MINNESOTA BOARD ON JUDICIAL STANDARDS

Opinion 2015-2

U-Visa Certifications

Issue. Does the Code of Judicial Conduct ("Code") permit a judge to sign an I-918B form certifying that an alien has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of a criminal activity of which he or she is a victim? If the Code does permit such certifications, are there circumstances in which the judge should not sign an I-918B form?

Summary. In the Board's opinion, the Code does not generally prohibit a judge from signing an I-918B certification. However, a judge may not sign a certification when a judge does not have an adequate basis for the averments made in the certification. A judge should disclose the certification to the parties to the case.

The appropriateness of an I-918B certification depends on the circumstances. The certification issue most often arises in four situations:

(1) *Certification by presiding judge after a criminal case is completed*. After a criminal defendant is convicted and sentenced or the case is otherwise completed, the Code does not prohibit the presiding judge from signing an I-918B form certifying that a U-visa petitioner was helpful.

(2) *Certification by a presiding judge in a pending criminal case*. The applicable federal regulations indicate that the appropriate time for judges to determine helpfulness is following conviction, not during the investigation or prosecution of a criminal matter. However, whether a judge should sign an I-918B form prior to a conviction is primarily an issue of law that does not implicate the Code.

(3) *Certification by a presiding judge in a civil case*. As noted, the applicable federal regulations indicate that the appropriate time for a judge to determine helpfulness is following a criminal conviction. Federal cases are divided on whether a presiding judge in a civil case should sign an I-918B form. In such matters, a judge may lack a sufficient basis for such a certification. However, given the unsettled state of the law, whether a judge in a civil case should sign an I-918B form is primarily an issue of law that does not implicate the Code.

(4) *Certification by a judge who is not assigned to the case*. Federal law does not appear to contemplate certification by a judge who is not assigned to the case, and the Board recommends against it.

1. Federal Law Background.

(a) The U-Visa program statute and regulations.

The United States Congress created the U-Visa in 2000 to aid undocumented alien victims of serious crimes. *Torres-Tristan v. Holder*, 656 F.3d 653, 656 (7th Cir. 2011). An alien "is eligible for a U Visa if the Secretary of Homeland Security determines that he has suffered 'substantial physical or mental abuse' as a result of qualifying criminal activity and that he has shown he 'has been helpful' to law enforcement authorities investigating or prosecuting the crime." *Id.* (quoting 8 U.S.C. §1101(a)(15)(U)(i)).

To be eligible for a U-Visa, an alien must (1) file a petition with the United States Citizenship and Immigration Services (USCIS); (2) supply a Form I-918, Supplement B form, U Nonimmigrant Status Certification ("I-918B form") signed by a certifying agency; (3) supply additional evidence to support the petition; and (4) provide a signed statement describing the "victimization." 8 C.F.R. 214.14(c)(1)-(2) (2013). The United States Citizenship and Immigration Services ("USCIS") will then review the application de novo. *Id.* § 214.14(c)(4).

By signing an I-918B form, a certifying official is certifying (1) their identity; (2) their position; (3) the alien's status as a victim of qualifying criminal activity that the certifying agency is investigating or prosecuting; (4) the alien's possession of knowledge concerning the qualifying criminal activity; (5) the alien's helpfulness in the investigation or prosecution of the qualifying criminal activity; and (6) the location of the qualifying criminal activity. *Id.* § 214.14(c)(2)(i).

A "certifying agency" or "certifying official" includes the law enforcement agency, prosecutor, or federal or state judge "that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity." *Id.* § 214.14(a)(2)-(3). Recognizing that judges do not participate in investigations and prosecutions, USCIS interprets the term "investigation and prosecution" to include "conviction and sentencing":

> USCIS is defining the term [investigation and prosecution] to include conviction and sentencing of the perpetrator because these extend from the prosecution. Moreover, such inclusion is necessary to give effect to section 214(p)(1) of the INA, 8 U.S.C. 1184(p)(1), which permits judges to sign certifications on behalf of U nonimmigrant status applications. Judges neither investigate crimes nor prosecute perpetrators. Therefore, USCIS believes that the term "investigation and prosecution" should be interpreted broadly . . . .

