being made on the Executive side.<sup>17</sup> On January 13, 2016, in his sixth State of the State Address, New York Governor Cuomo outlined his 2016 agenda. In it, the Governor specified he will “direct the New York State Police and the Division of Human Rights to establish official protocols and begin receiving and processing U Visa certifications for claimants, victims, and witnesses.”<sup>18</sup> Additionally, he “will direct

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<sup>13</sup> *Id.* at 14-15.

<sup>14</sup> *Id.* at 15 n.79 (discussing confidential memorandum directing judges that proceedings resolved on consent cannot substantiate certification).

<sup>15</sup> Interview 13 (July 10, 2015).

<sup>16</sup> Media Advisory, *Members Named to New Advisory Council on Immigration Issues in Family Court*, N.Y. ST. UNIFIED CT. SYS. . (Oct. 5, 2015), available at <http://nylawyer.nylj.com/adgifs/decisions/15/100615members.pdf>.

<sup>17</sup> Consistent with the desire to provide better services and information to immigrants about their rights, New York City Mayor Bill de Blasio announced the creation of ActionNYC on December 14, 2015. ActionNYC is “the nation’s largest investment by a municipality to prepare for executive action and in response to the need for nationwide comprehensive immigration reform.” It creates community navigation hubs at immigrant services organizations and rotating legal clinics across all five boroughs.

Press Release, Office of the Mayor, Mayor Bill de Blasio Announces Launch of ActionNYC(December 14, 2015) (on file with author).

<sup>18</sup> N.Y. ST., 2016 STATE OF THE STATE, available at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2016\\_State\\_of\\_the\\_State\\_Book.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2016_State_of_the_State_Book.pdf)

the Office of Children and Family Services . . . to advise districts of their responsibility as the investigating entities, to certify U Visas, as provided for in law.”<sup>19</sup>

The New York City Police Department and the New York City Commission on Human Rights have implemented Governor Cuomo’s directives. The New York City Police Department promulgated a rule putting forth a procedure for processing U-Visa certifications.<sup>20</sup> The rule provides that the Department must respond within 45 days and that an applicant has 90 days to appeal a denial.<sup>21</sup> On February 9, 2016, the New York City Commission on Human Rights announced that it is accepting requests for U-Visa certifications, “making it the first and only anti-discrimination agency in a major U.S. city to provide the certification.”<sup>22</sup>

In keeping with the aims of the Advisory Council and the progressive tone set by the executive branch, Modern Courts hopes to provide guidance on U-Visa issues with an eye toward a consistent, predictable, and legally sound certification process with this memorandum.

Part I of this memorandum reviews the national landscape of U Visa certification. Part II identifies flawed practices relating to U Visa certification in the New York family courts. Part III provides the statutory and regulatory framework of the U Visa certification process and discusses the “helpfulness” determination involved in certification decisions. It explains that a variety of actions constitute “helpfulness” under the U Visa statute, contrary to the views expressed in many courts. Finally, Part IV offers practical recommendations to remedy the issues identified, including training and the creation of a desk guide for family court judges and court personnel.

## I. NATIONAL LEGAL LANDSCAPE

The Victims of Trafficking and Violence Protection Act of 2000 established the U Visa,<sup>23</sup> “intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes, while also protecting victims of crimes.”<sup>24</sup> This goal is satisfied by allowing victims of certain crimes the opportunity to seek relief through U Nonimmigrant Status

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<sup>19</sup> *Id.* at 235.

<sup>20</sup> Requesting Certifications for U Nonimmigrant Status, 38 Rules of the City of NY §22 (2016).

<sup>21</sup> *Id.* at §22-04.

<sup>22</sup> Press Release, Office of the Mayor, Mayor de Blasio Announces NYC Commission on Human Rights First Such Agency in Major U.S. City to Issue U and T Visa Certifications (Feb. 9, 2016) (on file with author).

<sup>23</sup> Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of the U.S. Code).

<sup>24</sup> *Victims of Criminal Activity: U Nonimmigrant Status*, *supra* note 10.

(“U Visa”).<sup>25</sup> U Visa certifications are submitted to United States Citizenship and Immigration Services (“USCIS”) of the Department of Homeland Security (“DHS”) as part of the U Visa application.<sup>26</sup> DHS makes the final determination whether to grant a U Visa.<sup>27</sup> Judges are authorized as certifying officials of the required I-918 Supplement B certification form (“Supplement B”), a necessary component of a U Visa application.<sup>28</sup> Without a certification, an applicant will not be granted U Visa relief.<sup>29</sup> Despite the statutory authority for certification, implementation of the process among officials and agencies has varied.

The U Visa process has been met with substantial opposition and inconsistency.<sup>30</sup> While this report focuses on New York,<sup>31</sup> current scholarship reveals nationwide problems. A national project on geographic differences in certification discovered a pervasive lack of uniformity.<sup>32</sup> It found that agencies are taking various approaches, including (1) refusing to sign certifications under any circumstance; (2) refusing to sign certifications for reasons that have no direct relationship to the statutory guidelines; and (3) consistently certifying that an individual was helpful.<sup>33</sup> These varying approaches to certification reflect a lack of uniformity and an overall misunderstanding of the statutory and legal requirements of the U Visa.

Plagued by many of these inconsistencies, California has attempted a legislative solution.<sup>34</sup> In October 2015, Governor Jerry Brown signed into law S.B. 674, an addition

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<sup>25</sup> *Id.* Victims of certain specified crimes may be eligible for relief. For a list of qualifying crimes, see *infra* note 77.

<sup>26</sup> See 8 U.S.C. § 1184(p) (2014) (setting forth application requirements).

<sup>27</sup> *Id.* § 1101(a)(15)(U)(i).

