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The U VISA: Another Remedy for Battered Immigrant Women.

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THE U VISA: ANOTHER REMEDY FOR BATTERED IMMIGRANT WOMEN

GRETA D. STOLTZ†

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I. INTRODUCTION

Her husband smuggled her across the border. They had married in Mexico and she thought they had a bright future together. Now she is pregnant with their first child and dreams of a new life in the United States. Soon, however, her husband starts to change. He grows jealous and angry easily. He does not let her leave the house, not even to talk to

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the neighbors. It is not long before the dismal cycle of abuse starts. First, he kicks her in the legs so that she falls down. Next, he punches her with a closed fist. Finally, he holds a pillow over her face and threatens to kill her. All of this she can stand; she is a strong woman. But when he hits her child, it is the last straw. She makes a call to the police and files charges for domestic abuse. He is deported. Surprisingly, her problems are far from over.

Stories such as the one described above are all too real for many immigrant women. To address these situations, Congress passed the Violence Against Women Act of 1994 (VAWA). Under VAWA, a victim of domestic violence could obtain a visa and legally remain in the United States if her spouse was a permanent legal resident or a United States citizen.¹ Many applauded the Act, but it was not a cure-all for battered immigrant women.² Left behind were those women who were either not married to their abuser or whose husband was not a permanent legal resident or a U.S. citizen.³

Fortunately, in 2000 Congress amended VAWA.⁴ Among other provisions, section 1513, entitled “Protection for Certain Crime Victims Including Victims of Crimes Against Women,”⁵ created the U visa. In short, the U visa provides what may be a critical remedy for non-citizen victims of domestic violence.⁶

However, the promise of benefits to immigrant victims of crime has not been fulfilled. The Department of Justice has not issued any regulations pertaining to the U visa. Thus, recipients eligible for the U visa remain in a “legal limbo” without lawful immigration status in the United States.⁷ To address this matter, part II discusses the U visa’s potential to award legal status to those women who did not previously qualify for VAWA relief because their abuser was not a U.S. citizen or a lawful permanent resident.⁸ Part III describes in detail who qualifies for a U visa. Part IV stresses that regulations must be issued soon to encourage immigrants to

1. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1849 (1994) (codified at 42 U.S.C. § 13701).

2. See generally Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN’S L.J. 137, 150-51 (2002) (describing the U visa’s potential to assist battered immigrant women who may otherwise not qualify for remedies under VAWA).

3. See Prince Frederick, *Lost in an Alien Land*, THE HINDU, Apr. 23, 2003, available at 2003 WL 18910458.

4. Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1534 (codified at 8 U.S.C. § 1101) (2000).

5. *Id.*

6. Immigration and Nationality Act (INA) § 101(a)(15)(U), 8 U.S.C. § 1101 (2004).

7. VTVPA § 1513.

8. 42 U.S.C. § 13701.

step forward with information related to crime. Further, part IV asserts that one possible explanation for the delay in regulations is due to the change of immigration functions from the Immigration and Naturalization Service to the Department of Homeland Security. Additionally, part IV describes what relief is available to victims of violent crimes pending the issuance of regulations. Finally, part IV describes the regulations of another visa meant to prosecute smugglers and to protect victims of human trafficking. Known as the T visa, it was created by the same law and at the same time as the U visa, although T regulations were issued in early 2002.⁹ A look at the T visa may provide a glimpse at potential U regulations.

II. THE VIOLENCE AGAINST WOMEN ACT: NOT A CURE-ALL FOR BATTERED IMMIGRANT WOMEN

The Violence Against Women Act was part of a congressional effort to address domestic violence for immigrants and citizens. VAWA allowed qualified immigrant women and children to either self-petition for permanent resident status or to request cancellation of removal.¹⁰ Self-petitioning gives the battered immigrant the power to help herself, without having to rely on the abuser.¹¹ In addition to suffering battery or extreme cruelty, self-petitioning requires a showing of: (1) a good-faith marriage; (2) good moral character; (3) marriage to a United States citizen or legal permanent resident; and (4) residence in the United States with the abusing spouse.¹²

Cancellation of removal provides relief and protection for battered immigrants in removal proceedings.¹³ It is available if the applicant: (1) was battered or subject to extreme cruelty by a U.S. citizen or permanent-legal-resident spouse during marriage while she was in the United States; (2) has been continuously physically present in the United States for three years preceding the filing of her application for relief; (3) is a person of good moral character; and (4) can demonstrate that leaving the United States would cause extreme hardship to herself or to her children.¹⁴

VAWA did not protect all battered immigrant women. Women who did not qualify for relief under VAWA, because their husbands were not

9. VTVPA § 1513.

10. 42 U.S.C. § 13701.

11. Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, 108 Stat. 1902-1955, at §§ 40701-40703.

12. *See* INA § 204(a)(1)(B)(ii); 8 U.S.C. § 1154(a)(1)(B)(ii) (2004).

13. *See* INA § 240A.

14. *See id.*

United States citizens or legal permanent residents, were forced to either remain in the United States illegally or to return to their home country, where often the same abuse they received in the United States awaited them.¹⁵ Far from the protections of United States laws, court orders, and enforcement, these women were again vulnerable to abuse.¹⁶ In many countries, such as Mexico, the police do little to assist women who are victims of domestic violence.¹⁷ For example, “Mexican women . . . often state that returning to Mexico is not an escape alternative because their spouses threaten to follow them abroad.”¹⁸ Moreover, the burden placed on women to prove their abuser’s status as a U.S. citizen or lawful permanent resident is sometimes insurmountable.¹⁹ It is difficult for women to locate documents, such as birth certificates and social security cards, to prove their husband’s immigration status.²⁰

III. THE U VISA

A. Congressional Intent

1. Reporting Criminal Activity

Congress created the U visa to encourage immigrants to step forward with vital information relating to crime.²¹ Specifically, Congress stated that the purpose of the U visa is to:

[F]acilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during in-

15. See Shawn Foster, *Law's Demise Puts Immigrant Wives at Risk*, SALT LAKE TRIB., Jan. 25, 1999, at B1 (reporting that restraining orders are not valid outside U.S. territories).

16. See Leslye E. Orloff & Janic V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 133-34 (2001) (describing risk of abuse abroad).

17. Such were the circumstances in a case handled by the St. Mary's University School of Law Immigration Clinic. Case materials are on file with the author.

18. Lee J. Teran, *Barriers to Protection at Home and Abroad: Mexican Victims of Domestic Violence and the Violence Against Women Act*, 17 B.U. INT'L L.J. 1, 70 (1999).

19. See Kwong, *supra* note 2, at 145 (“It [is] difficult for battered women to provide [documents proving their abuser’s status] because INS databases are often inaccurate and their batterers sometimes [lack] official documents.”).

