FORGING ALLIANCES WITH LAW ENFORCEMENT AS LEVERAGE TO SECURE CRIME VICTIM AND INFORMANT VISAS

by Karl W. Krooth[*]

INTRODUCTION

The best means for a practitioner to gather evidence in support of victims of crime and abuse as well as informants, is the development of alliances with law enforcement. On one hand, police reports may document abuse or establish a prospective informant's status in a criminal organization to qualify him or her as a credible and effective informant for the prosecution that deserves protection against removal. On the other hand, the alliances that a practitioner has forged in the law enforcement community may well improve the odds of securing visas for victims and informants.

A practitioner's relationships have impact because law enforcement officers exercise broad discretion and a receptive audience will often exercise the discretion that the law affords. The practitioner's relationships are key to whether a given officer will take time to listen to the equities that merit a certification about a victim on Forms I-918B or I-914B for U or T visas respectively, a certification about a prospective informant on Form I-854 for an S visa, or supplemental police reports specific to domestic violence in support of Form I-360.

This article offers strategies for developing relationships in the law enforcement community. It then offers ways that law enforcement may assist the practitioner in satisfying certification and other requirements that pertain to U and S visas. The article finally summarizes prima facie elements on petitions for T and U visas and affirmative VAWA applications filed with the Vermont Service Center (VSC), rather than those filed in immigration court.

UNLIKELY ALLIANCES

Practitioners can only carry the immense burden of gathering evidence for victim and informant visas by forging alliances with law enforcement. The foundation of any relationship is reciprocity. Practitioners have a great deal of practical experience on which law enforcement may need to draw from time to time. For example, local police officers may not make the link between notification of Immigration and Customs Enforcement (ICE) about undocumented crime victims and the threat to public safety that arises when the undocumented victims fear removal more than their abuser. The fear of enforcement of civil immigration violations is a stigma that runs deep in the undocumented population. A stigma is often the source of power on which abusers and other perpetrators rely. The availability of victim visas is an invitation for practitioners to help thwart otherwise perfect crimes, which are offenses in which a victim's stigma deters him or her from notifying authorities.

Similarly, a prosecutor may become more receptive to filing Form I-854 in support of an informant visa if the informant's attorney testifies as an expert witness at trial to prevent any deleterious inference against the informant's credibility. For example, a practitioner may testify that Form I-854 is only the first step in the process and only satisfies one of many elements for a prima facie case. In the context of a trial, the jury may find the informant credible based on the attorney's testimony that the prosecutor only vouched for the informant rather than providing the informant with a green card (as the defense will probably allege).

In cases that lack an eyewitness, law enforcement officers can play a significant role by inferring abuse based on behavioral patterns that others observed. In contrast to certifications that rely on co-workers or family members for circumstantial evidence, U visa regulations prohibit introduction of such secondary evidence in lieu of certification.

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STRATEGIES FOR FORGING ALLIANCES IN THE LAW ENFORCEMENT COMMUNITY

The first step to developing ties to law enforcement requires kindling a commitment to civics and the community. Some practitioners foster relationships in the context of participation on political campaigns for party candidates. Contributing time to political campaigns improves the possibility of connections with other campaign workers, some of whom will likely work in law enforcement. Officers frequently take interest in local politics, so the opportunity for lasting connections is high. Contributing money to a political campaign for a party candidate marginally increases access, as candidates tend to have relationships in the law enforcement community.

Other practitioners may wish to investigate the possibility of volunteering at nonprofit organizations that conduct liaison work with law enforcement. For example, the practitioner may well have the tools to help law enforcement on language access issues as a corollary of immigration practice. The practitioner can find a good fit at the nonprofit by volunteering as a board member, a media liaison, or a coordinator for public outreach.

Practitioners may prefer to volunteer for nonprofit organizations that play a role in the rehabilitation programs offered by local probation departments. Probation tends to employ officers with perspective on rehabilitation. Few probation departments have institutionalized policies in terms of local enforcement or notification of ICE about foreign nationals in custody. Most probation officers do not view the undocumented as criminals for entering without inspection (EWI) as long as any priors are relatively innocuous. A crime victim or informant who EWI'd as a youth is more likely to secure a warm reception and provide a strong basis for a certification, especially if the probation officer already knows the practitioner representing the victim or informant.

