



## Case Law Overview: How Courts Address the Use of Crime Victims' Immigration Information in Criminal Cases

Protecting crime victims' privacy in their immigration-related information is often an important part of advocating for victims. Such efforts may take the form of fighting requests to examine victims about their immigration history or seeking to quash attempts to discover victims' U or T Visa applications. U and T Visas provide legal status for qualifying noncitizens who are victims of serious crimes.<sup>1</sup> The U and T Visas were designed with the purposes of strengthening the ability of law enforcement agencies to investigate and prosecute crimes, while offering protection to noncitizen crime victims.<sup>2</sup> Among other benefits, U and T Visas provide noncitizen crime victims a pathway to obtain lawful permanent residency, employment authorization, and family unity, as well as increased access to health care, housing, and other services.<sup>3</sup>

To obtain a U Visa, a noncitizen must submit an application to the U.S. Citizen and Immigration Services (USCIS). The U Visa application consists of an I-918 form, Supplement B form, a personal statement, and any other relevant evidence to prove the crime occurred.<sup>4</sup> The Supplement B is a "U Nonimmigrant Status Certification," which requires a "certifying official" to confirm that the petitioner "has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim."<sup>5</sup> The Supplement B form requires petitioner to give a brief description of the criminal activity being investigated and or prosecuted and the crime victim's involvement, as well as a description of any known or documented injury to the victim. To obtain a T Visa, a noncitizen must submit an application to USCIS, which includes an I-914 form, in addition to any other relevant evidence to support the victim's claim. Victims seeking T Visas may—but are not required to—submit a Supplement B form demonstrating law enforcement agency endorsement.

The I-918 and I-914 forms require victims to answer a broad range of questions about their criminal, immigration, and medical history. These questions include whether the victim has

ever engaged in prostitution, illegal gambling, or assisting a noncitizen to illegally enter the country, received or anticipates receiving public assistance, abused an illegal drug, voluntarily participated in a totalitarian political party, and whether the applicant has a physical or mental disorder that has caused or may cause a threat to self or others. Victims are also required to attach a statement explaining any affirmative response to these questions. Victims must provide detailed information about their immigration history and current status, and that of any derivative family members.<sup>6</sup>

Defense counsel routinely seeks to question crime victims and other government witnesses about their immigration history and status as well as to discover their visa application materials. Because of the nature of the visa application questions victims are required to answer, these files contain a variety of private and highly sensitive information about the victims and their families. To best assist victims in protecting immigration-related information, it is critical to understand how courts analyze the propriety of defense requests to discover and use this information. Below is an overview of the growing body of case law in which courts address the admissibility of crime victims’ and other government witnesses’ immigration-related information and the discoverability of their visa applications. The first group of criminal cases summarized in chart form below includes those in which a reviewing—usually appellate—court addresses whether the lower court erred in precluding the defense from cross-examining the victim or witness about some aspect of their immigration status. The second group of cases address defense access to a victim’s or witness’s immigration files.<sup>7</sup>

*A. Propriety of cross-examining the victim/witness regarding immigration status in criminal cases.*

1. Finding No Error in Excluding Evidence

Case Name	Summary	Basis for Decision: Scope of Cross-Examination was Sufficient for Defendant to	Basis for Decision: Failure to Lay Foundation/ Speculative/Not Relevant/Danger of Prejudice Outweighed

		Argue Bias	Probative Value
<i>United States v. Almagro</i> , 393 Fed. App'x 627, 632-33 (11th Cir. 2010)	(finding no abuse of discretion by the trial court in limiting defendant's cross-examination of a government witness in a case in which defendant was convicted of encouraging or inducing undocumented people to enter the United States; the trial court permitted defendant to question the witness about whether she sought to please the government and whether she understood that the government would initially determine the success of her pending asylum petition, but did not permit him to question her about the underlying facts of her application (e.g. whether she sought asylum on the basis of religious, gender, or other persecution))	X	
<i>United States v. Diaz</i> , 876 F.2d 1344, 1350 (7th Cir. 1989)	(finding no violation of defendant's confrontation right resulting from the trial court's restriction of defendant's cross-examination of a government informant to show bias in narcotics case as questioning revealed that the witness came to the country illegally and his work with the government allowed him to remain in the country)	X	
<i>United States v. Contreras-Saldana</i> , 274 Fed. App'x 394, 398-99 (5th Cir. 2008)	(finding no violation of defendant's confrontation right in case in which defendant was found guilty of transporting undocumented people by means of a motor vehicle; the trial court permitted defendant to cross-examine the government's witness about the MWRP (Material Witness Release Program), a program whereby the United States Border Patrol	X	

