

April 28, 2011

FIELD ASSISTANCE BULLETIN NO. 2011-1

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM: NANCY J. LEPPINK
ACTING ADMINISTRATOR

SUBJECT: CERTIFICATION OF SUPPLEMENT B FORMS OF U
NONIMMIGRANT VISA APPLICATIONS

This memorandum discusses the guidelines and procedures the Wage and Hour Division (WHD) will follow to determine when and whether to complete and certify Supplement B of a I-918 petition for U Visa Nonimmigrant Visa Status. The Secretary of Labor has the authority to complete and certify Supplement B forms for U Nonimmigrant Visas (U Visas) under Section 1513(b) of the Victims of Trafficking and Violence Protection Act of 2000, as amended, 8 U.S.C. § 1101(a)(15)(U) and related Department of Homeland Security regulations, 8 C.F.R. § 214.14. The Secretary's Order 05-2010 delegated this authority to the WHD Administrator. This authority is being further delegated to the WHD Regional Administrators. WHD Regional and District Office representatives will work closely with Solicitor of Labor Regional Office (RSOL) attorneys to gather, document and review the facts and information to determine whether to complete and certify Supplement B form of a I-918 U-Visa petition.

WHD will regularly evaluate these protocols for effectiveness and efficiency and may revise as it deems necessary.

I. Background

A. Statute

Under Section 1513(b) of the Victims of Trafficking and Violence Protection Act of 2000, as amended, 8 U.S.C. 1101(a)(15)(U), victims of qualifying criminal activities (QCA) who have suffered substantial physical or mental abuse may apply for a U Visa if they are willing to assist law enforcement or other officials in the investigation or prosecution of those crimes. The U.S. Citizenship and Immigration Service (USCIS) has

sole jurisdiction over all petitions for U nonimmigrant status. *See* 8 C.F.R. § 214.14(c).¹ Individuals who receive U Visas from USCIS may be authorized to stay in the United States for up to 4 years. *See* 8 C.F.R. § 214.14(g). USCIS will issue an Employment Authorization Document (EAD) to individuals who are granted a U Visa. *See* 8 C.F.R. § 214.14(c)(7) and (f)(7).

B. Form I-918

Nonimmigrants seeking U Visas must submit a completed Form I-918, Petition for U Nonimmigrant Status to USCIS for consideration. Supplement B of Form I-918 is to be completed by an agency such as the Department of Labor (DOL) that is authorized to complete and certify Supplement B forms as a result of its “responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity.” *See* 8 C.F.R. § 214.14(c)(2)(i); Instructions for I-918, Supplement B at 2. In completing Supplement B, the agency must certify that the individual submitting the Form I-918 is a victim of certain qualifying criminal activity and is, has been, or is likely to be helpful in the investigation or prosecution of that activity. *See* 8 C.F.R. § 214.14(c)(2).² An agency’s decision to complete and certify a Supplement B form is entirely discretionary. *See* Form I-918, Supplement B at 1. The applicant is responsible for submitting the entire Form I-918, including Supplement B, to USCIS for review and approval. *See* 8 C.F.R. § 214.14(c). The decision whether to approve or deny the Form I-918 Petition rests solely with USCIS.

C. Applicable Regulations

Department of Homeland Security (DHS) regulations specify that Federal or local law enforcement agencies, or other authorities that have “responsibility for the investigation or prosecution of a qualifying crime or criminal activity” may complete and certify Supplement B of Form I-918. *See* 8 C.F.R. § 214.14(a)(2). The regulations explicitly state that this includes the DOL, as well as other agencies such as the Equal Employment Opportunity Commission (EEOC). *Id.* Further, the regulations define “investigation or prosecution” to include “the *detection* or investigation of a qualifying crime or criminal activity.” *See* 8 C.F.R. § 214.14(a)(5) (emphasis added). WHD will consider exercising its authority to certify Supplement B forms in cases in which it has detected a QCA and each of the following conditions are met: (1) the detected QCA is involuntary servitude, peonage, trafficking, obstruction of justice or witness tampering; (2) the alleged QCA arises in the context of a work environment or an employment relationship; and (3) there is a related, credible allegation of a violation of a law that WHD enforces. The