Eligibility for ''U'' Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,020 (Sept. 17, 2007). *See* 8 C.F.R. § 214.14(a)(5) (stating, "*Investigation or prosecution* refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, *conviction, or sentencing* of the perpetrator of the qualifying crime or criminal activity.") (second emphasis added).

Accordingly, federal regulations permit a judge to sign an I-918B form to certify that an alien "has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of [a] qualifying criminal activity of which he or she is a victim," 8 C.F.R. § 214.14(a)(12) (2015).

(b) Federal Cases.

A majority of federal cases have held that a judge who did not preside in the alien's criminal trial may not sign an I-918B certification. In *Villars v. Kubiatowski*, 45 F.Supp.3d 791, 811 (N.D. Ill. 2014), the district court denied an alien's motion for certification in part because the judge in that matter, a civil rights action, was not the judge who had presided over the criminal trial in which the alien testified. In *Villars*, the judge interpreted the requirement that the certifying official be responsible for the "detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity" to mean that only the presiding judge could sign an I-918B form. *Id*. (quoting 8 C.F.R. § 214.14(c)(2)(i)). *See also Torres-Lopez v. Scott*, No. 2:13-CV-061-J, at 1-2 (N.D. Tex. June 25, 2013) (Memorandum and Order denying plaintiff's request that judge sign I-918B form because there was no indication that there would be a criminal investigation and stating, "Federal judges are authorized officials when they have some responsibility for investigation or prosecution of the relevant crime—that is, when the victim could help the judge fulfill her responsibility.")

As noted in the decision of a federal court in New York, there is a split in decisions involving an alien seeking certification from a judge in a civil matter:

> To the court's knowledge, there have been no cases in this circuit in which a federal judge has granted U-Visa certification to a party involved in a civil proceeding before the court. The few district courts that have opined on when it would be appropriate for a judge to certify a U-Visa application are in disagreement. *Compare Agaton v. Hospitality and Catering Services, Inc.*, No. 11-1716, 2013 WL 1282454 (W.D. La. Mar. 28, 2013) (denying certification because there was no pending investigation or prosecution of alleged crimes committed by employer), *with Garcia v. Audubon Communities Mgmt., LLC.*, No. 08-1291, 2008 WL 1774584 (E.D. La. Apr. 15, 2008) (granting certification where plaintiffs made prima facie showing that they were made victims of involuntary servitude), *and Villegas v. Metro. Gov't of Nashville*, 907 F. Supp.2d 907 (M.D. Tenn. 2012) (citing *Garcia* and granting certification where plaintiff had previously won summary judgement and was awarded jury damages for defendant's violation of her constitutional rights).

Baiju v. U.S. Dep't. of Labor, No. 12-CV-5610, 2014 WL 349295, at *19 (E.D.N.Y. Jan. 31, 2014). In *Baiju*, the court found the reasoning in *Agaton* persuasive and declined to grant the alien's motion because there was "no evidence of any possible pending investigation or prosecution of the qualifying crimes." *Id.* at *20. The court in *Agaton* determined that the federal regulations defining "investigation or prosecution" should not be read so broadly "as to allow certification by a judge when that judge has no connection to any criminal prosecution or investigation involving the victims" because doing so would do "violence to the rest of the regulatory language." *Agaton*, 2013 WL 1282454 at *4.

2. *Analysis.*

(a) North Carolina Opinion.

A 2014 North Carolina Judicial Standards Commission opinion concludes that judges should not sign I-918B forms because to do so would violate the North Carolina ethics code. The opinion gives three reasons for its opinion: (1) certification of an I-918B form may violate the rule against providing voluntary character testimony, (2) certification of an I-918B form puts a judge in an inappropriate role akin to law enforcement or prosecution rather than an impartial judicial role, and (3) certification of an I-918B form is an improper public comment on the merits of a pending proceeding. N.C. Judicial Standards Comm'n, Formal Advisory Op. 2014-03 (2014). At this time, it appears that the North Carolina opinion is the only state judicial board opinion on the subject of whether the Code permits a judge to sign I-918B certifications.