<sup>28</sup> 8 U.S.C. § 1184(p)(1); see *infra* Part III (providing further legal background).

<sup>29</sup> See 8 U.S.C. § 1184(p)(1) (“The petition filed by an alien under section 1101(a)(15)(U)(i) of this title *shall* contain a certification . . . .”) (emphasis added).

<sup>30</sup> Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 403 (2010) (addressing nationwide disparity and law enforcement opposition).

<sup>31</sup> We have spoken with sixteen individuals—academics, public interest attorneys, government employees and others—with experience in counties including New York, Queens, Bronx, Kings, Suffolk, Albany, Westchester, Orange, Rockland, Putnam, Dutchess, Sullivan, and Ulster.

<sup>32</sup> UNIV. OF N.C. SCH. OF LAW IMMIGRATION/HUMAN RIGHTS POLICY CLINIC & ASISTA, *The Political Geography of the U Visa: Eligibility as a Matter of Locale* 24 (June 2014), available at <http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf> (*hereinafter* Political Geography).

<sup>33</sup> Political Geography, *supra* note 31 at 2-4.

<sup>34</sup> Dan Levine & Kristina Cooke, *U.S. Visa Program for Crime Victims is Hit-or-Miss Prospect*, REUTERS (Oct. 21, 2014), available at <http://www.reuters.com/article/2014/10/21/us-usa-immigration-uvisa-specialreport-idUSKCN0IA1H420141021>; Kate Lithicum, *Safety for Immigrant Victims Put on Hold by U-visa Delay*, L.A. TIMES (Feb. 1, 2015), available at <http://www.latimes.com/local/california/la-me-u-visa-20150202-story.html>. See also Political

to the California Penal Code intended to remove jurisdictional discrepancies in U-visa certification.<sup>35</sup> The bill requires state agencies to certify upon request where a victim “has been helpful, is being helpful, or is likely to be helpful,”<sup>36</sup> and establishes a presumption that the victim fits those criteria if he or she “has not refused or failed to provide information and assistance reasonably requested by law enforcement.”<sup>37</sup> On October 28, 2015, Kamala Harris, the Attorney General of California, issued further guidance urging local law enforcement agencies to be “vigilant in identifying and supporting immigrant crime victims who may be eligible for U visas” and makes clear that there is no statute of limitations barring victims from applying for a U visa.<sup>38</sup>

The new California statute states that a “current investigation, filing of charges and a prosecution or conviction” is not necessary to meet the “helpfulness” requirement of a Form I-918 certification.<sup>39</sup> Additionally, a timeliness provision requires a determination of cooperation within 90 days; if deportation proceedings are in progress, the deadline is 14 days.<sup>40</sup> The bill and guidance may enable crime victims who were erroneously denied certification in the past to return to the law enforcement agency that denied them or approach another law enforcement agency for certification.<sup>41</sup>

As policymakers begin to address these issues, federal courts remain divided about judicial authority to certify. Federal courts generally agree that the decision to issue

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Geography, *supra* note 31, at 15. For example, in Kern county, only four of 160 requests for certification had been approved over a period of three years, while other jurisdictions approved thousands in that same time. See Kate Lithicum, *Kern County Sheriff a Defiant California Maverick on Immigration*, L.A. TIMES (Apr. 9, 2015), available at <http://www.latimes.com/local/great-reads/la-me-c1-kern-sheriff-20150410-story.html#page=1>. Another county, Riverside, had blanket policy against certifying in all of its agencies. See Political Geography, *supra* note 31, at 27.

<sup>35</sup> Patrick McGreevy, *Immigrant Crime Victims Get Help from California Governor*, L.A. TIMES (Oct. 9, 2015), available at <http://www.latimes.com/local/political/la-me-pc-immigrant-crime-victims-20151005-story.html>.

<sup>36</sup> See S.B. 674, 2015 Leg., Reg. Sess., § 679.10(e) (Cal. 2015) (approved by Governor Oct. 02, 2015), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB674](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB674).

<sup>37</sup> See *id.* § 679.10(f).

<sup>38</sup> ATTORNEY GENERAL KAMALA HARRIS, INFORMATION BULLETIN, NEW AND EXISTING STATE AND FEDERAL LAWS PROTECTING IMMIGRANT VICTIMS OF CRIME, DLE-2015-04 (Oct. 28, 2015), available at [https://oag.ca.gov/system/files/attachments/press\\_releases/dle-2015-04.pdf](https://oag.ca.gov/system/files/attachments/press_releases/dle-2015-04.pdf).

<sup>39</sup> See *id.* § 679.10(i).

<sup>40</sup> See *id.* § 679.10(h).

<sup>41</sup> IMMIGRANT LEGAL RESOURCE CENTER SB 674: *Immigrant Victims of Crime Equity Act Fact Sheet* (Jan. 2016) available at [http://www.ilrc.org/files/documents/sb\\_674\\_fact\\_sheet.pdf](http://www.ilrc.org/files/documents/sb_674_fact_sheet.pdf).

a U Visa certification is discretionary.<sup>42</sup> However, they are currently split as to when a judge has the authority to issue U Visa certifications.<sup>43</sup>

Confusion and inconsistency extend to other certifying officials. In addition to judges, the statute permits certification by “Federal, State, or local law enforcement official[s].”<sup>44</sup> In New York State, law enforcement officials include district attorneys and police departments. Additionally, Administration for Children’s Services (“ACS”) and Child Protective Services (“CPS”) may issue certifications related to child abuse cases.<sup>45</sup>

The federal cap on U Visas introduces temporal pressure for applicants who already face substantial hurdles in securing certification. Each year, USCIS approves a maximum of 10,000 petitions for U Visas. For the past seven years, it has granted the statutory maximum of petitions well in advance of its end-of-year deadline.<sup>46</sup> If eligible individuals are not granted a U Visa because the federal cap has been exceeded, they are placed on a waitlist to be considered once the cap is opened the following fiscal year.<sup>47</sup>