¹ The certifying agency does not have to certify as to whether the petitioner suffered “substantial physical or mental abuse” as a result of the QCA. *See* 8 C.F.R. § 214.14(c)(2)(i). This is a determination that will be made by USCIS based on information submitted by the petitioner. *See* 8 C.F.R. § 214.14(b)(1) and (c)(2)(ii).

² The certifying agency does not have to certify as to whether the petitioner suffered “substantial physical or mental abuse” as a result of the QCA. This is a determination that will be made by USCIS based on information submitted by the petitioner. *See* 8 C.F.R. § 214.14(b)(1) and (c)(2)(ii).

procedures WHD and SOL will follow to determine whether to complete and certify a Supplement B form are outlined below.

II. WHD's Procedures

Each WHD Regional Administrator will designate a representative to serve as the coordinator for U Visa petitions for that region. Likewise, each Regional Solicitor will designate one attorney to coordinate U Visa petition issues for that SOL region. This will enable DOL to develop the necessary expertise to effectively and efficiently handle requests to certify Supplement B forms for U Visa applications. Although WHD intends to hire individuals to serve as regional U Visa coordinators, on an interim basis the regional Director of Enforcement (DOE) will serve in this capacity, unless a Regional Administrator determines otherwise. The regional WHD U Visa coordinator will work closely with the regional RSOL attorney designated to handle U Visa issues.

Generally speaking, the regional WHD U Visa coordinator will be responsible for overseeing incoming Supplement B form certification requests, providing guidance and assistance with related WHD investigations, and coordinating efforts with appropriate law enforcement agencies, social service organizations or outside entities representing U Visa applicants, as well as other DOL agencies and the designated RSOL attorney. The designated RSOL attorney will conduct any necessary legal research and analysis and provide legal guidance regarding the QCA. The RSOL attorney will prepare the Supplement B form I-918 and required supporting documentation, as described below.

The WHD U Visa coordinator will make a recommendation to the WHD Regional Administrator as to whether or not to certify Supplement B of Form I-918. In most cases, the WHD Regional Administrator will be the certifying official, pursuant to a delegation of authority from the WHD Acting Administrator.

The key steps in WHD's process for completing and certifying Supplement B forms are outlined below.

A. Investigation of a violation of a law that WHD enforces and detection of a related QCA

As mentioned above, WHD will consider requests for certification of Supplement B forms in cases in which the alleged QCA arises in the context of a work environment or an employment relationship and there is a related, credible allegation of a violation of a law that WHD enforces. There are a number of QCAs identified in the DHS regulations and the Form I-918. Of these, WHD has determined that it will consider requests to certify Supplement B forms predicated on the following QCAs: involuntary servitude, peonage, trafficking, obstruction of justice, and witness tampering.³ WHD believes that these QCAs are most likely to be found in connection with its workplace investigations and that it can effectively train its staff in the detection of these QCAs. WHD will

³ If WHD receives a request to certify for any other QCA, the U Visa coordinator will work with the requestor to identify other federal and state agencies that may be willing to consider certifying the request.

document basic information and evidence concerning these QCAs when they are detected during a WHD investigation, but it does not have jurisdiction to investigate or prosecute these crimes. Thus, DOL's authority to complete and certify Supplement B forms will be based on its role as a law enforcement agency that has "detected" the crimes.

