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The U Visa Unveiled: Immigrant Crime Victims Freed from Limbo

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*by Jessica Farb**

On October 28, 2000, the U.S. Congress signed the Victims of Trafficking and Violence Protection Act (VTVPA),[1] which included the U visa — a new form of immigration relief intended to provide legal status to undocumented immigrant victims of crimes if they suffer substantial physical or mental abuse from the crime, and they help law enforcement officials investigate or prosecute the crime. Victims and their advocates expected that the U.S. government would promptly implement the U visa and integrate it into immigration law by releasing specific regulations. While Congress allocated 10,000 U visas per year, the Department of Homeland Security (DHS) did not issue a single U visa for almost seven years. On September 5, 2007, DHS finally issued U visa regulations, making these crime victims immediately eligible for relief.

As a result of the delay, thousands of victims failed to obtain full benefits of the U visa legislation. Undocumented women and men from around the world have suffered human rights abuses in the United States without a safe and practical opportunity to seek justice. For example, an undocumented Pakistani woman endured a decade of domestic abuse from her partner thought she could come out of hiding, report the criminal, separate from him, and continue her life in the United States free from abuse. An undocumented Mexican man, a victim of assault and attempted murder by unknown assailants, thought he could help investigators locate the criminals and reciprocally remain in the United States. A Japanese college student, who recently lost her U.S. immigration status, was raped as she walked home from class. She had reason to believe that if she reported the crime and helped the police convict the rapist, she could continue to study in the United States legally. Although the Pakistani, Mexican, and Japanese immigrants described above likely qualified for the U visa, they remained in limbo.[2]

This article examines how the DHS delay in implementing the U visa — despite Congressional intent and legislation — caused pernicious effects for potential recipients and their advocates. Further, the article evaluates how a series of class action lawsuits against DHS, with both individual and institutional plaintiffs, effectively addressed these problems. The author's perspective stems from experience working with U visa victims and immigration attorneys. The author reviews strategies that did and will achieve justice for U visa victims, exemplifying how diverse actors can collaborate to address human rights abuses resulting from U.S. immigration policy.

UN Photo/Paulo Filgueiras

Immigrant children reflect the diversity of the United States population.

Delays in Implementing the VTVPA and Issuing U Visa Regulations

Why the Wait?

The administrative agencies responsible for issuing regulations and governing applications for the U visa frustrated Congressional intent to provide protection for U visa victims. Congress passed the VTVPA in 2000 under former President Bill Clinton's Administration. After January 20, 2001, President George W. Bush's Administration oversaw U.S. immigration agencies' structural upheaval. March 1, 2003, marked the transition from the Immigration and Naturalization Services (INS) to the newly created DHS, which oversees three sub-agencies: U.S. Citizenship and Immigration Services (CIS), administrator of immigration petitions; U.S. Customs and Border Protection (CBP); and U.S. Immigration and Customs Enforcement (ICE).

While CIS only recently began to allow those who may qualify for U visa relief to apply, CIS released a memorandum on October 8, 2003,[3] which guided victims on how to apply for U visa interim relief and deferred action status. Unlike the potentially greater benefits of a U visa, deferred action status is a temporary and minimally protected status under immigration law that provides victims with an opportunity to apply for employment authorization with few benefits and no path to citizenship. The CIS memorandum gave basic guidelines for the interim relief application and welcomed admittance at the CIS's Vermont Service Center (VSC) office. The U visa interim relief victim had to present evidence of *prima facie* eligibility for the U visa,[4] including law enforcement certification. Although no standard U visa certification form existed for U visa interim relief, CIS required victims to submit letters or forms — with the involved law enforcement official's signature — that 1) stated that the U visa victim was a victim of one of the crimes defined

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by Congress under the VTVPA; 2) identified the crime; and 3) verified that the victim is, has been, or is likely to be helpful to the prosecution or investigation of the criminal activity.