After approving U Visas for the fiscal year 2015, USCIS indicated that more than 117,579 victims had received U Visas since 2009.<sup>48</sup> However, demand for U Visas far outweighs availability; in 2015, more than 52,000 individuals submitted petitions.<sup>49</sup>

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<sup>42</sup> See, e.g., *United States v. Biao*, No. 98cr2812–BTM, 2011 WL 607087, at \*1-2 (S.D. Cal. 2010) (declining to issue certification); *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 887 (N.D. Cal. 2008) (holding that denial of law enforcement certification is not subject to judicial review); see also *Ordonez Orosco v. Napolitano*, 598 F.3d 222, 227 (5th Cir. 2010) (articulating discretionary nature of certification); *Bejarano v. Homeland Sec. Dep’t*, 300 Fed. App’x 651, 652 (11th Cir. 2008) (same).

<sup>43</sup> Compare, e.g., *Villegas v. Nashville*, 907 F. Supp. 2d 907, 912-14 (M.D. Tenn. 2012) (issuing certification in context of civil rights suit), with *In re Certification Form for U Visa for Movant Nunez-Ramirez*, No. M–13–746, 2013 WL 6273961, at \*4-5 (S.D. Tex. Dec. 3, 2013) (explaining that regulations suggest federal judge’s involvement should be limited to situations in which judge is directly involved in sentencing or conviction) and *Agaton v. Hospitality & Catering Servs., Inc.*, No. 11-1716, 2013 WL 1282454, at \*4 (W.D. La. Mar. 28, 2013) (finding that judges in civil cases have no role in investigation or prosecution of criminal offenses and thus lack authority to issue certifications).

<sup>44</sup> 8 U.S.C. § 1184(p)(1) (outlining certification procedures). Other federal officials who may not be obvious upon a first reading of the statute, may also certify, including the Department of Labor. Interview 3 (June 22, 2015).

<sup>45</sup> Interview 3 (June 22, 2015).

<sup>46</sup> Press Release, *USCIS Approves 10,000 U Visas for 7th Straight Fiscal Year*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Dec. 29, 2015), available at <https://www.uscis.gov/news/uscis-approves-10000-u-visas-7th-straight-fiscal-year>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Number of I-918 Petitions for U Nonimmigrant Status (Victims of Certain Criminal Activities and Family Members) by Fiscal Year, Quarter, and Case Status 2009-2016*, U.S. CITIZENSHIP & IMMIGRATION SERVS (May 25, 2016), available at

Given the existing backlog of applicants, USCIS has not been able to evaluate applications submitted after 2013.<sup>50</sup> As of September 2015, there is a backlog of nearly 64,000 applications pending.<sup>51</sup> These limitations resonate in New York City: it may take six to seven years<sup>52</sup> from the submission of an application until a U Visa is awarded to the applicant.

## II. CONFUSION SURROUNDING U VISA CERTIFICATION IN NEW YORK FAMILY COURTS

New York Family Court judges inconsistently and sometimes incorrectly manage the certifications of helpfulness required for U Visa relief. In a 2014 report, Modern Courts considered, among other issues, certifications of helpfulness in connection with the detection, investigation, and prosecution of offenses required for U Visa relief.<sup>53</sup> It found that judicial decision-making based on a pervasive lack of information and incorrect guidance from a confidential memorandum circulating in the courts had the “potential to infect the U Visa certification process with uncertainty and inconsistent administration of justice.”<sup>54</sup>

Following a review of the literature, statutory guidelines, and case law concerning U Visas, we spoke with New York-based practitioners about their experiences with certification in the family courts. Our research reflects discussions with academics, public interest attorneys, government employees, and others. Each individual has familiarity with the family courts, and many have sought certification on behalf of their clients.

This Part follows up on previous research, confirming the confusion among New York family court judges surrounding U Visa certification and recounting challenges faced by practitioners.

### A. Confidential Memorandum Circulating in the New York Family Courts

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[https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u\\_visastatistics\\_fy2016\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2016_qtr2.pdf).

<sup>50</sup> *Id.*

<sup>51</sup> Liz Robbins, *Immigrant Crime Victims Seeking Special Visas Find a Tough Path*, N.Y. TIMES, (Mar. 8, 2016), available at [http://www.nytimes.com/2016/03/09/nyregion/immigrant-crime-victims-seeking-special-visas-find-a-tough-path.html?\\_r=0](http://www.nytimes.com/2016/03/09/nyregion/immigrant-crime-victims-seeking-special-visas-find-a-tough-path.html?_r=0).

<sup>52</sup> *Id.*

<sup>53</sup> See generally Fund for Modern Courts Report, *supra* note 11.

<sup>54</sup> *Id.* at 15 (highlighting issues in New York City family courts with respect to U Visa certification).

As reported by practitioners and confirmed by Modern Courts, a confidential memorandum was for several years circulating among New York City Family Court judges.<sup>55</sup> The memorandum was never distributed to the public, but it is believed to contain guidance asserting that certifications should not be granted based on evidence heard in a family court proceeding if that proceeding has been resolved on consent<sup>56</sup>, and that if judges have not made any formal findings themselves in relation to the act qualifying the individual for U Visa certification, they may not certify the individual's helpfulness.

The effect of the memorandum, as articulated by practitioners appearing before the courts, was to constrain the discretion of judges and promote a narrow interpretation of the relevant statutory language.<sup>57</sup> By explaining that judges may not issue certifications if they have not made formal factual findings, the guidance of the memorandum limited the availability of U Visa relief, not only in New York City but across the state.<sup>58</sup> The incorrect legal guidance promoted by the memorandum reinforced the widespread confusion regarding judicial authority to certify.