20. See Leslye E. Orloff et al., *Recent Development: Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 80 (2003) (noting that some protective orders have required that the abuser give the battered immigrant victim access to immigration papers and documents).

21. VTVPA § 1513. *But see* Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059, 1081-82 (2002) (suggesting that law enforcement authorities exploit the immigrant desire to remain in the United States in exchange for receiving cooperation in criminal investigations).

vestigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.²²

With the U visa, Congress recognized that “it is virtually impossible for state and federal law enforcement . . . to punish and hold perpetrators of crimes against non-citizens accountable if abusers and other criminals can avoid prosecution by having their victims deported.”²³ “Few non-citizen crime victims are willing to assist in prosecutions without some form of immigration status that protects them from such retaliation.”²⁴

2. Serving the Immigrant Population

In addition to prosecuting crimes committed against non-citizens, Congress likewise hoped that creating this new nonimmigrant classification would encourage law enforcement officials to better serve immigrant crime victims.²⁵ Many of the crime victims Congress hopes to help are battered women. “Domestic violence occurs in more than one-quarter of all marriages, and an estimated 4 million American women are battered each year by their partners or husbands. . . .”²⁶ The Federal Bureau of Investigation reports that boyfriends or family members kill 30 to 40 percent of all female homicide victims.²⁷ About 35 percent of women visiting hospital emergency rooms are there because of domestic violence injuries.²⁸ “[I]t is even more difficult to document the number of immigrants who experience abuse. . . .”²⁹ Battered immigrant women face unique problems in the domestic violence arena. Most victims, as newcomers to this country, exhibit a deep sense of isolation.³⁰ Studies show that close to 60 percent of married immigrant women experience domes-

22. VTVPA § 1513.

23. See Orloff & Kaguyutan, *supra* note 16, at 163; see also VTVPA § 1513(a)(1)(B) (finding that immigrant victims must be able to report the crimes committed against them).

24. See Orloff & Kaguyutan, *supra* note 16, at 163; see also VTVPA § 1513(a)(2)(A), (B) (identifying the facilitation of crime reporting as the purpose behind the U visa).

25. VTVPA § 1513.

26. Maurice Goldman, *The Violence Against Women Act: Meeting Its Goals in Protecting Battered Immigrant Women?*, 37 FAM. & CONCILIATION CTS. REV. 375, 377 (1999).

27. See The Family Violence Prevention Fund, DOMESTIC VIOLENCE IN CIVIL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION at xvii (1992).

28. Violence Against Women Act of 1993, H.R. REP. NO. 103-395, at 86 1993, *available at* 1993 WL 484760.

29. Goldman, *supra* note 26, at 377.

30. Diane Smith, *Center Offers Help to Muslim Women*, FORT WORTH STAR-TELEGRAM, Feb. 26, 2002, *available at* 2001 WL 27530405 (describing the “social hurdles” immigrant women face in America).

tic violence.³¹ While domestic violence does not occur more often within one racial group or socio-economic class, immigrant victims of domestic violence are more adversely affected when abuse occurs.³² For instance, they are usually reluctant to report offenses to authorities for fear of deportation.³³ Clients at the Domestic Violence Law Clinic in Tucson, Arizona have reported that they never, or have rarely, sought law enforcement assistance because of the fear of being reported to immigration authorities.³⁴ Moreover, women who are financially dependant on their abusive partners would only be acting against their own economic interests if they reported their abusive husbands to the authorities.³⁵

Furthermore, many immigrants do not trust police, due in part to negative experiences in their home countries and because of racism and prejudice that they have encountered in the United States.³⁶ Ignorance of American laws and a poor command of the English language also keep immigrants from coming forward with information related to criminal activity.³⁷ In addition, religious and cultural upbringing can factor into a woman's choice not to report crime, even when she has been the victim of abuse.³⁸ For instance, many cultures and religions disapprove of chal-

31. Shauna Curphey, *Gender Violence Victims Wait for Visas*, Mar. 28, 2003 at <http://www.womensnews.org/article.cfm/dyn/aid/1271/context/archive> (last visited Sept. 19, 2004).

32. Orloff et al., *supra* note 20, at 45.

33. See Marie Chiche, *International Women Fear Deportation if Relationship Abuse Reported*, BG NEWS, Sept. 27, 2001, available at 2001 WL 27530405 (quoting Deidra Bennett, victim advocate at Bowling Green State University, who claims that there is not necessarily a higher occurrence of domestic violence in the international community, but that "women in the international community are less likely to get help because they fear losing their immigration status"); see also LENI MARTIN, *Identifying Battered Immigrant Women*, reprinted in DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN 5 (Deeana L. Jang et al. eds, 2d ed.) (1997).

34. Zelda B. Harris, *The Predicament of the Immigrant Victim/Defendant: "VAWA Diversion" and Other Considerations in Support of Battered Women*, 14 HASTINGS WOMEN'S L.J. 1, 12-13 (2003).

35. Michelle DeCasas, *Protecting Hispanic Women: The Inadequacy of Domestic Violence Policy*, 24 CHICANO-LATINO L. REV. 56, 73 (2003).

36. *Concerning New York City Executive Order 124: Hearing on Exec. Order No. 124 Before the House Judiciary Subcomm. on Immigration, Border Security, and Claims* (2003) (statement of Leslye E. Orloff, Director, Immigrant Women Program NOW Legal Defense and Education Fund) [hereinafter Orloff Statement].

37. Goldman, *supra* note 26, at 382 (discussing the barriers undocumented battered women face in escaping violent situations).

38. Leila Rothwell, *VAWA 2000's Retention of the "Extreme Hardship" Standard for Battered Women in Cancellation of Removal Cases: Not Your Typical Deportation Case*, 23 U. HAW. L. REV. 555, 561 (2001).

lenges to male domination.³⁹ For many immigrants, family is the revered social unit and divorce brings great shame.⁴⁰

It is also interesting to note that it was not until recently that society began to punish the perpetrators of domestic violence.⁴¹ Reluctant to pry into the privacy of the home, the government long refrained from intervening in domestic relationships.⁴² The times have finally changed.⁴³ Part 3796gg, “Grants to Combat Violent Crimes Against Women,”⁴⁴ was recently added to section 42 of the United States Code. The purpose of this program is to assist the states in developing and strengthening “effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services in cases involving violent crimes against women.”⁴⁵ Among other functions, the grants may be used to train law enforcement officers and other personnel to respond to violent crimes against women, including sexual assault, domestic violence, and dating violence.⁴⁶ Additionally, the fact that so many of the crimes listed in the U visa statute qualify as crimes against women further demonstrates that Congress is finally serious about preventing domestic violence.⁴⁷ To say the least, it is a step in the right direction.