CIS made minimal efforts to implement the VTVPA in 2004 when it publicly proposed U visa regulations. The U.S. Department of Justice (DOJ) rejected these delayed regulations, and thus they never became effective. The proposed regulations were fairly generous to U visa victims, giving advocates cause to believe that the final regulations could be more conservative. Regardless of DOJ's reasoning, CIS did not take timely action to adjust the regulations and propose new ones in light of DOJ's response.

CIS Delay Deprived U Visa Victims, Their Families, and Their Advocates

The most fundamental omission by CIS was its failure to promptly implement the U visa from the VTVPA with the proper regulations and procedures. This delay caused confusion among all involved. Law enforcement officials questioned whether the U visa was valid and often refused to sign U visa certification forms. Victims and their advocates were cautious to place borderline victims on DHS's radar for fear the victims might later face deportation. For almost seven years, victims could live only a limbo state of interim relief.

First, the delay deprived victims of the ability to apply for the U visa. Of the approximately 9,000 immigrants who applied for U visa status by mid-2007, approximately 7,500 qualified for interim relief and were granted deferred action.[5] Under these remedies, there remains no guarantee of confidentiality. The absence of standards prevented clarity on victims' eligibility. This uncertainty deferred advocates from processing cases for borderline crime victims who clearly cooperated in the investigation or prosecution of crimes against them.

Second, unlike other immigrant petitions, the U visa had no standardized form or filing fee. From 2003 to September 2007, victims and their advocates had no guidelines on the requirements of U visa petition. While the VTVPA legislation and CIS memoranda provided guidance for certain parts of the application, such as the certification form, other sections were not specified. This disorganization caused lengthier application processing times, during which CIS sent requests for further evidence (RFEs) to victims who remained without *any* status while gathering the necessary evidence. This undue delay would have occurred more rarely if the U visa regulations were available to victims and advocates, and the regulations were in effect.

Third, families of U visa victims remained in a state of vicarious limbo. Those with U visa interim relief could not freely leave the United States. Those with deferred action status were required to file lengthy applications to CIS for permission to travel, which CIS rarely granted. For seven years since the VTVPA enactment, those that qualified for a U visa had effectively no opportunity to visit family members overseas unless they abandoned their applications. A person with full U visa status would not face these obstacles.

Fourth, CIS created no means to teach local law enforcement officials about their role in the U visa process. Some officials readily sign certifications, some are entirely ignorant of the U visa and hesitate to sign, and others want to play no role in the immigration process. The attitudes of some law enforcement officials deter immigrants from reporting crime, creating a dangerous environment, particularly for domestic violence victims who already face psychological barriers preventing them from approaching officials. When an advocate from the San Francisco Bay area asked a police officer in San Diego, California why he refused to sign a victim's U visa certification, the officer replied, "I didn't vote for that law."[6] This type of unlimited discretion remains a stumbling block for victims. The lack of fluid cooperation by law enforcement to sign U visa certification also contradicts the U.S. Congress's intent in strengthening law enforcement's ability to work on crimes against immigrant victims.

2007 Class Action Lawsuit: Advocates Lead Victims to Demand CIS Process U Visas

When advocates and victims began submitting interim relief applications in 2003, CIS attempted to quell concerns by continually promising advocates, off the record, that they would release U visa regulations. During the past four years, CIS repeatedly answered telephone calls, letters, and in-person requests for a timeframe with the same answer — "soon." CIS's lethargic response prompted advocates to file suits against CIS in October 2005 and March 2007. These suits were intended to expose the problem and create pressure for a solution.

On behalf of a class of U visa victims and advocates, attorneys turned to courts to hold CIS responsible for not providing prompt protection and humanitarian relief to qualified U visa victims. The 2007 suit is the most recent tactical response by advocates. This second suit, which received a favorable initial decision in August 2007, likely provided the driving force behind CIS's release of the regulations on September 5, 2007.

> "While Congress allocated 10,000 U visas per year, the Department of Homeland Security did not issue a single U visa for almost seven years."