	identifies a potential material witness, transports the witness to another agency for consideration of a temporary employment authorization card, and releases the person for up to six months to the United States Pretrial Services program, which then supervises the person, as well as about any benefits the witnesses received pursuant to the program, thus defendant was given ample room to explore and argue the issue of bias)		
<i>Morgan v. Dickhaut</i> , 677 F. Supp. 2d 424, (D. Mass. 2010)	(denying habeas relief to petitioner convicted of murder and finding no violation of petitioner’s confrontation right where he was permitted to impeach the government witness as to bias and veracity; even though the court prevented him from asking about the witness’s prior deportations, he was able to ask about, <i>inter alia</i> , his citizenship, country of origin, and the possibility of an immigration detainer against him)	X	
<i>State v. Aguilar-Villa</i> , No. 1 CA-CR 08-0200, 2009 WL 1819522, at *5-6 (Ariz. Ct. App. June 25, 2009)	(holding that the trial court did not abuse its discretion in applying Rule 403 and holding that the danger of unfair prejudice and confusion of the jury outweighed any probative value of defendant’s proposed line of questioning of the victim about his illegal status and whether he believed that because he was testifying against defendant, the state authorities were not acting against him or informing on him to the federal authorities; defendant failed to make an offer of proof demonstrating that victim had this belief, but even if it was error to prohibit this line of questioning, any	X	X

	such error was harmless in light of other evidence admitted that called into question the victim’s credibility)		
<i>People v. Lopez</i> , No. E052901, 2012 WL 2115477, at *2 (Cal. Ct. App. June 12, 2012)	(concluding that the trial court did not abuse its discretion in prohibiting evidence of the assault victim’s U Visa application on the basis that the evidence was irrelevant because the inference of bias that defendant sought to present “was based on mere speculation” and even if it was error, the error was not prejudicial as the victim testified credibly and consistently about what happened and his testimony was generally supported by another witness)		X
<i>Junior v. State</i> , 653 S.E.2d 481, 484 (Ga. 2007)	(holding that in a trial for murder and armed robbery, the trial court did not abuse its discretion in granting the state’s motion seeking to bar defendant from cross-examining the testifying victims about their immigration status as “[t]he immigration status of the victims was not an issue relevant to the matter being tried; i.e. whether [defendant] committed the crimes charged”)		X
<i>State v. Leos-Hernandez</i> , No. 100,382, 2009 WL 2371017, at *1-2 (Kan. Ct. App. July 31, 2009) (per curiam)	(finding that the trial court did not abuse its discretion in granting the state’s motion to exclude evidence about the victim’s immigration status in defendant’s trial for aggravated battery as defendant agreed with the motion and the prosecutor did not open the door to this line of questioning by referring to the victim’s use of another name in questioning the victim; defendant’s clear intent was to impeach the victim with evidence that he used		X

	different names to avoid detection because he does not have legal status, but he failed to cite any proffer of evidence regarding the victim’s alleged illegal status)		
<i>Guardado v. State</i> , No. 2397, 2015 WL 5968756, at *4 (Md. Ct. Spec. App. Oct. 14, 2015)	(concluding that the trial court did not err when it prohibited defense counsel from asking, during cross-examination, whether the rape victim understood that if she were the victim of a crime, that status would allow her to remain in the United States longer; but stating that “the defense offered no evidence that [the victim] lacked stable immigration status, that she could be eligible for some sort of favorable immigration treatment as a crime victim,[] or, if it exists, that she was aware of that program at the time she identified [defendant]. The outcome might be different if the court had prevented [defendant] from cross-examining [the victim] with information he had in hand, but it is not appropriate for counsel to invite the jury to speculate about [the victim’s] motivation” without a sufficient factual foundation)		X
<i>Commonwealth v. Sealy</i> , 6 N.E.3d 1052, 1057-59 (Mass. 2014)	(holding that, in a rape trial in which defendant asserted a consent defense and argued that the victim reported their consensual sexual conduct as rape to obtain immigration benefits, the trial court did not violate defendant’s confrontation rights or otherwise err in precluding defendant from cross-examining the victim about a prior assault and its connection to previous immigration status benefits she received as defendant did not make the required showing that the victim’s	X	X