The North Carolina opinion has two significant limitations as authority for present purposes. First, the opinion is based on the North Carolina Code of Judicial Conduct, as adopted in January 2006. This version of the Code antedates substantial amendments to the ABA Model Code of Judicial Conduct (2006) and to the Minnesota Code of Judicial Conduct (2009). As will be discussed below, differences between the North Carolina and Minnesota Codes are significant concerning the permissibility of certifications.

Second, the North Carolina opinion directly analyzes only pre-conviction certification of an I-918B form and does not discuss the possibility that a judge may certify an I-918B form after conviction. However, the definition of "investigation" includes conviction and sentencing. 8 C.F.R. § 214.14(a)(5). The opinion concludes that judges should not sign certifications that an alien victim "has been" helpful. The opinion thereby suggests that judges should not sign certifications even after convictions. However, the opinion's analyses and identifications of problems are directed to pre-conviction and even pre-trial concerns, and the opinion does not give any express reason for disapproving of certifications where the victim "has been" helpful.

(b) Potentially Applicable Rules.

Rule 1.3. A judge may not "abuse" the prestige of judicial office to advance the interests of others. Rule 1.3. Although it is true that the certification advances an alien's interests, the Board does not believe that certification involves the "prestige" of judicial office, as opposed to the office itself. Federal regulations contemplate that a judge may sign an I-918B form on behalf of an alien victim. *See* 8 C.F.R. § 214.14(c)(4). Federal courts have recognized certifications by judges as authorized. Abuse is not involved when the law and the courts countenance judicial certifications.[1]

[1] The North Carolina opinion does not cite the counterpart portion of North Carolina Code Canon 2A ("A judge should not lend the prestige of judicial office to advance the private interests of others;"), in support of its conclusion, even though the North Carolina Code has a broader prohibition ("shall not lend") than the Minnesota Code ("shall not abuse").

Rule 3.3. This rule provides, in relevant part, "A judge shall not . . . vouch for the character of a person in a legal proceeding, except when duly summoned." The North Carolina opinion relies in part on North Carolina Canon 2B, "A judge should not testify voluntarily as a character witness." The North Carolina opinion interprets a certification as to helpfulness as, "in essence, the endorsement of the victim's honesty, reliability, potential for cooperation and other character traits." In the Board's opinion, a certification does not vouch for an alien's character. Instead, the certification pertains to the alien's helpfulness to the prosecution. A helpful alien may or may not have good character.

Rule 2.10(A) and (D). Rule 2.10(A) prohibits a judge from "mak[ing] any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." However, Rule 2.10(B) provides, "Notwithstanding the restriction in [Rule 2.10(A)], a judge may make public statements in the course of official duties . . . ." If signing an I-918B certification is one of a judge's "official duties," the prohibition on certain public statements in Rule 2.10(A) does not apply. Although a judge has the discretion whether or not to sign an I-918B form, "duties" in Rule 2.10(D) should not be interpreted to refer only to non-discretionary duties.

Even if Rule 2.10(D) did not provide an exception, the Board believes that Rule 2.10(A) does not prohibit I-918B certifications. Rule 2.10(A) applies only to a "pending or impending" matter, not to a post-conviction certification. As noted, the applicable federal regulations indicate that the appropriate time for a judge to determine helpfulness is following a criminal conviction. The North Carolina opinion directly analyzes only pre-conviction certification of an I-918B form and does not discuss the possibility that a judge may certify an I-918B form after conviction. The opinion's analysis and identification of problems are directed to pre-conviction and even pre-trial concerns, and the opinion does not give any express reason for disapproving of certifications where the victim "has been" helpful in the prosecution of criminal activity.