B. *Qualifications*

“The U visa is available for up to 10,000 individuals per year who cooperate in the investigation or prosecution of the perpetrators of certain criminal offenses.”⁴⁸ The non-citizen must prove that she was the victim

39. See Gail Pendleton, National Immigration Project of the National Lawyers’ Guild, *Barriers Faced by Noncitizen Survivors of Domestic Violence 2* (2001), at <http://www.nationalimmigrationproject.org/domestic-violence/barriers1.doc> (last visited Sept. 19, 2004).

40. Kwong, *supra* note 2, at 140.

41. See Hannah R. Shapiro, *Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT’L. & COMP. L.J. 27, 27 (2002) (noting the recent phenomenon of criminalizing domestic violence).

42. See generally, Reva B. Siegel, *Article: “The Rule of Love”: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

43. See Nora O’Connell and Ritu Sharma, *Treaty for the Rights of Women Deserves Full U.S. Support*, 10 HUM. RTS. 22, (2003) (noting failure of United States to ratify the Convention on the Elimination of All Forms of Discrimination Against Women).

44. 42 U.S.C. § 3796gg (2000).

45. *Id.*

46. *Id.*

47. See INA § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (listing many gender-related crimes qualifying immigrant victims for a U visa, including rape, domestic violence, sexual assault, abusive sexual contact, prostitution, and female genital mutilation).

48. National Immigration Project of the National Lawyers’ Guild, *IMMIGRATION LAW AND DEFENSE* 3-194 (3d ed. 2004).

of one of several enumerated crimes, and that she suffered substantial mental or physical abuse as a consequence.⁴⁹ In addition, the non-citizen must prove that she “has been helpful, is being helpful, or is likely to be helpful to a federal, state, or local law enforcement officer, prosecutor, judge,”⁵⁰ or to the Department of Homeland Security (DHS) in investigating the criminal activity.⁵¹ To prove this, the U visa applicant must obtain certification from a law enforcement official investigating or prosecuting the crime.⁵² The specific requirements for obtaining a U visa are described below.

1. Substantial Physical or Mental Abuse

As set out in the Victims of Trafficking and Violence Protection Act (VTVPA), a U visa applicant must present evidence demonstrating that he or she has suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity.⁵³ The criminal activity is listed at section 101(a)(15)(U)(iii) of the Immigration and Nationality Act (INA), specified in footnote 48. The range of crimes listed in that section is extensive, including:

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held 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; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. . . .⁵⁴

The level of harm that the U visa applicant is required to suffer varies on a case-by-case basis. A recent DHS memorandum states that the United States Citizenship and Immigration Service (USCIS) officers will adjudicate all U visa applications in accordance with the regulations once they are issued to determine “[w]hether the level of harm meets the stat-

49. INA § 101(a)(15)(U)(i)(I).

50. Sarah Igantius & Elisabeth S. Stickney, *Proving Eligibility for a U Visa*, IMMIGRATION LAW & FAMILY § 14:113 (2004).

51. *Id.*

52. Memorandum from William R. Yates, CIS Associate Director of Operations on “Centralization of Interim Relief For U Nonimmigrant Status Applicants, (Oct. 8, 2003), discussed and reproduced in 80 No. 40 INTERPRETER RELEASES, *CIS Interim Guidance Centralizes U Visa Process*, at 1437 (Oct. 20, 2003) [hereinafter Yates, October 8 Memorandum].

53. VTVPA § 1513.

54. INA § 101(a)(15)(U)(iii).

utory requirement of substantial physical or mental abuse. . . .”⁵⁵ The interim relief memorandum further states that a misdemeanor crime should not be treated with less gravity than a felony.⁵⁶ Additionally, DHS officers may not make an adverse determination of admissibility or deportability of a non-citizen applying for U nonimmigrant status based upon information provided by “the perpetrator of the substantial physical or mental abuse and the criminal activity.”⁵⁷ This means that the abusive partner cannot call DHS and claim that his significant other is lying about the crime or abuse. Moreover, DHS employees are also subject to disciplinary action and fines up to \$5,000⁵⁸ if they disclose any information relating to the application.⁵⁹

2. Information Concerning the Criminal Activity

The U visa applicant must present evidence demonstrating that he or she possesses information concerning the criminal activity referred to in section 1 above.⁶⁰ In the case of an alien child under the age of sixteen, the parent, guardian, or next friend of the alien may present evidence of this information.⁶¹ This is usually proved via the certification requirement, discussed below. Any credible evidence relevant to the petition will be considered,⁶² allowing applicants to submit a host of evidence to support each element of proof. This standard demonstrates that Congress recognized the difficulty that battered immigrant crime victims might have in obtaining proof to win their immigration case.⁶³ Additionally, it is interesting to note that, at this time, any criminal case, regardless of when it occurred, qualifies under the statute.⁶⁴

3. Has Been, Is Being, or Is Likely to Be Helpful

Third, the applicant must present evidence demonstrating that he or she “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

55. Yates, October 8 Memorandum, *supra* note 52.

56. *Id.*

57. *Id.*

58. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 384(c) (1996).

59. IIRIRA § 384(a)(2).

60. INA § 101(a)(15)(U)(i)(III), 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2004).

61. *Id.*

62. VTVPA § 1513(c)(4).

63. *See* Orloff & Kaguyutan, *supra* note 16, at 133-34.

64. Yates, October 8 Memorandum, *supra* note 52; *see also* Julie Dinnerstein et al., *Issues in Representing Immigrant Victims*, 29 FORDHAM URB. L.J. 71, 98-99 (2001) (“Even if you have a criminal case from 1974 and you were helpful, there is nothing in the statute to say you could not apply for this benefit now.”).

prosecutor, to a Federal or State judge, to the [Immigration and Naturalization] Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity. . . .”⁶⁵ To demonstrate this assistance, the applicant must submit a certification letter from a law enforcement official attesting to the fact that the non-citizen “has been, is likely to be, or is being helpful” to the investigation or prosecution of the crime.⁶⁶ The official must sign the certification letter “within six months immediately preceding the submission of the request for interim relief.”⁶⁷ Significantly, the investigation or prosecution does not have to result in a conviction.⁶⁸

At this time, obtaining the certification is often the most difficult part of the application process. To begin with, there is no form for the certification. Advocates must create one themselves or use a letter.⁶⁹ Additionally, victims are uninformed that they should be seeking certification when speaking with the police.⁷⁰ Many law enforcement personnel are likewise unaware that this type of relief is available.⁷¹ Some may be reassured to know that other jurisdictions are providing similar certifications.⁷² Nonetheless, some like to be provided with “official” Department of Justice memoranda before signing a certification.⁷³ It seems that as long as the practitioner presents the certification letter in a simple and straightforward manner, most enforcement personnel are willing to cooperate.⁷⁴

Additionally, relationships between immigrants and law enforcement personnel have been historically strained. Some of the most brutal acts of

65. INA § 101(a)(15)(U)(i)(III).

66. *Id.*

67. *Id.*

68. *Id.*

69. See generally National Immigration Project, *Immigrant Survivors of Domestic Violence and Sexual Assault*, at [http://www.nationalimmigrationproject.org/immigrantsurvivors\(alt\).htm](http://www.nationalimmigrationproject.org/immigrantsurvivors(alt).htm) (last visited Sept. 19, 2004) (clicking on “Instructions for Completing the U Certification Form” will provide a sample U visa certification form).

