Out of the Wilderness: After a Seven-Year Wait, U Visa Applicants Finally Receive Guidance

Mark J Calaguas
THE NO-MATCH REGULATION: IMMIGRATION ENFORCEMENT PUT ON STANDBY

By: Erin Kalwaic1

U.S. Immigration and Customs Enforcement (ICE) effected its long awaited “no-match” regulation on September 14, 2007. The purpose of this regulation is to alert employers that a potential employee is an illegal immigrant and to assist employers in resolving immigration issues during the employment process. Under the no-match regulation, the Department of Homeland Security (DHS) or Social Security Administration (SSA) will send a "no match" letter to an employer when it receives biographic information on employment forms that does not match the agency’s records. This letter will alert the employer to the problem and offer a step by step process to resolve it. Although the SSA has been sending these no-match letters since 1994, the letters did not delineate the legal obligations of an employer until the recent issuance of the no-match regulation. This article aims to explain the provisions of the no-match regulation, the impact it could have on people and businesses across the country, and the outcome of the lawsuit that challenged it.

When the SSA receives a W-2 tax form containing information that does not match its records, the agency sends a no-match letter to the employer identifying the discrepancy. Similarly, DHS sends a no-match letter to the employer when information on the I-9 employment verification form does not match its records. Under the new no-match regulation, the letters explain employer obligations to resolve the issue. First, the employer must

1 Erin Kalwaic is a J.D. candidate for the class of 2010 at Northeastern University School of Law. Prior to law school, she worked as an immigration advisor and assistant in the field of international education. Erin is a student member of the American Immigration Lawyers Association.
check its records to determine the nature of
the disagreement between the agency
records and the employment forms, as the
problem is often a clerical one. In the case
of a clerical mistake, the employer should
correct the error and inform the appropriate
agency within 30 days of receipt of the
notice. If the discrepancy is not a clerical
error, the employer should speak with the
employee to confirm the information on
record. If the employee indicates the
information is not correct, the employer
must inform the appropriate agency of the
correction. On the other hand, if the
employer indicates that the information is
correct, the employer should tell the
employee to follow up with the appropriate
agency within 30 days.

If the discrepancy still has not been
resolved within 90 days, the employer has
an additional three days to attempt to verify
employment authorization by asking the
employee to complete a new Form I-9. If
the no-match letter questioned an
employee’s social security number, the
employee must complete the new Form I-9
without using the social security number in
dispute. Instead of using the number in
dispute, the employee may prove his or her
identity using documents with photographs
and other biographic information that
conform to the Form I-9 identity
requirements. This process is the no-match
regulation’s safe harbor procedure. If the
employer verifies work authorization
through this procedure, it will not be liable
if the employee in question turns out to be
unauthorized to work. If the employer does
not verify employment through this
procedure, it risks liability for having
“constructive knowledge” that the employee
is not authorized to work.

DHS contends that it is
implementing the no-match rule in response
to employer requests for clarification, and
there is support for this proposition. Some
employers and human resources
professionals welcome the regulation for the
clarity and guidance it provides in
explaining the proper handling of a no-
match letter. Employers have been
receiving these no-match letters for over ten
years, and until DHS released the official
regulation, they were unsure of how to
appropriately respond to ensure compliance
with the law.

Although there is some support for
the regulation, many organizations are
rallying against it. After its initial proposal
of the regulation, DHS solicited comments
from the public. It received over 5,000
comments from many groups, including
labor unions, trade groups, and businesses.2
One reason for such opposition is that DHS
is relying on the SSA database, which is
notoriously inaccurate. In its lawsuit against
the regulation, the American Federation of
Labor and Congress of Industrial
Organizations (AFL-CIO) expressed
concern about this issue. The AFL-CIO
argued that because of its inaccuracies, the
SSA database could violate worker’s rights
by subjecting workers to undue hardship.
The Inspector General of the SSA estimates
that of the 17.8 million no-matches, over 70
percent of the social security numbers
involved are used by legitimate U.S.
citizens.3 It follows that approximately 12.7
million people will receive the no-match
letter in error. Often the errors are clerical,
but recipients of the letter still bear the
burden of proving their identity.

The error-laden SSA database is just
one reason for the many objections to the

---

45614 (Aug. 15, 2007) (to be codified at 8 C.F.R. §
274a.1).

3 David Bacon, No Justice with No-Match Rule, THE
AMERICAN PROSPECT, Sept. 10, 2007,
http://www.prospect.org/cs/articles?article=no_justic
e_with_nomatch_rule.
no-match regulation. Some opponents also contest the timeframe for compliance. These opponents believe 93 days is too short a time period to require employers and employees to respond to the SSA or DHS. The U.S. District Court seems to agree with this contention. In issuing the preliminary injunction against DHS, Judge Charles R. Breyer found that “the government’s proposal to disseminate no-match letters affecting more than eight million workers will, under the mandated time line, result in the termination of employment to lawfully employed workers.”4 Others critics argue that employers may just terminate employment upon receipt of a no-match letter instead of completing the safe harbor procedure. Such a disposition could lead to mass-dismissals of legally authorized workers.

