



**Committee for Public Counsel Services
Immigration Impact Unit**

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**The U visa:
What is a U visa; Who is Eligible;
What is Subject to Discovery?¹**

Quick Summary: Why does this matter for criminal defendants?

U visas provide a pathway to legal immigration status for otherwise undocumented noncitizens who are victims of crimes and are willing to assist in the prosecution of those crimes. The alleged victim in a criminal case, or another witness against the defendant, may be seeking or may have sought a U visa. Approval of the visa requires cooperation with the investigation and/or prosecution of “qualifying criminal activity.” Once it has been approved by the federal immigration agency, U.S. Citizenship and Immigration Services (USCIS), the U visa provides protection against deportation and a work permit for previously undocumented people, including family members. Defense counsel may want to obtain discovery and cross-examine the witness to investigate and evaluate a witness’s motive to fabricate or embellish in hopes of obtaining a U visa. News about the U visa’s relatively easy availability and extraordinary value to recipients and family members has been broadly disseminated in many immigrant communities.² The difficulty of being undocumented combined with the promise of a U visa creates a powerful motive to lie and provides defense counsel a useful avenue to challenge a witness’s credibility.

**Part I
Overview of the u-visa**

What is a U visa?

The U visa is a legal immigration status granted by the U.S. government to noncitizens who have “suffered substantial mental or physical abuse” as a result of specified criminal activity, who have information about the relevant criminal activity, and who are helpful to law enforcement or

¹ March 2022. This advisory is not legal advice and does not substitute for legal analysis of an individual client’s immigration history. The advisory was originally written by Maryland’s Office of the Public Defender, Immigration Division Director Nadine Wettstein and adapted for Massachusetts practitioners by the Immigration Impact Unit at CPCS. Comments, questions should be directed to iiu@publiccounsel.net.

² *Benitze v. Wilkinson*, 987 F.3d 46 (1st Cir. 2021)(“At the end of 2019, there were nearly 152,000 pending principal [u visa] petitions and nearly 104, 000 pending petitions for family members).

government officials in the investigation or prosecution of that activity.³ The U visa allows noncitizen crime victims and certain qualifying family members to enter and/or remain lawfully in the United States for up to four years, with potential extensions.⁴ They can obtain work permits, and later may be able to become lawful permanent residents (LPR, aka “green card holders”) and eventually, U.S. citizens.⁵

Who can qualify for a U visa?

The U visa is for direct and indirect “victims” of “qualifying criminal activity.”⁶ The definitions are broad and reach many people.

A direct victim is a person “who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity.”⁷ A direct victim may include a bystander who suffered unusually direct injuries, such as a witness to a crime who had a severe reaction such as a miscarriage or heart attack.⁸

A direct victim’s spouse, children under 21 years of age, and if the direct victim is younger than 21, parents and unmarried siblings under 18 years of age, will be considered indirect victims where the direct victim died due to murder or manslaughter, or is incompetent or incapacitated, and therefore unable to provide information concerning the criminal activity or to be helpful in the investigation or prosecution.⁹

An indirect victim must meet all the other requirements including possessing information about the relevant criminal activity, and being helpful to the investigation or prosecution.¹⁰

Separately, “qualifying family members” of the victim also qualify derivatively for U visas.¹¹ *See below.*

What are the benefits of a U visa?

The applicant and eligible, derivative family members (see below) obtain at least temporary protection against deportation and a work permit issued by the federal government. After three years in U visa status, they can apply to become lawful permanent residents (LPR), a required step in the difficult process of becoming a U.S. citizen.¹²

³ 8 U.S.C. 1101(a)(15)(U); 1184(p); 8 C.F.R. 214.14. Source: Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. Law. No. 106-386, § 1513(a)(2); *see also* <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status>

⁴ 8 U.S.C. 1184(p)(6); 8 C.F.R. 214.14(g)

⁵ 8 USC 1184(p); 8 C.F.R. 245.24

⁶ 8 C.F.R. 214.14(a)(9), 14

⁷ 8 C.F.R. 214.14(a)(14)

⁸ 72 Fed. Reg. 53014, 53016-17 (Sept 17, 2007)

⁹ 8 C.F.R. 214.14(a)(14)(i). *Morris, v. Nielsen*, 374 F. Supp. 3d 239, 247 (E.D.N.Y. 2019)

¹⁰ 72 Fed. Reg. 53014, 53017 (Sept 17, 2007). *Morris, v. Nielsen*, 374 F. Supp. 3d at 247.