Because DOL does not have the authority to investigate and prosecute QCAs, WHD will refer the underlying QCA to appropriate law enforcement agencies in accordance with its normal protocols for referral of criminal laws not enforced by WHD. WHD's role would be to provide, where appropriate, detected information to the appropriate law enforcement agency charged with investigating and prosecuting the crime, and to pursue in coordination with that law enforcement agency the wage and hour or other workplace claims on behalf of the workers. Whether such a referral is made before or after a decision to complete and certify a Supplement B form will depend on the circumstances of a case. In all cases, the safety of the petitioner and his or her family should be a primary consideration, as well as the safety of other individuals who have been harmed or may be at risk of harm from the detected criminal activity. The regional U Visa coordinator will provide guidance as necessary to the local District Office (DO) as to how to manage the referral and will, as appropriate, work with social service organizations or representatives for the petitioner.

WHD anticipates that Supplement B form certification requests will arise in two primary contexts: (1) during a WHD workplace investigation, or after the investigation is completed, an individual connected with the investigation requests that WHD complete and certify a Supplement B form based on a detected or alleged QCA; (2) a U Visa petitioner contacts WHD with an allegation of both a violation of a law that WHD enforces and a related QCA and requests that WHD complete and certify a Supplement B form. In all cases, the regional U Visa coordinator will be the point of contact for the individual seeking Supplement B form certification.

(1) Requests for certification connected to current or completed WHD investigations If a U Visa petitioner contacts WHD to request certification connected to a current or completed WHD investigation, the U Visa coordinator will determine whether one of the five QCAs for which WHD will consider requests for certification was detected during the course of the WHD investigation. If the investigation is ongoing, the DO will proceed with normal investigation protocols, taking care to document separately any detected information related to the QCA, as discussed further below.

In any investigation, regardless whether there has been a U Visa request, upon detection of information related to a QCA the DO will alert the regional WHD U Visa coordinator. Although Wage and Hour Investigators (WHIs) will only receive training on detecting the five QCAs listed above (involuntary servitude, peonage, trafficking, obstruction of justice, and witness tampering), the DO will notify the U Visa coordinator of any QCA it has detected. If, during the course of a WHD investigation, the WHI has detected a QCA other than the five enumerated above, the U Visa coordinator and the Regional Administrator will determine how best to proceed based on the facts and circumstances of the case. In all cases, the WHD Regional U Visa coordinator will maintain

information about the detected QCA for use in the event WHD receives a certification request connected with the wage and hour investigation. In any case where WHD has detected a QCA during the course of its investigation, when appropriate and feasible WHD will notify the victim of, or otherwise utilize the services of, community resources that may be able to assist the victim.

(2) Requests for certification concurrent with a WHD complaint If a U Visa petitioner contacts WHD claiming a workplace violation of a law that WHD enforces and a related QCA, along with requesting certification of a Supplement B form, the DO will proceed with normal intake of the underlying wage and hour complaint and forward the information related to the QCA and Supplement B form request to the regional WHD U Visa coordinator. The DO should assign the WH complaint for investigation consistent with its normal protocols. The petitioner should provide the U Visa coordinator with information that supports his or her allegation of a QCA and related violations of a law that WHD enforces and make him or herself available to be interviewed by a representative from WHD.

Regardless of how a request to certify a Supplement B form originates, the regional WHD U Visa coordinator will review the information detected during the WHD investigation, if any, and any information provided by the petitioner related to the QCA and in support of the Supplement B certification request, and make a preliminary determination as to whether WHD would potentially certify the Supplement B form. The primary factors the WHD U Visa coordinator should consider include whether:

- The QCA arises in the context of an employment relationship or work environment and there is a related, credible allegation of a violation of a law that WHD enforces;
- Petitioner alleges a QCA of either involuntary servitude, peonage, trafficking, obstruction of justice, or witness tampering;
- The Petitioner has demonstrated that he or she has been, is being, or is likely to be cooperative with law enforcement officials in any investigation or prosecution of the QCA;
- Another law enforcement agency is already engaged in the investigation or prosecution of the QCA or would be in a better position to certify the Supplement B form based on the facts presented; and
- Certification of the Supplement B form would assist WHD's investigation of a violation of a law that it enforces.