## ***B. New York Family Courts Struggle to Understand U Visa Certification Standards***

The challenges faced by New York family court judges in understanding and applying the U Visa's legal and statutory framework are much broader and deeper than simply one memorandum. This section identifies a variety of the inaccurate decisions that have been rendered by judges struggling to apply the law when considering U Visa certifications. For example, practitioners reported the following circumstances in which misunderstanding of the law resulted in judicial refusal to certify: (1) in a proceeding resolved on consent; (2) where a temporary order of protection, or another action that is not final, exists; (3) if the judge has not been involved in the underlying proceeding; and (4) avoidance of immigration-related decisions.

### **1. Proceedings resolved on consent**

According to practitioners, some judges have ruled that certifications may not be issued on the basis of underlying proceedings if such proceeding was resolved on consent.<sup>59</sup> In an action resolved on consent, the court does not make formal findings of

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<sup>55</sup> *Id.* at 14-15 (explaining the memorandum).

<sup>56</sup> *Id.*; *see also* Fund for Modern Courts Report, *supra* note 11, at 15 n.79 (discussing confidential memorandum directing judges that proceedings resolved on consent cannot substantiate certification).

<sup>57</sup> Interview 5 (June 23, 2015).

<sup>58</sup> In the past, judges across the five boroughs and the state have explicitly referred to the memo when making certification decisions. *See* Interview 10 (New York City); Interview 11 (New York City); Interview 5 (Albany); Interview 1 (explaining that memorandum has circulated in Westchester).

<sup>59</sup> Interview 8 (June 26, 2015).

fact, as parties have agreed to resolution without a fact-intensive inquiry.<sup>60</sup> Judges interpret the absence of formal findings of fact as barring their ability to issue U Visa certifications.

Judges may view the issue of consent as final, and precluding them from any authority to involve themselves in certification.<sup>61</sup> For example, in a proceeding in which an individual had an order of protection granted as part of a settlement, a judge said that the court was not involved in any finding of fact, and therefore declined to certify.<sup>62</sup>

## 2. Temporary orders of protection or other non-final actions

Individuals seeking U Visa relief may receive temporary orders of protection in connection with underlying criminal activity, such as domestic violence. Consistent with the Family Court Act, judges grant such temporary orders to protect individuals who have been hurt or threatened.<sup>63</sup> Judges may believe that they cannot issue a U Visa certification if only a temporary order of protection exists.<sup>64</sup> For example, in one instance, a judge signed a certification of helpfulness, but indicated a lack of knowledge regarding the individual's cooperation, in part because only a temporary order of protection had been issued.<sup>65</sup>

In response to the refusals to certify,<sup>66</sup> practitioners have reported that, in cases involving temporary orders of protection and lacking formal fact findings, they have submitted memoranda articulating the legal bases upon which judges may certify.<sup>67</sup> But

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<sup>60</sup> Interview 13 (explaining a scenario in which a judge declined to certify in connection with an order on consent but later reversed the decision).

<sup>61</sup> Interview 8.

<sup>62</sup> Interview 13.

<sup>63</sup> See N.Y. FAM. CT. ACT § 828 (McKinney 2014) (explaining that temporary order of protection is not a finding of wrongdoing).

<sup>64</sup> Interview 2 (June 18, 2015).

<sup>65</sup> Interview 3.

<sup>66</sup> Interview 5. In this scenario, the judge initially refused to sign the related certification because there was no formal adjudication. The attorney submitted a memorandum, explaining that “investigation or prosecution” as articulated in the federal statute should be broadly interpreted. The judge ultimately granted a certification of helpfulness. *Id.*

<sup>67</sup> *Id.*; see also Interview 4 (June 23, 2015) (explaining that, in some cases, judges in Westchester county have responded positively to receiving these memos with the certification request).

those challenges have had only limited success, with many courts continuing to refuse certifications in the absence of a final order or adjudication.<sup>68</sup>

### 3. Lack of involvement in the underlying cases

Some judges have indicated that they will not certify that a victim is helpful if the court had no involvement in the investigation or prosecution of the underlying criminal activity.<sup>69</sup> Without direct involvement in the proceeding, judges believe that they lack knowledge of the individual's cooperation, and are thus unable to certify whether that individual has been, or will be, helpful.<sup>70</sup> Court attorneys have indicated that, absent guidance from the administrative judge whether individual judges must be directly involved in the proceeding to certify, the policy would not change.<sup>71</sup>

### 4. Avoidance of immigration decisions

There is also resistance to the U Visa certification process based on the court's misunderstanding of the scope of its role and a mistaken belief that the family court is being asked to make a decision about an individual's immigration status.<sup>72</sup> This confusion may stem from the fact that judges are unaware of the implications of signing a certification.<sup>73</sup> There is misinformation that signing a certification is equivalent to approving an individual for legal immigration status.<sup>74</sup> It appears that some courts are equating the process of seeking a U Visa certification with the larger political debate about immigration nationwide.<sup>75</sup>

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<sup>68</sup> Interview 9 (July 1, 2015) (noting that court staff have indicated that certification will not be granted without final order or adjudication).

<sup>69</sup> Interview 2 (explaining that a judge signed a certification but refused to check off the box indicating that an individual had been helpful, because the court had not been involved in the underlying criminal activity); *see also* Interview 8; Interview 10.

<sup>70</sup> Interview 3 (explaining a situation in which the judge signed a certification, but indicated a lack of knowledge of cooperation, resulting in a defective certification).

<sup>71</sup> Interview 2.

<sup>72</sup> Interview 4; Interview 7 (June 25, 2015).