¹¹ 8 C.F.R. 214.14(a)(10).

¹² U.S.C. 1255m

What does a person need to do to be eligible for a U visa?

The person needs to demonstrate that they have suffered “substantial physical or mental abuse as a result of having been a victim of” specified crime that occurred in the United States.¹³

A certifying official¹⁴ must certify that the person “has been helpful, is being helpful, or is likely to be helpful” to a federal, state, or local law enforcement officials, a prosecutor, a federal or state judge or to Department of Homeland Security (DHS) officials “investigating or prosecuting” the qualifying criminal activity.¹⁵ In Massachusetts, local police departments, district attorney offices, the Department of Children and Families, and the Trial Courts, among others, may act as a certifying official. See M.G.L. Ch. 258F §§1-4.

It is not necessary that a prosecution or a conviction results from the applicant’s help as the statute refers to “investigating or prosecuting.”¹⁶ However, the applicant must continue to be helpful as required by the prosecuting officials, even if the criminal case is reopened post-conviction or post appeal, or the certifying official may deny or revoke the certification.¹⁷

Finally, the United States Citizenship and Immigration Services (USCIS) or an immigration judge must review the person’s application and grant a “waiver,” officially overlooking the person’s undocumented status.¹⁸

What counts as “qualifying criminal activity?”

The immigration statute and regulations list criminal activity in violation of U.S. federal, state, or local law, and includes “any similar activity.”¹⁹ Included are: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

The alleged crime does not have to be recent; the statute and regulations do not include a statute of limitations.

¹³ 8 U.S.C. 1101(a)(15)(U); 8 C.F.R. 214.14(a)(8), (b). Indian country, U.S. military bases, and some other federal jurisdictions are included.

¹⁴ A certifying agency includes 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. 8 C.F.R. 214.14(a)(2). A certifying official includes any person in a supervisory role who has been specifically designated by the certifying agency to issue certifications on behalf of the agency. 8 C.F.R. 214.14(a)(3).

¹⁵ 8 U.S.C. 1101(a)(15)(U)(i)(III); 1184(p)(1); 8 C.F.R. 214.14(c)(2)(i).

¹⁶ 8 U.S.C. 1101(a)(15)(U)(i)(III). *See also* 8 U.S.C. 1184(p)(1).

¹⁷ 8 U.S.C. 1255(m)(1); 8 C.F.R. 214.14(h)(2).

¹⁸ 8 C.F.R. 214.17.

¹⁹ 8 U.S.C. 1101(a)(15)(U)(iii); 8 C.F.R. 214.14(a)(9)

Which family members can obtain a U visa based on the relationship to the principal applicant?

If the principal U visa applicant is 21 or older, qualifying family members are the principal's spouse and children younger than 21.

If the principal U visa applicant is younger than 21, qualifying family members are the principal's spouse, child(ren), parents, and unmarried siblings younger than 18.²⁰

Applicants and family members living inside or outside the United States can apply. If outside the United States and if approved, they will be admitted to the United States.²¹

Are there any Massachusetts specific rules regarding U visa certification?

Yes. In July 2021, the Massachusetts legislature passed new legislation, M.G.L. ch. 258F, Certification for Victims of Violent Crime and Human Trafficking.²² This law requires the following:

1. Certifying agencies shall adopt policies for completing and signing certification forms for those who intend to petition for U visas;
2. Certifying agencies shall respond to requests for certification no later than 90 days after receiving the request, absent extenuating circumstances outside of the control of the agency.
3. In responding to certification requests, agencies may respond in one of three ways:
 - a. A signed completion of the requested certification form;
 - b. A written denial, without prejudice, informing the requestor of the reasons the request does not meet the requirements of the agency's certification policy; or
 - c. A written notification of extenuating circumstances beyond the control of the certifying agency, including a written explanation of the delay, the process the certifying agency will take to make its response, and a projected timeline to receive that response.

Part II
How to Obtain U Visa Discovery

Is there a list or database we can access to see who is applying or has applied for a U visa?

Such a database is not publicly available, but DHS attorneys do have access to this information. For example, in immigration court they can immediately confirm that information for an immigration judge.