In addition to these opportunities for interacting with local community members, the development of connections with federal legislators may carry a lot of weight. Even a conservative congress person or senator may feel strongly that victims or informants should not be removed. A practitioner who meets with legislators may have leverage to ask for help in identifying sympathetic federal officers for subsequent collaboration.

THE U VISA: CERTIFICATION AND OTHER REQUIREMENTS

The threat that law enforcement agencies (LEAs) may notify ICE about the undocumented status of a victim is substantial. Undocumented victims often fear the possibility of removal and immigration detention more than they fear the abuser. While the U visa can provide victims in the undocumented population with an incentive to come out of the shadows, slow and uneven implementation by law enforcement agencies impede its effectiveness. The financial dependency of a victim on an undocumented abuser may render the victim ambivalent about reporting abuse. This relationship may offset the incentive to report crime, especially if the abuser is the primary breadwinner for the victim and the children that they have in common. This disincentive often arises where the victim recognizes that his or her cooperation with the prosecution will likely lead to conviction and eventual removal of the abuser from the United States. Cooperation could relegate the victim to reliance on public assistance, which may well render the victim ineligible for adjustment of status to permanent residency without a waiver.

Nonprofit organizations and practitioners play an important role in addressing the legitimate concerns of prospective petitioners for the U visa. These crime victims often approach nonprofit organizations before contacting immigration counsel. In communities where local law enforcement agencies often collaborate with ICE, nonprofits have an essential duty to either help crime victims in acquiring a certification or refer them to counsel for same. However, victims may lack resources for counsel who does not offer services on a sliding scale. Filing fees may also prove a deterrent to qualification for a U visa. While there is a waiver for the fee to file Form I-918 itself, U.S. Citizenship and Immigration Services (USCIS) has not developed regulations to waive the filing fee for the related waiver of inadmissibility.

The delay in the development of interim regulations and the subsequent glacial progress in visa adjudications require recapture of visa numbers for the fiscal year. While crime victims initially applauded VAWA legislation that contemplated the U visa, the delay in promulgating regulations left them with the spare benefits of deferred action and employment authorization. The VSC received informal applications and re-

sponded by granting this limited relief until USCIS finally promulgated interim regulations in 2007.[1]

On one hand, the development of Form I-918 provides victims with a standard petition to apply for the U visa. On the other hand, it has increased expectations and afforded little additional relief. USCIS has not delivered on congressional intent. The interim regulations should have provided a means for adjustment of status to permanent residency and expedited adjudication times. Instead, the interim regulations do not speak to adjustment of status. Moreover, USCIS has moved at the same glacial rate in adjudicating U visas that it did in promulgating regulations. Since USCIS has apparently failed to use any of the 10,000 U visa numbers for the fiscal year ending October 2008, only recapture would ensure that supply meets demand. The U visa compels a partnership between LEAs and practitioners that ultimately deters local enforcement of immigration law. The U visa assures crime victims that any exposure to removal proceedings will be mitigated. This boon to local law enforcement comes at a time when other tools for investigation and prosecution of criminals, such as community policing and municipal refuge policies, have lost public support.

Prima Facie Eligibility for a U Visa

Local enforcement has led to a high incidence of victims in removal proceedings. The Office of Chief Counsel (OCC) may be persuaded to join a motion to terminate. If the U visa is denied, then OCC may reinstate proceedings.

Certification Requirement

Current regulations create an impasse for adjudication of U visas that Congress did not contemplate. Petitioners are required by USCIS to obtain a certification from an LEA or a judge or prosecutor about the actual or likely significant assistance that the victim offered in either investigation or prosecution.[2]

Obtaining this certification can prove to be a major obstruction in the path of the victim. The regulations anticipate a signature on the certification by someone that the lead prosecutor, head sheriff, or police chief has appointed for this task.[3] Rather than placing the task of certification on the party most intimately acquainted with the details of the investigation or most closely connected with the U visa petitioner, this requirement assigns the task to a third party who likely has little knowledge of the victim's role. The certification thereby becomes a bureaucratic exercise delegated to an administrator rather than a tool used by an active investigative or prosecutorial LEA participant. The result is a high incidence of bureaucratic delay to secure certifications from LEA administrators.

