MANDATORY U-VISA CERTIFICATION UNNECESSARILY UNDERMINES THE PURPOSE OF THE VIOLENCE AGAINST WOMEN ACT'S IMMIGRATION PROTECTIONS AND ITS "ANY CREDIBLE EVIDENCE" RULES— A CALL FOR CONSISTENCY

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INTRODUCTION

The Violence Against Women Act's (VAWA) immigration protections were designed to enhance protection for immigrant victims of domestic violence, sexual assault, human traf cking, and other crimes. Since 1990, Congress has passed a series of immigration law protections designed to remove barriers keeping immigrant victims from calling the police for help and from cooperating

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under VAWA or the Traf cking Victims Protection Act (TVPA[4]) are able to submit "any credible evidence[5]" that they can garner in support of their case. This article discusses the development of immigration law's "any credible evidence" standard of proof and its application in VAWA and TVPA related immigration cases.

This article urges reforms in immigration law to remove U-visa certi cation as a mandatory prerequisite that bars many otherwise eligible immigrant crime victims from being able to access U-visa protections. Victims who can prove to Department of Homeland Security (DHS) adjudicators that they have been, are being, or are willing to be helpful in the detection, investigation or prosecution of criminal activity covered by the U-visa should be given the opportunity to prove their case to DHS by presenting "any credible evidence."

Section I of this article considers the legislative history of VAWA's "any credible evidence" standard of proof. As part of this survey, the article examines the pre-1994 battered spouse waiver protections created by Congress to offer immigration relief to abused immigrant spouses and efforts by the Immigration and Naturalization Service (INS, now ICE) to limit the kinds of evidence that an abused immigrant spouse could offer to support their petition for lawful permanent residency. Such evidentiary limitations ultimately lead to Congress's mandating the "any credible evidence" rule which applies, with one exception, to all forms of immigration bene ts involving crime victims. Between 1994 and 2005, Congress strengthened and broadened available protections under immigration law for victims of domestic violence, sexual assault, and traf cking and continued to apply the "any credible evidence" more exible standard of proof to each VAWA-related petition for legal immigration status. The logic of this evidentiary change has been to make clear Congress's intention that evidentiary rules alone should not be used to block an immigrant victim's access to VAWA's protections where a broader or more exible standard would suf ce to establish victimization as well as all other elements of proof required for a victim to receive an approval of a VAWA or T-visa case from DHS or an immigration judge. These "any credible evidence" rules also apply to all other aspects of U-visa cases except the government of cial certi cation.

In light of the broad protections and exible evidentiary standards envisioned by Congress in VAWA, Section II examines the deterrent effect on eligible victims of the current U-visa requirement that each U-visa petition include a certi cation from a law enforcement of cer, a prosecutor, a judge, or another federal, state, or local government of cial with responsibility for detection,

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4. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, § 40701(a)(3), 40702(a) and 40703(b), 108 Stat. 1955 (codi ed as amended at 8 U.S.C. 1186a(c)(4)(C)) [hereinafter VAWA 1994]; Traf cking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat 1464 (2000) [hereinafter TVPA].

5. , . ., Immigration and Nationality Act § 216(c)(4), 8 U.S.C. § 1186a(c)(4) [hereinafter INA]; INA § 202(a)(1)(J), 8 U.S.C. § 1154; INA § 240A(b)(2), 8 U.S.C. § 1252a; Violence Against Women Act of 2000 § 1513(c)(4), Pub. L. No. 106-386, 114 Stat. 1464 (codi ed at 8 U.S.C. § 1184) [hereinafter VAWA 2000]; 8 C.F.R. § 214.11(d)(2009); TVPA Regulations 67 Fed. Reg. 4786 (proposed Jan. 31, 2002) (to be codi ed at 8 C.F.R. § 214).

investigation, or prosecution of criminal activity. In this required certi cation the government of cial attests that the person seeking certi cation has been a victim of criminal activity and the victim has been, is being, or is likely to be helpful in the detection, investigation, or prosecution of criminal activity. This article considers how the actual application of this requirement has, in fact, created a signi cant and unwarranted procedural hurdle for victims. The mandatory U-visa certi cation requirement by a government of cial is in direct con ict with VAWA's "any credible evidence" protections. As a result, victims who have the courage to come forward and report crimes and who are helpful in criminal investigations and prosecutions without certi cation are unable to apply for relief no matter how compelling the case and evidence and no matter how signi cant the crime victim's injuries.

