FISCAL IMPACT REPORT

SPONSOR SHPAC **LAST UPDATED** 3/2/23 **ORIGINAL DATE** 2/24/23

SHORT TITLE U-Visa Certification Act **BILL NUMBER** CS/Senate Bill 350/SHPACS

ANALYST J. Torres

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*
(dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	No fiscal impact	Indeterminate but minimal	Indeterminate but minimal			

Parentheses ( ) indicate expenditure decreases.
*Amounts reflect most recent version of this legislation.

Sources of Information
LFC Files

Responses Received From [Prior Bill]
Administrative Office of the Courts (AOC)
Department of Public Safety (DPS)
New Mexico Attorney General (NMAG)
Administrative Office of the District Attorneys (AODA) [Committee Substitute]

SUMMARY

Synopsis of SHPAC Substitute for Senate Bill 350

The Senate Health and Public Affairs Committee Substitute for Senate Bill 350 sets forth several definitions that are instrumental in carrying out its functions. An "accredited representative," is a department of justice (DOJ) appointee who represents a person before homeland security; and also includes those employed by charitable, social service, or similar organizations recognized by the DOJ as being in good standing to represent such persons. The term "certification form" means a U.S. form I-918 supplement B, or its successor, certifying that a person is a victim of a qualifying crime. The term "certifying entity," as defined under 8 C.F.R. Section 214.14(a)(2), includes law enforcement officers, tribal police departments authorized per Section 29-1-11 NMSA 1978, or other criminal detection, investigation, or prosecuting authority or agency regarding qualifying crimes.[1] Certifying entities may also include district attorneys, the courts, HSD, CYFD, and Workforce Solutions.

The term "certifying officials" includes principal certifying officials, or those they may designate; state district, magistrate and municipal judges; along with those defined under 8 C.F.R. Section 214.14(a)(3).

[1] Section 29-1-11 NMSA 1978. *Authorization of tribal and pueblo police officers and certain federal officers to act as New Mexico peace officers; authority and procedure for commissioned peace officers.*

"Helpfulness" means that the victim has credible and reliable information and knowledge of the "qualifying criminal activity or events" that leads to law enforcement's determination that the victim is and will be helpful in the investigation or prosecution of said criminal activity.

The term "qualifying criminal activity" is defined in 8 C.F.R. Section 214.14(a)(9) and under state and local law as per the categories of offenses set forth in 8 U.S.C. Section 1101 (a)(15)(U) or other similar criminal activities, attempts, conspiracies or criminal solicitation to commit the enumerated crimes.

The "victim" refers to someone that has suffered direct and proximate harm from the qualifying criminal activity, as stated in 8 C.F.R. Section 214.14(a)(14), which includes direct, indirect and bystander victims.

The bill then states the procedures for certifying victims of qualifying crimes and includes a presumption of helpfulness. The circumstances under which certifying officials shall not refuse to complete the certification for or otherwise certify the victim's helpfulness are clearly stated. This is followed by provisions pertaining to the certifying officials' determinations that a victim has either been helpful or has not been helpful. Procedures for submitting U Visa certification requests shall be published on the entity's website. Certification reports are to be provided to the legislative entity on an annual basis. Those reports may be made public upon request, without disclosing names or other personal identifying information. The attorney general is given investigative authority over alleged violations as specified under the act.

The bill's substitute addresses several agency concerns regarding its conformity with federal law and internal consistency. Its definitions and procedural direction provide guidance as to the manner in which the bill should be implemented. As noted by the AODA, the substitute may require additional revisions in order to best conform to federal definitions and practice, as well as local certification requirements. AODA also notes that the bill's "presumption of helpfulness" may conflict with the form I-918 "perjury" clause.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

AODA states:

> The Attorney general's office will need more funding for investigations and civil acts against the certifying entity. Reporting to legislative committee will require more resources for the district attorney offices but it hard to determine an amount because it is unknown how many U VISAs will be submitted to district attorney offices.

AOC stated:

> There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the number of U visa certifications sought from acting judges or court clerks. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

DPS and NMAG did not indicate a fiscal impact.

SIGNIFICANT ISSUES

AODA states:

Senate Bill 350 as amended adds a new definition in Section 2 to include new terms that were deemed vague on the original version of the bill.

It also expands who may request U Visa certification to include guardians of victims and victims' attorneys in Section 3. It adds new material allowing that there may be more than one victim in a crime eligible for U Visa Certification. It also removes references and definitions of "direct" and "indirect" victims and now uses just the single term "victim."