<sup>73</sup> Interview 4.

<sup>74</sup> Tahja L. Jensen, *U Visa "Certification": Overcoming the Local Hurdle in Response to A Federal Statute*, 45 IDAHO L. REV. 691, 704 (2009). In addition to judges, local law enforcement may be resisting certification in an effort to avoid involvement in immigration issues. *Id.*

<sup>75</sup> *See* Valeria Fernandez, *Immigrants in Arizona Face Resistance to Getting Visas After Being Victims of Crimes*, PUB. RADIO INT'L (Oct. 27, 2002), available at <http://www.pri.org/stories/politics-society/government/immigrants-in-arizona-face-resistance-to-getting-visas-after-being-victimsof-crimes-11902.html> (explaining that Arizona officials are skeptical of the U Visa process because they want to avoid taking a stance on immigration issues).

### III. FAMILY COURT JUDGES DECLINE TO CERTIFY WITHOUT PROPER LEGAL BASIS

An analysis of the relevant statutes and regulations governing the U Visa certification process reveals that the issues and confusion described in Part II arise from flawed legal interpretations and mistakes of law. This Part first provides a brief summary of the statutory framework of the certification process and judicial authority to issue certifications. It then explains that a broad range of conduct suffices to fulfill the statute's "helpfulness" requirement, contrary to the practices observed in Part II.<sup>76</sup>

#### A. *Statutory Background*

The statutory basis for U Nonimmigrant Status is found in 8 U.S.C. § 1101(a)(15)(U). This statute sets out the factors the Department of Homeland Security ("DHS") considers in determining whether to grant a U Visa.<sup>77</sup> The procedural requirements for certification are outlined in 8 U.S.C. § 1184(p)(1), which provides that applicants must submit "a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority" stating that the applicant 'has been helpful, is being helpful, or is likely to be helpful' in the investigation or prosecution of criminal activity."<sup>78</sup> This certification takes the form of a Form I-918

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<sup>76</sup> See *infra* notes 95-104 and accompanying text (explaining "helpfulness" requirement).

<sup>77</sup> An applicant must generally meet the following conditions before the Department of Homeland Security will issue a U Visa:

- (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 [...]

8 U.S.C. § 1101(a)(15)(U) (2014).

<sup>78</sup> *Id.* § 1184(p)(1). Qualifying criminal activity includes the following:

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter;

Supplement B, which asks the certifying official to identify an underlying criminal act, the relevant information possessed by the applicant, and an explanation of past, current or likely future helpfulness in a criminal investigation or prosecution.<sup>79</sup> Without a Supplement B certification, an applicant will not receive a U Visa.<sup>80</sup>

Federal, state, and local judges are identified as certifying officials under 8 U.S.C. § 1184(p)(1). Through rules and regulations, DHS has clarified the scope and authority of officials tasked with certifying U Visas. A judge is a “certifying agency” and “certifying official” under the act.<sup>81</sup> Other certifying agencies include traditional law enforcement and “agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.”<sup>82</sup> A certifying agency need not have the responsibility for prosecuting the crime itself. This is also supported by regulations defining “investigation or prosecution” as referring to the “detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator.”<sup>83</sup>

A role for judges in the certification process is reinforced by the inclusion of “conviction” and “sentencing” in the regulation’s definition of “investigation or prosecution.”<sup>84</sup> DHS has stated that “such inclusion is necessary to give effect to [the provision permitting] judges to sign certifications on behalf of U nonimmigrant status applications[, as] [j]udges neither investigate crimes nor prosecute perpetrators.”<sup>85</sup> This

murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

*Id.* § 1101(a)(15)(U)(iii).

<sup>79</sup> See Form I-918 Supplement B, U Nonimmigrant Status Certification, DEP’T OF HOMELAND SEC., OMB No. 1615-0104 (*hereinafter* “Supplement B”). The information contained in the required certification is important, but not dispositive as to whether DHS will issue a certification. See New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,019-24 (Sept. 17, 2007) (codified at 8 C.F.R. pts. 102, 212, 214, 218, 274a, 299) (“While USCIS will give a properly executed certification on Form I-918, Supplement B, significant weight, USCIS will not consider such certification to be conclusory evidence that the petitioner has met the eligibility requirements. USCIS believes that it is in the best position to determine whether a petitioner meets the eligibility requirements as established and defined in this rule.”).

<sup>80</sup> 8 U.S.C. § 1184(p)(1).

<sup>81</sup> 8 C.F.R. § 214.14(a).

<sup>82</sup> *Id.*

<sup>83</sup> See *id.* § 214.14(a)(5).

<sup>84</sup> *Id.* § 214.14(c)(2)(i).

<sup>85</sup> 72 Fed. Reg. 53,014, 53,019-24 (citations omitted).

definition also reflects the “broad” interpretation of “investigation or prosecution” encouraged by the DHS and the Attorney General.<sup>86</sup>

### **B. Certification is Proper in a Wide Variety of Circumstances**

Apart from indicating that the “applicant is a victim of criminal activity” and providing information related to such criminal activity, the Supplement B requires the certifying official to confirm the “helpfulness” of the victim.<sup>87</sup> In Part 4 of the Supplement, the certifying official must indicate that the applicant has knowledge of the criminal activity listed and “[h]as been, is being or is likely to be helpful in the investigation and/or prosecution” of the criminal activity.<sup>88</sup>

DHS regulations encourage a broad interpretation of “investigation or prosecution.”<sup>89</sup> Such an interpretation contemplates a role in the certification process for judges and agencies outside traditional law enforcement.<sup>90</sup> For instance, family services agencies and the Department of Labor are not necessarily involved in traditional criminal prosecutions, but are explicitly named as proper certifying officials.<sup>91</sup> Though these agencies, like courts, are not directly involved in criminal investigations or prosecutions, they do have a role in “detecting” the criminal activity described by the statute.<sup>92</sup>

The appropriately “broad” interpretation of “investigation or prosecution” permits certification at a relatively early stage following actions taken by the applicant in response to abuse. DHS has explicitly indicated that agencies involved in “detection” of criminal activity participate in the “investigation or prosecution” of the relevant crime

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<sup>86</sup> *See id.* (“Judges neither investigate crimes nor prosecute perpetrators. Therefore, USCIS believes that the term “investigation or prosecution” should be interpreted broadly as in the AG Guidelines.”).

