

# U-VISA CERTIFICATION REQUIREMENT IS BLOCKING CONGRESSIONAL INTENT CREATING THE NEED FOR A WRIT OF MANDATE AND TRAINING – UNDOCUMENTED IMMIGRANT FEMALE FARMWORKERS REMAIN HIDING IN THE FIELDS OF SEXUAL VIOLENCE AND SEXUAL HARASSMENT

## I. INTRODUCTION

Patricia M.<sup>1</sup> was born in Mexico and came to the United States when she was twenty-one years old.<sup>2</sup> Even though Patricia did not have a work visa, she was able to find work as an undocumented immigrant farmworker harvesting almonds in California.<sup>3</sup> The foreman at the almond farm would constantly offer Patricia food and drinks, and she believed these offers were not made innocently.<sup>4</sup> The foreman would pick up the farmworkers in the morning at a gas station, drive them to the farm, and drop them off at the gas station when the day's work was over.<sup>5</sup> After the third day of work, the foreman dropped off the farmworkers and would not let Patricia out of the vehicle.<sup>6</sup> He instead drove her to a se-

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<sup>1</sup> The article that reports the story of this woman gives her a pseudonym to protect her identity.

<sup>2</sup> Grace Meng, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, HUMAN RIGHTS WATCH 1 (2012), [http://www.hrw.org/sites/default/files/reports/us0512ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

cluded field, used her bandanna to tie her hands to the truck, took off her clothes, and raped her.<sup>7</sup> Patricia felt alone and helpless.<sup>8</sup> She had to continue harvesting almonds at the same farm due to the lack of work opportunities and her desperate need for money, which led to continuous abuse from the foreman, eventually resulting in her getting pregnant.<sup>9</sup> Patricia feared that reporting the crime would result in her either being put in jail or sent back to Mexico since she was in the United States illegally.<sup>10</sup> As human beings and regardless of citizenship status, the type of pain and suffering Patricia endured, along with many other female farmworkers who bore the same fate, should not be tolerated. Fortunately, Congress recognized these humanitarian issues and addressed them by implementing the U-nonimmigrant visa (“U-Visa”) as a form of protection for victims such as Patricia.<sup>11</sup>

While undocumented female immigrant workers are working in the agricultural industry to provide food for millions of people around the world, they are frequently becoming victims of sexual violence and sexual harassment while working in the fields.<sup>12</sup> Many immigrants, in particular women and children, who come to the United States to work, fall victim to crimes committed by their employers or supervisors.<sup>13</sup> Specifically, these types of crimes consist of sexual violence and sexual harassment, including rape,<sup>14</sup> trafficking,<sup>15</sup> unwanted touching, verbal abuse, and exposure of private parts.<sup>16</sup> In order to help address the infliction of sexual violence and sexual harassment on immigrant victims, such as undocumented immigrant female farmworkers, Congress created the U-Visa in 2000.<sup>17</sup> The expressed congressional intent of the U-Visa is to

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2.

<sup>11</sup> Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(1)(A), 114 Stat. 1464 (2000) (codified as amended at 8 U.S.C.A. § 1101).

<sup>12</sup> Meng, *supra* note 2, at 3. The term “working in the fields” refers to a wide variety of agricultural labor farmworkers engage in, such as planting crops, harvesting crops, packing, cultivation of soil, raising livestock, dairying, etc. *Id.* at 15.

<sup>13</sup> *Id.* at 3-4.

<sup>14</sup> *Id.* at 24.

<sup>15</sup> *U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement*, U.S. DEP’T. OF HOMELAND SEC. 2, [http://www.dhs.gov/xlibrary/assets/dhs\\_u\\_visas\\_certification\\_guide.pdf](http://www.dhs.gov/xlibrary/assets/dhs_u_visas_certification_guide.pdf) (last visited Feb. 28, 2013).

<sup>16</sup> Meng, *supra* note 2, at 27.

<sup>17</sup> See Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(1)(A), 114 Stat. 1464 (2000) (codified as amended at 8 U.S.C.A. § 1101).

strengthen the ability of law enforcement to investigate and prosecute crimes and protect the victims.<sup>18</sup>

This Comment will show that the U-Visa's certification process is undermining the congressional intent of protecting victims and leaving undocumented immigrant female farmworker victims hiding in the fields of sexual violence and sexual harassment. Further, this Comment will demonstrate that Congress's intent is hindered in two ways: (1) law enforcement agencies abuse of discretion and (2) there is a lack of guidance and education at the federal and state level regarding the U-Visa and its certification requirement. Part II of this Comment will explore how the United States' agriculture industry is supported by a significant number of immigrant female farmworkers and how these women commonly experience sexual harassment and sexual violence while working in the fields. Part III will explain the history of United States' humanitarian interests leading to the protection of crime victims and the background and congressional purpose of the U-Visa. It also will explain the statutory requirements, primarily focusing on the certification requirement in the statute that is hindering victims' ability to acquire a federal immigration benefit. Part IV will address how the U-Visa certification requirement serves as a gatekeeper. It will also demonstrate that the certification requirement is actually serving as a roadblock to victims deserving immigration benefits and the opportunity to pursue a writ of mandate must be created as a path to overcome the roadblock so victims are not left helpless. Part V will recommend that education is essential in furthering the congressional intent behind the U-Visa and reducing the need for further litigation and the unnecessary use of scarce judicial resources since the mandamus procedure is burdensome, time and resource intensive, and should be used as a last resort.

## II. UNITED STATES' AGRICULTURE AND THE PROBLEM OF SEXUAL VIOLENCE AND SEXUAL HARASSMENT IN THE FIELDS

### A. *United States' Agriculture is Fueled by the Labor of Immigrant Farmworkers*

Immigrant farmworkers drive United States' agriculture.<sup>19</sup> As of January 2011, roughly 11.5 million undocumented immigrants were residing

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<sup>18</sup> *Id.* at § 1513(a)(2)(A).

<sup>19</sup> See Steve Baragona, *US Farmers Depend on Illegal Immigrants*, VOICE OF AMERICA (last updated Aug. 11, 2010, 8:00 PM), <http://www.voanews.com/content/us-farmers-depend-on-illegal-immigrants-100541644/162082.html>.

in the United States.<sup>20</sup> Agriculture is especially important in the United States because “[t]he United States is one of the world’s largest producers, consumers, exporters[,] and importers of agricultural commodities . . . .”<sup>21</sup> In May 2011, there were approximately 1.4 million crop workers and 429,000 livestock workers in the United States.<sup>22</sup> The United States’ agriculture industry is highly fueled by immigrant farmworkers, and this industry depends on these immigrant laborers to work on the farms; this dependence has increased over the years.<sup>23</sup> There are two types of immigrant farmworkers: legal resident immigrants and undocumented immigrants.<sup>24</sup> Legal resident immigrants are immigrants who are “granted lawful permanent residence; granted asylum; admitted as refugees; or admitted as nonimmigrants for a temporary stay in the United States,” such as students or temporary workers.<sup>25</sup> Undocumented immigrants are immigrants who are not legal residents in the United States and are therefore illegal residents under federal immigration law.<sup>26</sup> This Comment focuses on undocumented immigrants. In 1989, 7% of the farmworkers in the United States were undocumented; this number increased to 37% during the period of 1994 to 1995.<sup>27</sup> From 2007-2009, about 48% were undocumented farmworkers,<sup>28</sup> and in 2009-2010, roughly 24% of the farmworkers were female.<sup>29</sup> From an overall perspective, roughly 50% of the farmworkers were undocumented from 2001 to 2011.<sup>30</sup>

Even though undocumented farmworkers populate the entire United States, California has the largest population of undocumented workers.<sup>31</sup>

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<sup>20</sup> Michael Hofer, Nancy Rytina & Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, U.S. DEP’T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS 1 (2012), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf).

<sup>21</sup> OCED, *EVALUATION OF AGRIC. POLICY REFORMS IN THE UNITED STATES* 14 (OCED Publishing 2011).

