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# CALIFORNIA'S EXPANSIVE CRIMINAL LAW PROVISIONS PROTECTING ELDERS ASSIST IMMIGRANT VICTIMS OF ABUSE

by Heather L. Poole

The County of Riverside has prosecuted multiple elder abuse cases and the perpetrators have been incarcerated and lives and fortunes have been saved. But to prosecute these cases, the victims have to be willing to come forward to the police and report the crime. This obstacle gives rise to a constant struggle, not only in identifying the victims, but also in convincing victims it is safe to turn to law enforcement for help, especially when many are undocumented immigrants threatened by their caretakers or their adult sons and daughters with deportation or worse if they report the crime.

## The U Visa

Local law enforcement agencies have acknowledged that the trust of their local communities is essential to detect and stop criminal activity that happens in secret, helping ensure that the police keep the community safer as a whole. Immigrants typically fear the police. Many have past experiences with police in their home country who were corrupt or failed to respond to crime reports. Other immigrants fear that reporting the crime to the police in the U.S. will result in their deportation, because the police will call U.S. Immigration and Customs Enforcement (ICE).

In 2002, to counteract such fears and to foster cooperation with law enforcement while offering protection to victims of violent crimes, including various forms of elder abuse, Congress created the U nonimmigrant visa by amending the Violence Against Women Act provisions of the Federal Immigration and Nationality Act.<sup>1</sup> The U visa was meant to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of abuse, domestic violence, sexual assault, human trafficking, and other related crimes.<sup>2</sup> To foster even more cooperation from scared victims, the U visa application process has been made completely confidential. Immigration officers who decide these cases for the U.S. Citizenship & Immigration Services (USCIS), the federal agency that adjudicates the benefit, are prohibited from disclosing any information that relates to the immigrant who applied for the U visa to anyone (other than a sworn officer or employee of the Department of Homeland Security or a bureau or agency thereof, for legitimate bureau or agency purposes).<sup>3</sup>

A U visa grants the victim the legal right to work and live in the U.S. For violence victims who have been deterred from leaving an abusive relationship because of the inability to find work or apply for a driver's license or California ID without proper immigration papers, the visa allows these victims to truly evolve into survivors and begin running their own lives again.

## Who is a Victim?

The U visa has the potential not only to protect the direct victim with its broad range of qualifying criminal activity, but, due to its flexible definition of victim, the U may also protect others who have witnessed or reported a crime or directly helped a victim.

The unique attributes of this visa create a larger potential victim pool. The victim does not have to possess valid immigration status (i.e., he or she can be "undocumented").<sup>4</sup> Similarly, the immigration status of the perpetrator or the person committing a criminal act is irrelevant.<sup>5</sup> The perpetrator does not have to be a family member or related to the victim in any way. The perpetrator can be a complete stranger (as in stranger rape, mugging, or even extortion) to the victim. In the elder abuse context, this could easily encompass a nursing home attendant or a nurse in a managed care facility. The immigration status of the perpetrator is also not at issue. And, since the relational status of the perpetrator is irrelevant, the U visa also encompasses gay and lesbian partner-on-partner violence.

Perhaps to encourage more reporting of violent crimes, the U visa can also be granted to the indirect victims of the criminal activity against the victim – the spouse, children under the age of 21, or siblings under the age of 18 of an incapacitated or murdered victim or the spouse or children under 21 of a direct, living and competent victim.<sup>6</sup> The visa may also be granted to a "next friend," which is defined as the person who appears in a lawsuit who acts for the benefit of the abuse victim if the abuse victim is incapacitated or deemed incompetent. The "next friend" is not a party to the legal proceeding and is not appointed as a guardian. Lastly, a U visa may be granted to any victim bystander who was so traumatized (suffered unusually direct injury) as a result of

1 INA § 101(a)(15)(U); Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, § 1533-37, part of Victims of Trafficking Protection Act of 2000 (VTVPA).

2 VTVPA § 1513(a), 114 Stat. @ 1533-34.

3 Any employee who willfully uses, publishes, or causes any information about the U victim to be disclosed in violation of

the Immigration and Nationality Act Section 384 (contained in IIRIRA) is subject to civil fines of up to \$5,000 for each violation and disciplinary action.

4 INA § 248(b).

5 INA § 101(a)(15)(U).

6 INA § 101(a)(15)(U)(ii)(II).

witnessing one of the qualifying crimes happen to another person who is the direct victim. This could potentially encompass an elder who witnessed the beating of an adult child whom the elder lives with by the adult child's partner and suffered a stroke from the stress or fear it induced or an elder who witnessed a friend being mugged and suffered a heart attack.