The amended bill adds a requirement that if a certifying official refuses to submit a U Visa for the victim, the official must submit a written report explaining how the victim was "unhelpful" in the investigation/prosecution and allow the decision to be appealed. (Section 4B).

The amendment in Senate Bill 350 adds a fifth section entitled "Reporting Requirements for Certifying Entities". It requires that the certifying agency have a website providing details entity's procedures for submitting U Visa certification requests, *and* that the certifying entity provide the legislative committee an annual report with the following: (1) the number of victims that requested a certification form from the certifying entity; (2) the dates on which the certifying entity received each request for certification of a certification form; (3) the dates on which the certifying entity provided either a completed certification form to the requester or a written statement of non-helpfulness; (4) the number of certification forms that were signed; (5) the number of certification forms that were denied; (6) the reason given for each denial of a (7) the number of decisions that failed to satisfy the deadlines prescribed in the U Visa Certification act. The report will be available to the public.

Senate Bill 350 as amended also adds a sixth section entitled "Attorney General Enforcement", under which the attorney general has the authority to conduct investigations of alleged violations of the U Visa Certification Act. The attorney general will have the power to require a law enforcement agency to state or a report in writing, under oath, of all information that attorney general deems necessary, examine law enforcement officers under oath and issue subpoenas to obtain records and conduct hearings or take other action needed. The attorney general may petition a court for an order to compel for any failure to comply with a subpoena or any other investigative request made pursuant to this section.

Senate Bill 350 as amended does address some previous concerns in the original bill but is redundant of federal form I-918 supplement B in the definition section.

Senate Bill 350 as amended still has a presumption of helpfulness, which again may clash with the perjury clause in I-918. There may be some issues as to timeliness imposed by the deadline to certify.

AOC stated:

1) The U Visa Certification Act, enacted by SB350 requires a direct victim or indirect victim to be "helpful," in order to obtain a certification from a certifying official on the U.S. citizenship and immigration services form I-918 supplement B certification that the victim has been helpful. There is no guidance or definition contained in SB350 as to what it means for a victim to be "helpful."

The U.S. Citizenship and Immigration Services (USCIS), in describing circumstances that may make a person eligible for a U nonimmigrant visa, or U visa, lists, among other items:

- You have information about the criminal activity. If you are under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may possess the information about the crime on your behalf.
- You were helpful, are helpful, or are likely to be helpful to law enforcement in the investigation or prosecution of the crime. If you are under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may assist law enforcement on your behalf.

See, *Victims of Criminal Activity: U Nonimmigrant Sta*tus (click the dropdown arrow for "U Nonimmigrant Eligibility"), https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status.

The "helpfulness" described by the USCIS appears to center around providing information about the crime, but it is still a vague and perhaps subjective standard for a victim to meet.

2) The USCIS lists the "Qualifying Criminal Activities" that will need to have occurred to determine U visa eligibility. See, *Victims of Criminal Activity: U Nonimmigrant Sta*tus (click the dropdown arrow for "Qualifying Criminal Activities"), https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status.

3) SB350, Section 2(B)(1) defines "certifying official" to include a district court judge, children's court judge, family court judge, municipal court judge or magistrate, and Section 4(A) requires the certifying official who has determined that a direct victim has been helpful to fully complete and sign the USCIS form certification and, regarding the victim's helpfulness, specifically describe: (a) the nature of the criminal offense detected, investigated or prosecuted; and (b) the direct victim's or indirect victim's helpfulness or likely helpfulness to the detection, investigation or prosecution of the criminal offense. Subsection A also requires the certifying official to process the form certification within prescribed time limits.

Perhaps the district attorney's (DA) office would be best suited to describe the nature of the criminal offense, and even the victim's helpfulness. If the DA or law enforcement can't or won't help a victim, then the court clerk, not the assigned judge could certify that charges were filed and the victim will or will likely testify against the defendant or be otherwise helpful.

NMAG stated:

Title 8 of the Code of Federal Regulations sets forth the definitions, eligibility,

qualifications and application procedure for U nonimmigrant status. *See* 8 C.F.R. § 214.14. SB 350 directly and indirectly contradicts the federal regulation[2] enacted by the Department of Homeland Security. Immigration status so clearly falls within the purview of federal regulation, it is unreasonable[3] to presume that Congress intended states to supplement the regulation and procedure for obtaining U nonimmigrant status. Such discrepancies between the Code of Federal Regulations and SB350 would fall on New Mexico courts to rule on the contentions. Many of the contradictions between SB350 and Title 8 of the Code of Federal Regulations[4] exists in the definitions provided in Section 2 and the deadlines imposed in Section 4.