70. See Suzanne Hurt, *New U Visa Stops Deportation of Undocumented Crime Victims*, *MODESTO BEE*, July 28, 2001, at B6 (“If they don’t know about it, how are they going to do it?”).

71. See Ann Benson & Gail Pendleton, *Helping Victims of Trafficking and Violence: The U Visa Certification Form*, *IMMIGRATION LAW TODAY*, Mar./Apr. 2003 at 56 (detailing instructions on completing U visa certification for law enforcement personnel).

72. Posting of Aimee Todd, ATodd@pgfm.com, to VAWAupdates@yahoogroups.com (Dec. 3, 2003) (copy on file with author).

73. Posting of Christina Varner, christina@lrcl.org, to VAWAupdates@yahoogroups.com (Dec. 3, 2003) (copy on file with author).

74. Posting of Judy Flanagan, judy.flanagan@azbar.org, to VAWAupdates@yahoo.com (Dec. 7, 2003) (copy on file with author).

violence and police brutality have occurred against immigrants.⁷⁵ In many cases, immigrants have been harassed, arrested, accused with crimes, and threatened with deportation because of police prejudice or ignorance.⁷⁶ When dealing with domestic violence, police officers often tend to blame the victim.⁷⁷ In essence, one drawback to the certification requirement of the U visa is that the victim is at the mercy of the police and prosecutors, who stand as gatekeepers to the administrative process.⁷⁸ It is only with the cooperation of law enforcement personnel that immigrant crime victims, such as battered women, can hope to remain in the United States. With adequate training, education, access to interpreters, and the development and implementation of appropriate policies, law enforcement perceptions can be changed and immigrants better served.⁷⁹

4. Crime Violated U.S. Laws or Occurred in U.S.

Finally, the criminal activity described must be in violation of United States laws or have occurred in the United States, “including in Indian country and military installations or the territories and possessions of the United States.”⁸⁰ Many argue that the location of the crime is an arbitrary requirement, and that the United States should protect victims of domestic violence regardless of where the abuse occurs.⁸¹ Hopefully, the new regulations will broadly interpret this requirement and, thereby, give relief to those women who have been the victims of abuse in the United States or abroad.

5. Other Provisions

Ten thousand U visas will be available to immigrants who qualify each fiscal year.⁸² The Attorney General may also grant the U visa to deriva-

75. See Dan Barry, *Charges of Brutality: The Overview; Leaders of Precinct Are Swept Out in Torture Inquiry*, N.Y. TIMES, Aug. 15, 1997, at A1 (referring to arrest and assault of Haitian immigrant Abner Louima, who claimed that officers shoved the wooden handle of a toilet plunger up his rectum and then into his mouth, all the while shouting racial slurs).

76. Orloff Statement, *supra* note 36.

77. *Id.*

78. *Id.*

79. *Id.*

80. INA § 101(a)(15)(U)(i)(IV); 8 U.S.C. § 1101(a)(U)(i)(IV) (2004).

81. See Lydia Brashear Tiede, *Battered Immigrant Women and Immigration Remedies: Are the Standards Too High?*, 28 HUM. RTS. 21 (Winter 2001) (arguing that the asylee who flees her country is held to higher evidentiary and legal standards than the undocumented victim in the United States who meets the VAWA requirements. “If legislators are serious about domestic violence. . .they should work to protect victims of domestic violence regardless of where the abuse occurs.”).

82. INA § 214(o)(2), *amended by* VTVPA § 1513(c).

tive applicants, such as children, in order to avoid extreme hardship.⁸³ The fiscal limit only applies to principal applicants. The recipient of a U visa will receive deferred action and become eligible for work authorization if she or he can demonstrate economic necessity.⁸⁴

Once a U visa is issued, the immigrant becomes a temporary resident.⁸⁵ Fortunately, the U visa also provides a way for recipients to gain lawful permanent residency. To do so, applicants must prove that they have continuously resided in the United States for at least three years since receiving the U visa.⁸⁶ Additionally, they must prove that humanitarian grounds or the public interest justify their continued presence.⁸⁷ Practitioners must also warn clients against extended visits outside the United States. A single absence greater than 90 days or any aggregate absences exceeding 180 days will negate the continuous physical presence requirement.⁸⁸ An exception is permitted, however, if an applicant's absence is for the purpose of assisting in the investigation or prosecution of the crime.⁸⁹ If the above elements are met, permanent residency may be granted at the discretion of the Attorney General. In addition, the Attorney General has the discretion to waive virtually all grounds of inadmissibility in granting adjustment to a U visa recipient.⁹⁰

IV. U VISA REGULATIONS MUST BE PROMULGATED

A. *The Need For Regulations*

Despite Congress' good intentions, U visas are not currently being issued because the Department of Homeland Security has yet to implement regulations. It has been four years since President Clinton signed the VTVPA into law, leaving many immigrants in a legal limbo.⁹¹ In January 2003, New Jersey Congressman Frank Pallone, Jr. released a statement entitled "INS Must Expedite U Visa Regulations Mandated by

83. INA § 101(a)(15)(U)(ii), *amended by* VAWA 2000 § 1513(b).

84. *See* Nancy Morowitz, *Procedures for the New U Nonimmigrant Category*, IMMIGR. BUS. NEWS & COMMENT, Feb. 15, 2002, at 33, 38.

85. *See id.* at 33, 39.

86. SARAH IGNATIUS & ELISABETH S. STICKNEY, IMMIGRATION LAW & FAMILY § 4.72 (2004).

87. *Id.*

88. INA § 245(e)(2), *amended by* VAWA 2000 § 1513(f); *see also* IGNATIUS & STICKNEY, *supra* note 86, at § 4.72.

89. IGNATIUS & STICKNEY, *supra* note 86, at § 4.72.

90. INA § 212(d)(13), *amended by* VAWA 2000 § 1513(e). The admissibility ground for having participated in genocide or Nazi persecution cannot be waived. *Id.*

91. *See generally* Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 36 WEEKLY COMPILATION PRESIDENTIAL DOCUMENTS 2662 (Nov. 6, 2000).