The 2005 Lawsuit

CIS continued to delay the U visa implementation process by not responding to either of two actions filed in 2005, calling on CIS to promptly issue regulations and U visas. On October 17, 2005, the Center for Human Rights and Constitutional Law (CHRCL) filed a class action federal lawsuit similar to the 2007 suit later highlighted in this article.

Unlike the 2007 suit, which includes both victims and advocacy organizations as plaintiffs, the 2005 suit presented individual victims as plaintiffs. The 2005 suit against DHS Secretary Michael Chertoff and CIS was dismissed. Alternate pressure was placed on the agency, however. Although Congress set

no deadline for U visa implementation in the VTVPA in 2000, the Violence Against Women and Department of Justice Reauthorization Act of 2005[7] provided a July 4, 2006, deadline for implementation. Again, DHS and CIS failed to respond promptly to Congressional orders and intent. U visa victims and their advocates responded with a second lawsuit, discussed below.

> "Undocumented women and men from around the world have suffered human rights abuses in the United States without a safe and practical opportunity to seek justice."

The 2007 Lawsuit

In the pending 2007 suit, CHRCL and the Asian Pacific Islander Legal Outreach (APILO) represent plaintiffs in a class action complaint for declaratory and injunctive relief from defendants Michael Chertoff and CIS. Plaintiffs brought the action to hold defendants responsible for their inaction in the U visa implementation.

The overall goals of the suit are to uphold the Immigration and Nationality Act (INA),[8] its amendments in the VTVPA, and the plaintiffs' U.S. Constitutional due process and equal protection guarantees. Plaintiffs call for preliminary and permanent injunctions requiring DHS to issue regulations implementing the U visa provisions of the VTVPA, to pay for the cost of the suit, and to adjudicate U visa applications pursuant to the statutory requirements.

In their complaint, plaintiffs allege that DHS placed a heavy burden on organizations assisting U visa victims by failing to implement a simple application process, but instead setting up a complex and incomplete two-part process. The first step involved applying for deferred action and for temporary employment authorization — relief that must be renewed annually. In the second step, which was never implemented due to the lack of regulations, organizations would help their clients apply for U visas. Plaintiffs argue that this two-part process diverts organizations' limited resources, making their work difficult and costly. The complaint also alleges that DHS harmed U visa-qualified victims by preventing them from obtaining U visas.

CHRCL and APILO filed this complaint on March 6, 2007. The U.S. District Court for the Northern District of California heard defendants' motion to dismiss and the plaintiffs' response on August 15 and decided for the plaintiffs on August 16, by declining to dismiss the complaint.[9] Shortly following this decision, on September 5, 2007, the U visa regulations were finally issued.

The issuing of the regulations has mooted plaintiffs' prayers for injunctive relief, but the due process, equal protection and other causes of action remain. Additionally, Peter Schey, a lead attorney for plaintiffs and Executive Director of CHRLC, noted that with the regulations issued, he and the other attorneys for plaintiffs "plan to litigate some of the provisions [of the regulations]." The U visa regulations released thus far are generally favorable to U visa victims, with some exceptions. U visa victims can now submit the new Form I-918 to the VSC, and upon approval, receive a U visa. Victims with new U non-immigrant status will have the opportunity to apply for the higher protected status of Legal Permanent Residency after three years, and later for U.S. citizenship. With these regulations in place, plaintiffs' attorneys must argue in the courtroom for more equitable regulations as they enter into effect in the Federal Register.

The Impact of the Lawsuit

Unlike other special settlement agreements that have directly benefited immigrant class members similar to plaintiffs, this lawsuit benefited U visa victims by prompting DHS to issue the regulations earlier than they may have done otherwise.[10] The suit exposed the incompetence of DHS actors in following appropriate procedures and respect Congressional mandates.