However, under M.G.L. 258F, there are new public reporting requirements. See M.G.L. ch. 258F § 4. These reports will not provide information on specific cases, but may provide broader information on the number of U visa requests and approved certifications.

²⁰ 8 U.S.C. 1101(a)(15)(U)(ii); 8 C.F.R. 214.14(a)(10), (f)(1).

²¹ 72 Fed. Reg. 53014, 53021 (Sept. 17, 2007).

²² See "[A Guide for Certifying Agencies, M.G.L. chapter 258F](#)"

Do prosecutors know that the complaining witness is seeking a U visa?

If the complaining witness is seeking a U visa based upon the allegations in the current case, then it is likely that the prosecutor would be aware and may even be the certifying agency. If so, the prosecutor would have completed an I-918 Supplement B form for the complaining witness. This form is a mandatory pre-requisite for any U visa application. In some cases, it is possible that the police department or other entity is the certifying agency and the prosecutor may not be aware of it.

The certifying agency also is expected to communicate with USCIS if the alleged victim refuses to assist in the investigation or prosecution and the agency wants to withdraw or disavow a previous certification.²³ Reportedly, some prosecutors refuse to certify until the prosecution is completed. The lack of earlier certification should not defeat or negate discovery obligations if conversations about U visa certification have taken place.

If a U visa is being sought based on a separate unrelated case, then the prosecutor may not have information regarding the application, especially if the cases are in different counties. If the cases are in the same county, there may be a common certifying official who would have access to the U visa information sought.

Is information about a U visa discoverable?

Yes. Defense counsel should argue that this information is subject to automatic discovery under Rule 14(a)(1). Where the prosecutor's office on the case at hand is the certifying agency for a witness's U visa application, information about a U visa certification is relevant and in the possession, custody or control of the prosecutor. *See* Mass. R. Crim. P. 14(a)(1)(A). Furthermore, a U visa certification is potentially exculpatory (Mass. R. Crim. P. 14(a)(1)(A)(iii) and is a "promise, reward or inducement" to the complaining witness (Mass. R. Crim. P. 14(a)(1)(A)(ix)). As such, prosecutors should provide U visa information routinely in the discovery packet. *See Commonwealth v. Sealy*, 467 Mass. 617, 624-35 (2014) (acknowledging that information regarding an alleged victim's awareness of U visa criteria and her application for a U visa were relevant to potential motive to lie).

In situations where the U visa has not been disclosed as part of automatic discovery, where the prosecutor denies a request for such information, and where defense counsel has reason to believe that the prosecutor has discussed U visa options with a witness or the alleged victim, counsel should request the information through a request for discretionary discovery under Mass. R. Crim. P. 14(a)(2). In these circumstances, defense counsel will have to educate the judge as to the potential exculpatory nature of the information.

Where defense counsel becomes aware that the alleged victim is pursuing a U visa, but where the certifying official is not the district attorney's office which is prosecuting defense counsel's case, counsel may employ a Rule 17 motion to request relevant evidence from a third party. The third party could be the agency certifying the U visa or the third party could be any attorney or organization that is assisting in filing the U visa application. *See Sealy*, 467 Mass. at 627 (where

²³ 8 C.F.R. 214.14(h)(2); U visa LE Guide, at 3-4

a defendant can meet the threshold requirements of Mass. R.Crim. P. 17(a)(2), they may be entitled to discovery of third party documents related to a U visa application); *See also* Sample Rule 17 motion for U visa discovery (attached).

What documents should we be asking for in discovery?

There may be different documents at different stages of the process. Documents could include:

- Email or other written communication from or to a witness or potential witness, or family member or a victim advocate, or an attorney or other party on the witness' behalf regarding a potential immigration benefit for cooperating or testifying, or notes of any such conversation or communication;
- Correspondence or communication (email or other) from a complaining witness or attorney asking the prosecuting authority and / or the certifying official or agency to certify;
- "U Nonimmigrant Status Certification" (Form I-918, Supplement B), by a certifying officer;²⁴
- Petition (Application) for U nonimmigrant status (Form I-918)²⁵

Part III

How to Use U Visa Information Obtained Through Discovery

Can a witness be cross examined based on a U visa?