<sup>87</sup> *See* Supplement B, *supra* note 78; *see also* 8 U.S.C. § 1184(p)(1) (setting forth certification requirements).

<sup>88</sup> *See* Supplement B, *supra* note 78.

<sup>89</sup> *See supra* note 85 and accompanying text (explaining DHS’s interpretation).

<sup>90</sup> *See* 8 C.F.R. § 214.14(a)(2) (explaining that in addition to judges, proper certifying agencies “include[] agencies that have criminal investigative jurisdiction in their respective areas of expertise including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.”).

<sup>91</sup> *Id.*

<sup>92</sup> *See* 72 Fed. Reg. 53,014, 53,019-20 (explaining that these agencies have “criminal investigative jurisdiction in their respective areas of expertise” and that “*detection* of criminal activity is within the scope of a law enforcement officer’s investigative duties”) (italics added).

under the statute.<sup>93</sup> Family court judges play a similar role in the “detection” of criminal activity and thus may certify at similarly early stages of a proceeding.<sup>94</sup> That a certification may be issued in the early stages of an investigation is further supported by USCIS’s commentary in its 2007 interim rule: “By allowing an individual to petition for U nonimmigrant status upon a showing that he or she may be helpful at some point in the future, USCIS believes that Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation.”<sup>95</sup>

As indicated by the varied tenses included in the relevant statute and Supplement B itself, helpfulness may consist of the applicant’s past, current, or future conduct relating to the underlying crime or crimes.<sup>96</sup> An applicant fulfills this requirement when she “was helpful, is being helpful, or is likely to be helpful in the detection, investigation or prosecution of criminal activity.”<sup>97</sup> While an applicant must provide assistance to law enforcement when “reasonably requested,” “[a] current investigation, the filing of charges, a prosecution or conviction is not required to sign the law enforcement certification.”<sup>98</sup> Moreover, “[t]here is no statutory or regulatory requirement that an arrest, prosecution, or conviction occur for someone to apply for a U Visa”<sup>99</sup> and “[t]here is no statute of limitations regarding the time frame in which the criminal activity must

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<sup>93</sup> See 72 Fed. Reg. 53,014, 53,020 (“The rule provides that the term ‘investigation or prosecution,’ used in the statute and throughout the rule, includes the detection or investigation of a qualifying crime or criminal activity . . .”).

<sup>94</sup> Orloff, U Visa Certification Tool Kit, *supra* note 8, at 7-9, 16-19 (arguing that judicial authority for certification of U Visas is bolstered by statutory language allowing officials responsible for “detecting” related criminal activity to issue certifications).

<sup>95</sup> 72 Fed. Reg. 53,014, 53,019.

<sup>96</sup> See *id.* (“The requirement was written with several verb tenses, recognizing that an alien may apply for U nonimmigrant status at different stages of the prosecution.”).

<sup>97</sup> DEP’T OF HOMELAND SEC., *U and T Visa Law Enforcement Resource Guide* (last updated Jan. 8, 2016), available at [https://www.dhs.gov/xlibrary/assets/dhs\\_u\\_visas\\_certification\\_guide.pdf](https://www.dhs.gov/xlibrary/assets/dhs_u_visas_certification_guide.pdf) (*hereinafter* DHS, Certification Resource Guide).

<sup>98</sup> *Id.* at 7; see also DHS, Information for Law Enforcement Officials, *supra* note 10 (noting that formal criminal charges or prosecution are unnecessary). DHS has further clarified that certification may be appropriate in a variety of settings where no formal criminal charges have been filed against the alleged abuser:

An instance may occur where the victim has reported criminal activity, but an arrest, prosecution, or conviction cannot take place due to evidentiary or other circumstances. Examples of this include, but are not limited to, when the perpetrator has fled or is otherwise no longer in the jurisdiction, the perpetrator cannot be identified, or the perpetrator has been deported by federal law enforcement officials. There is no statute of limitations on signing the certification – one can be signed for a crime that happened many years ago or recently. A certification may also be submitted for a victim in a closed case.

DHS, Certification Resource Guide, *supra* note 96, at 7.

<sup>99</sup> DHS, Certification Resource Guide, *supra* note 106, at 21.

have occurred”<sup>100</sup> nor for “a victim’s helpfulness.”<sup>101</sup> Rather, USCIS regulations require only that “since the initiation of cooperation, the victim has not unreasonably refused to cooperate or failed to provide information and assistance reasonably requested by law enforcement.”<sup>102</sup> This relatively low standard of cooperation is enough to “constitute ‘helpfulness’ or ‘enough cooperation’” under the relevant statutes and regulations.<sup>103</sup>

The statute requires only that the applicant have been “helpful” and does not enumerate specific “helpful” actions.<sup>104</sup> In its work funded by the State Justice Institute and in collaboration with USCIS, the National Immigrant Women’s Advocacy Project (NIWAP) at American University, Washington College of Law has identified a number of actions in connection with family law cases that qualify as “helpful” behavior:

- (a) [Seeking] a civil protection order;
- (b) [Receiving] an ex parte protection order which was served on the perpetrator by local police or sheriff’s deputies;
- (c) Calling police to enforce or report violations of a civil protection order;
- (d) Attempting to provide information to the police to report violations of a protection order that could not be communicated because the police did not obtain a qualified interpreter;
- (e) Providing evidence of domestic violence or child abuse in a custody case, including providing photographs of injuries or providing medical records;
- (f) Providing information regarding child/ elder abuse to protective services/ investigators;
- (g) [Returning] to family court for a show cause hearing to report perpetrator’s violations or contempt of family court custody and visitation order if threats or other criminal activity occurs;
- (h) Providing evidence or testifying in a child or elder abuse or neglect case; [or]
- (i) Providing a history of violence, if a repeat offender.<sup>105</sup>

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<sup>100</sup> DHS, Certification Resource Guide, *supra* note 96, at 19.