Congress Two Years Ago.”⁹² The Congressman urged then Immigration and Naturalization Service Commissioner Michael Garcia to quickly enact regulations so that immigrant women and children in “legal limbo” could get on with their lives.⁹³ “Not only would the U Visa statute enable the victims of crime to come forward without fear,” Pallone asserted, “but it would also be an effective tool for law enforcement agencies whose investigation of crimes against non-citizens are virtually impossible when the victim’s immigration status is dependent on her abusive spouse.”⁹⁴

United States Senator Patrick Leahy of Vermont also issued a statement emphasizing his support for the VTVPA, but calling the processing of U visas “disorderly at best.”⁹⁵ Thanks to Senator Leahy, the same Department of Homeland Security unit that rules on VAWA applications, the Vermont Service Center, will now adjudicate all U visa petitions.⁹⁶ Once regulations are implemented, this centralization should help to expedite the process of U visa requests.⁹⁷

A recent Florida criminal case demonstrates the “slow implementation and apparent prosecutorial ignorance of the U and T visas.”⁹⁸ Officials accused Princess Buniah Al Saud, a Saudi Arabian national living in Florida, of throwing her personal servant down a flight of stairs.⁹⁹ The maid, Ismiyati Soryono, an Indonesian national, cooperated with officials in the prosecution of Al Saud, but was unable to apply for the new U visa because the Immigration and Naturalization Service had not implemented regulations that would enable consular officials to issue that particular visa.¹⁰⁰

Like Ismiyati Soryono, Adama Hawa Barry is also waiting for a U visa. Fleeing her native New Guinea, she arrived in Boston in April of 2002 on

92. Press Release, Congressman Frank Pallone, Jr., I.N.S. Must Expedite U Visa Regulations Mandated by Congress Two Years Ago (Jan. 7, 2003) (on file with author).

93. *Id.*

94. *Id.*

95. See “*Alien Smuggling/Human Trafficking: Sending a Meaningful Message of Deterrence: Hearing Before Subcomm. on Crime, Corrections and Victims’ Rights Comm. on the Senate Judiciary* (2003) (statement of Senator Patrick Leahy, Ranking Member, Senate Judiciary Committee), available at 2003 WL 5636604.

96. See *id.*

97. See Lauren Gilbert, *Family Violence and U.S. Immigration Law: New Developments*, IMMIGR. BRIEFINGS 1, at 24 (Mar. 2001) (noting that Vermont Service Center has experience dealing with victims of domestic violence).

98. *Florida Case Underscores Slow Implementation, Prosecutorial Unfamiliarity With New Visa Categories for Crime Victims*, 55 IMMIGR. BUS. NEWS & COMMENT DAILY, July 12, 2002, at 2 [hereinafter *Florida Cases Underscore Slow Implementation*].

99. *Id.*

100. *Id.*

a visitor's visa.¹⁰¹ A month later, she became pregnant.¹⁰² Days before her due date, she became the victim of random violence as a gun-toting passenger shot and struck her on the subway.¹⁰³ While Barry recovered, the son she had waited so long for did not.¹⁰⁴ Speaking up about the crime revealed that Barry had overstayed her visitor's visa.¹⁰⁵ She is now applying for a U visa and has received certification from the Boston District Attorney's office.¹⁰⁶ As discussed below, however, Barry can only seek interim relief, as detailed in departmental memoranda, until regulations are published and U visas are issued.

In Texas, many are also waiting for U visas. Twenty-two undocumented immigrants from Mexico survived a deadly smuggling trip from El Paso to North Texas in the summer of 2002.¹⁰⁷ Federal judge Leonard Davis issued an order stating, "[A]lthough . . . they had entered this country illegally, the aliens were desperate to the point that they had little control over their own fate and were at the mercy of those to whom they had entrusted their passage."¹⁰⁸ The immigrants' lawyers are preparing U visa applications in hopes that regulations are issued soon.¹⁰⁹

B. *The Creation of Federal Regulations*

The process of creating federal regulations can be lengthy. As evidenced by the U visa, it can take years before regulations are issued. "Once Congress passes a law, rules or regulations are developed by an agency."¹¹⁰ These regulations describe how the agency will implement the law.

Other organizations also play a role in shaping regulations. Pro-immigrant advocacy groups have been actively involved in shaping the regulations that will directly affect the clients they serve; however, other forces within the Department of Homeland Security have also had a hand in

101. Cindy Rodriguez, *A Random Bullet, A Baby's Death, A Mother's Sorrow*, BOSTON GLOBE, Mar. 22, 2003, at B1, available at 2003 WL 3386661.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Louie Gilot, *Judge's Words Help Rescued Migrants' Visa Hopes*, EL PASO TIMES, Dec. 30, 2003, at 1.

108. David Sedeno, *Survivors in Trailer Smuggling Seek Visas; Judge's Determination of "Victims" in Case May Aid Immigrants*, DALLAS MORNING NEWS, Dec. 29, 2003, at 3.

109. *See id.* (contending that "U" Visa protects victims of trafficking).

110. U.S. Citizenship and Immigration Services, *Making Federal Regulations*, at <http://uscis.gov/graphics/lawsregs/regDEV.HTM> (last visited Oct. 5, 2004).

developing the regulations¹¹¹ and are attempting to create regulations that are narrowly-tailored and unhelpful to the populations Congress intended to protect.

C. *What's the Holdup? From INS to DHS*

Another problem with the slow implementation of the U visa regulations may be the reorganization of the Department of Homeland Security.¹¹² As of March 1, 2003, the Immigration and Naturalization Service no longer exists¹¹³ and the Department of Homeland Security has taken over immigration services. The Homeland Security Act of 2002, passed on November 25 of that year, officially marked the change.¹¹⁴ The Department of Homeland Security now supervises three separate agencies dealing with immigration: the United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and the Customs and Border Protection (CBP).¹¹⁵

The Homeland Security Act also left certain immigration-related procedures with the Department of Justice and the Department of State.¹¹⁶ As talks of changes loomed in early 2002, there was criticism of the plans.¹¹⁷ An open-letter written to President Bush from over thirty national and over one-hundred local immigrant-rights organizations stressed concern about moving the immigration functions to the Department of Homeland Security. "Taking a deeply troubled Immigration Service and melding it into such a massive division with tens of thousands of employees is a recipe for failure for our immigration adjudications and enforcement functions and will not meet our security needs."¹¹⁸ Con-

111. E-mail from Gail Pendleton, Assistant Director, National Immigration Project, to the author (Nov. 17, 2003, 12:07 CST) (on file with author).