Secondary evidence is unavailing, as the regulations provide victims no alternative to a certification in a close case. Given the power disparity between the certifying LEA and the crime victim, a practitioner with developed relationships in the law enforcement community may make the difference in obtaining a certification. The thousands of U visa petitioners who qualified for interim relief based on secondary evidence may be left at a loss. Regulations now require victims to obtain an elusive certification based on cases the LEA may have closed 10 or 15 years ago.

Victim Requirement

The U visa petitioner must prove that he or she is a direct or indirect victim of substantial abuse.[4] The definition of severe abuse is broad enough to encompass mental, physical and emotional abuse.[5] Suffering may result from an isolated incident or repeated abuse over a period of time. This definition recognizes gender dynamics, nuances of domestic abuse, and manipulation techniques that are common in the context of abuse. The definition of a direct victim applies to any individual who "has suffered direct and proximate harm as a result of the commission of qualifying criminal activity."[6] Bystanders of violent crimes may be direct victims but only if they witness the offense and suffer a severe negative consequence, such as a pregnant woman who miscarries. The definition of an indirect victim requires evidence of either a series of events, circumstances or relationships sufficient to show extreme suffering on the part of a petitioner who meets the ongoing cooperation requirement discussed *infra*. In the context of a homicide, the direct victim's spouse, siblings or children may qualify as indirect

[1] New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014 (Sept. 17, 2007).

[2] 8 CFR §214.14(c)(2)(i).

[3] *Id*.

[4] 8 CFR §214.14(a)(14); 8 CFR §214.14(b)(1).

[5] 8 CFR §214.14(b)(1).

[6] 8 CFR §214.14(a)(14).

victims.[7] A direct victim's incapacitation is a similar source of indirect victims. Guardians or parents of a crime victim under the age of 18 may also qualify as indirect victims.[8]

Those who petition for U visa relief as indirect crime victims have the burden to present evidence that a relationship with the direct victim of the crime has led to personal suffering, or that the perpetrator indirectly caused the petitioner to suffer severely.

Cooperation Requirement

The victim has the burden to show that he or she has information concerning the qualifying criminal activity and is disposed to cooperate with any reasonable request on the part of the investigating or prosecuting law enforcement agency.[9] Reasonable assistance probably requires compliance with any component of criminal investigation or prosecution by sharing information, answering questions, and being available to testify. Potential impacts of cooperation include prosecution and/or removal of the family's breadwinner or father of the victim's children, which will render some victims ineligible. The capacity of a victim to actively participate in an investigation and prosecution may be the bellwether for a practitioner during consultation. An exception exists for a victim whose incapacitation renders him *unable* rather than unwilling to provide assistance, but only where a family member or similarly-situated individual applied as an indirect victim and has information that authorities find useful.

Qualifying Crime Requirement

This broad element encompasses victims of "any similar activity" to the following qualifying crimes: rape, domestic violence, kidnapping, murder, extortion, felonious assault and false imprisonment.[10] This non-exclusive list of "qualifying crimes," of which a U visa petitioner may be victim, is a good starting place to gauge the severity of abuse a victim has suffered. Similar activity expands its breadth to include perjury, obstruction of justice, extortion, and conspiracy to commit any qualifying crime.[11]

THE T VISA: MANDATORY REQUIREMENTS RENDER CERTIFICATION OPTIONAL

Congress established the T visa with the passage of the Victims of Trafficking and Violence Protection Act (VTVPA).[12] The VTVPA offers relief to victims of severe trafficking while simultaneously enhancing the capacity of law enforcement agencies to investigate and prosecute crimes. Congress capped the annual allotment of T visas at 5,000.[13] The Office of Refugee Resettlement has reported that few petitions for T visas are ever received, and that USCIS approves only a fraction of the ones received. Of the 601 petitions that it reviewed in 2003, only 297 T visas were granted.[14]

The heavy burden of proof is one reason that so few petitions are received. The petitioner must produce evidence of severe trafficking.[15] Severe trafficking is defined in the United States as either "the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery," or "sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such act has not attained 18 years of age."[16] USCIS has discretion to decide whether a petitioner is a victim of severe trafficking, which it bases largely on the circumstances surrounding that person's entry into the United States.