SB 350 Section 2(C): "criminal offenses" defined, differs from qualified crimes under Form I-918, Supplement B, Part 3 Criminal Acts or enumerated under 8 C.F.R. § 214.14(a)(9) and the Federal Immigration and Nationality Act, Section 101(a)(15)(U)(iii). Section 2(C)(31) is also ambiguous as it references state misdemeanor offenses from Sections 2(C)(1) – (30) which are clearly not enumerated in Section 214.14(a)(9) of the federal regulation. Section 2(C)(30) and (32) are overly broad as they encompasses all charges of attempted felony and conspiracy under Section 30-28-1 and Section 30-28-2 respectively, which could include charged crimes without a specific victim. The same is true of Section 2(C)(34).

SB350 Section (E): "indirect victim" of the proposed act is inconsistent with the definition of "qualifying family member(s)" pursuant to 8 C.F.R. § 214.14(a)(10) and (14)(i) and the Federal Immigration and Nationality Act, Section 101(a)(15)(T)(ii) and (U)(i). If enacted, presumably SB350 would fall within Chapter 31, Article 26: Victims of Crime, as a new subsection of the article given the topic and theme of the act. It should be noted that the definitions for "criminal offenses" in SB350 do not align with the definition of "criminal offenses" under Section 31-26-3 NMSA. Because of the difference in enumerated offenses under SB350 and those in Section 31-26-3 NMSA, it is possible that a victim may be entitled to a the certification process for a U visa application but would not be afforded the same protections and rights as victims under the Victims of Crime Act.

Throughout SB350, the term "helpful" or "helpfulness" is used but the term is never defined. This provides significant discretion among certifying entities and or certifying officials. This is also the case for a "justified refusal." The lack of definition or parameters could create inconsistencies between certifying entities and or officials. Especially when certain certifying entities and or officials may be privy to more information than others. For example, a judge and a law enforcement officer may have different perspectives on a victim's "helpfulness" depending on the stage of a matter.

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[2] For federal regulations to preempt state law or municipal ordinance, the federal regulations must be themselves constitutionally valid, and must be constitutionally enforced. *See U.S. v. City of St. Louis*, E.D.Mo.1978, 452 F.Supp. 1147.

[3] "Field preemption occurs when federal law so occupies the field that state courts are prevented from asserting jurisdiction. Congressional intent to occupy the field may be found if a scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the [s]tates to supplement it." *State v. Herrera*, 2014-NMCA-003, ¶ 9, 315 P.3d 311 (internal quotations and citations omitted).

[4] See specifically 8 C.F.R. § 214.14.

This may open the door for a victim to seek multiple I-918 supplement B certifications from different entities or officials at different points in an investigation or prosecution until a desired outcome is received.

Current case law would take precedent over SB350 Section 4(C), barring a certifying official or certifying entity's compliance with the proposed subsection of the act. The New Mexico Court of Appeals has ruled that full immigration application information for a victim or witness may be material to a case as it relates to motive, bias, could be exculpatory, offers impeachment evidence, etc. *See State v. Huerta-Castro*, 2017-NMCA-026, 390 P.3d 185 (holding that immigration information for the mother of two minor victims of criminal sexual penetration was deemed "material" and the State's failure to disclose the full application was considered a *Brady* violation). The same could be true for any writings required by Section 4(B). Should the certifying official who is drafting these writings be a law enforcement officer or prosecution agency, they may be subject to disclose these writings as evidence. Furthermore, the reasons given for a determination of "not helpful" could project a view of impropriety. For example, if after receiving a writing pursuant to Section 4(B), a direct or indirect victim then becomes "helpful," a potential argument could be made that this individual was bribed or pressured into assisting with a prosecution or investigation. The potential of this type of exchange is adverse to the Victims of Crime Act and the enumerated rights in Section 31-26-4 NMSA.

SB 350 Section 4(D) does not comport with Rule 5-502.1 NMRA which was enacted to protect the privacy of victim(s) and witnesses. It is not only possible, but likely, that multiple victims or other witness's information would be included in a police report or incident report. Requiring a certifying official to disclose this information is inconsistent with the spirit or intentions of Rule 5-502.1 NMRA. Furthermore, it is unclear how "filed" is defined in Section 4(D) as these reports may exist in a certifying official or certifying entity's custody/discovery but the report is not considered "filed" or public.