## Legal Requirements

To qualify for the U visa, the immigrant must: (1) have suffered substantial physical or mental abuse as a result of being the victim of a listed criminal activity; (2) possess information concerning a listed criminal activity; and (3) have been helpful, be helpful, or be likely to be helpful in the investigation or prosecution of a listed criminal activity.<sup>7</sup> Typically, the most difficult elements to prove in elder abuse U visa cases are that the crime fits within a listed criminal activity and that the victim has been helpful or is likely to be helpful to the investigation or prosecution.

## Qualifying Criminal Activity

The criminal activity must either have occurred in the U.S. (or a territory of the U.S.) or have violated the laws of the U.S.

The list of criminal activity in the statute is not exhaustive. Any activity that is "substantially similar" may be covered:

Federal Listed Criminal Activity	Related California Crimes
Rape, incest, sexual assault, abusive sexual contact	Rape (Pen. Code, § 261), sexual battery (Pen. Code, § 243.4), incest (Pen. Code, § 285), lewd act by caretaker (Pen. Code, § 288), sexual penetration (Pen. Code, § 289), sodomy (Pen. Code, § 286)
Domestic violence, felonious assault, female genital mutilation	Battery (Pen. Code, § 242), assault (Pen. Code, § 240), elder abuse (Pen. Code, § 368), criminal threats (Pen. Code, § 422), poisoning (Pen. Code, § 347), stalking (Pen. Code, § 646.9), violation of criminal restraining order/civil elder abuse order (Pen. Code, § 273.63, Welf. & Inst. Code, § 15657.03); robbery (Pen. Code, § 211)

Unlawful criminal restraint, being held hostage, false imprisonment	Isolation as elder abuse (Pen. Code, § 368, Welf. & Inst. Code, § 15610.43), false imprisonment (Pen. Code, § 236)
Peonage, involuntary servitude, slave trade, trafficking	Kidnapping for purposes of slavery (Pen. Code, § 207, subd. (c)), human trafficking (Pen. Code, § 236.1)
Prostitution, sexual exploitation	Pimping (Pen. Code, § 266h), pandering (Pen. Code, § 266i), human trafficking (Pen. Code, § 236.1)
Kidnapping, abduction	Kidnapping (Pen. Code, § 207), abduction as elder abuse (Pen. Code, § 368, Welf. & Inst. Code, § 15610.06)
Murder, manslaughter, torture	Murder (Pen. Code, § 187), manslaughter (Pen. Code, § 192), torture (Pen. Code, § 206)
Blackmail, extortion	Extortion (Pen. Code, § 518)
Witness tampering, obstruction of justice, perjury	Witness intimidation (Pen. Code, § 136.1), obstruction of justice (Pen. Code, §§ 96.5, 182), perjury (Pen. Code, § 118)
Solicitation to commit any of the above crimes	Solicitation (Pen. Code, § 653f)
Conspiracy to commit any of the above crimes	Conspiracy (Pen. Code, § 182)

Where do other forms of elder abuse crimes not listed above fit in to the listed criminal activity? Elder abuse can take many forms, whether it's physical or financial abuse or mental cruelty. Elder abuse can be prosecuted either under the Penal Code's specific elder abuse provisions or its general criminal provisions (such as battery).

Elder abuse can also encompass crimes that the state considers abuse that do not on their face appear to qualify as a crime similar to those that do qualify for the U visa. But advocates should not count these crimes out. Advocates and attorneys representing elder victims should argue that these crimes by their nature and in their elements are substantially similar to the criminal activities listed in the U visa statute and have the same purpose of protecting the elderly victim if the victim is either directly harmed or could qualify as a bystander victim of the criminal activity. These additional California crimes include: failure to provide for a parent (Pen. Code, § 270), disturbing the peace (Pen. Code,

<sup>7</sup> INA § 101(a)(15)(U).

§ 415), racial, religious or ethnic terrorism (Pen. Code, § 11411), unlawful discharge of a firearm (Pen. Code, § 246), and arson (Pen. Code, § 451).

Neglect (Welf. & Inst. Code, § 15610.57) and abandonment (Welf. & Inst. Code, § 15610.05) are prosecuted as elder abuse under the California Penal Code (Pen. Code, § 368), and it should be argued that they are substantially similar to battery, because they involve reckless disregard for the safety of the adult.