<sup>101</sup> DHS, Information for Law Enforcement Officials, *supra* note 10.

<sup>102</sup> DHS, Certification Resource Guide, *supra* note 96, at 18.

<sup>103</sup> *See id.*

<sup>104</sup> 8 U.S.C. § 1101(a)(15)(U).

<sup>105</sup> Benish Anver, et al., *U-Visa: “Helpfulness”*, NIWAP (Jul. 23, 2015), available at <http://library.niwap.org/wp-content/uploads/2015/IMM-Checklist-UVisaHelpfulness-09.25.13.pdf> (enumeration and punctuation added). A guide by a Minnesota judge identifies “examples of helpful actions,” including the following:

- (1) the victim calling 911 to report the crime,
- (2) the victim providing a statement to the police,

The proposition that providing testimony or actively participating in a family court proceeding satisfies the “helpfulness” requirement is supported by the fact that the help sufficient to satisfy the statutory requirements may be provided “to a Federal or State judge.”<sup>106</sup> These and many other actions, whether or not accompanied by formal determinations of violence in the context of the proceeding before the court, are enough to satisfy the statute’s “helpfulness” requirement.

This interpretation of the U Visa statutes and regulations comports with the discretionary nature of the certification process, consistent with the permissive language of the legislative and executive authority.<sup>107</sup> As a prosecutor or law enforcement officer may sign a certification absent the filing of formal charges or during the course of an investigation,<sup>108</sup> there is no legal basis for the notion that a judge must make factual findings on the record prior to certification. In fact, a guide issued by the New York State Judicial Committee on Women in the Courts, commissioned by the Chief Judge of New York, contains the following guidance on U Visa certification:

New York State judges, including criminal court and family court judges, are among the government officials authorized to sign U-Visa certifications. Judges may sign certifications while a case is pending or even before a case is initiated. Cooperating in an abuse and neglect proceeding or giving evidence in a family offense case in Family Court, for example, may qualify as assisting with the investigation of a crime as may cooperating with the police.<sup>109</sup>

As this guidance reflects, the U Visa statute and DHS regulations permit certification in a wide variety of circumstances, including those identified in Part II.B of this memorandum in which New York judges have declined to certify:

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- (3) filing a police report,
  - (4) victim currently assisting law enforcement, or
  - (5) victim sought a civil protection order, that the victim can enforce if violated in the future.

Pendleton, Certification Guide, *supra* note 7, at 4.

<sup>106</sup> 8 U.S.C. § 1101(a)(15)(U)(III).

<sup>107</sup> *See, e.g., Ordonez Orosco v. Napolitano*, 598 F.3d 222, 225 (“[T]he language of § 1184(p) makes it abundantly clear that the decision to issue a law enforcement certification is a discretionary one.”).

<sup>108</sup> *See supra* notes 92, 99-102 and accompanying text (explaining certification may be issued absent formal charges and at various points during an investigation).

<sup>109</sup> N.Y. STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, *supra* note 3, at 3.

- There is no statutory requirement that a judge must make a formal factual finding prior to issuing a certification.<sup>110</sup>
- Statutes or regulations do not prohibit judges from issuing certifications based on evidence heard in matters eventually resolved on consent.<sup>111</sup>
- A certifying agency or official may sign an I-918 Supplement B certification at any stage of a proceeding, including upon the issuance of a temporary protection order.<sup>112</sup>
- Judges need not be involved in the underlying criminal investigation in order to issue a certification.<sup>113</sup>
- Family court judges do not make immigration decisions when they issue a certification:<sup>114</sup> The certification is but one necessary component of a U Visa petition, which will ultimately be decided by USCIS.<sup>115</sup>

#### IV. RECOMMENDATIONS

The confusion and inconsistency in the New York Family Court’s approach to U Visa certification compels the need for further judicial training and practice resources. Despite the notion that family court judges should not engage with the immigration

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<sup>110</sup> See 8 U.S.C. § 1184(p) (posing no threshold evidentiary requirements and providing only that the government consider “any credible evidence” when evaluating an applicant’s petition as a whole); 8 C.F.R. § 214.14(c)(2)(i) (specifying required contents of certification).

<sup>111</sup> The relevant statutes pose no requirements for formal findings, nor do they prohibit certification in matters resolved on consent.

<sup>112</sup> See *supra* notes 94-95, 106 and accompanying text (explaining that certification may be issued at early stages of a proceeding).

<sup>113</sup> The family court judge need only verify the victim’s “helpfulness.” *Supra* notes 95-103 and accompanying text. In one of the few available New York Family Court opinions regarding a U Visa certification, the court issued the requested certification based on a transcript of previous proceedings where the presiding judge had retired. See *In re Rosales*, 40 Misc. 3d 1216(A) (N.Y. Fam. Ct. 2013) (unreported table disposition).