A trafficking victim should volunteer any instances of prostitution in which he or she engaged prior to trafficking. To the extent that the petitioner ever engaged in prostitution previously or procured anyone for prostitution, or the trafficker recruited him or her based on previous instances of prostitution, a trafficking claim may be frivolous.

The victim must be physically present in the United States (or a U.S. territory).[17] The victim must show that they will endure extreme hardship upon

[7] 8 CFR §214.14(a)(14)(i).

[8] *Id*.

[9] 8 CFR §214.14(b)(3).

[10] 8 CFR §214.14(a)(9).

[11] *Id*.

[12] Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000).

[13] INA §214(o)(2).

[14] U.S. Dept. of Justice, Assessment of U.S. Government Activities to Combat Trafficking in Persons 2004, 21 (June 2004) (*www.usdoj.gov/olp/pdf/june2004_assessment.pdf*).

[15] 8 CFR §214.11(b)(1).

[16] 8 CFR §214.11(a).

[17] 8 CFR §214.11(b)(2).

their removal from the United States.[18] The victim must show that they will be able to "reasonably" assist in the investigation or prosecution of a trafficking offense.[19] The broad definition of reasonable assistance is generally assumed to parallel the one applicable to U visas, *supra*.

A trafficking victim must submit a personal narrative with his or her application. This narrative is critical to the approval of the T visa and must describe the circumstances and events surrounding the trafficking experience. Petitioner's narrative should be as specific as possible, detailing all five stages of his or her trafficking experience (pre-departure, travel/transit, destination, detention/deportation/criminal evidence, integration/reintegration). It should include—when possible—dates, names, relationships, mental states at specific moments and specific occurrences of abuse. Petitioner should also address where and how he or she has spent their time since any break from the party that trafficked the victim, why he or she fears being returned to the country of origin, and what harm might come to him or her if removal is ordered.

The narrative should emphasize circumstances surrounding cultural factors related to recruitment and *entry* of the victim to the United States. The shared history of the home country with the United States is highly relevant to how the trafficking is interwoven in the social fabric of the two countries, whether geographical factors or natural disasters play a role in the trafficking, what socioeconomic factors are at work, whether gender issues render women particularly vulnerable, and the political context in which the trafficking arises.[20]

VAWA ON FORM I-360: REQUIREMENTS ARE INDEPENDENT OF CERTIFICATION

In accordance with the Violence Against Women Act (VAWA), victims of domestic abuse perpetrated by U.S. citizens or lawful permanent residents may "self petition."[21] Abuse may include manipulation or threat of a change or loss of immigration status, deportation, separation from lawfully-present children and/or shame in returning to the home country. The goal of a petition on Form I-360 is an immigrant visa number, a pivotal step toward adjustment of status to lawful permanent residency. The benefits of an approved I-360 alone provide victims with some relief against abuse and mitigate fear of negative immigration consequences.

The personal narrative applicable to VAWA is different than the one to which T visa petitioners are subject. While trafficking petitions require great specificity about the facts leading up to and throughout the trafficking, a self-petition under VAWA should tell the victim's life story from a time before he or she met the abuser, should describe the relationship with the abuser, and must specify the abuse with precision, including providing context from the pre-abuse relationship. A VAWA declaration should also briefly address the petitioner's good moral character, including participation in church activities, charitable organizations and involvement in the lives of friends who are good people. The practitioner should use law enforcement contact to obtain and provide USCIS with documentation about the abuser's arrests and convictions.[22]

"Any credible evidence" is admissible to show the petition has merit.[23] This standard is more liberal than the evidentiary requirements for establishing "extreme mental cruelty" imposed on battered spouses who file I-751 waiver applications.[24] However, "[t]he determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion…" of USCIS.[25]

The practitioner has a significant role to play if the VAWA self-petitioner lacks adequate identification or does not have a copy of the abuser's identification documents. Inadequate personal identification may impede acquiring a background check or police reports that were filed with authorities based on his or her complaints about the abuser. Domestic violence advocates and immigration attorneys must frequently educate law enforcement about the need to provide police clearance letters and reports to undocumented domestic violence survivors with non-standard identification documents. Inadequate identification of the abuser may undermine the petition because the victim

[18] 8 CFR §214.11(b)(4).