<sup>22</sup> Philip Martin, *California Hired Farm Labor 1960-2010: Change and Continuity*, MIGRATION DIALOGUE: UNIV. OF CALIFORNIA DAVIS 11 (2011), <http://migration.ucdavis.edu/cf/files/2011-may/martin-california-hired-farm-labor.pdf>.

<sup>23</sup> Baragona, *supra* note 19.

<sup>24</sup> Hofer, Rytina & Baker, *supra* note 20, at 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> TADLOCK COWAN, CONG. RESEARCH SERV., RL33184, CALIFORNIA’S SAN JOAQUIN VALLEY: A REGION IN TRANSITION 172 (2005).

<sup>28</sup> Daniel Carroll, Annie Georges & Russell Saltz, *Changing Characteristics of U.S. Farm Workers: 21 Years of Finding from the National Agricultural Workers Survey*, IMMIGRATION REFORM AND AGRIC. CONFERENCE AT UC DAVIS 14 (2011), <http://migration.ucdavis.edu/cf/files/2011-may/carroll-changing-characteristics.pdf>.

<sup>29</sup> Meng, *supra* note 2, at 16.

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.* at 39.

Specifically, California's San Joaquin Valley, which includes Fresno, Kern, Kings, Madera, San Joaquin, Stanislaus, and Tulare counties, "is home to five of the ten most agriculturally productive counties in the United States."<sup>32</sup> About one million farmworkers work in California and between seventy-five and ninety percent of them were not originally born in the United States but rather Mexico.<sup>33</sup> Out of these one million farmworkers, roughly twenty-eight percent of them are female.<sup>34</sup>

*B. Undocumented Immigrant Female Farmworkers are Targeted in the Fields as Prey for Criminals, Making Them the Perfect Victim*

Sexual harassment and sexual violence are prevalent issues in the fields.<sup>35</sup> In 1995, Equal Employment Opportunity Commission ("EEOC") staff, while meeting with advocates and farmworkers in Fresno, California, stated, "[w]e were told that hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors."<sup>36</sup> The EEOC was also informed by farmworkers and advocates that one company's fields are commonly referred to as the "field de calzon," or "field of panties," because many farmworkers were raped there.<sup>37</sup> In 2010, out of the 150 female farmworkers surveyed in the California's San Joaquin Valley, eighty percent reported experiencing some type of sexual harassment.<sup>38</sup>

Undocumented immigrant female farmworkers are more vulnerable victims for a variety of reasons including fear of deportation,<sup>39</sup> language barriers,<sup>40</sup> lack of education,<sup>41</sup> poverty,<sup>42</sup> and working in isolated areas.<sup>43</sup> Since these victims are undocumented immigrants, they cannot go to law enforcement for help without fear of deportation due to their illegal

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<sup>32</sup> CONG. RESEARCH SERV., RL33184, at 1-2.

<sup>33</sup> Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, SAGE PUBL'NS 239 (2010), <http://vaw.sagepub.com/content/16/3/237>.

<sup>34</sup> *Id.*

<sup>35</sup> See generally Meng, *supra* note 2, at 23.

<sup>36</sup> William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075, 1079-80 (2000).

<sup>37</sup> *Id.* at 1080.

<sup>38</sup> Meng, *supra* note 2, at 23.

<sup>39</sup> *Id.* at 49.

<sup>40</sup> *Id.* at 15-16, 78.

<sup>41</sup> *Id.* at 15-16.

<sup>42</sup> Waugh, *supra* note 33, at 245.

<sup>43</sup> *Id.*

status leaving them as targeted victims.<sup>44</sup> Additionally, many of the female farmworkers only speak their native language of Spanish, creating a language barrier.<sup>45</sup> Since law enforcement cannot fully understand the victims due to this barrier, indifference among police about crimes reported is often created.<sup>46</sup> Also, the majority of these farmworkers have little to no education and average an eighth grade education; this lack of knowledge leaves these victims vulnerable for abuse.<sup>47</sup> Furthermore, undocumented female farmworkers are often very poor, which places these individuals financially in a difficult position.<sup>48</sup> Due to needing the money from the job to support themselves and their children, these poverty-stricken farmworkers are left complying with perpetrators' sexual propositions, so they do not get fired.<sup>49</sup> In addition, female farmworkers tend to work in isolated areas, away from coworkers, either due to the job requirements or their supervisor's choice, which leaves these farmworkers vulnerable to sexual harassment and sexual violence since no one else is around to hear their cries for help.<sup>50</sup> These challenges are making undocumented immigrant female farmworkers more apt to be the perfect victims.<sup>51</sup>

### III. THE U-VISA: CONGRESS'S ATTEMPT TO PROTECT VICTIMS OF CRIMES BY CREATING A STATUTORY AVENUE FOR SAFETY

#### A. Human Rights Interests – Keeping Individuals Protected

The United States is devoted to furthering humanitarian interests both internationally and nationally,<sup>52</sup> and this devotion is seen in the implementation of the U-Visa.<sup>53</sup> "Human rights are basic rights and freedoms that all people are entitled to regardless of nationality, sex, national or ethnic origin, race, religion, language, or other status."<sup>54</sup> Human rights law requires countries to protect individuals from violations based on

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<sup>44</sup> Meng, *supra* note 2, at 49.

<sup>45</sup> *Id.* at 16.

<sup>46</sup> *Id.* at 78.

<sup>47</sup> *Id.* at 16.

<sup>48</sup> Waugh, *supra* note 33, at 245.

<sup>49</sup> *Id.* at 245-246.

<sup>50</sup> *See id.*

<sup>51</sup> *See generally* Meng, *supra* note 2, at 16, 49; *see generally* Waugh, *supra* note 33, at 245-246.

<sup>52</sup> *See* sources cited *infra* note 57.

<sup>53</sup> *See* Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464 (2000) (codified as amended at 8 U.S.C.A. § 1101).

<sup>54</sup> *Human Rights Basics*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/research/human-rights-basics> (last visited Nov. 29, 2012).

humanitarian interests, including sexual harassment and sexual violence, and to provide remedies when those rights and freedoms have been violated.<sup>55</sup> International human rights laws are in place to protect citizens and non-citizens in a country's territory.<sup>56</sup> Over the past century the United States has signed many declarations and conventions and ratified a few conventions to protect individuals' human rights, specifically to protect both citizens and non-citizens from experiencing sexual violence and sexual harassment.<sup>57</sup> However, even though conduct involving sexual violence and sexual harassment clearly violate international human rights laws and various United States federal and state laws, numerous undocumented female immigrants continued to be victimized, which created the need for the U-Visa.<sup>58</sup>

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<sup>55</sup> Meng, *supra* note 2, at 87; see Savitri Goonesekere, *A Rights-Based Approach to Realizing Gender Equality*, UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN, <http://www.un.org/womenwatch/daw/news/savitri.htm> (last visited Nov. 29, 2012) (discussing the origin of human rights and general equality).

<sup>56</sup> See sources cited *infra* note 57.

<sup>57</sup> For instance, the Universal Declaration of Human Rights of 1948 ("UDHR") was the first document to define human rights; the declaration set forth that all human beings were born equal in both dignity and rights. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), at Preamble & art. 1. Some of the rights included in the declaration were rights and freedoms without discrimination based on sex or other status, the right to not be tortured or being subjected to cruel and inhuman treatment, and the right to work in just and favorable conditions. *Id.* at art. 2, 5, 23. The UDHR, although legally not enforceable as a declaration, has served as the foundation of "formally setting standards, or establishing norms, for other declarations and legally binding conventions covering abuses against some of the world's most highly vulnerable victims who were unable to protect themselves." PAUL G. LAUREN, *THE EVOLUTION OF INT'L HUMAN RIGHTS: VISIONS SEEN* 228-229 (University of Pennsylvania Press, 3rd ed. 2011). The Convention Against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture") and the International Covenant on Civil and Political Rights ("ICCPR") prohibit torture, cruel, inhuman, degrading treatment, and punishment against any individual within the countries borders. Meng, *supra* note 2, at 87. The United States has both signed and ratified both the Convention Against Torture and ICCPR meaning they are binding law. *Id.* The United States has also signed the Convention of the Elimination of All Forms of Discrimination Against Women in 1980 recognizing that "violence against women is a form of discrimination against women and that states parties should have effective legal, preventive, and protective measures in place to provide justice for victims, hold offenders accountable, and protect society from future acts of sexual violence." *Id.* at 88. The United States has not ratified this convention, but as a signatory the United States still has to adhere to the convention and not act in any way that would go against the purpose of the convention. *Id.*

<sup>58</sup> See Battered Immigrant Women Protection Act § 1513(a)(1)(B).