	earlier assault was relevant to a motive to lie and defendant was permitted to question the victim about her prior knowledge of the U Visa process)		
<i>Mariano v. State</i> , No. 57859, 2013 WL 7160123, at *1 (Nev. Oct. 31, 2013)	(concluding that the trial court did not abuse its discretion by limiting defendant’s cross-examination of the sexual assault and kidnapping victim “regarding her bias, the U–Visa program, and her immigration status because such topics were irrelevant and speculative” and noting that defendant “presented evidence regarding the U–Visa program, but the mere existence of the U–Visa program is insufficient to establish that [the] intended cross-examination topics were relevant. [Defendant] made no showing that [the victim] knew about the U–Visa program or lied about [his] sexual assault in order to seek its protections[,]” and that “[t]here is no evidence that [the victim] intended to apply for protection under the U–Visa program”)		X
<i>State v. Corbin</i> , No. A-1673-10T1, 2012 WL 5499889, at *3-4 (N.J. Super. Ct. App. Div. Nov. 14, 2012)	(concluding that the trial court did not abuse its discretion in prohibiting defense counsel from questioning the robbery and assault victim about his illegal immigrant status as defendant had the opportunity to question the victim about his motive to fabricate to avoid arrest for fighting and the “the legality of [the victim’s] status in this country had limited probative value but significant potential to unfairly prejudice the jury against him”)	X	X
<i>People v. Anderson</i> , 137 A.D.3d 601, 601	(finding no error by the trial court in an attempted murder prosecution resulting from the trial court’s failure to permit		X

(N.Y. App. Div. 2016)	defendant to impeach the victim with questions about his immigration status; because the victim was legally in the United States at the time of the incident and the “problem about his status, not necessarily impacting his credibility, arose thereafter and was under review at the time of the trial[,]” this decision fell within the trial court’s wide latitude to place reasonable limits on cross-examination and did not deprive defendant of his right of confrontation)		
<i>State v. Morales</i> , No. C-120670, 2014 WL 467331, at *3-5 (Ohio Ct. App. Feb. 5, 2014)	(concluding that the trial court did not err by excluding evidence of the domestic violence victim’s citizenship and immigration status on the grounds that defendant had failed to lay a foundation to demonstrate the evidence would lead to probative impeachment evidence and that any probative value would not be substantially outweighed by the dangers of unfair prejudice against the victim; observing that defendant “did not proffer any evidence that [the victim] had applied for the U-visa benefit or that she could have benefitted from the program due to her citizenship and immigration status. Nor was there any indication that she even knew of the benefit”)		X
<i>State v. White</i> , --- P.3d ---, No. 20141003-CA, 2016 WL 7322810, at *8-9 (Utah Ct. App. Dec. 15, 2016)	(holding that the trial court did not abuse its discretion in denying defendant’s request to cross-examine the victim about the victim’s refusal to disclose to the defense a copy of his and family members’ I-918 immigration petitions; the trial court conducted an <i>in camera</i> review of the files and determined they did not contain exculpatory information and	X	X



	<p>that the victim had the right not to provide the documents; the trial court allowed defendant to have an expert witness provide general information as to how the immigration process worked and to elicit from the victim the fact that he and his family members had filed petitions; withholding of personal information contained in petitions from defendant, who was found in the victim's home, was reasonable, and any inference that defendant argued the jury would have made constituted speculation, and cross-examination about the victim's refusal to provide copies of petitions to the defense did not make it more probable that the victim had fabricated his story)</p>		
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2. Finding Error in Excluding Evidence

Case Name	Summary	Basis for Decision: Scope of Cross-Examination was Not Sufficient for Defendant to Argue Bias	Finding Error, But Concluding it was Harmless in Light of Other Evidence
<p><i>Fajardo v. State</i>, 193 So. 3d 1019, 1023-26 (Fla. Dist. Ct. App. 2016)</p>	<p>(holding that the trial court erred in precluding defendant—who was convicted of attempted murder—from cross-examining a state witness to demonstrate bias regarding the witness's immigration detention and the fact that he was in detention when he identified defendant in a photo lineup; error was not harmless and required reversal because the witness</p>	<p>X</p>	