Section III proposes that the mandatory U-visa certi cation requirement should be amended by Congress to become one form of evidence to be considered in the adjudication process as opposed to a condition precedent to the ling of the U-visa application. DHS has the experience and has developed the necessary procedures in the context of T-visa applications to adjudicate U-visa applications without mandatory law enforcement or government agency certi cations. Adjudications of U-visa applications should be in the same manner as T-visa applications and crime victims should be allowed to prove that they have been, are being, or are likely to be helpful to law enforcement or other government of cials through "any credible evidence."

I. Background and Legislative History of VAWA's "Any Credible Evidence" Standard of Proof Provisions

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an effort to prevent sham marriages for the purpose of receiving priority immigration status[9]. IMFA changed immigration law to presume that marriages were fraudulent unless proven to be valid. IMFA required that immigrant spouses

In recognition of the problems immigration laws created for immigrant women who were abused by their husbands, Congress enacted the "battered spouse waiver"[18] in 1990.[19] The battered spouse waiver provided immigrant victims of battering or extreme cruelty an opportunity to leave the abusive relationship and obtain lawful permanent residency without having to comply with IMFA's joint petitioning requirement.[20] The battered spouse waiver provided immigrant victims a powerful legal tool to escape their abusive relationships. It helped keep immigrant battered women from being locked by immigration law in abusive marriages by allowing victims to le for removal of the conditions on their residency statuses without their abusers' knowledge or cooperation and without having to wait two years.[21] This allowed victims to ee abusive marriages and to le for and obtain full lawful permanent residency. The Immigration Act of 1990 also included another new waiver that has been helpful to battered immigrants. Immigrant spouses who had been divorced could le for a waiver of the joint ling requirement, and immigrant spouses were no longer required to have initiated divorce proceedings and to have demonstrated "good cause" for marriage termination.[22]

B. THE IMMIGRATION AND N

modeled after evidentiary provisions in domestic violence and family law cases that allowed parties flexibility in the types of evidence they could present to meet their burden of proof.[38] VAWA 1994's "any credible evidence" provisions state that "[i]n acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application".[39]

VAWA's "any credible evidence" requirements were designed to ease the evidentiary

evidence" provisions to every type of VAWA case, including:

- Battered spouse waivers;[44]
- VAWA self-petitions;[45]
- VAWA Cuban Adjustment Act Cases;[46]
- VAWA Nicaraguan Adjustment and Central American Relief Act (NACARA) Cases;[47]
- VAWA Haitian Refugee Immigration Fairness Act (HRIFA);[48]
- VAWA suspension of deportation cases;[49]
- VAWA cancellation of removal cases;[50]
- K-visa waiver adjudications;[51]
- U-visas;[52] and
- T-visas.[53]

When creating the "any credible evidence" standard, Congress recognized that

spousal violence, crime victimization, and traf cking uniquely affect a person's ability to explain or document the victim's case. As the INS Of ce of the General Counsel has noted, the purpose of this exibility in evidence rules is to take into account the experience of victimization:

> This principle recognizes the fact that battered spouse and child self-petitioners are not likely to have access to the range of documents available to the ordinary visa petitioner for a variety of reasons. Many self-petitioners have been forced to ee from their abusive spouse and do not have access to critical documents for that reason. Some abusive spouses may destroy documents in an attempt to prevent the self-petitioner from successfully ling. Other self-petitioners may be self-petitioning without the abusive spouse's knowledge or consent and are unable to obtain documents for that reason. Adjudicators should be aware of these issues and should evaluate the evidence submitted in that light.[54]

This INS General Counsel memo went on to categorically state: "A self-petition may not be denied for failure to submit particular evidence. It may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility."[55] This memo articulated the "any credible evidence" standard in the context of VAWA self-petitions re ecting VAWA's purposes, permitting but not requiring petitioners to demonstrate that preferred primary or secondary evidence is unavailable.[56]

Not only may it not be feasible for a battered immigrant, traf cking victim, or crime victim to obtain the necessary documentation, it may also be dangerous for the victim to try. Often, abusers of immigrant victims and perpetrators of crimes against them maintain control of documents that victims need to use as evidence in their case. The abusive spouse, parent, employer, or human traf cker may have taken or destroyed the victim's passport, identity documents, or other documentation. Absent VAWA's "any credible evidence" rules, victims would be forced to obtain these documents in order to receive VAWA immigration bene ts. Taking and/or destroying the victim's documents is part of the pattern of abuse that is a particularly effective means of exerting power and control over immigrant victims that serves as a form of severe psychological abuse and at the same time undermines the victim's ability to gain independence from the abuser.[57] Less of