*B. Background and Congressional Purpose of the U-Visa – Protecting the Most Vulnerable Victims*

In 1994, Congress enacted the Violence Against Women Act (“VAWA”), which was the first federal law that recognized domestic violence and sexual assault as crimes and provided protections to victims of such crimes.<sup>59</sup> In 2000, Congress recognized the vulnerability of individuals being victims of illegal human trafficking and enacted the Victims of Trafficking and Violence Protection Act (“VTVPA”) to address this issue and also to improve existing protections offered by federal programs and laws in the United States to protect undocumented immigrants from domestic violence and prevent violence against women.<sup>60</sup> The VAWA was reauthorized in 2000, which is called the Violence Against Women Act of 2000 (“VAWA 2000”), becoming part of the VTVPA as a separate division (Division B).<sup>61</sup> The VAWA 2000 specifically strengthened federal laws and further assisted immigrant victims of domestic violence.<sup>62</sup>

Congress found that immigrant women and children in the United States were frequently and specifically targeted as victims of rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage, and being criminally restrained.<sup>63</sup> In order to address these crimes, Congress created the U-Visa process in the VTVPA as a federal benefit to help non-citizens who are victims of crimes.<sup>64</sup> Congress’s purpose of creating the U-Visa was to

create a new nonimmigrant visa classification that [would] strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States . . . [and to] encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.<sup>65</sup>

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<sup>59</sup> See Office of Violence Against Women, *The History of the Violence Against Women Act*, U.S. DEP’T OF JUSTICE (2009), <http://www.ovw.usdoj.gov/docs/history-vawa.pdf>.

<sup>60</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>61</sup> See generally *id.*

<sup>62</sup> *The History of the Violence Against Women Act*, *supra* note 59.

<sup>63</sup> Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(1)(A), 114 Stat. 1464 (2000) (codified as amended at 8 U.S.C.A. § 1101).

<sup>64</sup> See *id.* § 1513(a)(2)(A). More specifically, within the VTVPA, the U-Visa process is in Title V, Battered Immigrant Women Protection Act of 2000 under VAWA 2000.

<sup>65</sup> *Id.*

Congress intended for the U-Visa to encourage undocumented immigrants who were “trafficked, exploited, victimized, and abused” to report crimes to law enforcement officials without fear of deportation.<sup>66</sup> In addition, Congress intended to give undocumented immigrant victims temporary legal status comporting with humanitarian interests<sup>67</sup> and the Attorney General discretion to allow the undocumented immigrant victim permanent resident status “when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.”<sup>68</sup>

If an undocumented immigrant is granted a U-Visa, they can remain in the United States for up to four years<sup>69</sup> and are authorized to work in the United States during that time.<sup>70</sup> Furthermore, keeping with humanitarian interests, the U-Visa holder has the option of receiving permanent legal resident status after three years of remaining in the United States.<sup>71</sup> A maximum of 10,000 U-Visas can be granted in one year.<sup>72</sup> The U-Visa provisions also allow spouses and children of the U-Visa holder and parents of the U-Visa holder (if the holder is twenty-one years old or younger) to petition to remain in the United States while his or her family member holds the U-Visa.<sup>73</sup> If a petition is granted, these derivative relatives do not count against the 10,000 numerical limitation.<sup>74</sup> Unfortunately, for the past three years, the 10,000 holder maximum has been met,<sup>75</sup> which is making it harder for law enforcement to prosecute crimes against dangerous perpetrators.<sup>76</sup>

### C. U-Visa Statutory Requirements

In order to apply for a U-Visa, the victim has to submit an I-918 Petition for U Nonimmigrant Status (“U-Visa Petition”) and submit Form I-918 Supplement B (“U-Visa certification form”) to the United States

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<sup>66</sup> *Id.* § 1513(a)(2)(B).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at § 1513(a)(2)(C).

<sup>69</sup> 8 U.S.C.A. § 1184(p)(6) (2009).

<sup>70</sup> *Id.* at § 1184(q)(1)(A).

<sup>71</sup> 8 U.S.C.A. § 1255 (m)(1)(A)(B).

<sup>72</sup> *Id.* at § 1184(p)(2)(A).

<sup>73</sup> *Id.* at § 1101(a)(15)(U)(ii) (2012).

<sup>74</sup> *Id.* at § 1184(p)(2)(B). A derivative relative is a spouse or child of the victim, and if the victim is under the age of sixteen, a derivative relative is a parent or guardian. *Id.* § 1101(a)(15)(U)(ii).

<sup>75</sup> *USCIS Reaches U Visa Cap for Third Year*, 89 INTERPRETER RELEASES 1633 (2012).

<sup>76</sup> *Rangel Introduces Violence Against Women Act*, CONGRESSMAN CHARLES B. RANGEL (March 28, 2012), <http://rangel.house.gov/statements/2012/03/rangel-introduces-violence-against-women-act.shtml>.

Citizenship and Immigration Services (“USCIS”),<sup>77</sup> which is in the Department of Homeland Security (“DHS”).<sup>78</sup> These two steps have to be completed in order to have the possibility of being granted a U-Visa.<sup>79</sup> Using the U-Visa petition and certification form, USCIS has the sole discretion and responsibility to decide whether an individual should be granted a U-Visa.<sup>80</sup> An undocumented immigrant qualifies for a U-Visa if the individual meets the following requirements: (1) “suffered substantial physical or mental abuse” from being a victim of criminal activity;<sup>81</sup> (2) “possesses information concerning [the] criminal activity;”<sup>82</sup> (3) provides a completed certification form signed by a certifying official confirming that the individual “has been helpful,<sup>83</sup> is being helpful, or is likely to be helpful to a Federal, State, or local 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 [the] criminal activity;”<sup>84</sup> and (4) was a victim of “the criminal activity . . . [which] violated the laws of the United States or occurred in the United States . . . or the territories and possessions of the United States.”<sup>85</sup> A criminal activity is defined by the statute as:

[any] activity involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: 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;

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<sup>77</sup> U.S. Citizenship and Immigration Services, *Instructions for Form I-918, Petition for U Nonimmigrant Status*, OMB No. 1615-0104, U.S. DEP’T. OF HOMELAND SEC. (2010), <http://www.uscis.gov/files/form/i-918instr.pdf> [hereinafter *Instructions for Form I-918*]; see also 8 C.F.R § 214.14(c)(1) (2008).

<sup>78</sup> *Citizenship and Immigration Overview*, U.S. DEP’T. OF HOMELAND SEC., <http://www.dhs.gov/topic/citizenship-and-immigration-overview> (last visited Mar. 14, 2013).

<sup>79</sup> *Instructions for Form I-918*, *supra* note 77, at 4.

<sup>80</sup> 8 C.F.R § 214.14(c)(1).

<sup>81</sup> 8 U.S.C.A. § 1101(a)(15)(U)(i)(I); see also 8 C.F.R § 214.14(b)(1).

<sup>82</sup> 8 U.S.C.A. § 1101(a)(15)(U)(i)(II); see also 8 C.F.R § 214.14(b)(2).

<sup>83</sup> Helpful means “assisting law enforcement authorities in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim.” New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53014-01, 53019 (proposed Sept. 17, 2007) (to be codified at 8 C.F.R. pt. 214.14); U.S. Citizenship and Immigration Services, *Instructions for I-918, Supplement B, U Nonimmigrant Status Certification*, OMB No. 1615-0104, U.S. DEP’T. OF HOMELAND SEC. 3 (2010), <http://www.uscis.gov/files/form/i-918supbinstr.pdf> [hereinafter *Instructions for Form I-918, Supplement B*].