<sup>114</sup> DHS, Information for Law Enforcement Officials, *supra* note 10. The ultimate decision whether to grant U Visa status lies with USCIS, and related application information is reserved for U Visa petition evaluation only. Judges do not grant immigration status when they sign a certification. *Id.* Because information pertaining to U Visa applications is made confidential by law, there is minimal risk that the certification may be utilized for other purposes. See 8 C.F.R. § 214.14(e) (“The use or disclosure . . . of any information relating to the beneficiary of a pending or approved petition for U [Visa] nonimmigrant status is prohibited . . . .”); see also *People v. Bartlett*, 40 Misc. 3d 1202(A) (N.Y. Sup. Ct. 2013) (unpublished table opinion) (denying defendant’s access to “all documents relating to the complainant’s application for a U Visa, as a victim of domestic violence,” citing Congress’s intent to “keep these visa applications confidential”).

<sup>115</sup> 72 Fed. Reg. 53,014, 53,024.

consequences arising out of the matters before them, the family court is often at the crossroads of immigration and family law. Indeed, the role of the family court judge is vital when it comes to the U Visa.<sup>116</sup> Current practices leave immigration outcomes to the “luck of the draw,”<sup>117</sup> eschewing judicial consistency and predictability in favor of personal preference and confidential memoranda.<sup>118</sup> For these reasons, we recommend both formal trainings for judges and their court staff—including court attorneys and clerks—and the drafting of a desk guide on U Visas and related topics to be provided to judges throughout the state.

### **A. Training for Judges and Court Personnel**

Modern Courts has previously recommended training related to immigration issues for family court judges and court personnel in order to familiarize judges with the various immigration issues they may encounter.<sup>119</sup> Training for court personnel is also important given the involvement of court attorneys and clerks in the certification process, as detailed by practitioners.<sup>120</sup> The findings of this report make clear that particularized training is needed regarding the U Visa certification process. This training could take the form of a stand-alone training about U Visas specifically<sup>121</sup> or a part of a broader series related to immigration issues.

A newly formed group, Immigrant Justice in State Courts, in partnership with Modern Courts, the Immigrant Defense Project, Feerick Center for Social Justice, the New York City Bar and many organizations across the state, is developing a series of trainings on immigration issues in the New York Family Courts. These New York-specific trainings will address issues identified in this memorandum. Each training will focus on a particular Article of the New York Family Law Act and corresponding immigration issues that arise in conjunction with proceedings under that Article.<sup>122</sup> We intend for this approach to provide practical guidance for judges about immigration issues that may arise in various contexts, including issues involving U Visas.

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<sup>116</sup> See *supra* notes 3-10 and accompanying text (explaining unique and essential role played by family court judges as certifying officials).

<sup>117</sup> See *supra* notes 58-72 (describing unpredictability of certification by family court).

<sup>118</sup> See *supra* Part II.A (describing memorandum).

<sup>119</sup> See Fund for Modern Courts Report, *supra* note 11, at 20-22 (advocating regular, in-person training for judges and court personnel on immigration issues).

<sup>120</sup> See *supra* notes 67, 70 (detailing interactions with court personnel).

<sup>121</sup> For an example of such a training, see Webinar, NIWAP, *Expert Advice for Judges: How to Handle U Visa Certification and T Visa Endorsement Requests* (Dec. 1, 2014), <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/december-1-2014-expert-advice-for-judges/recording-expert-advice-for-judges>.

<sup>122</sup> For example, while one training may focus on common immigration issues in Article 8 (family offense) proceedings, another would focus on Article 6 (custody and adoption) proceedings.

Similarly, Chief Administrative Judge Lawrence Marks has appointed an Advisory Council which will work to enhance training programs for Family Court judges managing proceedings involving immigration-related issues such as Special Immigrant Juvenile Status, immigration consequences for parties in delinquency, neglect and other Family Court proceedings, and language, cultural and other barriers to justice faced by litigants.<sup>123</sup> Judicial training will help to ensure consistent, accurate application of the law and foster public confidence in the judiciary.

### ***B. Reference Guide for Judges***

In response to the problems identified in this memorandum regarding U Visa certification, we also recommend the creation of a clear, easy-to-follow U Visa desk guide for family court judges. This guide should set forth the relevant statutes and regulations regarding U Visa certification and clarify the scope of judicial authority to certify as well as the proper evidentiary bases for certification. This resource will facilitate uniform standards for certification and dispel current confusion. Some organizations have already initiated this approach: NIWAP has developed an extensive practice toolkit for judges on U Visas,<sup>124</sup> while a Minnesota judge has developed a short, five-page guide to U Visa certification issues.<sup>125</sup> A New York-specific resource has yet to be published.

### **CONCLUSION**

As our research suggests, there is significant confusion within the family courts regarding U Visa certification process. As established in Part III, family court judges are within their statutory authority when they issue U Visa certifications on the basis of evidence from proceedings resolved on consent, and in many other scenarios. The flawed interpretation upon which many New York judges base their decisions regarding certification and determinations of helpfulness creates inconsistent results. A correct interpretation of the relevant statutes and regulations, aided by training and guides, would address the problems outlined in this memorandum.

Resolution of this issue has significant consequences for other certifying officials as well. While judges are situated to address matters relating to family law, other governmental actors, including traditional law enforcement and federal or state agencies, are also certifying officials. These individuals are positioned to facilitate cooperation and communication with applicants seeking U Visas and thus play an important role in the certification process. For those parties conferred with statutory authority to certify,

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<sup>123</sup> See *Members Named to New Advisory Council on Immigration Issues in Family Court*, *supra* note 19.

<sup>124</sup> See Orloff, U Visa Certification Tool Kit, *supra* note 8.

<sup>125</sup> See Pendleton, Certification Guide, *supra* note 7.

including the judiciary and law enforcement officials, a proper implementation of the statute would result in consistent, fair outcomes for U Visa applicants.