The first three elements listed above are required in order to certify the Supplement B form and the remainder will be weighed in prioritizing requests. Although WHD's detection of a QCA should be considered in the petitioner's favor, in cases where there is

an ongoing or completed WHD investigation the fact that WHD did not detect a QCA should not be the basis for denying a certification request.

If the regional WHD U Visa coordinator makes a preliminary determination that this is a case where WHD would potentially complete and certify a Supplement B form, the regional WHD U Visa coordinator should alert the DO that received the wage and hour complaint and also provide the designated RSOL attorney with basic information about the case. The RSOL attorney should advise the WHD U Visa coordinator regarding the necessary legal elements of the particular QCA and provide advice to WHD U Visa coordinator about the kind of information and evidence that will be needed to inform the certification decision. If necessary, as will be the case when there has not yet been a WHD investigation, the regional U Visa coordinator will interview the U Visa petitioner to gather and confirm any information needed for the Supplement B form certification decision.

If the WHD U Visa coordinator makes the preliminary determination that it is unlikely that WHD would certify the Supplement B form based on the above factors, the U Visa coordinator should inform the petitioner of that assessment in writing as soon as possible, along with information as to which other law enforcement agencies may be able to certify the petition so that the petitioner can explore other avenues for certification.

B. Investigator Action

For requests associated with ongoing WHD investigations, the regional WHD U Visa coordinator will work with the appropriate DO to make sure that evidence is gathered and documented consistent with the direction set out below to assist with determining whether to certify Supplement B of Form I-918. For requests received simultaneously with a complaint alleging a violation of a law WHD enforces, the WHD complaint will be directed to the appropriate DO for a determination whether to investigate in accordance with WHD's Complaint Policy. WHD investigators will not initiate an investigation or return to a workplace for the sole purpose of detecting information about a QCA.

If necessary, such as when a request for certification is received simultaneously with the complaint, the regional U Visa coordinator will interview the U Visa petitioner to gather and confirm any information needed for the Supplement B form certification decision. For requests associated with an active investigation of a WH violation, the U Visa coordinator will alert the DO and Wage Hour Investigator (WHI) of the request and alleged QCA so that the DO knows to keep the U Visa coordinator informed of any relevant evidence detected during the course of the investigation.

As discussed, WHD does not have jurisdiction to conduct investigations of the QCAs. Consequently, WHD investigators should follow WHD training and guidance on detecting crimes that are enforced by other law enforcement agencies.

C. U Visa Coordinator Action

The detected facts related to the QCA will be recorded as part of a narrative statement prepared by the U-Visa coordinator. This statement should be a separate document and will not be incorporated into the WHD case file. Rather, a separate file folder should be created for the case information that is relevant to a particular U Visa petitioner. The narrative statement should:

- Address how the case came to WHD's attention, and the current status of the WH complaint. For example, it should be noted whether WHD is pursuing injunctive and/or monetary remedies to address the WH claims.
- Provide a summary of the information provided by the petitioner to the U Visa coordinator or written information provided by the petitioner, which should be attached to the narrative statement, together with a credibility determination by the U Visa coordinator or, if the individual was interviewed during the course of a WHD investigation, the WHI.
- Include an assessment of the petitioner's helpfulness in detecting the QCA and investigating the workplace violation claim, as well as an assessment as to whether the individual is likely to be helpful in any future investigation or prosecution of the QCA. This assessment can be made based on the helpfulness of the individual to the WHD investigation, the individual's personal knowledge of the circumstances surrounding the QCA, and other observations made by the WHI and the U Visa coordinator concerning the individual's general disposition and willingness to assist government officials.
- Address what, if anything, has been done or will be done to refer the case to the appropriate law enforcement agency that has jurisdiction to investigate and/or prosecute the QCA.
- Document any known injury to the petitioner, if available, and whether any of the petitioner's family members are believed to have been involved in the criminal activity of which he or she is a victim. This information will be needed in order to complete Supplement B of Form I-918.