<sup>84</sup> 8 U.S.C.A. § 1101(a)(15)(U)(i)(III); see also 8 C.F.R § 214.14(b)(3) & (c)(2)(i).

<sup>85</sup> 8 U.S.C.A. § 1101(a)(15)(U)(i)(IV); see also 8 C.F.R § 214.14(b)(4).

felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes . . . .<sup>86</sup>

An applicant has the burden of proof to establish that he or she has met the four qualifications.<sup>87</sup>

#### *D. Certification Requirement*

Congress recognized that it was essential for the victim to cooperate and assist law enforcement in order to effectively investigate and prosecute criminals.<sup>88</sup> In order to address the victim's cooperation and assistance and to meet the third statutory requirement, the applicant must submit the U-Visa certification form as proof to the USCIS that he or she is being helpful, has been helpful, or is likely to help law enforcement in assisting the investigation and prosecution of the crime inflicted on him or her.<sup>89</sup> The U-Visa certification form must be submitted to a "certifying agency" and signed by a "certifying official,"<sup>90</sup> and according to the statute, a local law enforcement agency is considered a certifying agency.<sup>91</sup> A certifying official is "the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency; or a Federal, State, or local judge."<sup>92</sup> The certifying agency's decision to certify the U-Visa certification form is entirely discretionary, which is stated in the following note on the instructions for the U-Visa certification form:

. . . An agency's decision to provide a certification is entirely discretionary; the agency is under *no legal obligation* to complete a Form I-918, Supple-

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<sup>86</sup> 8 U.S.C.A. § 1101(a)(15)(U)(iii).

<sup>87</sup> 8 C.F.R. § 214.14(c)(4).

<sup>88</sup> See Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(1)(B), 114 Stat. 1464 (2000) (codified as amended at 8 U.S.C.A. § 1101).

<sup>89</sup> 8 C.F.R. § 214.14(c)(2)(i).

<sup>90</sup> *Id.*; New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014-01, 53019 (proposed Sept. 17, 2007) (to be codified at 8 C.F.R. pt. 214.14).

<sup>91</sup> 8 C.F.R. § 214.14(a)(2). A certifying agency is a "Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity [and] . . . includes agencies that have criminal investigation 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." *Id.*

<sup>92</sup> *Id.* at § 214.14(a)(3).

ment B, for any particular alien. However, without a completed Form I-918 B, Supplement B, the alien will be ineligible for U nonimmigrant status.<sup>93</sup>

This discretionary authority and the *no legal obligation* language undermine the U-Visa.<sup>94</sup> The discretionary language is not stated in the regulation;<sup>95</sup> instead the regulation directs the certifier to present fact-specific information that the applicant was a victim of a qualifying criminal activity, has information concerning that criminal activity, has been, is being, or is likely to be helpful in the investigation or prosecution of the crime.<sup>96</sup> Once someone with agency supervisory authority establishes the helpfulness of the victim and signs the U-Visa certification form, the applicant is confirmed to have met the third requirement of the statute.<sup>97</sup> USCIS then reviews the U-Visa certification form with the rest of the applicant's U-Visa petition to determine if the victim is eligible for a U-Visa.<sup>98</sup> The USCIS will not review a victim's U-Visa petition without a completed U-Visa certification form showing the victim's helpfulness in the investigation and prosecution of the crime.<sup>99</sup>

#### IV. CERTIFICATION: THE GATEKEEPER OR THE ROADBLOCK? – THE BLOCKING OF CONGRESSIONAL INTENT AND CREATION OF A PATH TO INJUSTICE

Although USCIS makes the final determination if an individual is granted or denied a U-Visa, the certifying agencies, which are often local law enforcement agencies,<sup>100</sup> have sole control over deciding whether or not the individual has met the statutory requirement of being “helpful.”<sup>101</sup> Since USCIS will not review a victim's U-Visa petition without a completed U-Visa certification form, the certifying agencies consequently

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<sup>93</sup> Instructions for Form I-918, Supplement B, *supra* note 83, at 1 (emphasis added). In addition to these instructions, in *Ordonez Orosco v. Napolitano*, 598 F.3d 222 (5th Cir. 2010), the court held that law enforcement certification is discretionary. *Ordonez Orosco v. Napolitano*, 598 F.3d 222, 226 (5th Cir. 2010).

<sup>94</sup> Tahja L. Jensen, Comment, *U Visa “Certification”: Overcoming the Local Hurdle in Response to a Federal Statute*, 45 IDAHO L. REV. 691, 702 (2009).

<sup>95</sup> See 8 C.F.R. § 214.14.

<sup>96</sup> *Id.* at § 214.14(c)(2)(i); Jensen, *supra* note 94, at 702.

<sup>97</sup> 8 C.F.R. § 214.14(c)(2)(i).

<sup>98</sup> *Id.* at § 214.14(c)(1).

<sup>99</sup> *Id.* at § 214.14(c)(2)(i); see also Instructions for Form I-918, Supplement B, *supra* note 83, at 1.

<sup>100</sup> See Gail Pendleton, *Winning U Visas: Getting the Law Enforcement Certification*, LEXISNEXIS EXPERT COMMENTARIES 4 (2008), [http://www.asistahelp.org/documents/resources/ExpCommPendleton0208\\_4D9DF9844BDF9.pdf](http://www.asistahelp.org/documents/resources/ExpCommPendleton0208_4D9DF9844BDF9.pdf).

<sup>101</sup> See 8 C.F.R. § 214.14(c)(2)(i); see also Instructions for Form I-918, Supplement B, *supra* note 83, at 1.

have a high degree of control and discretion over whether or not an applicant even has an ability to obtain a U-Visa.<sup>102</sup> These certifying agencies are essentially acting as a gatekeeper only allowing victims who are being helpful, have been helpful, or are likely to be helpful in assisting law enforcement in the investigation and prosecution of the crime inflicted on the victims to have the possibility to receive a federal benefit, the U-Visa.<sup>103</sup>

With the power to certify the helpfulness of the victim given by Congress, the certifying agencies, when they choose not to use their discretion, are not actually functioning as a gatekeeper.<sup>104</sup> Rather, the certifying agencies are acting like a roadblock, which is resulting in injustice and the total undermining of the congressional intent behind the U-Visa.<sup>105</sup> This is occurring because law enforcement agencies have complete discretion in certifying a victim's helpfulness, which at times is resulting in an abuse of discretion, and there is a lack of guidance and education at the federal and state level with regards to the U-Visa and its certification requirement.<sup>106</sup>

*A. Local Law Enforcement Agencies Abuse of Discretion and Victims  
Need for a Writ of Mandate*

Among other certifying agencies, Congress gave local law enforcement the power to certify the U-Visa certification form and the agencies can do so at their complete discretion.<sup>107</sup> While exercising discretion, there is always a possibility that law enforcement agencies may abuse their discretionary authority.<sup>108</sup> This abuse of discretion is currently happening.<sup>109</sup> For example, instead of considering all the facts and making a discretionary decision, some county sheriff and police departments in

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<sup>102</sup> See 8 C.F.R. § 214.14(c)(2)(i); see also Instructions for Form I-918, Supplement B, *supra* note 83, at 1.

<sup>103</sup> See 8 C.F.R. § 214.14(c)(2)(i); see also Instructions for Form I-918, Supplement B, *supra* note 83, at 1.

<sup>104</sup> See 8 C.F.R. § 214.14(c)(2)(i); see also discussion *infra* Part IV.A-B.

<sup>105</sup> See 8 C.F.R. § 214.14(c)(2)(i); see also discussion *infra* Part IV.A-B.

<sup>106</sup> See Instructions for Form I-918, Supplement B, *supra* note 83, at 1; see also discussion *infra* Part IV.A-B.

<sup>107</sup> See 8 C.F.R. § 214.14(c)(2)(i); see also Instructions for Form I-918, Supplement B, *supra* note 83, at 1.

<sup>108</sup> See Bernice B. Young, *Police Discretion in Contemporary America* 6 (April 4, 2011) (unpublished M.A. thesis, Georgetown University) (on file with Georgetown University Library).