112. See generally Jeffrey Manns, *Reorganization as a Substitute for Reform: The Abolition of the INS*, 112 YALE L.J. 145 (2002) (discussing reorganization proposals and the potential to accomplish intended goals).

113. Homeland Security Act of 2002, Pub. L. No. 107-296, § 471(a), 166 Stat. 2135 (2003) (codified at 6 U.S.C. § 291).

114. *Id.*

115. Stanley Mailman & Stephen Yale-Loehr, *Immigration Functions in the Department of Homeland Security*, 8 BENDER'S IMMIGR. BULL. 663, at 663 (Apr. 15, 2003).

116. *Id.* ("The Executive Office for Immigration Review (EOIR) remains with the Department of Justice. Consular processing remains a function of the Department of State."); see also Jennifer Barnes, *Practice-Context: The Lawyer-Client Relationship in Immigration Law*, 52 EMORY L.J. 1215, 1215-16 (2003) (explaining the role of the immigration courts).

117. See Editorial, *What Next for the INS?*, WASH. POST, Nov. 21, 2002, at A40; see also DAVID M. REIMERS, UNWELCOME STRANGERS: AMERICAN IDENTITY AND THE TURN AGAINST IMMIGRATION 65-86 (1998) (describing our "broken immigration system").

118. *Open Letter to President Bush*, 7 BENDER'S IMMIGR. BULL., no. 22, at 1452, 1459 (Nov. 15, 2002).

gressman Melvin Watt likewise commented that moving “the most inefficient government agency in America . . . down the hall and making it a two-headed monster will not make the agency more efficient.”¹¹⁹

USCIS is “responsible for the ‘service’ functions previously provided by the INS.” These “service functions” include adjudicating visa petitions, such as family-sponsored and employment-based petitions, naturalization applications, and asylum and refugee cases.¹²⁰ The ICE “is charged with enforcing customs laws and protecting the over 8,000 federally-owned and leased buildings within the United States and its territories.”¹²¹ Enforcement by the ICE includes “immigration investigations, detention, removal, and intelligence.”¹²² Lastly, the CBP assumes responsibilities previously assigned to the border patrol. This includes enforcing “immigration and customs laws at and between the 307 ports of entry into the United States.”¹²³

Another component of immigration law is the Executive Office for Immigration Review (EOIR), or the immigration court. Unlike the other branches described above, EOIR is under the Department of Justice, and it is an impartial body separate from the Department of Homeland Security. Its three major components are (1) the Office of the Chief Immigration Judge, (2) the Board of Immigration Appeals, and (3) the Office of the Chief Administrative Hearing Officer. The Office of the Chief Immigration Judge oversees 52 immigration courts in the United States and more than 220 immigration judges. In 2002, those immigration judges heard over 250,000 matters.¹²⁴ The Board of Immigration Appeals is the appellate body of the immigration world and consists of 11 members. Board decisions may be appealed to the federal circuit level; some even go on the Supreme Court of the United States. Lastly, the Office of the Chief Administrative Hearing Officer hears cases involving employer sanctions against companies who employ aliens in violation of federal law.

It is unclear whether separating enforcement and service functions will improve the immigration functions overall. At least at the beginning, many expect the reorganization to cause long delays in the adjudication

119. See 148 CONG. REC. H1632-34 (daily ed. Apr. 25, 2002) (statement of Rep. Melvin Watt).

120. 1 IMMIGRATION LAW & DEFENSE § 2:15 (2003); see also Daniel M. Kowalski and Lory Diana Rosenberg, *DHS Up and Running*, 8 BENDER'S IMMIGR. BULL. 451 (Mar. 15, 2003).

121. Mailman & Yale-Loehr, *Immigration Functions in the Department of Homeland Security*, *supra* note 115, at 663-64.

122. *Id.*

123. *Id.*

124. Barnes, *supra* note 116, at 1215.

of applications and a continued immigration backlog.¹²⁵ As several commentators note, a mere “shuffling [of] boxes on an organizational chart will not necessarily improve immigration services or enforcement.”¹²⁶ “The real trouble lies elsewhere: in the lack of political will to make the department function as it should. . . . [T]he weakness of the INS reflects the country’s hypocrisies and ambivalence in the debate about immigration.”¹²⁷ This immigration reorganization may also be a likely cause in the delay to issue U visa regulations.

D. *Interim Relief*

Until regulations are issued, agency memoranda provide guidelines for handling potential U visa cases. An Immigration and Naturalization Service memorandum made public in August of 2001 establishes interim procedures for identifying and assisting potential beneficiaries of the U visa.¹²⁸ The memorandum, written by Michael Cronin, Immigration and Naturalization Service Acting Executive Associate Commissioner of Office Programs, states, “[N]o alien identified as a possible victim eligible for ‘T’ or ‘U’ nonimmigrant classification should be removed from the United States until they have had an opportunity to avail themselves of the provisions of the VTVPA.”¹²⁹ Instead, Service¹³⁰ personnel are instructed to use existing mechanisms, such as parole, deferred action, con-

125. Stanley Mailman & Stephen Yale-Loehr, *Immigration in a Homeland Security Regime*, 8 BENDER’S IMMIGR. BULL. 1, 1 (2003); see also Nina Bernstein, *A Longer Wait for Citizenship and the Ballot*, N. Y. TIMES, Jun. 11, 2004, at A1 (“[T]he backlog of pending citizenship cases in New York exceeds 100,000, more than any other district in the country. It now takes triple the time to become a United States citizen in New York as in San Antonio—a year and a half compared with six months. Cleveland has one of the longest waits—three years. Yet application delays are shrinking in other areas, such as Seattle, Phoenix, El Paso, and even in Los Angeles.”); see also Nina Bernstein, *Backlog Blocks Immigrants Hoping to Vote*, N. Y. TIMES, Oct. 15, 2004, at B1 (noting that because about 60,000 prospective citizens were not naturalized in time for . . . the state voter registration deadline, the 2004 election could potentially be impacted considering the small margin of victory in the 2000 presidential election).

126. Mailman & Yale-Loehr, *Immigration in a Homeland Security Regime*, *supra* note 125, at 1.

127. See *What Next for the INS?*, *supra* note 117.

128. Michael D. Cronin, INS Acting Executive Associate Commissioner, Office of Programs, “Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—‘T’ and ‘U’ Nonimmigrant Visas,” Memorandum to Michael A. Pearson, Executive Associate Commissioner Office of Field Operations, INS Mem. HQINV 50/1 (Aug. 30, 2001), reprinted in 78 INTERPRETER RELEASES 1751 (Nov. 12, 2001).