The delays and resulting lawsuit have caused a shifting dynamic between individual petitioners — U visa victims — and legal advocates. The suit identifies the represented class as, "All persons who are *prima facie* eligible for a U visa and who have applied for or would apply for issuance of a U visa but for defendants' failure to issue U visas or promulgate regulations implementing [Section] 1512 of the [VTVPA]."[11] Counsel for the suit propose that thousands are likely to be involved in this class, though a smaller number would be able to join as plaintiffs. Furthermore, unlike the 2005 suit, which included only individual petitioners as plaintiffs, this suit includes eight prominent agencies as plaintiffs.[12] The lawsuit prompted the relief of the burden and institutional injuries that CIS's inaction caused such organizations assisting in the U visa process. With the new regulations, the organizational plaintiffs may more effectively assist clients; they know the full span of immigration relief available and only need apply once for new clients. However, the organizational plaintiffs are suffering an economic burden after the release of the regulations because they now have a duty to contact all former clients and offer assistance in adjusting status from U visa interim relief to U visa status.

While public interest attorneys generally have little incentive other than acting in the best interest of their clients, plaintiffs' counsel in the 2007 suit must balance organizations' immediate concerns and demands with those of the U visa victims. The victims, in their delicate position of deferred action status, were not able to advocate for themselves or demand certain regula-

tions or procedures. Attorneys in this suit, however, have policy goals of clarifying the U visa process and exposing the faults of immigration agencies. This was apparent in the broad form of relief prayed for by plaintiffs, namely the issuance of U visa regulations and procedures.

The Wait is Over: Recommendations for Further Action

What problems remain, and what needs to be done? Victims and their advocates must continue to push for a system that furthers justice by allowing victims and their families to obtain humanitarian relief in return for victims' crucial participation in the criminal justice system.

Public support is key to ensuring protection of victims' rights. The U.S. media has highlighted the struggle of trafficking victims, especially of young women forced into prostitution. U visa victims would benefit from similar coverage. Advocates can facilitate this publicity by cooperating with television and radio stations, newspaper reporters, and local community forums. Understaffed organizations may fear that publicity may attract more U visa victims than they can handle, yet organizational cooperation with the media will further the chance that qualified victims know of their right to apply for the U visa. As the general public begins to understand the plight of U visa victims, these victims may encounter fewer obstacles in applying for immigration relief.

Advocates must also target the U visa victims themselves. Recent immigration raid statistics suggest that an estimated 15% of undocumented immigrants may qualify for U visas but fail to apply because they are unaware of the relief. Because U.S. immigration law is regulatory rather than criminal, immigrants — even those who are detained — have no right to government-appointed attorneys. Some advocates organize "Know Your Rights" presentations and offer intake opportunities for both detained and non-detained U visa victims. Publicity campaigns are necessary to prevent immigrants who qualify for protected status from remaining in hiding. Such campaigns can inform these victims of their rights and create greater opportunity for their protection. These immigrants coming forward will also assist law enforcement in solving crimes.

Another aspect of the publicity campaign should focus on training law enforcement officials on the U visa and their role in the certification process. This vast group of government officials who ultimately give U visa victims permission to apply for relief include federal, state, and local law enforcement officials; prosecutors and judges; and other federal, state, and local authorities investigating relevant criminal activity. CIS has not taken steps to adequately inform these officials about the parameters of the U visa. Advocates could demand that DOJ place the burden on DHS to train law enforcement officials in immigration law as it relates to the U visa, but DHS has not and likely will not take that step independently. Advocates must therefore assume this training role themselves by providing the information to potential signers of a U visa certification, who may then make an appropriate decision about whether o sign. Such law enforcement trainings may improve cooperation and prevent discretionary decision-making by law enforcement officials unfamiliar with the U visa and immigration laws.

As advocates help victims apply for the U visa, they must not forget the importance of spreading awareness of this form of immigration relief. With U visa regulations in place, advocates may pressure for regulations to better align with Congressional intent. Once the general public, U visa victims, and law enforcement officials recognize and understand the U visa, Congressional intent demonstrated in the VTVPA may finally be realized.