<sup>109</sup> See sources cited *infra* note 111.

California, which are all law enforcement agencies in California,<sup>110</sup> have been known to refuse to consider U-Visa certification form requests.<sup>111</sup> This can ultimately result in denying victims the opportunity to be heard or considered to receive a federal benefit granted by the U-Visa, leaving a victim with no recourse for abuse because the certification is a requirement that needs to be met in order to apply for a U-Visa.<sup>112</sup> In these situations where local law enforcement agencies are abusing their discretionary authority in certifying a victim's helpfulness, a writ of mandamus, which is "a judicial command requiring the performance of a specified duty which has not been performed,"<sup>113</sup> should be available and mandated by a state court to compel such agencies to consider U-Visa certifications.<sup>114</sup>

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<sup>110</sup> See *California Law Enforcement Agencies*, CA.GOV POST, <http://www.post.ca.gov/le-agencies.aspx> (last visited Nov. 29, 2012).

<sup>111</sup> Attorneys in California have stated that some country sheriff and police departments in California will not consider or have not considered in the past certifying U-Visa certification forms for any victims. Interview and conversations with Jessica Smith Bobadilla, Attorney, The New American Legal Clinic and Law Office of Jessica Smith Bobadilla, in Fresno, Cal. (Sept. to Nov. 2012). See also Jessica Farb, *The U Visa Unveiled: Immigrant Crime Victims Freed from Limbo*, WASHINGTON COLLEGE OF LAW 27, <http://www.wcl.american.edu/hrbrief/15/1farb.pdf> (law enforcement officer did not exercise discretion and instead refused to sign the form because he "didn't vote for that law"). An officer cannot legally refuse to exercise discretion, because he did not vote for the law; therefore, this is an abuse of discretion. The U-Visa was a congressional action and not a ballot initiative; therefore, there was no law for the public to vote on for the U-Visa. See Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464 (2000) (codified as amended at 8 U.S.C.A. § 1101).

<sup>112</sup> See Instructions for Form I-918, Supplement B, *supra* note 83, at 1; see also discussion *supra* Part III.D.

<sup>113</sup> Mandamus in Administrative Actions: Current Approaches, 1973 DUKE L. REV. VOL. 207, 207 (1973).

<sup>114</sup> See discussion *infra* Part IV.A.1.

### 1. California Law Writ of Mandate

In California, a writ of mandamus is called a writ of mandate,<sup>115</sup> and California states,

[a] writ of mandate may be issued by any court to any . . . person to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded . . . .<sup>116</sup>

A writ of mandate can specifically be issued against a public officer or a “country, city[,] or other public body.”<sup>117</sup> In order to obtain a writ of mandate, the following requirements have to be met: “(1) a clear, present[,] and usually ministerial duty on the part of the respondent, and (2) a clear, present[,] and beneficial right on the part of the petitioner to the performance of that duty.”<sup>118</sup>

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<sup>115</sup> CAL. CIV. PROC. CODE § 1084 (West 2012). Since the U-Visa is a federal statute, one might believe that a federal court should issue a writ of mandamus to compel the state agencies to act. Federal Rules of Civil Procedure Rule 81(b) abolished the writ of mandamus, but under 28 U.S.C. § 1361, the federal district courts have “original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” FED. R. CIV. P. 81(b); *see also* 28 U.S.C.A. § 1361. With regards to a state agency abusing its discretion to certify the U-Visa certification form, however, a victim would not be seeking a writ of mandamus to compel an officer, employee, or agency of the *United States*, but rather a *state* officer, employee, or agency, and “federal district courts do not have authority to issue writs of mandamus to direct state officials in the performance of their duties.” *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1380 (N.D. Ga. 2012). However, even though the federal court cannot compel a state agency to perform its duties, the federal court did “issue a writ of mandamus ordering a state official to enforce rights protected by federal law” in *CBS Inc. v. Young*, 522 F.2d 234, 237 (6th Cir. 1975) when the federal law was the First Amendment; although, the court only ordered a writ of mandamus due to the *extraordinary nature* of the case allowing the court to have jurisdiction. *Jenkins v. Cowan*, No. 3:07CVP688-S, 2008 WL 4146658, at \*1 (W.D. Ky. Aug. 29, 2008); *see also* *CBS Inc. v. Young*, 522 F.2d 234, 237 (6th Cir. 1975). Since the U-Visa statute is a federal statute, a victim might be able to seek a federal writ of mandamus to compel a state agency, employee, or officer. But an argument would probably lie over the extraordinary nature of the U-Visa as compared to our nation’s First Amendment rights. Therefore, a writ of mandamus to compel a state agency would probably be more suitable in a state court.

<sup>116</sup> CAL. CIV. PROC. CODE § 1085 (West 2011).

<sup>117</sup> *Venice Town Council, Inc. v. City of Los Angeles*, 47 Cal. App. 4th 1547, 1558 (1996).

<sup>118</sup> *California Ass’n for Health Services at Home v. Dep’t of Health Services*, 148 Cal. App. 4th 696, 704 (2007).

As to the first requirement, a writ of mandate “will lie to compel a public official to perform an official act required by law.”<sup>119</sup> A writ of mandate is traditionally used to compel a public officer or agency to perform a ministerial act, which is an act one is obligated to perform, rather than discretionary acts.<sup>120</sup> Discretion “is the power conferred on public functionaries to act officially according to the dictates of their own judgment.”<sup>121</sup> Regarding discretionary acts, a writ of mandate cannot be used to control a police officer or agency to exercise discretion in a certain manner,<sup>122</sup> but it can be used to correct a public officer or agency’s abuse of discretion<sup>123</sup> and compel a police officer or agency to exercise discretion “if he [or she] is required by law to do so” and “to exercise [discretion] under a proper interpretation of the applicable law.”<sup>124</sup>

An abuse of discretion lies when an individual entirely refuses to exercise discretion.<sup>125</sup> In other words, the “failure to consider” is an abuse of discretionary authority.<sup>126</sup> For instance, in *Anderson v. Phillips*, 13 Cal.3d 733 (1975), the respondent had the discretionary authority to assign assignments among judges of the court but refused to assign any assignments to petitioner.<sup>127</sup> Due to the refusal of exercising discretion, the court reasoned that a writ of mandate was appropriate to compel the judge “both to exercise his discretion and to exercise it under a proper interpretation of the applicable law.”<sup>128</sup> Since completing the U-Visa certification form is discretionary, a victim should be able to seek a writ of mandate to compel a local law enforcement agency to exercise its discretion when there is a lack thereof and also to consider certifying the form instead of just refusing to consider certifying.<sup>129</sup>

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<sup>119</sup> *Common Cause v. Bd. of Supervisors of Los Angeles County*, 49 Cal.3d 432, 442 (1989).

<sup>120</sup> *AIDS Healthcare Found. v. Los Angeles County Dept. of Pub. Health*, 197 Cal. App. 4th 693, 700 (2011).

<sup>121</sup> *Rodriguez v. Solis*, 1 Cal. App. 4th 495, 501-502 (1991).

<sup>122</sup> *Daily Journal Corp. v. County of Los Angeles*, 172 Cal. App. 4th 1550, 1555 (2009).

<sup>123</sup> *California Hosp. Ass’n v. Maxwell-Jolly*, 188 Cal. App. 4th 559, 570 (2010).

<sup>124</sup> *Id.*; *see also* *Bd. of Supervisors of Los Angeles County*, 49 Cal.3d at 442. An example of controlling exercise of discretion is “to compel an official to exercise discretion in a particular manner.” *California Hosp. Ass’n*, 188 Cal. App. 4th at 570.

<sup>125</sup> *Morris v. Harper*, 94 Cal. App. 4th 52, 62 (2001).

<sup>126</sup> *Daily Journal Corp.*, 172 Cal. App. 4th at 1555. “Although a court may order a government entity to exercise its discretion in the first instance when it has refused to act at all, the court will not ‘compel the exercise of that discretion in a particular manner or to reach a particular result.’” *Id.*

<sup>127</sup> *Anderson v. Phillips*, 13 Cal.3d 733, 737 (1975).