[19] 8 CFR §214.11(b)(3)(i).

[20] S. Loue, "Sex, Sexuality and Gender Issues in Immigration Law," 07-06 *Immigration Briefings* 1 (June 2007).

[21] *See generally* INA §§204(a)(1)(B)(ii)–(iii).

[22] J. Dinnerstein, "Options for Immigrant Victims of Domestic Violence," *Immigration & Nationality Law Handbook* 482 (AILA 2007–08 Ed.).

[23] INA §204(a)(1)(J).

[24] 8 CFR §216.5(e)(3).

[25] INA §204(a)(1)(J).

must produce proof of the abuser's status as a U.S. citizen or lawful permanent resident.

Any hint of marriage fraud may negatively affect a VAWA petition's outcome. In consequence, it is important to address suspicious circumstances directly. Good faith is not compromised by an arranged marriage or the role of family members in pressuring for marriage in the context of a pregnancy, instability, or financial reasons. Joint residence should be established with verifiable proof when possible.

THE S VISA: THE ELUSIVE CERTIFICATION ON FORM I-854 AS A STEP TOWARD STATUS

The Violent Crime Control and Law Enforcement Act of 1994 created a new immigration regulation establishing an "S" visa, which may provide informants with a temporary visa and potentially a permanent green card.[26] The USA PATRIOT Act permanently established the S visa program.[27] The S-1 visa is issued to aliens who possess "critical reliable information" regarding criminal activity, who willingly share such information and whose presence in the United States is or was necessary for a successful prosecution of criminal activity. A state prosecutor, U.S. attorney, or LEA, may file the application on Forms I-854 and I-539.

Approval of Form I-854 waives inadmissibility. A nonimmigrant visa in S classification permits a foreign national to remain in the United States and authorizes employment for three years.[28] An application for adjustment of status is subject to adjudication if filed under INA §245(j) during the three years of authorized presence. However, only USCIS may authorize its adjudication. USCIS has a duty to apply the waiver that the state prosecutor or U.S. attorney approved on I-854.[29]

The requisite supporting documentation is the primary reason that the U.S. attorney often decides against filing for S nonimmigrant classification. The LEA has a duty to "… provide evidence in the form of attachments establishing the nature of the alien's cooperation with the government, the need for the alien's presence in the United States, all conduct or conditions which may constitute a ground or grounds of excludability, and all factors and considerations warranting a favorable exercise of discretionary waiver authority by the Attorney General…."[30]

QUALIFYING UNDER THE U.N. CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

Informants may qualify for treaty protection under the U.N. Convention Against Transnational Organized Crime.[31] This treaty anticipates that "[e]ach State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention ...."[32] The issue is "whether the Government's obligations under protocols of the United Nations Convention Against Transnational Organized Crime ... prohibit [] removal."[33] While the law underlying this issue remains unresolved, the Third Circuit demanded that the BIA "… set out how existing law complies with the Convention."[34] The Third Circuit implied that existing law was inadequate by stating that "… the Convention calls into question whether the Government may put [the petitioner] into harm's way in Albania after using his cooperation to obtain a guilty plea from a significant criminal."[35]

CONCLUSION

While opportunities exist for victims and informants to obtain visas, neither USCIS nor prosecutors have complied with congressional intent. USCIS has deprived victims of eligibility for U visas unless an LEA provides them with a certification and prosecutors are hesitant to take on the burden of complying with the documentary requirements for an S visa. The practitioner's relationship with the relevant LEA is the only hope for many victims and informants.

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[26] Pub. L. No.103-322, 108 Stat. 1796 (Sept. 13, 1994).

[27] Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

[28] 8 CFR §214.2(t)(4)(i).

[29] *See* 8 CFR §245.11(a)(4)(ii)(B)–(C); 8 CFR §245.11(c).

[30] 8 CFR §214.2(t)(4)(i)(C).

[31] 2225 UNTS 209, Treaty No. I-39574 (Nov. 15, 2000).

[32] *Rranci v. Attorney General*, __ F.3d __, 2008 WL 3876591 at 10–11, 2008 U.S. App. LEXIS 18008 at 29–33 (3d Cir. 2008).

[33] *Id.*

[34] *Id.*

[35] *Id.*