The foundational right to cross-examination of witnesses enshrined by the confrontation clause of the Sixth Amendment "includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51–52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *see also Commonwealth v. Ruffen*, 399 Mass. 811, 816, 507 N.E.2d 684 (1987) ("the Constitution requires that a defendant be permitted to introduce evidence which may materially affect the credibility of the victim's testimony").

The fact that a witness is seeking a U visa is relevant to and can materially affect the witness's credibility, and should therefore be a permitted inquiry on cross examination. *See Commonwealth v. Sealy*, 467 Mass. 617, 624-35 (2014) (acknowledging that information regarding an alleged victim's awareness of U visa criteria and her application for a U visa were relevant to potential motive to lie). However, the ability to cross examine a witness about a U visa should not be conflated with assertions that a witness has reason to lie simply because they lack lawful immigration status. *See Commonwealth v. Chicas*, 481 Mass. 316, 218-322 (2019) (a witness's undocumented status alone is insufficient to impugn his credibility).

²⁴ 8 C.F.R. 214.14(c)(2)(i). <https://www.uscis.gov/sites/default/files/document/forms/i-918supb.pdf>

²⁵ Form I-918 and instructions on USCIS website: <https://www.uscis.gov/I-918>

If I am not sure what a witness might say, are there other ways to use a U visa?

Yes. Before trial, you could ask the prosecutor to stipulate to the existence of the U visa certification. Such a stipulation would include information about what a U visa is and the benefits to the applicant. It would also include the fact that the witness had sought certification, obtained certification and/or applied for a U visa. *See* Sample U visa stipulation (attached).

COMMONWEALTH OF MASSACHUSETTS

XXXXXX, ss:

SUPERIOR COURT DEPARTMENT
XXXXXX

COMMONWEALTH

v.

XXXXXX XXXXXX

MOTION FOR THIRD PARTY RECORDS
FROM NEIGHBORHOOD LEGAL SERVICES IN LYNN

The defendant moves this Honorable Court to order the Neighborhood Legal Services at 37 Friend Street at Lynn, MA 01902 (phone: 781-599-7730) to produce copies of all documents, statements, papers, records, and photographs included in the I-918, Petition for U Nonimmigrant Status prepared by or on behalf of XXXXXX XXXX (DOB: XX/XX/19XX) with the intent to submit to U.S. Citizenship and Immigration Services (USCIS), whether or not the materials were submitted. This request includes, but is not limited to, the following:

1. The completed I-918, Petition for Nonimmigrant Status;
2. The completed I-918 Supplement A, Petition for Qualifying Family Member of U-1 Recipient;
3. The completed I-918 Supplement B, U Nonimmigrant Status Certification;
4. Any and all documents, statements, papers, records, and photographs submitted in support of the aforementioned petition. These documents, statements, papers, records, and photographs include, but are not limited to, any evidence to be submitted in an attempt to establish the following requirements of an I-918, Petition for U Nonimmigrant Status:
 - a. "Evidence You Are the Victim of Qualifying Criminal Activity;"
 - b. "Evidence You Have Suffered Substantial Physical and Mental Abuse;"

- c. "Evidence You Possess Information Concerning Qualifying Criminal Activity;"
- d. "Evidence of Helpfulness;"
- e. "Evidence Criminal Activity is Qualifying and Violated U.S. Law or Occurred in the United States;"
- f. "Personal Statement;"
- g. "Waiver of Ground(s) of Inadmissibility;" and
- h. "Affidavit."

As grounds therefore, the defendant states the following:

1. This motion satisfies all the requirements of Mass.R.Crim.P. 17 and Commonwealth v. Lampron, 441 Mass. 265 (2004). See Affidavit, attached.
 - a. The documents are evidentiary and relevant.
 - b. The documents are not otherwise procurable reasonably in advance of trial by exercise of due diligence.
 - c. The party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial.
 - d. The application is made in good faith and is not intended as a general "fishing expedition."
2. The records are not privileged.
 - a. Only confidential communications are protected by the attorney-client privilege. Accordingly, any information given to an attorney with the expectation that it would be turned over to a third party would not be covered by the privilege. US v. Rivera, 837 F.Supp. 565, 569-570 (S.D.N.Y. 1993); citing In re Horowitz, 482 F.2d. 72, 81-82 (2d Cir. 1973); In re Grand Jury Subpoena Duces Tecum, 731 F.2d at 1037. This is true in the immigration context. In Rivera, the Court ruled that information contained client files that were provided by the client with the intention that it be revealed to the INS in connection with an application for amnesty was not protected by the attorney-client privilege. Rivera, supra at 569-570. Similarly, in United States v. Spitzauer, the Ninth Circuit held that an INS form that was completed with the specific intent