<sup>128</sup> *Id.* at 737, 741.

<sup>129</sup> *See* discussion *supra* Part IV.A.1; *see* Instructions for Form I-918, Supplement B, *supra* note 83, at 1.

As to the second requirement, California Code of Civil Procedure (“CCCP”) section 1085 gives individuals a “broad right to issuance of a writ of mandate ‘to compel performance of an act which the law specifically enjoins.’”<sup>130</sup> CCCP section 1085 is available “‘to those who are ‘beneficially interested’ parties within the meaning of [CCCP] section 1086,’”<sup>131</sup> which is “one who has a ‘special interest over and above the interest of the public at large.’”<sup>132</sup>

The beneficial interest standard is so broad, even citizen or taxpayer standing may be sufficient to obtain relief in mandamus. ‘[W]here a public right is involved, and the object of the writ of mandate is to procure enforcement of a public duty,’ a citizen is beneficially interested within the meaning of Code of Civil Procedure section 1086 if ‘he is interested in having the public duty enforced.’<sup>133</sup>

U-Visa victims should be considered beneficially interested parties because (1) they have an interest in obtaining relief from being victims of crimes and United States protects these humanitarian interests regardless of citizenship status<sup>134</sup> and (2) ultimately the investigation and prosecution of these crimes will help further humanitarian interests for people at large improving society where citizens and non-citizens both reside.<sup>135</sup> Since these victims would seek relief ultimately furthering human rights interests, which was Congress’s intent,<sup>136</sup> the victim’s interests must satisfy the beneficial interest requirement in order to obtain a writ of mandate.<sup>137</sup>

When agencies abuse its discretion, a writ of mandate should be issued stating that the law enforcement agency must consider certifying U-Visa certification forms allowing victims some recourse when law enforcement agencies are failing to exercise discretion.<sup>138</sup> Without this form of judicial review, victims are ultimately denied a possible federal benefit at the hands of local law enforcement agencies since a victim is not eligible for a U-Visa when the certification form is not completed.<sup>139</sup>

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<sup>130</sup> California Hosp. Ass’n v. Maxwell-Jolly, 188 Cal. App. 4th 559, 569 (2010).

<sup>131</sup> Mission Hosp. Reg’l Med. Ctr. v. Shewry, 168 Cal. App. 4th 460, 479 (2008).

<sup>132</sup> California Hosp. Ass’n, 188 Cal. App. 4th at 569.

<sup>133</sup> *Id.*

<sup>134</sup> See discussion *supra* Part III.A.

<sup>135</sup> See *How Law Enforcement is Using the U-Visa*, VERA INST. OF JUSTICE 2 (2011), <http://www.vera.org/sites/default/files/resources/downloads/U-visa-practice-brief.pdf>.

<sup>136</sup> See Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464 (2000) (codified as amended at 8 U.S.C.A. § 1101).

<sup>137</sup> See Mission Hosp. Reg’l Med. Ctr., 168 Cal. App. 4th at 479.

<sup>138</sup> See discussion *supra* Part IV.A.

<sup>139</sup> Instructions for Form I-918, Supplement B, *supra* note 83, at 1.

## 2. *A Writ of Mandamus has been Previously Granted in the Immigration Context*

Although the majority of successful writ of mandamus actions are not reported, do not have written decisions, or are dismissed due to the government taking the action requested, a writ of mandamus is shown to be available in the immigration law context and has been issued specifically for violations of abuse of discretion.<sup>140</sup> In the past, writs of mandamus have been issued “to compel the government to exercise its discretion in a case where the government has failed to take any action.”<sup>141</sup> With regards to the complete denial of local law enforcement refusing to certify all U-Visa certification forms, the victims seek this same justice because law enforcement is failing to take any action.<sup>142</sup> Particularly, writs of mandamus were issued requiring the defendants to deliver judgments regarding applications.<sup>143</sup> Instead of ordering the defendant “to exercise [his or her] discretion in any particular manner,” “the court will order the government to take *some* action” and not necessarily in the plaintiff’s favor.<sup>144</sup> A court has even specifically stated, “[t]o review a Board of [Immigration] Appeals decision for an abuse of discretion when its decision involves no exercise of discretion would fly in the face of common sense.”<sup>145</sup> When an abuse of discretion exists due to an agency not taking any action, a writ of mandamus is needed to allow victims a path for action.<sup>146</sup>

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<sup>140</sup> See *Mandamus Actions: Avoiding Dismissal and Proving the Case*, LEGAL ACTION CENTER 1, 4 (2009), [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_081505.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_081505.pdf); *Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (writ of mandamus was issued ordering a consulate to act on the plaintiff’s visa application); *Yu v. Brown*, 36 F. Supp. 2d 922, 925, 935 (D.N.M. 1999) (allowing a writ of mandamus to be granted ordering officials of Immigration and Naturalization Service to act on an application due to unreasonable delay).

<sup>141</sup> *Mandamus Actions: Avoiding Dismissal and Proving the Case*, *supra* note 140, at 4.

<sup>142</sup> See discussion *supra* Part IV.A.

<sup>143</sup> *Patel*, 134 F.3d at 933; *Yu*, 36 F. Supp. 2d at 925, 935.

<sup>144</sup> *Mandamus Actions: Avoiding Dismissal and Proving the Case*, *supra* note 140, at 4-5.

<sup>145</sup> *Melendez v. U.S. Dept. of Justice*, 926 F.2d 211, 218 (2d Cir. 1991) (the hearing officer and Board of Immigration Appeals both did not exercise any discretion when deciding the victim should not be granted asylum and this lead to judicial review focusing on an abuse of discretion).

<sup>146</sup> See *Mandamus Actions: Avoiding Dismissal and Proving the Case*, *supra* note 140, at 4-5; see also discussion *supra* Part IV.A.

*B. Law Enforcement's Lack of Awareness of the U-Visa and its Certification Process due to Delay of Regulations and Minimal Guidance and Education*

Law enforcement's lack of awareness of the U-Visa and its certification process is highly prevalent.<sup>147</sup> An individual at Victim Services in the Monterey County District Attorney's Office admitted that there is a widespread misunderstanding about the U-Visa and many responsible for certifications do not know what it actually is.<sup>148</sup> A victim even stated that when she reported harassing phone calls before she was raped, the police department did not show any interest in helping her.<sup>149</sup> Also, in Florida, a legal services lawyer explained how a victim called the police to report domestic violence; instead of helping the victim and investigating the allegation, the police officer arrested everyone in the house.<sup>150</sup> The officer made no documentation of an investigation for the U-Visa certification, which left the victim incapable of even applying for a U-Visa totaling undermining the statute's intent.<sup>151</sup> There is also evidence that local police departments do not want help understanding the U-Visa provision.<sup>152</sup> For instance, a woman from a female farmworker advocacy organization stated that when she offered to help give local police departments outreach support, the departments were not interested, which showed minimal "institutional commitment to providing services."<sup>153</sup> If law enforcement officials lack knowledge about the U-Visa, it is unlikely that they understand the importance of the certification process required by the U-Visa legislation.<sup>154</sup> Since state and local law enforcement officials play such a vital role in the U-Visa process, it is very important that they are aware of the U-Visa and the certification requirement so victims of crimes are not left without relief due to the lack of knowledge on the part of law enforcement.<sup>155</sup> Education and awareness would prevent agencies from hiding behind a veil of "discretion" when really they are not even considering the merits of a victim's case.<sup>156</sup>

With regard to the certification process, the U-Visa certification form creates concern and frustration among many law enforcement representa-

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<sup>147</sup> See discussion *infra* Part IV.B.

<sup>148</sup> Meng, *supra* note 2, at 56.

<sup>149</sup> *Id.* at 78.

<sup>150</sup> *Id.* at 56.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 78.