D. Legal analysis and review of documentation, and recommendation whether to certify

Upon completion of the narrative statement, the U Visa coordinator will consult with the designated RSOL attorney regarding whether the information set out in the narrative statement and any attachments is sufficient to recommend completion and certification of the Supplement B form. After receiving the RSOL attorney's advice, the U Visa coordinator will make a recommendation to the Regional Administrator as to whether the application should be certified. If the U Visa Coordinator, after consultation with the Regional Administrator and the RSOL attorney, concludes that a recommendation to certify should be made, the RSOL will proceed to complete the Supplement B, Form I-918. If the conclusion is not to recommend certification, the U Visa coordinator will state in writing to the Regional Administrator the reasons for not recommending

certification and submit the reasons and narrative statement to the Regional Administrator.

III. Certification Decision

A. Completion of Supplement B, Form I-918

The designated RSOL attorney will use the narrative statement provided by WHD and the completed legal research and analysis to complete the Supplement B of Form I-918. To complete Supplement B, the RSOL attorney will draft an attachment that includes information such as:

- A statement that WHD is involved because it is or was investigating or has received a complaint related to an alleged violation of a law that WHD enforces, and that the agency is seeking monetary and injunctive remedies for those violations (if applicable).
- A statement explaining the facts detected and/or alleged that support a finding that the individual has been a victim of a QCA.
- A statement regarding any known injury to the victim, if available, and the individual's helpfulness in investigating the matter.
- A summary of what has been done (or will be done), if anything, to refer the case to or share information with the appropriate criminal law enforcement agency.

B. Review and certification of Supplement B, Form I-918

Once RSOL has completed the Supplement B form, it will be sent to the Regional Administrator. In most instances, the final authority to certify will be delegated to the Regional Administrator. If the Regional Administrator certifies a Supplement B form, he or she should attach to the form a copy of the memoranda delegating the certification authority to the Administrator and further to the Regional Administrator. If the Regional Administrator decides not to certify the Supplement B form, the U Visa coordinator should inform the petitioner's representative of the decision in writing as soon as possible, along with information as to which other law enforcement agencies may be able to certify the petition so that the petitioner can explore other avenues for certification.

C. Timeliness and notification of WHD's certification decision

It is very important that all requests for U Visa certification be processed expeditiously and that WHD notify the petitioner and/or his or her representative of its decision in writing as soon as possible. The timely review of the petitioner's allegations and, where appropriate, the certification of a U Visa petition could help to protect the individual victims of QCAs who may be at risk of future harm, and whose cooperation with law

enforcement officials will be helpful to investigating or prosecuting the alleged perpetrator(s) of the QCAs. In those cases where WHD determines it will be unable to certify a Supplement B form, the petitioner should be provided with information as to which other law enforcement agencies may be able to certify the petition.

WHD anticipates that it will take it three months to review a single U Visa certification request and make a determination as to whether or not to certify. This timeframe will vary, however, depending upon the complexity of the case and the overall volume of U Visa certification requests WHD's regional representatives are handling at any one time. This estimated timeline may be adjusted based on WHD's experience reviewing certification requests under the procedures outlined here.

D. Confidentiality

DOL officials are prohibited from using or disclosing information relating to the beneficiary of a pending or approved petition for U nonimmigrant status unless the disclosure is made to a sworn officer or employee of DHS, the Department of Justice, or the Department of State for legitimate agency purposes, or in certain other limited circumstances. *See* 8 C.F.R. §214.14(e) and 8 U.S.C. § 1367. If a WHD official is uncertain as to whether it is permissible to disclose information to a particular party, SOL should be consulted for advice.

IV. **Conclusion**

Additional guidance and training concerning investigation protocols and the handling of Supplement B form certifications will be provided to WHD and RSOL staff, and shared with other DOL worker protection agencies that may also encounter U Visa issues.