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consistent with the court's articulation of VAWA's ameliorative intent. Both INS and DHS have issued regulations that con rm the application of the "any credible evidence" standard in VAWA, T- and U-visa cases.[62] The VAWA self-petitioning regulations preamble recognizes, for example, that:

> [a]vailable relevant evidence will vary, and self-petitioners are encouraged to provide the best available evidence of qualifying abuse. Persons who have obtained an order of protection against the abuser or taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by af davits. This rule also provides that other forms of credible evidence will be accepted, although the Service will determine whether documents appear credible and the weight to be given the . The Service is not precluded from deciding, however, that the petitioners' unsupported af davit is credible and that it provides relevant evidence of suf cient weight to meet the self-petitioners burden of proof.[63]

Since 1994, Congress has repeatedly expanded the "any credible evidence" provisions to ensure that battered immigrants and immigrant crime victims can apply for any and all of VAWA's and the TVPA's immigration bene ts by submitting the best available evidence each victim can safely muster. Congress has made its intentions clear that VAWA's goals include assuring that evidentiary rules do not block victim access to VAWA's immigration protections. In addition to statutory provisions, VAWA's legislative history is consistent with these goals. VAWA 2000's legislative history stated:

> This legislation also clari es that the VAWA evidentiary standard under which battered immigrants in self-petition and cancellation proceedings may use any credible evidence to prove abuse continues to apply to all aspects of self-petitions and VAWA cancellation as well as to the various domestic violence discretionary waivers in this legislation and to determinations concerning U-visas.[64]

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62. 8 C.F.R. §§ 103.2(b)(2)(iii), 201.11 (2009) (VAWA self-petitioning regulations); 8 C.F.R. § 214.11(d) (T-visa regulations); 8 C.F.R. § 214.14(c)(4),(f)(5) (U-visa regulations).

63. Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13066 (proposed March 26, 1996) (codi ed at 8 C.F.R. pts 103, 204, 205, 216).

64. 146 CONG. REC. S10,192 (2000). Further, VAWA 2000's legislative history explained that an intended bene t of VAWA 2000 section 1503's provisions offering VAWA self-petitioning for unknowing spouses of U.S. citizen or lawful permanent resident bigamists was to overcome provisions in VAWA 1994 that required VAWA self-petitioners to provide documentary proof of each of the prior divorces of their abusive spouse. VAWA 2000's legislative history con rmed Congressional intent to remove this remaining evidentiary barrier for VAWA self-petitioners. The Conference report on page S10,192 stated:

In deciding applications submitted by crime victims for each VAWA or TVPA form of immigration relief, including the U-visa and adjustment of status to lawful permanent residence in U-visa cases, DHS is required by statute to apply the "any credible evidence" standard.[65] Under current law, immigrant domestic violence victims, traf cking victims, and crime victims are able to prove each element of any VAWA-related case under the "any credible evidence" standard, *18,* , , - . Victims of domestic violence, human traf cking, and crime ling for U-visa protections are required to provide a certi cation from a law enforcement of cial, prosecutor, judge, or other state, federal, or local government of cial involved in detecting, investigating, or prosecuting the criminal activity.[66] Without this certi cation, DHS will not adjudicate the victim's U-visa case. While the "any credible evidence" standard applies to all other U-visa evidentiary proof requirements, it does not apply to certi cation.

As will be illustrated below, this certi cation requirement is barring access to U-visa protections for many immigrant crime victims. Victims are being cut off from VAWA protections much in the same way that requiring an af davit from a licensed mental health care provide687.4.1(fr.1(sameo-)]TJ -2A5hsameo.elmmigrant)-3

included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships;

(2) providing battered immigrant women and children who were experiencing domestic violence at home with protection against deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration bene t under the abuser's control; and

(3) there are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law.

(b) PURPOSES.—The purposes of this title are—

(2) PURPOSE.—

(A) The purpose of this section is to create a new nonimmigrant visa classi cation that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, traf cking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement of cials to better serve immigrant crime victims and to prosecute crimes committed against aliens.

(B) Creating a new nonimmigrant visa classi cation will facilitate the reporting of crimes to law enforcement of cials by traf cked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement of cials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.