<sup>153</sup> *Id.*

<sup>154</sup> See discussion *supra* Part IV.B.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

tives and victims due to the lack of awareness resulting in inconsistent ways different jurisdictions apply the certification provision.<sup>157</sup> For instance, some jurisdictions use the U-Visa to respond to domestic violence, other jurisdictions use the U-Visa “as part of a larger community policing scheme” protecting the community as a whole, and a number of jurisdictions do not even use the U-Visa.<sup>158</sup> Law enforcement officials have been known to treat the certification form in one of three ways: (1) want nothing to do with the immigration process; (2) intentionally remain “entirely ignorant of the U-Visa and [would] hesitate to sign” the certification form; or (3) willingly sign the certification form.<sup>159</sup> For example, a law enforcement officer in San Diego, California stated the reason he did not sign a U-Visa certification form for a victim was because he “didn’t vote for that law.”<sup>160</sup> This type of attitude not only discourages victims from applying for a U-Visa seeking relief but also goes against the congressional intent set forth with the U-Visa legislation, which was designed to protect victims and *encourage* law enforcement officials to investigate and prosecute crimes.<sup>161</sup> This inconsistency could be connected to the lack of information given to law enforcement officials concerning both the U-Visa and its certification process.<sup>162</sup>

### *1. Delay of Regulations – Resulting in Law Enforcement Hindering Congressional Intent*

Even though the U-Visa was established in 2000 allowing for 10,000 U-Visas to be issued in one year, the DHS failed to establish interim rules and regulations for the U-Visa until 2007.<sup>163</sup> Due to this delay, the USCIS was forced to delay the approval or denial of the U-Visa petition for the majority of its applicants for those seven years.<sup>164</sup> The delay significantly impacted the lives of victims because while waiting for a decision from USCIS, they could not leave the country and most often were

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<sup>157</sup> Meng, *supra* note 2, at 55.

<sup>158</sup> *How Law Enforcement is Using the U-Visa*, *supra* note 135, at 2.

<sup>159</sup> Farb, *supra* note 111, at 27.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*; see Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464 (2000) (codified as amended at 8 U.S.C.A. § 1101).

<sup>162</sup> *How Law Enforcement is Using the U-Visa*, *supra* note 135, at 2.

<sup>163</sup> 8 U.S.C.A. § 1184(p)(2)(A); see New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53014-01, 53019 (proposed Sept. 17, 2007) (to be codified at 8 C.F.R. pt. 214.14).

<sup>164</sup> Joey Hipolito, Article, *Illegal Aliens or Deserving Victims?: The Ambivalent Implementation of the U Visa Program*, 17 Asian Am. L.J. 153, 155 (2010).

not able to legally work in the United States.<sup>165</sup> This situation potentially leaves abused victims prone to facing the same danger and violence previously endured.<sup>166</sup> The USCIS finally issued the first U-Visa in 2008 allowing victims to receive relief.<sup>167</sup> This delay also resulted in inconsistent law enforcement cooperation and law enforcement's not complying with the congressional intent behind the U-Visa.<sup>168</sup>

The U-Visa provision itself lacks a training program or component.<sup>169</sup> To address this issue, in December 2011, the DHS finally created the U-Visa Law Enforcement Certification Resource Guide to address law enforcement's concerns regarding the certification of U-Visas.<sup>170</sup> The U-Visa resource guide was designed for federal, state, territorial, tribal, and local law enforcement.<sup>171</sup> Although this U-Visa resource guide and the 2007 DHS interim rules and regulations are informative, law enforcement officials are still not aware of the U-Visa provisions, which is shown by the high degree of lack of knowledge and awareness by law enforcement.<sup>172</sup> This lack of awareness could be causing the failure to consider certification, which is leading to an abuse of discretion.<sup>173</sup>

## 2. Minimal Guidance and Education – Establishing Bad Practices

According to some law enforcement officials, they have not received adequate guidance explaining the requirements of certification.<sup>174</sup> Thus, law enforcement agencies are left attempting to research the U-Visa provisions on their own and incorporating their own knowledge gained in the certification process.<sup>175</sup> For instance, a law enforcement official at the Salinas Police Department stated that she did not receive any assis-

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 156.

<sup>167</sup> See *USCIS Reaches Milestone: 10,000 U Visas Approved in Fiscal Year 2010 Questions and Answers*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=749a58a734cd9210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> (last modified July 15, 2010).

<sup>168</sup> Farb, *supra* note 111, at 27.

<sup>169</sup> See 8 C.F.R. § 214.14; Jensen, *supra* note 94, at 710.

<sup>170</sup> Louis Quijas, *DHS U Visa Law Enforcement Certification Resource Guide*, THE BLOG @ HOMELAND SEC. (Dec. 28, 2011, 2:21PM), <http://blog.dhs.gov/2011/12/dhs-u-visa-law-enforcement.html>.

<sup>171</sup> *U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement*, *supra* note 15, at 1.

<sup>172</sup> Meng, *supra* note 2, at 56; see discussion *supra* Part IV.B.

<sup>173</sup> See discussion *supra* Part IV.B.

<sup>174</sup> Meng, *supra* note 2, at 56.

<sup>175</sup> *How Law Enforcement is Using the U-Visa*, *supra* note 135, at 3.

tance regarding certification, had to do her own research online, and did not even know who to call for help.<sup>176</sup> Also, a victim in Fresno, California stated police officers complained “they are signing certifications for ‘green cards’” and accused victims of “using [crimes] to get an immigration visa;” the victim also said police officers construe “helpful” narrowly and subjectively.<sup>177</sup> In another case, a victim stated a police officer would not sign the certification form because the police officer was not able to get a hold of her while she was in a shelter, thus misconstruing the meaning of “helpful” in the statute.<sup>178</sup>

Even if policies and protocols exist concerning the U-Visa, they often are inconsistent with the U-Visa statute and include conditions not consistent with the statute.<sup>179</sup> For example, some law enforcement agencies are adding “time limits for filing a certification request and submission of medical records as documentation proving that the injuries were sustained during a crime.”<sup>180</sup> Although some jurisdictions are using the U-Visa, few have implemented good practices.<sup>181</sup> Law enforcement agencies are even mistaken about the difference in approving U-Visa certification and the U-Visa petition process in general; some of them think, mistakenly, that by authorizing the certification the victim automatically receives permanent legal status in the United States, and some are unaware of the fact that the certification form only gives them the ability to certify that a criminal activity actually occurred, the victim is helpful or is willing to be, and the victim has knowledge of the criminal activity.<sup>182</sup>

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<sup>176</sup> Meng, *supra* note 2, at 56.

<sup>177</sup> *Id.* at 55. “Politicians, national-anti-immigration groups, and others . . . [have] suggested that the U Visa is an incentive for fraud by unauthorized immigrants seeking a route to legal immigration status.” Elizabeth McCormick, Article, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 Stan. L. & Pol’y Rev. 587, 591 (2011). Since there is a common belief in the immigration context that undocumented immigrants want permanent legal status, there is a valid argument that undocumented immigrants will fraudulently use crimes to apply for a U-Visa. However, the USCIS may revoke a U-Visa petition where fraud is present, and the Fraud Detection and National Security unit of the USCIS targets and carefully investigates potential fraudulent petitions. See 8 C.F.R. § 214.14 (h)(2)(i)(C); see also *U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement*, *supra* note 15, at 15.

<sup>178</sup> Meng, *supra* note 2, at 56.

<sup>179</sup> *How Law Enforcement is Using the U-Visa*, *supra* note 135, at 2.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 3.

<sup>182</sup> *Id.* at 2; see 8 U.S.C.A. § 1101(a)(15)(U)(i)(III); see also 8 C.F.R. § 214.14(c)(2)(i).