DPS stated:

In 2000, Congress enacted the Victims of Trafficking and Violence Protection Act ["VTVPA"] for the purpose, *inter alia*, of creating what is known as a "U-Visa.[5]" A U-Visa may be granted to victims of certain crimes enumerated in the statute who help United States law enforcement officials investigate or prosecute the enumerated crimes. See *In re Clara F.*, 52 Misc.3d 640 , 642, 32 N.Y.S.3d 871 (2016). To qualify for the issuance of a U-visa, "'an applicant must demonstrate that [the applicant] (i) has suffered substantial physical or mental abuse as the result of having been the victim of qualifying criminal activity; (ii) possesses information concerning the qualifying criminal activity; and (iii) has been helpful, is being helpful or is likely to be helpful in investigating or prosecuting the qualifying criminal activity.'" Id. at 643-44 (discussing 8 U.S.C. § 1101(a)(15)(U)). In order to prove up the "helpfulness" requirement, the applicant for a U-visa must include in the application "a certification from a Federal, State or local law enforcement official, prosecutor, judge or other Federal, State or local authority investigating criminal activity" that the applicant "has been helpful, is being helpful or is likely to be helpful." See 8 U.S.C. § 1184(p)(1); U.S. Citizenship and Immigration

[5] The "U-Visa" derives its name from the subsection where it is codified – 8 U.S.C. §1101(a)(15) (U).

Services ["USCIS"] Form I-918 B, a/k/a Supplement B, U Nonimmigrant Status Certification. However, nothing in the federal statute requires a federal, state or local law enforcement official, prosecutor or judge to cooperate in this endeavor by providing a certification if requested to do so. See *In re Clara F.*, 52 Misc.3d at 645 (and cases cited therein).

The purpose of SB350 appears to be to fill the gap between the need of an applicant for law enforcement certification – where appropriate – and what may be the reluctance of some law enforcement agencies to assist the applicant. Section 3 of SB350 will make law enforcement certification of the "helpfulness" of the applicant mandatory in those cases where what SB350 defines as a "direct" or "indirect" victim of a crime "was helpful, is being helpful or is likely to be helpful to the detection, investigation or prosecution" of criminal offenses enumerated in SB350. SB350 also creates a rebuttable presumption of "helpfulness" which is to be applied by the certifying official, where a victim "has neither refused nor failed to provide information and assistance reasonably requested." If a victim has refused or failed to provide information and assistance the rebuttable presumption remains present if the refusal "was justified."

Although DPS has no formal policy on how the agency processes requests for U-visa law enforcement certifications, the practice of DPS has been for the Secretary/Chief to delegate to the Major overseeing the zone in which the crime occurred or in which the crime was investigated to review the request and, where appropriate, complete and sign Form I-918 B, a/k/a Supplement B, U Nonimmigrant Status Certification.

Section 4 (2) of SB350 sets forth timelines from the date of the victim's "request" in which the certifying official must complete the form I-918 supplement B. certification. The certification must be completed within thirty days of the request unless the victim is "engaged in immigration removal proceedings" in which case, the certification must be completed within "seven days from the first business day following the day the" victim makes the request. In that regard, DPS believes the statute needs to include a specified method – e.g. certified mail return receipt request – with which a law enforcement agency is to be "served" with the request and a requirement that each agency by rule, identify a mailing address and perhaps a job title to which the U-visa application should be addressed. These additions will help ensure the request is brought to the attention of the appropriate official within the agency and can be timely processed. The "victim" should also be required to inform DPS if immigration removal proceedings are pending. DPS believes the seven day requirement will not allow enough time for the designated certifying official to complete an investigation into the victim's helpfulness, particularly in those instances in which there has been a passage of time and turn over in personnel. DPS believes the deadline should be thirty days in all instances.

Section 4 B. will require a certifying official who determines a victim "has not been helpful" to provide a written explanation of "the reasons for that determination." While a certifying official can certainly do this, this could be harmful to a victim who may have in the past refused to provide assistance should he or she desire to change this response in the future.

Section 4 D. would require a certifying official to provide a victim who filed a report of a crime with an agency to provide the victim with an "unredacted" copy of the police or

incident report pertaining to the same within seven days of the victim's request. Requiring DPS to provide an "unredacted" copy of a report could put DPS at odds with the requirement under the Inspection of Public Records Act not to provide personally identifying information of individuals identified in the report as well as the requirement not to identify individuals suspected of but not charged with a crime, among other confidentiality provisions under New Mexico law. DPS believes a redacted copy should be sufficient for the victim's purposes.

JT/al/ne/rl/al/ne