(C) Finally, this section gives the Attorney General discretion to convert the status of such nonimmigrant to that of permanent residents when doing so is justi ed on humanitarian grounds, for family unity, or is otherwise in the public interest.

The new visa offered victims relief in cases of certain crimes that tend to tar-

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government of cials investigating or prosecuting such criminal activity.[71] In creating this new nonimmigrant visa, Congress recognized that it is virtually impossible for state and federal law enforcement, other government enforcement agency of cials, and the justice system in general to punish and hold perpetrators of crimes against noncitizens accountable if abusers and other criminals can avoid prosecution by having their victims deported.[72]

B. CERTIFICATION REQUIREMENT

Congress mandated that VAWA's "any credible evidence" rules apply in U-visa cases, as it has for all forms of crime-victim-related immigration relief since VAWA 1994.[73] However, unlike the "any credible evidence" standard in all other VAWA cases, the U-visa application process also requires an immigrant crime victim to obtain a certi cation by an approved certifying of cial verifying that the victim possesses information about the criminal activity perpetrated against the U-visa applicant and attest to the fact that the victim has been, is being, or is likely to be helpful in the detection, investigation, or prosecution of that criminal activity.[74] Petitioners are required to submit a certi cation form (commonly referred as "Form B") lled out and signed by a certifying law enforcement of- cial during the six months immediately preceding the submission of the victim's U-visa application.[75]

In recognition of the fact that obtaining certi cation may be dif cult for U-visa victims, Congress explicitly listed in the statute a wide range of government of cials who could provide U-visa certi cations. These certifying of cials include:[76]

- federal, state, or local law enforcement of cials;[77]
- federal, state, or local prosecutors;
- federal, state, or local criminal, civil, or administrative law judges;[78]

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71. VAWA 2000 § 1513(a)(2)(a), 8 U.S.C. § 1184 (recognizing the dual goals of the new nonimmigrant visa classi cation to strengthen the ability of law enforcement agencies to prosecute crimes against immigrants and to protect the victims of such crimes).

72. . §1513(a)(1)(B) (nding that all immigrant victims, women and children alike, must be able to report the crimes committed against them in the United States and to participate fully in the subsequent investigation and prosecution).

73. INA § 214(p)(4), 8 U.S.C. § 1184(p)(1) (2006).

74. INA § 214(p)(1), 8 U.S.C. § 1184(p)(1); 8 C.F.R. § 214.4(c)(2)(i); 72 Fed. Reg. 53020, 53024 (proposed interim nal rule Sept. 17, 2007).

75. 8 C.F.R. § 214.14(c)(2)(i) (2007).

76. INA § 214(p)(1), 8 U.S.C. § 1184(p)(1) (2006).

77. 8 C.F.R. § 214.14(a)(3).

78. 8 C.F.R. § 214.14(a)(3); Fed. Reg. 53,015, 53,024 (Sept. 17, 2007). It is important to note that Congress speci cally wanted judges to be included as certi ers. Both family court judges make ndings regarding events that constitute criminal activity in the context of divorce, custody and protection order proceedings. This is detection of criminal activity. Criminal court judges hearing criminal cases become involved in detection, conviction and sentencing all of which fall within the types of activities both the statute and DHS contemplated for certifying authorities. Under the statute and the regulations judges clearly have the authority to sign

- the Department of Homeland Security; or
- other authorities investigating a criminal activity described in section 101(a)(15)(U)(iii).[79]

The Department of Homeland Security issued regulations requiring that with the exception of certifications provided by judges, the government official signing the I-918 Supplement B certification form must be an official with a supervisory role and must be specifically designated as a certifying official by that official's agency heads.[80] This supervisory official certification requirement was not required by statute. As with the imposition of the mandatory affidavit of a licensed mental health professional by regulation when INS implemented the battered spouse waiver, DHS's regulatory requirement that all certifying officials have supervisory authority and be the head of an agency or specifically designated by the head of an agency to sign U-visas, this requirement significantly narrowed immigrant victim's access to U-visa protection.