V. RECOMMENDATIONS: OPENING A PATH TO RELIEF AND PROTECTION – FULFILLING CONGRESS’S INTENT AND HONORING HUMAN RIGHTS

A. *Filling the Void of Lack of Guidance and Education Regarding the U-Visa and Certification Requirement*

Even though the U-Visa has helped victims since the enactment of the VAWA 2000,<sup>183</sup> the U-Visa could help more victims by addressing law enforcement agencies’ lack of guidance of the U-Visa regulation and specifically the certification process.<sup>184</sup> Addressing both the lack of guidance of the U-Visa regulation and lack of education regarding the certification process are essential in furthering the congressional intent behind the U-Visa and preventing the need for further litigation and the unnecessary use of scarce judicial resources.<sup>185</sup>

1. *Education is Essential in Furthering the Congressional Intent Behind the U-Visa*

Law enforcement agencies are one of the few “certifying agencies” that can sign a U-Visa certification form showing that an individual has been or will be helpful in the prosecution and investigation of the crime.<sup>186</sup> Since law enforcement agencies play a critical role in determining whether or not an individual has met the statutory certification requirement,<sup>187</sup> it is vital for these individuals to understand what the U-Visa is and the certification process.<sup>188</sup> In order to address the lack of awareness and inconsistency issues, the DHS should make every law enforcement official that signs off on a U-Visa certification form to undergo universal training.<sup>189</sup> Training should also be given to law enforcement agencies’ internal staff that assists the law enforcement officials, so those staff members will better understand the U-Visa regulation as well.<sup>190</sup> The training should explain the congressional purpose behind the U-Visa, the statutory requirements, the certification process, and the

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<sup>183</sup> Meng, *supra* note 2, at 7.

<sup>184</sup> See discussion *supra* Part IV.B.

<sup>185</sup> See discussion *supra* Part IV; see Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464 (2000) (codified as amended at 8 U.S.C.A. § 1101).

<sup>186</sup> See 8 C.F.R § 214.14(a)(2).

<sup>187</sup> See *id.* at § 214.14(c)(2)(i).

<sup>188</sup> See discussion *supra* Part IV.B.

<sup>189</sup> See *How Law Enforcement is Using the U-Visa*, *supra* note 135 (a training program is vital to address lack of awareness among law enforcement agencies).

<sup>190</sup> *Id.* at 4.

petition process an individual has to complete in order to submit a completed application.<sup>191</sup> To address the inconsistent certification issues raised by victims and advocates, every law enforcement agency, and even all certifying agencies, should receive the same training to promote consistency between the jurisdictions.<sup>192</sup> This training could be conducted by an online webinar to keep prices down since the DHS and Department of Justice do not have sufficient funding.<sup>193</sup>

By law enforcement undergoing this training and gaining knowledge about the true congressional intent behind the U-Visa, the training may not only fill the void of lack of awareness but may additionally improve law enforcement's cooperation in helping immigrant victims and help eliminate discrimination against immigrants leading to unbiased decision-making.<sup>194</sup> The implementation of a training program for law enforcement agencies, their internal staff, and victims is paramount to address the lack of awareness issue as to what the U-Visa process truly involves and requires.<sup>195</sup> Once law enforcement agencies understand the true purpose of the U-Visa and the humanitarian aspect embedded within, congressional intent will be furthered instead of circumvented.<sup>196</sup>

## 2. Connecticut's Helpful Guidelines

State guidance is essential in informing law enforcement agencies on how to act with regards to the U-Visa. While these guidelines are scarce, currently Connecticut is setting forth such guidelines.<sup>197</sup> Connecticut's guidelines state that

each law enforcement agency shall designate at least one officer with supervisory duties to expeditiously process, upon request of a victim or other crime who is applying for U Nonimmigrant Status (A) a certification of helpfulness on Form I-918, Supplement B, . . . confirming that the victim of family violence or other crime has been helpful, is being helpful, or is likely to be helpful in the investigation and prosecution of the criminal activity, and (B) any subsequent certification required by the victim.<sup>198</sup>

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<sup>191</sup> See discussion *supra* Part IV.B.

<sup>192</sup> See generally *Promoting U Visas with Local Officials*, NAT'L IMMIGRANT FAMILY VIOLENCE INST. 3, <http://www.nifvi.org/Promoting%20U%20Visas%20with%20Local%20Officials.pdf> (last visited on Feb. 28, 2013).

<sup>193</sup> *Id.*

<sup>194</sup> See discussion *supra* Part V; see generally CON. GEN. STAT. ANN. § 46b-38b (West 2012).

<sup>195</sup> See discussion *supra* Part V.

<sup>196</sup> *Id.*

<sup>197</sup> See CON. GEN. STAT. ANN. § 46b-38b, (f).

<sup>198</sup> *Id.* at § 46b-38b, (e)(2).

Also, Connecticut's guidelines mandate the Police Officer Standards and Training Council to set forth education and training programs for law enforcement officials that shall include the eligibility requirements for U-Visas "for undocumented immigrants who are victims of family violence and other crimes."<sup>199</sup> Even though these guidelines set forth minimal direction, Connecticut is taking a step in the right direction by at least offering some guidance to its state and local officers.<sup>200</sup> Since California has the largest population of undocumented workers,<sup>201</sup> California, especially, needs to take this initiative and implement guidelines to help direct law enforcement agencies in how to act and make decisions regarding the U-Visa as do other states with significant immigrant populations in order to meet congressional intent.<sup>202</sup>

### *B. Writ of Mandate as a Last Resort*

The implementation of training programs and guidelines can potentially address the lack of guidance of the U-Visa regulation and lack of education regarding the certification process, including addressing the abuse of discretion issue.<sup>203</sup> If these recommendations address the issue of law enforcement agencies abusing their discretionary authority, a victim will not need to seek a writ of mandate as a remedy, but the remedy is available if needed.<sup>204</sup>

## VI. CONCLUSION

Due to Congress's achievements, the United States has addressed humanitarian concerns in the enactment of the VAWA 2000 and also has provided undocumented immigrant female farmworker victims with a legal remedy by giving them protection and the ability to escape hiding, prevent further abuse, and seek help without fear of deportation.<sup>205</sup> Although this legal remedy exists, it has not effectively been implemented.<sup>206</sup> The U-Visa's certification process is hindering congressional intent, leaving undocumented immigrant female farmworker victims

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<sup>199</sup> *Id.* § 46b-38b, (f).

<sup>200</sup> *See generally id.*

<sup>201</sup> Meng, *supra* note 2, at 39.

<sup>202</sup> *See discussion supra* Part V.

<sup>203</sup> *Id.*

<sup>204</sup> *See discussion supra* Part IV, V.

<sup>205</sup> *See generally* Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513(a), 114 Stat. 1464 (2000) (codified as amended at 8 U.S.C.A. § 1101).

<sup>206</sup> *See discussion supra* Part IV.

hiding in the fields from sexual violence and sexual harassment.<sup>207</sup> Our society is facing this problem because the very law enforcement agencies that are supposed to protect the victims are abusing their discretion, have a lack of guidance and education regarding the U-Visa and its certification requirement, and instead are contributing to the continual abuse of victims and the perpetration of the victims living in daily fear.<sup>208</sup> Specifically, it is extremely important to address the certification issue so undocumented immigrant female farmworkers (1) are not victims of inhumane crimes such as rape, torture, or sexual harassment and (2) can receive a federal benefit directly and in alignment with the human rights protections that Congress intended for them with the enactment of the VAWA 2000.<sup>209</sup>

The U-Visa was specifically and expressly created “to empower law enforcement agencies to become more effective in solving crime and protecting public safety.”<sup>210</sup> Many jurisdictions have not yet realized the positive impact the U-Visa has in a community.<sup>211</sup> The lack of awareness among victims and law enforcement agencies must be addressed to “help maximize the U-[V]isa’s benefits as a community-policing and crime-fighting tool,” which will also hopefully lead to less discretionary abuse by law enforcement agencies.<sup>212</sup> With growing awareness, law enforcement agencies can properly apply the certification requirement and ultimately improve the safety of our communities by recognizing the dignity in all human beings regardless of citizenship status.<sup>213</sup>

AMANDA M. KJAR<sup>214</sup>

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<sup>207</sup> *Id.*; see discussion *supra* Part III.C.

<sup>208</sup> *Id.*

<sup>209</sup> See discussion *supra* Part IV, V.

<sup>210</sup> *How Law Enforcement is Using the U-Visa*, *supra* note 135, at 4.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*; see discussion *supra* Part IV, V.

<sup>213</sup> See discussion *supra* Part IV, V.

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