

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: Senate Bill 177 would create a new section in Chapter 31, Criminal Procedure, creating a process for state agencies and the courts to review U Visa Certification Requests.

SB 177 does not contain an effective date and would be effective on June 20, 2025, 90 days following adjournment of the Legislature, if signed into law.

FISCAL IMPLICATIONS

There will be a significant administrative cost for the statewide update, distribution and documentation of statutory changes. As drafted, this legislation would create a fiscal impact on the judiciary, thus requiring additional resources to handle the increase. This legislation does not provide an appropriation to the judiciary to implement the provision of SB 177.

Section 4 requires a certifying official to “process a request for U visa certification within thirty days”. It is highly unlikely that the court record alone will provide the judge sufficient information to decide on the U visa certification request, and an evidentiary hearing will need to be set.

Section 6A creates a private right of action for individuals seeking U Visa certification to bring an action in either the district court located in their county of residence or the First Judicial District Court. The creation of this private right of action will result in an increase in the caseload of district courts, with potential for significant increased caseloads in the First Judicial District Court should individuals elect to file actions there instead of in their county of residence.

SIGNIFICANT ISSUES

SB 177 creates a new process for U visa certifications. There are significant issues with the new provisions in this legislation.

1. Creates a new private right of action in district courts.

Section 6A in SB 177 creates a private right of action for individuals seeking U Visa certification to bring an action in either the district court located in their county of residence or the First Judicial District Court. This new private right of action requires “the district court shall make findings of fact and conclusions of law...” that the “victim is eligible for U Visa certification”. According to the U.S. Citizenship and Immigration Services (USCIS) Resource Guide, “Certifying agencies play a key role in the U visa program. They are often in the best position to provide information about the reported qualifying crime(s) and the victim’s helpfulness, as they are frequently the first to encounter victims. Form I-918B is a required piece of evidence victims submit to USCIS to establish eligibility for U nonimmigrant status.” www.uscis.gov/sites/default/files/document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf This legislation places the judge in an unusual position of re-examining a certifying

agency's denial for U visa certification and using substituted judgement versus first-hand knowledge of the victim's role and cooperation in separate case.

In addition, this legislation allows judges to award "reasonable costs and attorney fees" to petitioners who challenge a denial of U visa certifications. Since this bill only includes state agencies as "certifying agencies," this necessarily means that the bill permits recovery of costs and attorney fees against the state, which has a fiscal impact.

2. Removes judicial discretion.

Form I-918, Supplement B requires certifying officials (or judges, under the judicial review process) to make several certifications under penalty of perjury: (1) that a crime or crimes occurred; (2) that the petitioner was the victim of the crime or crimes; (3) when the crime or crimes occurred; (4) where the crime or crimes occurred; (5) whether the crime or crimes violated a federal extraterritorial jurisdiction statute; (6) the specific criminal activity that occurred; (7) the involvement of the petitioner in the criminal activity; (8) any injuries to the petitioner as a result of the crime or crimes; (9) whether the petitioner has information concerning the crime or crimes; (10) whether the petitioner is, was, or will be helpful in the investigation or prosecution of the crime or crimes; (11) whether the petitioner has refused or failed to assist in the investigation or prosecution of the crime or crimes; (12) whether any of the petitioner's family members are culpable in the crime or crimes; and (13) that the certifying official will notify U.S. Citizenship and Immigrations Services (USCIS) if the petitioner becomes uncooperative with the investigation or prosecution subsequent to signing the certification.

SB 177 mandates that a certifying official or agency may deny a U visa certification "only if a victim refuses to provide information or assistance after reasonable requests." Under federal law, there are multiple grounds upon which a certifying official must be permitted to deny a certification beyond a petitioner's refusal to provide information or assistance. The certifications required by Form I-918B necessitate personal knowledge or a detailed investigation of facts, neither of which are accounted for in the bill's mandate to certify except under limited circumstances. Furthermore, this legislation appears to place the judiciary in the primary role of completing U visa requests, rather than having the responsibility on the arresting law enforcement agency or prosecutor's office, who would have better first-hand knowledge of the victim's role in the "investigation or prosecution of the qualifying criminal activity of which they were a victim."