1. Problems in the Implementation of the Regulations

The U-visa regulations have had the effect of directly undermining Congressional intent to facilitate the reporting of crimes,[81] the fostering of better relationships between

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certifications for U-visa cases and are well placed to do so. The requirement that the certifying official be a supervisor imposed by the DHS regulations does not apply to judges. 8 C.F.R. § 214.14(a)(3). The preamble to the U-visa regulations Fed. Reg. 53,020 (Sept. 17, 2007) states that "[t]he rule provides that the term 'investigation or prosecution,' used in the statute and throughout the rule, includes the detection or investigation of a qualifying crime or criminal activity, as well as the prosecution, conviction, or sentencing of the perpetrator of such crime or criminal activity. New 8 C.F.R. § 214.14(a)(5). Referring to the AG Guidelines, USCIS is defining the term to include the detection of qualifying criminal activity because the detection of criminal activity is within the scope of a law enforcement officer's investigative duties. AG Guidelines, at 22–23. Also referring to the AG Guidelines, USCIS is defining the term to include the conviction and sentencing of the perpetrator because these extend from the prosecution. Id. at 26–27. Moreover, such inclusion is necessary to give effect to section 214(p)(1) of the INA, 8 U.S.C. 1184(p)(1), which permits judges to sign certifications on behalf of U nonimmigrant status applications. INA § 214(p)(1), 8 U.S.C. § 1184(p)(1). Judges neither investigate crimes nor prosecute perpetrators. Therefore, USCIS believes that the term 'investigation or prosecution' should be interpreted broadly as in the AG Guidelines."

79. 8 U.S.C. § 1101(a)(15)(U)(i) (2006); 72 Fed. Reg. 53,014, 53,023-53,024 (Sept. 17, 2007). The preamble to the U-visa regulations Fed. Reg. 53,019 (Sept. 17, 2007) states that "the rule defines a 'certifying agency' as a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority that has responsibility for the investigation or prosecution of the qualifying criminal activities designated in the BIWPA. New 8 C.F.R. § 214.14(a)(2). This includes traditional law enforcement branches within the criminal justice system. However, USCIS also recognizes that other agencies, such as child protective services, the Equal Employment Opportunity Commission, and the Department of Labor, have criminal investigative jurisdiction in their respective areas of expertise." 72 Fed. Reg. 53,019 (Sept. 17, 2007).

80. 72 Fed. Reg. 53,023 (Sept. 17, 2007) ("This rule defines 'certifying official' as the head of the certifying agency or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency, or a Federal, State, or local judge. 8 C.F.R. § 214.14(a)(3). USCIS believes that this definition is reasonable and necessary to ensure the reliability of certifications. It also should encourage certifying agencies to develop internal policies and procedures so that certifications are properly vetted.").

81. VAWA 2000 § 1513(a)(2)(B), 8 U.S.C. § 1101.

justice system of cials and immigrant crime victims, the encouragement of law enforcement to better serve immigrant crime victims, the prosecution of crimes perpetrated against immigrants,[82] and the furtherance of the humanitarian interests of the United States in protecting crime victims.[83] These regulations also created confusion among law enforcement of cials and agencies and had the effect of narrowing the number of certi ers available to victims.

The mandatory certi cation requirement in the regulations left victims' cases dependent on the ability of the often time-pressed agency head to sign the form or to designate an of cial with authority to do so. While some law enforcement agencies have issued protocols, implemented procedures, or adopted practice7.6(or)-2(i

department and the local immigrant community. This work led the National Network to End Violence Against Immigrant Women to highlight the Lexington Police Department's achievements and issue them an award for their work at the Network's national conference in November of 2007, shortly after the U-visa regulations went into effect. Within a year after receiving this award, following issuance of the U-visa regulations requiring that only the chief of police or a designated supervisory authority be the only persons authorized to issue U-visa certi cations, the Lexington police department stopped issuing U-visa certi cations altogether. Unfortunately, while the Lexington police department provides a stark example of the signi cance of this problem, they are not the only police department to decide to not issue U-visa certi cations.[88]

Since certifying the application is mandatory for the immigrant victim of crime,[89]

at the time—and threatened retaliation if they complained of such conduct."[92] Id. the press release announcing a $1,525,000 settlement on the EEOC's employment discrimination lawsuit brought against DeCoster Farm under Title VII of the Civil Rights Act of 1964, Chairperson of the EEOC at the time, Cari M. Dominguez, stated that "[p]rotecting immigrant workers from illegal discrimination has been, and will continue to be, a priority for the EEOC."[93] These types of