The criminal conduct listed in the U statute limits the U visa's potential use for the elderly victim. When elder abuse comes to mind, a common scenario is the adult child's coercive tactics to take over the estate or the bank accounts and misappropriate the elderly parent's money even though the elderly parent is competent and legally capable of handling his or her own affairs. This kind of conduct is usually prosecuted as a theft crime. These crimes include embezzlement (Pen. Code, § 503), larceny (Pen. Code, § 484) and forgery (Pen. Code, § 470). Forgery can happen in the elder abuse setting when an adult child takes funds from the elderly parent by signing the elderly parents' checks over to the adult child. This can cause substantial harm, especially if a parent can no longer provide for him or herself if the bank account is depleted. In this modern age of technology, elderly victims are also becoming more susceptible to identity theft and false personation, both crimes that are prosecutable under the California Penal Code. A victim of false personation (impersonating another through electronic means or the Internet) may have a chance at qualifying for the U visa because the statute contains an actual element of intent to harm, intimidate, or threaten the victim. But identify theft, the fastest growing crime against the elderly, is not recognized as a qualifying crime for the U, even though it can leave devastation in its path. However, if the perpetrator engaged in intimidation through witness tampering, perjury or obstruction of justice in the investigation or prosecution of the identity theft that victimized the elderly person, this may qualify for U visa protection, as those are specifically listed criminal acts in the statute.

Even if USCIS will not recognize the crime as a listed criminal activity under the U statute, if during the course of the investigation or prosecution of that crime against the elder, a battery, assault, or any clearly identifiable U-type criminal conduct is also revealed (even though not prosecuted), the regulations allow the certifying officer to sign the U visa certification based on the qualifying crime since the law does not require prosecution of that particular crime. The victim was helpful in an investigation or potential prosecution of that newly discovered crime, as well.<sup>8</sup>

## Substantial Harm

The victim also must have sustained substantial physical and/or mental harm as a result of the qualifying criminal

<sup>8</sup> 72 Fed. Reg. 53,014, 53,018 (Sept. 17, 2007).

activity. USCIS considers the following factors in analyzing whether the harm sustained rises to the level of "substantial": (a) the nature of the injury inflicted or suffered; (b) the severity of the perpetrator's conduct; (c) the severity of the harm suffered; (d) the duration of the infliction of the harm; (e) the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim; and (f) the existence of a pre-existing condition that was aggravated by the criminal act.<sup>9</sup>

No one factor is more important than the others, and any credible evidence will be considered. USCIS reviews the allegation of substantial harm in its totality to determine whether the abuse is substantial, including taking into account various abusive events that happened over time.

Police incident reports, restraining orders, pictures of bruises and injuries, medical records, therapy records, financial statements, pictures of destroyed belongings and uninhabitable housing conditions, criminal transcripts, and witness statements all help to establish substantial harm. The Division of Victim Services of the Riverside County District Attorney's Office has referrals for counseling, shelters, and provides restitution assistance when elders are stripped of money for basic life needs as a result of elder abuse. They also provide court advocates who attend hearings alongside the elder in criminal matters. Most courts also provide restraining order assistance for elders through local community organizations. Attorneys should utilize these resources to help substantiate the substantial harm argument.

## Helpfulness

The victim must possess information concerning the criminal activity and must have been, potentially be, or currently be helpful to an investigation or prosecution of that criminal activity. Being helpful may be difficult if the victim has signs of dementia, Alzheimer's, or other memory problems that interfere with the ability to cooperate. This is where the conservator, spouse, or "next friend" of the incapacitated or incompetent victim can provide information on the victim's behalf to assist in the prosecution or investigation.<sup>10</sup>

Whether a victim is helpful is a determination left to the law enforcement official investigating or prosecuting the crime. The law requires that a federal, state, or local law enforcement official must provide a certification for the victim who files a U visa application.<sup>11</sup> The law enforcement official authorized to sign is determined by the law enforcement agency itself, and can be a supervisor designated by that agency or the head of the agency.<sup>12</sup> In elder abuse cases, it may be possible to obtain a certification

<sup>9</sup> 8 CFR § 214.14(b)(1).

<sup>10</sup> INA § 101(a)(15)(U).

<sup>11</sup> Form I-918, Supplement B, available at [uscis.gov/files/form/i-918supb.pdf](http://uscis.gov/files/form/i-918supb.pdf).