Small business owners are particularly concerned about the regulation. They believe the no-match rule would cause worker shortages in certain industries, like agriculture and construction, and that such shortages could ultimately decrease productivity and depress the economy. In addition, the Equal Employment Opportunity Commission (EEOC) has expressed its concern that the regulation will encourage discrimination based on national origin by creating an incentive to terminate employees that an employer presumes are unauthorized for employment. In a letter in response to DHS’s request for public comment on the no-match regulation, the EEOC noted its concern with the language used in the regulation. The EEOC said that “use of terms such as “may” and “could” create uncertainty; and an employer uncertain about what “may” or must be done, could seek to remedy no-match letters by engaging in practices that discriminate against individuals based on their national origin.”5 DHS did not heed the EEOC’s concern, and these ambiguous words remain in the final regulation.6

Like these groups, the U.S. District Court has also expressed concern about the no-match regulation. Just days after DHS’s official release of the final rule, the U.S. District Court for the Northern District of California issued a preliminary injunction restraining DHS from implementing the no-match regulation.7 In addition to the AFL-CIO, plaintiffs included the American Civil Liberties Union, San Francisco Labor Council, Chamber of Commerce of the United States of America, and many others. The court held that the balance of hardships tipped in favor of the plaintiffs “because altering the status quo would subject employers to greater compliance costs and employees to an increased risk of termination, while imposing significantly less burdens on the government.”8

The potential implications of the no-match regulation are enormous. The regulation could affect thousands of employers and millions of workers, not to mention the U.S. economy. Although Congress refused to enact President Bush’s immigration reform bill last year, it is clear the government has not abandoned its platform. With the no-match rule, DHS is attempting to circumvent Congress and use the SSA to enforce immigration law. The preliminary injunction against DHS has delayed this plan for now, but the regulation and the vehement response to it show that immigration reform remains a controversial

6 8 C.F.R. § 274a.1.
8 Id. at 5.
issue facing this country.

OUT OF THE WILDERNESS: AFTER A
SEVEN-YEAR WAIT, U VISAPPLICANTS
FINALLY RECEIVE GUIDANCE

By: Mark J. Calaguas

On September 17, 2007, long-awaited regulations implementing the U Visa program were published in the Federal Register. Established by the Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA”), which was signed into law by President Clinton after almost unanimous passage in both congressional houses, the U Visa grants temporary status to undocumented aliens who have been victimized by crime and are willing to assist law enforcement in the investigation and prosecution of those criminal acts.

Although other legislation addresses the victimization of non-citizens, particularly in relation to domestic violence, the U Visa protects a broader range of individuals.

Bureaucratic reorganization after 9/11 left thousands of U Visa applicants in limbo as seven years passed before an administrative framework was finally promulgated. The lag even resulted in a class action suit being filed at the federal district court in Los Angeles by a coalition of U Visa applicants and public interest groups against Department of Homeland Security (DHS) chief Michael Chertoff in 2005, which was ultimately withdrawn after Congress gave U.S. Citizenship and Immigration Service (USCIS) officials until July 2006 to release guidelines. Even so, the interim final rule was published well over a year past that deadline, with the continued delay prompting class action plaintiffs to revive litigation in the federal district court in San Francisco in March

Reauthorization Act of 2005, tit. VIII, Pub. L. 109-162, 119 Stat. 2960 (2006), contains self-petition procedures for battered spouses, children, and in some cases, parents, of U.S. citizens and legal permanent residents. See also Ketaki Gokhale, Domestic Violence Victims Get U Visa, INDIA-WEST (San Leandro, Calif.), Sept. 14, 2007, at A1 ("...many abusive partners in the South Asian community are not green card holders - they have H-1Bs. Their dependent spouses can't self-petition and they also are not in a position where they can return to their home country"); Jessie Mangaliman, U visa offers hope for illegal immigrants who are abuse victims, KNIGHT RIDDER TRIB. BUS. NEWS, May 24, 2005, at 1 (reporting on efforts to identify possible U Visa candidates, such as the spouses of H1-B workers, undocumented immigrants, and immigrant minors who have been sexually abused).

9 Mark Calaguas is an attorney based in Chicago, Illinois. He received a J.D. with Certificate in International Law and Practice from Loyola University Chicago School of Law and a B.A. from the University of Michigan.