Despite the EEOC's early and consistent work with crime victims and its willingness to provide U-visa certi cations, the EEOC's procedures for issuing U-visa certi cations changed dramatically following the issuance of the U-visa regulations by DHS in September of 2007. One year after DHS promulgated the U-visa regulations, the EEOC established guidelines that would need to be followed by EEOC of cials interested in providing future U-visa certi cations for victims of criminal activities the EEOC was investigating. Under the new EEOC guidelines, regional attorneys have the authority to certify applications, but only upon the recommendation of the EEOC General Counsel. If the General Counsel determines certi cation is appropriate, the case must then be referred to the Of ce of the EEOC Chairperson who retains the authority, on a case-by-case basis, to determine if the EEOC should act as the certifying agency.[99]

This complex, multi-layered, daunting process is having the effect of reducing EEOC's issuance of U-visa certi cations. A recent example is the case of immigrant workers subject to child labor violations,[100] extortion,[101] and assault[102] at the Agriprocessors Kosher meatpacking plant in Postville, Iowa. Among many of these workers were hundreds of victims of labor exploitation, including 9,311 child labor violations, and dozens of victims of gender-based crimes.[103] Although Agriprocessors was involved in a range of criminal activities against its workers, including crimes similar to those committed against workers in the De Coster case, the EEOC of ce that championed the De Coster case did not play any role in investigating complaints in the Postville Agriprocessors case. This occurred despite the fact that the EEOC had prior contact with the Agriprocessors.[104]

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99. Memorandum from Naomi C. Earp, Chair, Equal Employment Opportunity Commission, to District Directors and Regional Attorneys (Jul. 3, 2008) (on le with author).

100. Agriprocessors was charged with "a total of 9,311 child labor violations, involving 32 youths under the age of 18 (Seven of the 32 also were under age 16.) The alleged violations date back to Sept. 9, 2007, for some of the children, and to as recently as May 12, 2008, when Federal of cials raided the Postville plant." Press Release, Iowa Attorney General's Of ce, Child Labor Law Charges Filed Naming Agriprocessors Of cials and Plant in Postville (Sept. 9, 2008) (on le with author).

101. Julia Preston, *$10* , N.Y. TIMES, October 30, 2008, at A22, http://www.nytimes.com/2008/10/30/us/30 ne.html?adxnnl=1&adxnnlx=1257973385 bLeLV5DvSdUwEUBVj4baPw.

102. Julia Preston, - , N.Y. TIMES, Aug. 6, 2008, at A15, http://www.nytimes.com/2008/08/06/us/06meat.html.

103. Lynda Waddington, , IOWA INDEP., May 31, 2008, http://iowaindependent.com/2401/workers-documents-paint-stories-of-coercion-sexual-exploitation-at-agriprocessors.

104. Sholom M. Rubashkin, , PHILADELPHIA JEWISH VOICE, Jul. 2006, http://www.pjvoice.com/v13/13104iowa.html.

III. Amend the Immigration and Nationality Act to Allow Crime Victims Applying for U-visas the Same Access to VAWA's "Any Credible Evidence" Protections Currently Afforded to Trafficking Victims Applying for T-visas

VAWA 2000 significantly expanded protections beyond domestic violence and child abuse to include a range of immigrant victims of violence against women and immigrant victims who could access the protection of legal immigration status by creating two new immigration remedies—the T-visa for victims of human trafficking and the U-visa for victims of a range of mostly violent crimes, including trafficking, sexual assault, and domestic violence. In creating these remedies, Congress expanded the forms of immigration relief that individual immigrant crime victims might qualify for. With the passage of VAWA 2000 and the long-delayed implementation of the U-visa through DHS regulations issued in the late fall of 2007,[105] some immigrant victims would now have the option to decide which one of the multiple forms of VAWA immigration relief that they qualified for and which would be the best and safest to apply for in light of their individual circumstances. Victims of domestic violence would qualify for U-visas in addition to a VAWA self-petition or a VAWA cancellation of removal application. Human trafficking victims would have the option of applying either for a T-visa or for a U-visa, since trafficking crimes were included as covered offenses in both visas. Since some of the evidentiary requirements for a T-visa might be difficult for some victims of human trafficking to meet, Congress included trafficking on the list of U-visa crimes to offer immigration relief for trafficking victims in a broader range of state and federal prosecutions of human traffickers. Trafficking victims who could not prove that they would suffer extreme hardship involving unusual and severe harm upon removal would not be able to obtain T-visas, but would qualify for U-visas.