that it be submitted to the INS in order that the agency might adjust his immigration status was never intended to be a confidential communication and was not privileged. 176 F. 3d 486 (C.A.9 Wash. 1999); citing United States v. Tellier, 255 F.2d 441, 447 (2d Cir. 1958); United States v. Oloyede, 982 F.2d 133, 141 (4th Cir. 1992). See also, United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982) (holding that any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege. Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to other communications relating to the same subject matter.) Even if the requested information was confidential, which it is not, Rule 1.6(b)(4) of the Massachusetts Rules of Professional Conduct allows a lawyer to disclose such information when required by law or a court order.

- b. In the present case, the I-918, Petition for U Nonimmigrant Status was prepared with the specific intent that it would be turned over to USCIS, a third party. Defense counsel has received from the Commonwealth a photocopy of an I-918 Supplement B U Nonimmigrant Status Certification. This is a form the District Attorney's Office prepared in support of the complainant's petition for U Nonimmigrant Status. The requested materials were never intended to remain confidential; in fact, they were always intended to be submitted to USCIS. Otherwise, they would not have been prepared.
3. The requested materials are necessary to protect the defendant's rights to due process of law, a fair trial, confrontation of witnesses, and the ability to produce evidence and "all proofs" on his own behalf, all as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article Twelve of the Massachusetts Declaration of Rights.

Respectfully Submitted,
XXXXXX XXXXXX
By his attorney,

ATTORNEY
BBO No.
CPCS

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

MIDDLESEX SUPERIOR COURT
NO. 2011-0000

COMMONWEALTH

v.

JOHN SMITH

STIPULATION OF FACTS BY THE PARTIES

Pursuant to Mass. R. Crim. P. 11(a)(1)(C)(iv), the Commonwealth and defendant John Smith hereby agree that the following facts are true and must be accepted by the factfinder:

1. “U non-immigrant status” is an immigration status created by Congress under the “Violence Against Women Act”.
2. U nonimmigrant status is available to non-U.S. citizens who are alleged victims of certain crimes, who assist government officials in investigating or prosecuting such crimes. This law allows a non-citizen to apply for temporary legal immigration status.
3. U nonimmigrant status is also known as a “U-Visa.”
4. The U-visa was enacted by Congress to encourage non-citizens who are crime victims or who have information about a crime to come forward and work with law enforcement without fear of possible immigration consequences.
5. To be eligible to apply for a “U-Visa” the non-citizen must (1) be an alleged victim of a qualifying crime that occurred in the U.S., (2) allege to have suffered substantial mental or physical abuse as a result of that crime, (3) possess information about that crime, and (4) be helpful in the investigation or prosecution of that crime.
6. The offense of *[insert qualifying offense in your case]* is considered a qualifying crime.
7. The process for applying for “U-Visa” involves submitting a petition to the United States Citizenship and Immigration Services (an agency of the Department of Homeland Security).
8. A U-visa petition must include an application form, the applicant’s statement about the alleged crime, and a certification “Supplement B” by a law enforcement agency official

certifying that the applicant possesses relevant information, and has been helpful to the investigation and/or prosecution.

9. A U-visa petition may also include additional evidence showing that the applicant meets the eligibility requirements for the U-visa.
10. An applicant is not necessarily granted U-visa status merely by filing the petition.
11. If the applicant's petition is successful, U.S. Citizenship and Immigration Services will grant the applicant lawful immigration status in the United States for no more than 4 years.
12. An applicant can include family members in his/her petition, such as a spouse, child, parent, or sibling.
13. Attorney [NAME] of the [*nonprofit org or law firm*] represents [*u visa applicant*] in connection with immigration issues.
14. [*u visa applicant*] has submitted a petition for a U-visa to U.S. Citizenship and Immigration Services.
15. [*u visa applicant*]'s U-visa petition is currently pending before U.S. Citizenship and Immigration Services.

Respectfully submitted,

John Smith
By his attorney:

For the COMMONWEALTH:

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Prosecutor, BBO # _____
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