129. *Id.*

130. “The Service” refers to the former Immigration and Naturalization Service.

tinuances, and stays of removal to prevent removal until guidelines are issued.¹³¹

A second Department of Homeland Security memorandum, written by William Yates, Associate Director of Operations, Citizenship and Immigration Services, was released on October 8, 2003.¹³² Addressed to the Director of the Vermont Service Center and entitled, “Centralization of Interim Relief for U Nonimmigrant Status Applicants,” this memorandum reiterates that interim relief must be used to protect this “vulnerable population” while regulations are in the clearance process.¹³³ This memorandum also stresses that “the fact . . . that the case in which the applicant is the victim is closed is not a determinative factor at this stage.”¹³⁴ Moreover, “[F]or interim relief purposes, ‘substantial physical or mental abuse’ should be broadly interpreted.”¹³⁵ The Yates memorandum further stresses that “it is better to err on the side of caution than to remove a possible U nonimmigrant status applicant.”¹³⁶

A third memorandum was released in May of 2004.¹³⁷ Also written by William Yates, this memorandum gives the Vermont Service Center (VSC) jurisdiction to assess deferred action to immigrants in removal proceedings at the time the request for interim relief is made.¹³⁸ Again, an individual must submit *prima facie* evidence of his or her eligibility to apply for U nonimmigrant status, then VSC personnel can exercise discretion as to whether to grant deferred action.¹³⁹ Prior to making an assessment, VSC is instructed to contact Immigration and Customs Enforcement (ICE) to determine whether there is any adverse information in the immigrant’s file.¹⁴⁰ If VSC approves interim relief, ICE is instructed to terminate removal proceedings.¹⁴¹

This lack of regulations, however, makes it difficult for advocates to defend their clients. Irena Lieberman, director of legal services at Tahirih

131. *Florida Case Underscores Slow Implementation*, *supra* note 98.

132. Yates, October 8 Memorandum, *supra* note 52.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. William R. Yates, USCIS Associate Director of Operations, “Assessment of Deferred Action in Requests for Interim Relief from U Nonimmigrant Status Eligible Aliens in Removal Proceedings,” Memorandum to Paul E. Novak, Director, Vermont Service Center, USCIS Mem. HQOPRD 70/6.2 (May 6, 2004), *available at* <http://www.nationalimmigrationproject.org/domestic-violence/U%20Visas%20in%20Proceedings%20May%206%202004.pdf>.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

Justice Center in Washington, D.C. claims that “now it’s sort of a free-for-all.”¹⁴² Without regulations, attorneys do not know how to appropriately file applications, and the DHS does not know how to grant the visas.¹⁴³ Interim relief is meant to be temporary. It is simply unacceptable that immigrant crime victims have no protection for their cooperation with authorities except for interim relief for the past four years. Again, regulations must be issued soon to serve the immigrant population that Congress intended to protect when passing the VTVPA.

E. *A Comparison to the T Visa Regulations*

1. *Regulatory Provisions*

The T visa was created by the same law that created the U visa.¹⁴⁴ In passing the Victims Prevention Trafficking Act, Congress found that 700,000 people per year are trafficked within or across international borders.¹⁴⁵ Moreover, Congress acknowledged that victims hesitate, for good reason, to report crimes or assist in investigation and prosecutions:

Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.¹⁴⁶

Building upon the Constitutional prohibition on slavery, the intent of the T visa was, therefore, to fight trafficking while also providing temporary immigration benefits to victims.¹⁴⁷ Accordingly, the T visa creates an incentive for victims to report their traffickers.

142. Curphey, *supra* note 31.

143. See Nina Bernstein, *Illegal Immigrants Testified to Stay in U.S.*, N.Y. TIMES, Sept. 16, 2004, at B1 (noting that 530 of 868 U visa applicants have been granted interim relief).

144. VTVPA § 1503. See generally Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN’S L.J. 77 (2002) (providing more information on T Visa).

145. VTVPA § 1503.

146. 22 U.S.C. § 7101(b) (2000); see also Daniel Gonzalez, *Migrant Advocates Doubt Plan’s Effect*, ARIZ. REPUBLIC, Nov. 11, 2003, at A2 (quoting immigrant who would be “very afraid” to report those who had smuggled him across the U.S. Mexican border eight years ago because . . . these are armed persons, and there . . . are many”).

147. VTVPA § 1503. See generally Cheryl Hanna, *The Trafficking of Women and Girls into the United States for Sexual Exploitation*, 13 HASTINGS WOMEN’S L.J. 1 (2002); Kathryn E. Nelson, *Sex Trafficking and Forced Prostitution: Comprehensive New Legal*

The regulations for T visas, however, were released in January of 2002,¹⁴⁸ and amended in June of 2003.¹⁴⁹ Currently, Immigration Form I-914, "Application for T Nonimmigrant Status," is used to file for a T visa.¹⁵⁰ In the first seven months after regulations were issued, the Immigration and Naturalization Service granted about 20 T visas.¹⁵¹

To be eligible for a T visa, trafficking victims must: (1) be physically present in the United States on account of the trafficking enterprise; (2) show that their removal from the United States would result in extreme hardship involving unusual and severe harm;¹⁵² and (3) demonstrate that they have complied with any reasonable request for assistance in the investigation or prosecution of a trafficking offense.¹⁵³ Congress set a very high standard for showing extreme hardship for T purposes.¹⁵⁴ Specifically,

The conferees expect that the Immigration and Naturalization Service and the Executive Office for Immigration Review will interpret the 'extreme hardship involving unusual and severe harm' to be a higher standard than just 'extreme hardship.' The standard shall cover those cases where a victim likely would face genuine and serious hardship if removed from the United States, whether or not the severe harm is physical harm or on account of having been traf-

Approaches, 24 HOUS. J. INT'L L. 551 (2002); LeRoy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L. L. REV. 227 (2003); Kara C. Ryf, Note, *The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000*, 34 CASE W. RES. J. INT'L. L. 45 (2002); Michelle R. Adelman, *International Sex Trafficking: Dismantling the Demand*, 13 S. CAL. REV. L. & WOMEN'S STUD. 387 (2004); Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L. L. 1 (2004).

148. New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 67 Fed. Reg. 4784 (Jan. 31, 2002) (to be codified at 8 C.F.R. pts. 103, 212, 214, 274a, 299).

149. Documentation of Nonimmigrants Under the Immigration and Nationality Act, as amended by Victims of Severe Forms of Trafficking in Persons, 22 C.F.R. § 41 (2003).