The T-visa offered immigration benefits for victims of severe forms of trafficking in persons,[106] which is defined to include sex or labor trafficking induced by force, fraud, or coercion.[107] The U-visa offered the protection of legal immigration status to immigrants who were victims of a broad range of crimes. The Congressional intent behind both visa categories was, from a humanitarian perspective, to help victims, and more broadly, to encourage victims to report crimes to law enforcement, thereby improving the ability of state and federal law enforcement officials to prosecute crime victims and discourage ongoing criminal activity in communities across the United States.[108] The Violence Against Women Act immigration protections for victims of spousal and child

105. 72 Fed. Reg. 53,014 (Sept. 17, 2007) (proposed interim final rule).
106. INA § 101(a)(15)(T)(i)(I), 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2006).

abuse also shared these same goals.[109] Thus, VAWA self-petitions, VAWA cancellation of removal, and VAWA suspension of deportation join T-visas and U-visas in becoming points in a continuum of assistance offered by federal immigration law to enhance the safety of immigrant crime victims and to hold perpetrators of criminal activity accountable.

Both the T-visa and U-visa forms of immigration relief require that victims prove that they are cooperating with law enforcement in the investigation or prosecution of crime perpetrators.

The T-visa regulations provide that a petitioner may submit an endorsement from a law enforcement agency, but it is not required. In the alternative, the traf cking victim may submit "any credible evidence" to prove the victims, efforts to co-operate with law enforcement.

The U-visa statute, on the other hand, requires that in order to prove helpfulness or willingness to be helpful, U-visa eligible applicants must obtain a certi cation from a justice system or law enforcement of cial.

> (1) Petitioning procedures for section 1101(a)(15)(U) visas
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> The petition led by an alien under section 1101(a)(15)(U)(i) of this title , , , , , , , , described in section 1101(a)(15)(U)(iii) of this title. This certi cation may also be provided by an of cial of the Service whose ability to provide such certi cation is not limited to information concerning immigration violations. This certi cation shall state that the alien "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of criminal activity described in section 1101(a)(15)(U)(iii) of this title.[113]

The U-visa statute further speci es that "in acting on any petition led under this subsection, the consular of cer or the Attorney General, as appropriate, shall consider any credible evidence relevant to the petition."[114] The effect is that "any credible evidence" relevant to the U-visa petition shall be considered, but that no U-visa victim can le for U-visa immigration relief unless they le the mandatory I-918 Supplement B U-Visa certi cation form as a part of their U-visa application. The practical result of the U-visa certi cation requirement is that many immigrant crime victims who are eligible for U-visas are precluded from ling their U-visa cases when law enforcement and other potential certifying of cials do not know about or are not interested in completing U-visa certi cations.

When Congress wrote the T-visa and U-visa protections in 2000, the two provisions came together and became law as part of the Victims of Traf cking and Violence Protection Act of 2000 (VTVPA).[115] However, these visas evolved in two different pieces of separately introduced legislation. The Traf cking Victims Protection Act of 2000 (TVPA), which became Division A of VTVPA,[116] sought to strengthen the ability of federal law enforcement of cials to prosecute human traf ckers and provide help, protection from deportation, and access to legal immigration status for immigrant victims of human traf cking in the United

States.[117] The U-visa was the new remedy for a broad range of crime victims that was included as the Violence Against Women Act of 2000, which became Division B of VTVPA.[118] The purpose of U-visas for crime victims was to strengthen the ability of law enforcement to detect, investigate, and prosecute crimes committed against immigrants and to encourage federal, state and local law enforcement of cials to better serve and protect immigrant crime victims.[119] Congress understood in both the T- and U-visa contexts that successful prosecutions depended on traf cking and crime victims being able to access legal immigration status, supportive services, and protection from deportation.[120]

Although both the T-visa and U-visa had similar purposes, the U-visa statute required certi cation and the T-visa did not. The legislative histories of the TVPA and VAWA 2000 are silent on the reason for this difference in the procedures required of victims ling for relief under the T-visa and the U-visa.

The source of the difference in original approach potentially stems from the fact that the TVPA focused on assisting federal prosecutions brought by federal prosecutors. Successful prosecutions of human traf ckers would only occur if victims received the stability that comes from protection from deportation, access to legal immigration status, and receiving much needed support and services.