	was the only person to make an in-court identification of defendant as being at the scene of the crime)		
<i>Romero-Perez v. Commonwealth</i> , 492 S.W.3d 902, 906-7 (Ky. Ct. App. 2016)	(holding that, in a case in which defendant was convicted of burglary and assault, domestic violence related, the trial court’s refusal to allow defendant to question the victim about her pending U Visa application or her immigration status was error and violated defendant’s Confrontation Clause rights, but that any error was harmless in light of the fact that defendant was permitted to ask the victim if she received anything in exchange for her testimony and other witnesses testified to substantially the same facts as the victim; concluding that although some prejudice might result from allowing examination about the U Visa application, a criminal defendant’s right to confront his accuser must prevail and evidence of her immigration status and knowledge of the U Visa application was relevant evidence from which the jury could infer that she had a personal interest in the outcome of the case)	X	X
<i>Carrero-Vasquez v. State</i> , 63 A.3d 647, 654-662 (Md. Ct. Spec. App. 2013)	(holding that the trial court erred in prohibiting defendant convicted of possession of cocaine with intent to distribute as well as related weapons and traffic offenses from questioning a government witness—the owner of the car defendant was driving when he was arrested and in which police found a stolen gun—about her immigration status and the effect a criminal conviction would have on that status, as the trial court’s order violated	X	

	defendant’s confrontation right by prohibiting him from pursuing a legitimate line of inquiry going to bias and motive to testify falsely)		
<i>State v. Valle</i> , 298 P.3d 1237, 1241-44 (Or. Ct. App. 2013) (en banc)	(holding that the trial court erred in prohibiting defendant from cross-examining the sexual abuse victim about the fact of her U Visa application as defendant laid a sufficient foundation by showing that the evidence had a tendency to demonstrate that the victim had a personal interest in testifying against him; the error requires reversal because the exclusion of the evidence “deprived the jury of an opportunity to consider all of the information relevant to [the victim’s] credibility”)	X	

*B. Discoverability of the victim’s/witness’s immigration file in criminal cases.*

1. Finding No Error Where Defendant Was Denied Access to Immigration Files<sup>8</sup>

Case Name	Summary	Basis for Decision: Scope of Cross-Examination was Sufficient for Defendant to Argue Bias	Basis for Decision: Failure to Lay Foundation/ Speculative/Not Relevant/Danger of Prejudice Outweighed Probative Value/Fishing Expedition
<i>United States v. Brown</i> , 347 F.3d 1095, 1098–99 (9th Cir.2003)	(holding that in a narcotics trial the quashing of defendant’s subpoena for a prosecution witness’s complete immigration file did not violate the defendant’s confrontation rights; even though the witness’s “unusual	X	

	immigration status should have been made known to [defendant] earlier than it was, [defendant’s] thorough cross-examination of [the witness] adequately illustrated to the jury both [the witness’s] strong incentive to curry favor with the government by providing information about drug dealers, and his opportunity to plant illicit evidence in [defendant’s] automobile”)		
<i>United States v. Cantu</i> , 557 F.2d 1173, 1178-79 (5th Cir. 1977)	(holding that the trial court did not err in denying defendant’s request to access immigration files of government witnesses who testified against him in prosecution for conspiracy and shielding persons without legal status from detection, where defendant provided only the “bald assertion that ‘this discovery is essential to the preparation of their (sic) defense herein’”)		X
<i>People v. Beltran</i> , No. D064469, 2015 WL 138749, at *6 (Cal. Ct. App. Jan. 12, 2015)	(holding that the trial court did not err in finding that the rape and kidnapping victim’s U Visa immigration file was not discoverable after reviewing the documents <i>in camera</i> and in placing the file under seal at the conclusion of the case)		X
<i>State v. Marroquin-Aldana</i> , 89 A.3d 519 (Me. 2014)	(finding that the defense attorney’s vigorous cross-examination of the child-victim’s mother based on her immigration issues and U Visa application made the possibility that the contents of the immigration file, including the U Visa application, would appreciably affect the jury’s perception of the witness’s credibility remote—particularly so given that the district attorney had produced a copy of	X	X

	its certification in support of the visa application—and therefore the trial court did not err in quashing the defense subpoena; and finding that the defense “subpoena, seeking a broad range of documents comprising [the child-victim’s mother’s] attorney’s ‘entire immigration file(s),’ bears the hallmarks of an impermissible fishing expedition”)		
<i>State v. White</i> , --- P.3d ---, No. 20141003-CA, 2016 WL 7322810, at *8-9 (Utah Ct. App. Dec. 15, 2016)	(holding that the trial court did not abuse its discretion in denying defendant’s request to cross-examine the victim about the victim’s refusal to disclose to the defense a copy of his and family members’ I-918 immigration petitions; the trial court conducted an <i>in camera</i> review of the files and determined they did not contain exculpatory information and that the victim had the right not to provide the documents; the trial court allowed defendant to have an expert witness provide general information as to how the immigration process worked and to elicit from the victim the fact that he and members of his family had filed petitions; withholding of personal information contained in petitions from defendant, who was found in the victim’s home, was reasonable, and any inference that defendant argued the jury would have made constituted speculation, and cross-examination about the victim’s refusal to provide copies of petitions to defense did not make it more probable that victim had fabricated his story)	X	X