150. See U.S. Citizenship and Immigration Services FORM I-914, available at <http://www.uscis.gov>.

151. James Pinkerton, *Immigrant Crime Victims Await Relief Under New Visa*, HOUS. CHRON., Aug. 5, 2002, at A1.

152. See generally Jennifer M. Wetmore, *The New T Visa: Is the Higher Extreme Hardship Standard Too High for Bona Fide Trafficking Victims?*, 9 NEW ENG. J. INT'L & COMP. L. 159 (2003).

153. Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1053-54 (2002).

154. See CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 28.01 (2003) (defining the scope and requirements of the T Nonimmigrant Classification for Victims of Trafficking in Persons).

ficked. *The extreme hardship shall involve more than the normal economic and social disruptions involved in deportation.*¹⁵⁵

In addition, the applicant must prove that “force, fraud, or coercion was used, and that the traffickers had a particular end in mind for the victim,” such as sex trafficking, involuntary servitude, or slavery.¹⁵⁶ Persons who voluntarily agree to be smuggled into the United States are not, of course, eligible for T-classification.¹⁵⁷ However, the Service has noted that an individual voluntarily smuggled into the country could become a victim of a severe form of trafficking if, for instance, after arrival the smuggler uses threats of serious harm or physical restraint to force the individual into involuntary servitude, peonage, debt bondage, or slavery.¹⁵⁸

There are 5,000 T visas available each year to principal victims, not including their relatives.¹⁵⁹ Even if a T visa is granted, however, it may be revoked for one of five reasons:

- 1) the non-citizen violated the terms of the T nonimmigrant visa;
- 2) the approval of the application violated the implementing regulations or involved error in preparation procedure or adjudication that affects the outcome;
- 3) in the case of a T-2 spouse, the non-citizen’s divorce from the T-1 principal applicant has become final;
- 4) in the case of a T-1 principal applicant, a law enforcement official with jurisdiction to investigate the acts of severe forms of trafficking in persons by which the non-citizen was victimized notifies the Service that the non-citizen has unreasonably refused to cooper-

155. H.R. CONF. REP. NO. 106-939, at 95 (2000) (emphasis added).

156. Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT’L L. 1143, 1162 (2003).

157. See Associated Press, *Smuggling Survivors Seek Visas / Immigrants’ Bid Comes in Wake of Deadly 2002 Trip*, HOUS. CHRON., Dec. 30, 2003, at 12. Some, like Dan Stein, Director of the Federation for American Immigration Reform, believe that T and U visas should not be given to smuggling victims: “These visas were created to encourage people to come forward to help in the prosecution of smugglers, not because you feel sorry for them because they got involved in a criminal act and got into a bad situation. The people involved here were assuming risk, and they were, in a sense, co-conspirators of the smuggling operation.” *Id.*

158. New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 67 Fed. Reg. 4784 (Jan. 31, 2002) (to be codified at 8 C.F.R. pts. 103, 212, 214, 274a, 299).

159. See 1 IMMIGRATION LAW AND DEFENSE § 3:131 (2003). Congress may review this limit if the number is insufficient to protect victims of trafficking. Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 161 (2002-2003).

ate with the investigation or prosecution of the trafficking in persons and provides the Service with a detailed explanation of its assertions in writing; or

- 5) the law enforcement official providing certification withdraws its endorsement or disavows the statements made therein and notifies the Service with a detailed explanation of its assertions in writing.¹⁶⁰

2. Cost

One drawback to the T visa is the high cost to applicants. As of April 30, 2004, the application requires a \$255 fee (plus an additional \$105 for each immediate family member filed concurrently, not to exceed \$510 per application), in addition to a fingerprinting fee, and \$175 for the employment authorization form.¹⁶¹ This presents an enormous financial burden to impoverished immigrants. When issuing U visa regulations, the Department of Homeland Security should seriously consider the hardship that high fees put on potential immigrants. Moreover, the agency should not forget the Congressional intent behind the U visa, which is to encourage immigrants to come forward with information relating to crime.¹⁶² High fees make it less likely that willing immigrants will be able to come forward with such information.

3. Adjudication

The T visas are adjudicated in two stages.¹⁶³ USCIS first “determines whether the application is bona fide.”¹⁶⁴ Essentially, the Service checks to see that *prima facie* evidence establishes each element of T-1 status and that the application appears to be free of fraud.¹⁶⁵ This determination allows the applicant access to certain benefits and services, such as employment authorization.¹⁶⁶ “Second, the Service conducts a *de novo* review of the application” materials submitted “and makes the final adjudication,” deciding to either grant or deny the application.¹⁶⁷ This stage may “require an in-person interview with the applicant.”¹⁶⁸ If the Service

160. See GORDON ET AL., *supra* note 154, at § 28.01 [8].

161. See *Crime Victims Still Await U Visa Regulations*, (Aug. 9, 2002) at <http://www.immigrationnewsmonthly.com/08012002.shtml> (last visited Oct. 27, 2004); see also <http://uscis.gov/graphics/formsfee/forms/i-914.htm> (last visited Oct. 31, 2004).

162. See VTVPA § 1513.

163. See GORDON ET AL., *supra* note 154, at § 28.01.

164. See *id.* at § 28.01 [3][a].

165. See *id.* at § 28.01 [3][d][i].

166. See *id.* at § 28.01 [3] [d] [i], § 28.01[5].

167. See *id.* at § 28.01 [3][d].

168. *Id.* at § 28.01[3] [d] [ii].

denies the application, an appeal process is available.¹⁶⁹ As a cautionary measure, however, practitioners should carefully consider whether to apply for a T visa if their client's case is not strong because the Service "may institute removal proceedings against applicants who are" illegally present in the United States "and whose trafficking claims are denied."¹⁷⁰

V. CONCLUSION

It is imperative that U visa regulations be issued soon. Without regulations in place, it is nearly impossible to provide relief for the victims of crimes. Further, the intent of the U visa cannot be realized until U visas are granted to immigrants who have assisted in the investigation or prosecution of crime. With the issuance of these visas, crime will be reduced, benefiting not only immigrants, but also the entire population of the United States.

It is also important to keep in mind that while regulations should be issued soon, they need to be created with thought and care. It will not help the immigrant population to rush and publish regulations that are too strict. In such a case, the regulations may end up hurting immigrants rather than helping them. Moreover, the success of the U visa depends upon victims' knowledge of their new rights and confidence that law enforcement agencies will protect these rights. Enforcement of immigration laws must be counter-balanced with use of the VTVPA elements that permit the government to allow victims to assume lawful status. If those elements are underutilized, or too narrowly interpreted, the incentive for victims to report crimes will fail and the cycle of crime, including domestic violence, will continue.

169. *Id.*

170. *See id.* at § 28.01 [7].