The TVPA allowed federal law enforcement of cials to seek "continued

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117. . at §§ 102(b)(14)-(17), (19), (20), 8 U.S.C. § 7101. "Existing legislation and law enforcement in the United States and other countries are inadequate to deter traf cking and bring traf ckers to justice . . . No comprehensive law exists in the United States that penalizes the range of offenses involved in the traf cking scheme. Instead, even the most brutal instances of traf cking in the sex industry are often punished under laws that also apply to lesser offenses, so that traf ckers typically escape deserved punishment. . the seriousness of this crime and its components is not re ected in current sentencing guidelines, resulting in weak penalties for convicted traf cker. Existing laws often fail to protect victims of traf cking. . . . Victims of severe forms of traf cking should not be inappropriately incarcerated, ned, or other wise penalized solely for unlawful acts committed as a direct result of being traf cked, such as using false documents, entering the country without documentation, or working without documentation. . . . Because victims of traf cking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been traf cked, because they are often subjected to coercion and intimidation including physical detention and debt bond-age, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often nd it dif cult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.

118. . at §§ 1001-1513 (codi ed at scattered sections of the U.S.C.).

119. . at § 1513(a)(2)(A), 8 U.S.C. § 1101.

120. . at § 102(a), 8 U.S.C. § 7101, which states that the purpose of the TVPA is to "combat traf cking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traf ckers, and to protect their victims." In section 1513(a)(2)(A) of VAWA 2000, Congress states the purpose of the U-visa protection as follows: "The purpose of this section is to create a new nonimmigrant visa classi cation that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, traf cking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement of cials to better serve immigrant crime victims and to prosecute crimes committed against aliens."

presence" on behalf of victims of severe forms of traf cking who are potential witnesses in human traf cking cases.[121] The TVPA of 2000 also allowed victims of severe forms of traf cking who could demonstrate that they have "complied with any reasonable requests for assistance in the investigation or prosecution of acts of traf cking" to self-petition for a T-visa.[122] Since the traf cking prosecutions originally envisioned by the TVPA of 2000 were federal, and victims had the burden of proof in their T-visa cases of proving to DHS that they complied with reasonable requests from federal law enforcement of cials, Congress did not make certi cations from a government of cial a mandatory prerequisite to traf cking victims ling for and being granted T-visas. Congress thus avoided burdening federal investigators and prosecutors with having to produce certi cations.

Further, when Congress in 2003 amended the law to provide T-visa access for victims of severe forms of traf cking who were cooperating with state and local law enforcement in the investigation or prosecution of human traf ckers, these additional traf cking victims were provided the ability to prove all aspects of their T-visa cases by presenting "any credible evidence." No certi cation requirement was imposed. Following these 2003 TVPA amendments, both the U-visa and the T-visa were available for immigrant crime victims who were cooperating with federal, , authorities in the investigations or prosecutions. However, in U-visa cases victims had to procure certi cations as a prerequisite to ling and T-visa applicants did not. As a result of these 2003 TVPRA amendments, DHS began adjudicating T-visa applications from victims who were involved in state and local prosecutions of traf ckers.

The Department of Homeland Security has developed signi cant expertise in adjudicating T-Visa petitions since the interim T-Visa regulations were issued in 2002.[123] DHS has experience adjudicating T-visa cases that are based on state and federal prosecutions. All of the T-visas and the U-visas are adjudicated by the specially trained VAWA unit at the DHS Vermont Service Center.[124] The DHS

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121. TVPA § 107(c)(3), 22 U.S.C. § 7105(c)(3) (2000). Traf cking victims who are granted "continued presence" also receive access to public bene ts and other services equivalent to those offered to refugees. . at § 107(b)(1)(E), 22 U.S.C. § 7105.

122. INA § 101(a)(15)(T)(i)(III), as originally included in section 107(e)(1) of the TVPA. Victims applying for T-visas would also have to prove that they would suffer extreme hardship involving unusual and severe harm if they were removed from the United States in order to be awarded a T-visa. INA § 101(a)(15)(T)(i)(IV), 8 U.S.C. § 1101(a)(15)(T)(i)(IV).

123. New Classi cation for Victims of Severe Forms of Traf cking in Persons; Eligibility for "T" Nonimmigrant Status, 67 Fed. Reg. 4784-01 (January 31, 2002).

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VAWA Unit has developed sufficient expertise in determining whether T-visa victims under the "any credible evidence" standard have submitted sufficient evidence of both victimization and compliance with reasonable requests for assistance in the investigation or prosecution of human trafficking.[125] Under the T-visa regulations, victims are encouraged to seek and provide a law enforcement endorsement as part of the evidence submitted to DHS. If victims file T-visa applications without such endorsement DHS officials adjudicating the petition usually send the victim a request for further information asking the victim to explain more fully the steps she has taken to collaborate with law enforcement