The U.S. government has straddled the fence on whether to help undocumented immigrant victims remain in the United States. Congress provided explicit language to implement the U visa, but CIS waited almost seven years to comply. As a result, many law enforcement officials have not complied with Congressional intent. By international human rights standards, victims' rights were violated because the government did not provide a legal avenue for many immigrants to escape hiding and seek adequate protection. A democratic government and its agencies, however, should adapt to the will of its people, as expressed through elected officials.

Advocates must now tilt the balance in favor of the victims. Vulnerable immigrants with U visa deferred action status may finally begin to exit their state of limbo. Today, victims need as much assistance recognizing that they qualify for this new form of relief as with filing an application. Once advocates disseminate information about the U visa, victims will be able to fully obtain the justice that Congress sought for them in 2000. ***HRB***

ENDNOTES: The U Visa Unveiled

1 Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, 1513, 114 Stat. 1464, 1534 (codified at 8 U.S.C. § 1101 (2000)). *See also* Immigration and Nationality Act 8 U.S.C §§ 1551, 1552.

2 These examples are drawn for the author's experience in working with potential U-visa applicants.

3 Memorandum to Director, Vermont Service Center William R. Yates, Associate Director of Operations, *Centralization of Interim Relief for U Nonimmigrant Status Applicants* (Oct. 8, 2003), *available at*: http://www.uscis.gov/files/pressrelease/UCntrl100803.pdf. (last visited Nov. 4, 2007).

4 *See id.* at 2 ("the alien must produce sufficient evidence to render reasonable a conclusion that the alien may be eligible for U non-immigrant status when regulations are issued implementing that status").

5 Exhibit D for Defendants as Declaration of Michelle Young, 7, Document 19 (May 29, 2007) (on file with author) (noting the statistics for applications and approvals from August 30, 2001 to May 25, 2007).

6 Anna Sanders heard the San Diego officer's statement in her previous position as Director of the International Institute of the East Bay's domestic violence program.

ENDNOTES *continued on page 61*

legal system. She believes that everyone deserves equal treatment and to be treated as a person. By using her legal education and background to provide needed services, Ms. Gehi gives communities that experience discrimination more than hope for a just society in the future.

Emphasizing the work of SRLP as a whole rather than her own noteworthy achievements Ms. Gehi's modesty is admirable. We applaud her work and dedication to human rights and her exceptional transition from law school to the professional arena. ***HRB***

Julie A. Gryce, a J.D. candidate at the Washington College of Law, covers the Alumni Profile for the Human Rights Brief.

ENDNOTES: The U Visa Unveiled *continued from page 29*

7 Pub. L. 109-162, 119 Stat. 2960 (2006).
8 The INA is the 1952 Act that is continually updated as the current state of U.S. immigration laws (*available at* http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=cb90c19a50729fb47fb0686648558dbe (last visited Nov. 4, 2007)).
9 *Catholic Charities CYO v. Chertoff,* no. L 07-1307 PJH, 2007 U.S. Dist. LEXIS 62732 (D. Cal. Aug. 16, 2007).
10 For example, the Nicaraguan Adjustment and Central American Relief Act (NACARA) was signed on November 19, 1997 by President Bill Clinton as a result of a class action lawsuit against legacy INS (now DHS). NACARA provided immigration relief and a path to U.S. citizenship for thousands of Central Americans who qualified as part of the injured class.
11 Complaint at ¶ 36, *CHRCL v. Chertoff*, ¶ 36 (D. Cal. 2007) *available at* http://vocesunidas.org/downloads/3-6-07UVisaComplaint-Updated.pdf (last visited Nov. 4, 2007).
12 Plaintiffs included Catholic Charities CYO (San Francisco, California); International Institute of the Bay Area, formerly International Institute of the East Bay (Oakland, California); Voces Unidas Project (Los Angeles, California); Central American Resource Center (Los Angeles, California); Hermandad Mexicana Nacional (Los Angeles, California); Sanctuary for Families (New York, New York); Friendly House (Phoenix, Arizona); and Diocesan Migrant & Refugee Services Inc. of El Paso (Texas). As with any class action suit, however, the named plaintiffs are only part of the class.