Even as to a pending or impending matter, a certification is not likely "to affect the outcome or impair the fairness of a matter," because, among other things, the I-918B certification would not come to a jury's attention. Rule 2.10(A) does not prohibit a judge from signing an I-918B form.

The North Carolina opinion relies in part on North Carolina Canon 3(A)(6), which provides that a judge should "abstain from public comment about the merits of a pending proceeding . . . ." Canon 3(A)(6) would not prohibit a post-conviction certification. Canon 3(A)(6), unlike Minnesota Rule 2.10(A), forbids all public comment on pending matters, regardless of whether the comment may reasonably be expected to affect proceedings. Because effect on proceedings is not an element of the Canon, the North Carolina opinion does not analyze whether such an effect would be likely. Although the Canon does make an exception for statements in the course of official duties, the North Carolina opinion does not address that exception.

Rules 1.2 and 2.2. The Board considered whether signing certifications involves judges improperly in the prosecution role of forecasting whether a witness may be helpful to the prosecution. Involvement in the prosecution role could bring into question whether a judge was

performing duties "fairly and impartially," Rule 2.2, and whether the judge was impairing public confidence in the impartiality of the judiciary and creating "the appearance of impropriety." Rule 1.2.

Post-conviction certifications by the presiding judge do not involve such forecasting as to a witness and do not involve judges in functions that are intrinsically those of a prosecutor. Whether such certifications create problems in other contexts is discussed below.

A judge who signs a certification without an adequate factual basis, as could be true of a judge who is not assigned to a case involving the U-Visa petitioner, risks undermining public confidence in the integrity of the judiciary and creating the appearance of impropriety in violation of Rule 1.2. In addition, a certification outside the context of a case may be beyond the duties of judicial office and therefore inconsistent with both Rule 1.2 and 1.2.

(c) Specific fact situations. The certification issue most often arises in the following four situations.

1. *Certification by presiding judge after criminal case is completed.* The applicable regulations provide that after a criminal conviction or sentenced, the presiding judge may certify that the victim has been helpful. 8 C.F.R. § 214.14(a)(5). Since the case is no longer pending after the defendant is convicted and sentenced or the case is otherwise completed, and the presiding judge will generally have sufficient factual basis to determine whether the alien was helpful, the rules cited above as possibly applicable do not actually apply, in the Board's opinion.

2. *Certification by presiding judge in pending criminal case.* The Board has not located any cases discussing whether the presiding judge in a criminal case may, prior to conviction, determine that a witness is likely to be helpful. USCIS comments state that a "certifying agency," which may include a law enforcement agency, prosecutor, or judge, may certify that an alien "may be helpful at some point in the future." Eligibility for ''U'' Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,019 (Sept. 17, 2007). However, the USCIS comments that specifically address certifications by judges suggest that the appropriate time for judges to determine helpfulness is not during the investigation or prosecution stage but at the conviction and sentencing stage. *Id.* at 53,020.

Further, in some circumstances, certification during the investigation or prosecution stage may create the impression that the judge favors law enforcement or the prosecutor in violation of Rule 1.2 and Rule 2.2, which may then require disqualification under Rule 2.11. Rule 1.2 requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. Comment 5 to Rule 1.2 states, "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's . . . impartiality . . . ." Rule 2.2 states, "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Nevertheless, it may be argued that the certification is in the nature of a probable cause determination which a judge may properly make at an early stage of the case.

There is no requirement that the judge sign the certification, and the certification may be signed by the appropriate law enforcement authority or prosecutor, who are in a better position than the judge to assess a witness's likely helpfulness in an investigation or prosecution. However, given the present lack of clarity in the law, the Board believes that whether a judge in a criminal case may sign an I-918B form prior to completion of the case is primarily an issue of law rather than an issue of compliance with the Code. *See* Rule 2.2, cmt. 3 (noting that "good-faith errors of fact or law" do not violate the rule requiring a judge to uphold the law and perform all duties of judicial office impartially). A judge should disclose a pre-conviction certification under Rule 2.11, comment 5.