<sup>12</sup> 8 CFR §§ 214.14(a)(3), 214.14(c)(2)(i).

from more than one source, in the event that records, response, or cooperation is lacking from any particular agency that had a hand in the criminal case. Law enforcement agencies may include police departments, sheriff's offices, federal marshals, the Highway Patrol, adult protective services agencies, district attorney's offices, the State Department of Mental Health, the State Department of Developmental Services (which investigates state mental hospitals and state development centers), a department of social services, the State of California Long-Term Care Ombudsman Program, the State Bureau of Medi-Cal Fraud & Elder Abuse, the State Insurance Commissioner's office, and the California Attorney General, among others. Even a probate judge, criminal judge, or a civil judge who heard an application for a civil elder abuse protective order could qualify as a signer.<sup>13</sup>

The law does not require that helpfulness must lead to either an investigation or a prosecution and a conviction to qualify for the U visa. Congress recognized that victims cannot control whether a charge is brought, an arrest is made or a prosecution results in a guilty verdict. These events are outside of the victim's control and are based on many factors (such as the disappearance or deportation of the assailant, the destruction of key evidence, unwilling witnesses, statute of limitations problems, the caseload and resources of the prosecuting agency, the death of the victim, a judge's ruling, etc.).

The most difficult part for immigration attorneys of assembling a U visa case is obtaining cooperation from law enforcement in providing the law enforcement certification. Some agencies and some police departments are much more cooperative and willing to help victims than others. All hope may not be lost, however, if the police are nonresponsive to a certification request. In 2005, the Violence Against Women Act was amended to include immigrant parents of abusive adult U.S. citizen children in the class of self-petitioners who could apply for an immigrant visa and a green card based on that abuse, extending a benefit previously available only to abused spouses of U.S. citizens and permanent residents.<sup>14</sup> To be eligible, the parent must have an U.S. citizen adult child, the parent must have resided with the U.S. citizen child, the parent must be a person of good moral character, and lastly, the parent must be able to demonstrate that he or she has suffered battery or extreme cruelty from the U.S. citizen child.<sup>15</sup> This self-petitioning process creates a path to residency much faster than the U

13 "New Classification for Victims of Criminal Activity – Eligibility for U Nonimmigrant Status. Revisions to Adjudicator's Field Manual (AFM) Chapter 39, AFM Update AD08-12," Interoffice Memorandum HQORPM AD08-12, HQ 70/8, US Citizenship & Immigration Services, March 27, 2008, at p. 2, available at [uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2008/afmupdate\\_ch39.pdf](http://uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/afmupdate_ch39.pdf).

14 INA § 204(a)(1)(A).

15 *Id.*

visa and does not require law enforcement certification, two main benefits of the process. Of course, this option it is very limited as to whom it covers: only parents of U.S. citizens, whereas the U visa can cover a wide range of potential victims. In addition, there may be other immigration options besides the U visa or VAWA self-petitioning that may be available to the abused parent or abused elder. A competent immigration attorney should always be consulted as to any and all options.

## The Approval of the U Visa

The U visa cannot be approved in many circumstances without the filing of a nonimmigrant visa waiver application to waive grounds of immigration inadmissibility. The most common of these is waiving a prior illegal entry. The victim must demonstrate to USCIS that it serves the public or national interest to grant the waiver.<sup>16</sup>

If approved, a U visa may be issued for a period of up to four years.<sup>17</sup> After three years in U visa status, a U visa holder may apply for permanent residence (a "green card") if the holder can demonstrate that his or her continued presence in the U.S. is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.<sup>18</sup> Permanent residency is not guaranteed. The U visa holder must also prove to immigration that he or she has not unreasonably refused to provide assistance in a criminal investigation or prosecution during the time since the initial U visa grant (i.e., ongoing cooperation with law enforcement during the three-year period).<sup>19</sup>

There are only 10,000 U visas available annually nationwide to cover so many types of violent crimes.<sup>20</sup> But the cap is not the biggest problem. Educating and getting the word out to victims that options are available remains a constant struggle. All that many victims hear all day are the threats of an abusive family member or caretaker telling them that they have no rights, the police will deport them, and the courts won't help them because they have "no papers" or are "illegal." Getting through to victims faced with this constant barrage can be tough.

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16 INA § 212(d)(14); Waivers are usually not granted for those victims who themselves have committed violent or dangerous crimes or who pose a security concern.

17 INA § 214(p)(6).

18 BIWPA, § 1513(f).

19 *Id.*

20 INA § 214(p)(2).