An announcement that regulations would soon be available was made by attorneys for DHS at a court hearing held later that August.\(^{17}\)

Section 101(a)(15)(U) of the Immigration and Nationality Act (INA) provides the definition and requirements for a U Visa.\(^{18}\) An alien is eligible to petition for a U Visa if he or she: (1) has suffered “substantial physical or mental abuse as a result of having been a victim” of a qualifying criminal activity;\(^{19}\) (2) either possesses information concerning those activities, or if the alien is under 16, has a parent, guardian or next friend that possesses such information;\(^{20}\) and (3) the alien (or parent, guardian or next friend) “has been helpful, is being helpful, or is likely to be helpful” to local, state or federal law enforcement authorities investigating or prosecuting the activities,\(^{21}\) which occurred (4) in violation of the laws or occurred within the territory of the United States.\(^{22}\) Additionally, the victim’s spouse and immediate relatives may also be eligible for petition as derivatives.\(^{23}\)

Section 214(p) limits the annual number of principal U Visa nonimmigrants to 10,000.\(^{24}\) Furthermore, it mandates that applications include certification from law enforcement attesting to the victim’s helpfulness in the criminal investigation.\(^{25}\) Also, the Attorney General shall refer the alien to nongovernmental organizations for assistance where appropriate and grant successful applicants authorization for employment.\(^{26}\) Nonimmigrant status lasts a maximum of four years and may be renewable upon additional certification.\(^{27}\)

In the seven years prior to publication of the new regulations, individuals qualifying for U Visa status were entitled to interim relief, the benefits of which included a stay of removal and work authorization.\(^{28}\) By not attaining any formal immigration status, those persons granted such measures nevertheless remained in a precarious legal situation, and thus had to re-file for interim relief on a yearly basis, as well as submit separate petitions for children and other family members.\(^{29}\) By mid-2006, over 7,200 people were estimated to have received interim relief, well below the 10,000 per year that would have been eligible for U Visas had the infrastructure been up and running.\(^{30}\)


\(^{19}\) § 1101(a)(15)(U)(i)(I). These activities include: “rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; 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; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.” § 1101(a)(15)(U)(iii).

\(^{20}\) § 1101(a)(15)(U)(i)(II).


\(^{22}\) § 1101(a)(15)(U)(i)(IV).

\(^{23}\) § 1101(a)(15)(U)(ii).


\(^{25}\) § 1184(p)(1).

\(^{26}\) § 1184(p)(3).

\(^{27}\) § 1184(p)(6).


\(^{29}\) Bernstein, supra note 6; Lodono, supra note 6.

\(^{30}\) See Lodono, supra note 6.
The interim final rule, which took effect on October 17, 2007 and then codified under 8 C.F.R. Parts 103, 212, 214, 248, 274a, and 299, establishes the procedures for obtaining a U Visa and provides further explanation of the language used in the original statute.31 Notably, U Visas are available not only to “direct victims” who have suffered direct and proximate harm from qualifying crimes,32 but also to “indirect victims,” which include certain family members of individuals rendered dead, incompetent or incapacitated by such crimes.33 Persons deemed culpable in the crimes upon which they base their petition cannot be considered victims for purposes of the U Visa.34 Determination of whether an applicant has suffered substantial abuse shall be made by USCIS on an individualized basis according to a non-exhaustive list of factors relating to both the perpetrator’s conduct and the injuries inflicted on the victim.35 Additionally, the list of qualifying crimes enumerated in the statute is to be read broadly, and may include crimes whose elements and nature are substantially similar to the ones explicitly referenced.36

With regard to “helpfulness,” the applicant has an ongoing responsibility to cooperate in the criminal investigation; merely reporting a crime and then refusing to provide further information is insufficient.37 The rule expands the list of certifying agencies to encompass those with criminal investigative jurisdiction over certain matters, “including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.”38

Applicants must complete the petition for U nonimmigrant status contained in Form I-918 and submit it by mail to USCIS, along with a biometric capture fee and initial evidence, which includes certification by law enforcement of the petitioner’s victimization and helpfulness (Form I-918, Supplement B), a signed statement by the petitioner relating the facts of his or her victimization, as well as any additional evidence the petitioner wants USCIS to consider.39 Interim relief is no longer available after the rule’s effective date; consequently, those persons who have been previously granted interim relief have 180 days from October 17, 2007 to re-file their U Visa petition using Form I-918.40 Although the usual grounds of inadmissibility apply to U Visa applicants, including aliens already present in the United States, petitioners may file a Form I-192 waiver of inadmissibility, the ultimate denial of which cannot be appealed.41 The Secretary of Homeland Security has the discretion to waive inadmissibility if it is in the national interest and excludes participants in Nazi persecutions, genocide, torture or extrajudicial killings.42

Aliens currently in removal proceedings or subject to a final order of removal can petition for U Visa status as well.43 Accordingly, the former may ask the