3. *Certification by presiding judge in civil case.* The next issue is whether a judge who is presiding over a civil case such as an Order for Protection or dissolution proceeding may determine that a party to the civil case is likely to be helpful if the party's allegations became the basis for a criminal investigation or prosecution. As noted, while USCIS comments suggest that the appropriate time for a judge to determine a victim's helpfulness is after the perpetrator is convicted, the regulations permit a "certifying official," which includes a judge, to certify helpfulness before a criminal investigation or prosecution has commenced. As discussed earlier, in a few federal decisions, the presiding judge in a civil matter certified that a party to the case was likely to be helpful in a criminal investigation and prosecution even though no criminal investigation or prosecution had been commenced. *See Baiju*, *supra* at 3.

Certification in a civil case before the case is completed may raise impartiality issues under Rule 2.2 and 2.11, similar to those identified above regarding certifications signing in pending criminal cases. Since a party to the civil case other than the one requesting the certification may consider the certification relevant to the judge's impartiality, a certification should be disclosed under Rule 2.11, comment 5.

Certification in a civil case after the case is completed does not raise impartiality issues. Nevertheless, there are questions whether a judge should sign such certifications. The judge, unlike a law enforcement official or prosecutor, may not be in a good position to know whether the witness is likely to be helpful during the investigative or prosecution stage. Indeed, a judge may not even know if investigation or prosecution is likely. As noted above, a judge who signs a certification without an adequate basis would violate the Code. If, however, the judge has an adequate basis for averring that the alien will be helpful in a prosecution, the Code does not prohibit signing.

4. *Certification by a judge who is not assigned to the case.* The law does not appear to contemplate certification by a judge who is not responsible for the case, such as a signing judge. It is not likely that there would be any reported cases on this topic, and the Board did not locate any. It is questionable whether outside the context of a case a judge will have a sufficient record to determine whether or not a witness is likely to be helpful or has been helpful in a criminal case.

Further, a certification outside the context of a case may be beyond the duties of judicial office and therefore inconsistent with the Judicial Code's requirement that a judge promote public confidence in the independence, integrity, and impartiality of the judiciary and perform the duties

of judicial office impartially. *See* Rules 1.2, 2.2.[2] There may be unusual circumstances in which such a certification could be proper, e.g., when the prosecutor is unavailable to sign the certification, there has been a conviction, and the presiding judge is incapacitated. In most instances, however, the Board recommends that a judge who is not responsible for a case involving the U-Visa petitioner decline to sign a certification.

Conclusion. Following a criminal defendant's conviction or sentencing, the presiding judge in that case is not prohibited by the Code from signing an I-918B form certifying that a U-visa petitioner was helpful. Federal cases have not clearly answered whether a presiding judge may sign an I-918B form in a criminal matter prior to completion or in a civil matter; consequently, whether a judge may sign an I-918B form in those circumstances is primarily an issue of law. Finally, a judge must have an adequate factual basis to sign an I-918B certification, and a judge who is not the presiding judge is unlikely to have an adequate factual basis for an I-918B certification.[3]

Adopted June 26, 2015

[2] A federal court in Texas has noted that for a judge to sign a U-Visa certification in the absence of an actual case or controversy involving opposing litigants would raise the issue of whether the certification was in effect an improper advisory opinion. *In re Nunez-Ramirez*, No. M-13-746, 2013 WL 6273961, at *5 n.6 (S.D. Tex. Dec. 3, 2013) (citing Article III of U.S. Constitution); *see also In re Tschumy*, 853 N.W.2d 728, 738 (Minn. 2014) ("A case is functionally justiciable if the records contains raw material (including effective presentation of both sides of the issues raised) traditionally associated with effective judicial decision-making." (citations and internal punctuation omitted).

[3] This opinion is based on case law as of May 21, 2015. This opinion is subject to change based on developments in case law after that date.