3. Conflict between records retention requirements and confidentiality provisions.

Section 4 in SB 177 requires certifying officials or agencies to maintain records and compile data regarding U visa certifications. The bill also requires certifying officials or agencies to transfer these records to the state department of justice for review on appeal. SB 177 § (4)(E). These records could become part of a court record through the judicial review process set out in Section 6 of this bill. However, federal statute and regulations prohibit the disclosure of information relating to the beneficiary of a pending or approved U visa petition. 8 U.S.C. § 1367(a)(2); 8 C.F.R. § 214.14(e). Specifically, "[a]gencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. § 1367." 8 C.F.R. § 214.14(e)(2). The federal statute contains limited exceptions, two of which could apply to state courts. 8 U.S.C. § 1367(b)(3) permits "disclosure of information in connection with judicial review of a determination in a manner that

protects the confidentiality of such information.” This could be read to permit sealing of subject materials in the judicial review process of SB 177, although the bill itself does not contain a sealing provision. However, this does not appear to cover the transfer of confidential records from a certifying official or agency to the state department of justice. 8 U.S.C. § 1367(b)(4) allows for waiver of confidentiality if all affected individuals are adults and execute a waiver. This exception necessarily is outside the control of certifying officials and agencies.

4. Federal law controls U visa application process.

To the extent SB177 attempts to expand or alter the requirements for U visa applications, this could cause a conflict between state and federal law. Federal law on immigration issues would likely preempt state law. *See Arizona v. United States*, 567 U.S. 387, 395 (2012) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”); *id.* at 399 (recognizing that (1) states are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance, and (2) state laws are preempted when they conflict with federal law). SB 177 includes provisions where the federal law directly controls. For example, Section 2 provides definitions of certifying agency, certifying official, and qualifying criminal activity, and Section 3 provides eligibility criteria for U visa certification. The definitions and eligibility criteria of a U visa application would be covered by federal law. This could lead to conflicts if federal law changes.

Further, SB 177 has requirements that go beyond requirements under federal law. *See* Section 3(D) (requiring a certifying official to certify unless the victim refuses to provide information or assistance after reasonable requests); Section 4 (A) (requiring timeframes for a certifying official to certify an application); Section 4(B) (requiring a certifying official to submit an “unredacted copy of the police or incident report, criminal complaint or affidavit to the victim or a person who made the request on behalf of the victim by certified mail and free of charge.”); Section 4(C) (requiring a certifying official to provide a written explanation for the denial, notice of the certifying agency’s internal appeal process, and the certifying official’s contact information; and requiring the certifying official to compile all documentation relating to the underlying qualifying criminal activity); Section 4(D) (requiring a certifying agency to establish an internal appeal process); Section 4 (E) (requiring the NM DOJ to accept administrative appeals from the internal review process); Section 4 (F) (allowing the victim to file a petition in the district court to appeal NMDOJ’s determination); Section 5 (requiring recordkeeping and reporting of U visa certification processes and requests); and Section 6 (providing for a private enforcement action in district court). These provisions could create constitutional challenges and issues in executing the intent of this legislation.

PERFORMANCE IMPLICATIONS – none identified.

ADMINISTRATIVE IMPLICATIONS

Section 4 of SB 177 requires the certifying official to provided “an unredacted copy of the police or incident report, criminal complaint or affidavit” to the victim or person “by certified mail and free of charge” if the U visa certification is approved. These records should be provided by the agency who created the document instead of requiring the judiciary to provide these records.

Section 5 of SB 177 requires a certifying agency to compile data regarding requests, approvals and denials for U visa certifications and to provide a report to the state department of justice or the legislatures. This data compilation requirement places an unnecessary burden on the

certifying agency without providing any additional resources to comply with this provision of SB 177.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP - none identified.

TECHNICAL ISSUES – none identified.

OTHER SUBSTANTIVE ISSUES

Section 4(E) of SB 177 allows a victim to “seek review from the state department of justice” if a certifying agency upholds a denial after an internal appeal process. The bill defines a “certifying agency” as including “a district court, children’s court, family court, metropolitan court, magistrate court or municipal court”. Article III, Section 1 of New Mexico’s constitution states, “The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person . . . shall exercise any powers properly belonging to either of the others.” As written, SB 177 would violate Article III of New Mexico’s Constitution by allowing the executive branch (department of justice) to review and overturn a decision made by a separate branch of government (judiciary).

ALTERNATIVES - none.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL – none.

AMENDMENTS – none.