---

31 See Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53014.
33 § 214.14(a)(14)(i); see also 72 Fed. Reg. at 53017 (explaining the reasons for expanding the range of “victims” eligible for the U Visa).
35 § 214.14(b)(1).
36 § 214.14(a)(9). This interpretation takes into account differences in language that exists within the criminal laws of the various states. Furthermore, USCIS recognizes that qualifying criminal activity may also be discovered in the course of prosecuting a non-qualifying crime. 72 Fed. Reg. at 53018.
37 72 Fed. Reg. at 53019.
38 8 C.F.R. § 214.14(a)(2).
39 §§ 214.14(c)(1)-(3).
40 72 Fed. Reg. at 53021.
41 8 C.F.R. §§ 212.4(a)(1), 212.17(a), 212.17(b)(2).
42 8 U.S.C. § 1182(b)(14); 8 C.F.R. § 212.17(b).
Bureau of Customs and Immigration Enforcement (ICE) to exercise its prosecutorial discretion and file a joint motion with the Immigration Judge or the Board of Immigration Appeals (BIA) to terminate removal proceedings. The latter conversely should apply separately for a discretionary stay of removal using Form I-246 because filing for a U Visa has no effect on ICE’s authority to execute final orders.

Although efforts are still underway to publicize the benefits and procedures of the U Visa, it has been already hailed as a valuable tool for law enforcement by enticing cooperation from undocumented individuals who would otherwise be reluctant to participate in criminal investigations. Former Republican presidential candidate Rudy Giuliani, for one, has been quoted as touting such efforts to encourage undocumented immigrants to report crimes. On the other hand, some high-profile attempts to secure temporary status for potential witnesses have not gone as smoothly as anticipated, like when attorneys for fourteen undocumented immigrants who survived or were bereaved by the destruction of the World Trade Center offered to have their clients testify during the sentencing phase of the trial of convicted 9/11 conspirator Zacarias Moussaoui in 2004. After the individuals exposed themselves as illegal residents, the federal prosecutor in Virginia decided to certify only three of them as “helpful,” leading to accusations that contrary to the VTVPA’s intent, the assistant U.S. attorney had acted arbitrarily in determining the level of abuse suffered by the would-be witnesses rather than leaving that issue up to specially-trained immigration officials at the USCIS service center in Vermont.

The establishment of formal application procedures, however, has renewed media interest in the possibilities offered by the U Visa, such as in the case of Kelsey Peterson, the 25-year-old Nebraska middle school teacher who fled to Mexico in the fall of 2007 with one of her students, a 13-year-old boy illegally residing in the United States. UNLV law professor Leticia Saucedo has even recently explored the possibility of harnessing U Visa provisions to protect the rights of undocumented employees exploited in the workplace.

In one of the earliest opinions dealing with the new interim rule, the Ninth Circuit Court of Appeals remanded a case to the BIA, which had discounted the petitioners’ pending U Visa applications in its initial decision to deny review of their removal proceedings.

---

45 §§ 241.6(a), 1241.6(a).
47 See Mangaliman, supra note 4; Londono, supra note 6; Hendricks, supra note 7.
48 Visas for victims, supra note 5.
51 See e.g., Oskar Garcia, New Visa May Aid Boy in Teacher Sex Case, ASSOCIATED PRESS, Nov. 11, 2007, available at http://ap.google.com/article/ALeqM5gCtOnnv40JXAiLjBYB4eW12wA5zgD8SRQOEO.
absence of federal regulations, the BIA refused to remand or reopen the petitioners’ case because they had based their applications on an offense not charged in the criminal complaint.\(^{54}\) The Court though noted that under the interim rule, inclusion of the qualifying crime in an indictment or complaint is not a requirement for U Visa relief.\(^{55}\) In addition, the Court pointed out that pursuant to 8 C.F.R. § 214.14(c), the BIA is authorized to continue proceedings at the request of individuals applying for a U Visa, and as such, ordered the BIA to consider the petitioners’ own request accordingly.\(^{56}\)

The publication of the interim rule thus fulfills a promise made by the nation’s lawmakers over seven years ago. For those who have had to endure not only the trauma of victimhood but also the fear of being hauled into removal proceedings, a U Visa can provide some piece of mind in an existence wracked by instability. Furthermore, by creating incentives for undocumented victims to come forward with critical information about serious crimes, the U Visa program may help bridge the gap between some of society’s most vulnerable individuals and a law enforcement community that for various reasons has been regarded with significant degrees of distrust. While the federal government’s inability to establish a U Visa framework within a reasonable amount of time has unnecessarily prolonged the hardships for thousands of qualified candidates, the recent developments of the past fall are much-needed steps toward progress.

\(^{54}\) Id. at 15907.
\(^{55}\) Id. at 15908.
\(^{56}\) Id.