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<sup>1</sup> 8 C.F.R. §§ 214.14(b)(1), (a)(9) (providing that a noncitizen is eligible for U nonimmigrant status if the noncitizen is a victim of a qualifying crime, has information about the crime, has been cooperative in the investigation and/or prosecution of the crime, and has “suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity[.]” and listing as qualifying crimes, *inter alia*, rape, torture, domestic violence, trafficking, sexual assault, and incest); 8 C.F.R. § 214.11(b) (providing that a noncitizen is eligible for T nonimmigrant status if the noncitizen “is or has been a victim of a severe form of trafficking in persons[.]” is present in the United States, has complied with reasonable requests for assistance in investigation or prosecution of the crime, and would suffer hardship if returned to his or her home country).

<sup>2</sup> See 22 U.S.C.A. § 7101(a) (the Trafficking Victims Protection Act of 2000 (TVPA) was enacted for three principal reasons: the protection of victims; the prevention of trafficking; and the prosecution of traffickers); Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in A Legislative Duel*, 29 St. Louis U. Pub. L. Rev. 373, 375 (2010) (describing “the dual purposes of the U visa framework that Congress intended--to both strengthen law enforcement’s pursuit of domestic violence cases and to protect victims”).

<sup>3</sup> See Abrams, *supra* note 2, at 380.

<sup>4</sup> 8 C.F.R. § 214.14(c)(2).

<sup>5</sup> 8 C.F.R. § 214.14(a)(12).

<sup>6</sup> See I-918, Petition for U Nonimmigrant Status, <https://www.uscis.gov/i-918>; I-914, Application for T Nonimmigrant Status, <https://www.uscis.gov/i-914>.

<sup>7</sup> Another legal issue that may arise in cases addressing the use of crime victims’ or witnesses’ immigration information in criminal cases is what obligations, if any, the government has under *Brady* to provide defense access to immigration information in its possession. See, e.g., *People v. Jones*, Nos. A137714, A141861, 2016 WL 6818870, at \*10 (Cal. Ct. App. Nov. 18, 2016) (holding that in case in which defendant was convicted of manslaughter, there was no reason to order a new trial based on the prosecutor’s late disclosure of its possession of three state witnesses’ U Visa applications; even though this was a violation of *Brady*, this did not provide basis to order a new trial “because the late disclosure of the U-Visa applications does not undermine ‘our confidence in the verdict’”); *State v. Huerta-Castro*, --- P.3d ---, No. 33,692, 2016 WL 6995379, at \*10-12 (N.M. Ct. App. Nov. 29, 2016) (concluding in

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prosecution for child sexual abuse that it was error for the trial court to suppress the child-victims' mother's U Visa application as it was a violation of defendant's due process rights under *Brady*, and that although defendant did not demonstrate "that this error, by itself, is sufficiently egregious to call into question the fairness of the entire trial[.]" when considered in combination with additional errors found, it required that defendant be granted a new trial).

<sup>8</sup> One court found that a habeas petitioner had sufficiently alleged a violation of his due process rights to survive a facial challenge to dismiss his petition and required the state to file a response regarding the state court's failure to release the victim's sealed immigration file. *Julieta v. Frauenheim*, Civil No. 16cv0987-BTM (BGS), 2017 WL 980331, at \*2-3 (S.D. Cal. Mar. 14, 2017) (adopting the findings and conclusions of the magistrate judge regarding defendant's habeas petition challenging his convictions for, *inter alia*, extortion, assault with a firearm, torture, and rape, and agreeing that defendant's argument sufficiently alleged a federal constitutional violation to survive a facial challenge regarding the failure of the state courts to release to the defense the victim's sealed immigration file that the trial court reviewed *in camera*; petition could not be dismissed outright and the government must file an answer regarding whether petitioner demonstrated a federal due process violation arising from his lack of access to the victim's immigration file).