



SAMPLE MOTION | 3/31/2019 | Magda Baker & Annie Benson
Motion to Admit Evidence of Immigration Status under ER 413(a)

IN THE [DISTRICT][MUNICIPAL] COURT OF [CITY NAME][_____] COUNTY]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

[CRIMINAL][JUVENILE] DEPARTMENT FOR [_____] COUNTY]

CITY OF [XXX]

Case No.

STATE OF WASHINGTON,

Plaintiff,

**MOTION TO ADMIT EVIDENCE OF
IMMIGRATION STATUS UNDER ER 413**

vs.

NAME OF CLIENT,

Defendant

To: COURT (working copy)

COUNTY PROSECUTOR

NOTE #1: This motion can be adapted to satisfy ER 413’s requirement of a pretrial motion for admission of a witness’s immigration status. Its focus is on asserting a defense of motivation and/or bias of an alleged victim or complaining witness (CW) related to obtaining lawful immigration status. Congress created two avenues for noncitizen crime survivors to obtain lawful immigration status: The U visa and the Self-Petition Process. (Both are a path to US citizenship.) After determining which avenue(s) apply (one or both) to the CW in your case, adapt the brief accordingly. See **WDA ER 413 Practice Advisory** for information on U visas & self-petitions and strategies for asserting a defense related to them.

NOTE #2: Determining the immigration status of the complaining witness is essential to pursue admission of immigration status as argued in this motion. Most CWs relevant to these

1 circumstances will be undocumented. However, noncitizen CW's with forms of temporary
2 immigration status (e.g., a student visa or DACA) can also be eligible to apply for a U visa or submit
3 a self-petition as argued in the motion. If the CW is a lawful permanent resident or a US Citizen,
4 admission of her, his, their immigration status is not relevant and this motion does not apply.

5 **NOTE #3:** If your client is a noncitizen and facts support a defense that CW wished to you're your
6 client deported as was addressed in State v. Bedada, 463 P.3d 125 (Wn. App. 2020), please
7 consult WDA's Immigration Project for assistance in adapting this motion.

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I. RELIEF REQUESTED

COMES NOW CLIENT NAME, the accused, and moves this Court to admit into evidence the
complaining witness' immigration status, specifically evidence that they do not have lawful
permanent residence status. The complaining witness' immigration status is directly related to
their ability to qualify for lawful permanent resident status, creating a motive to present biased
testimony. The evidence in the attached affidavit and the argument below satisfy the
requirements of ER 607, as referenced in ER 413(a), and allow this court to admit evidence of the
complaining witness' immigration status. Further, the court's denial of admission of the
complaining witness' immigration status would violate defendant's right of confrontation under
Sixth Amendment to the United States Constitution.

II. FACTS

Congress established two avenues for noncitizens who allege they are crime survivors to
obtain lawful permanent resident status (a.k.a. a "greencard") and then become US citizens.
Both rely on the immigration status of the noncitizen who alleges she [or he] is a crime survivor,
along with the alleged crime, associated conduct and/or any ensuing conviction. The
complaining witness in the instant case presents facts that indicate they could be eligible to

1 obtain lawful immigration status through [one of] [both of] these avenues. Such facts provide
2 the basis for admission of their immigration status into evidence.

3 Include facts that support CW's eligibility for a U Visa: undocumented status [or some type of
4 temporary nonimmigrant visa status, such as tourist or student visa or DACA recipient] and any
5 other facts not already in the record that support U visa eligibility as outlined in §II(A)(1)

6 And/or Include facts that support CW's eligibility to file a self-petition: undocumented or
7 nonimmigrant visa status; marriage to and/or children with the defendant who is a US citizen or
8 permanent resident. And any other facts not already in the record that support eligibility to file
9 a self-petition as outlined in §I(A)(b).

10 III. ARGUMENT

11 Under ER 413(a)¹, a court *may* admit evidence of immigration status to show bias pursuant
12 to ER 607 if the evidence is relevant and reliable and its probative value outweighs its
13 prejudicial nature.² The court *must* admit evidence of a witness' immigration status if excluding
14 it would violate the defendant's constitutional rights. Both bases for admission apply here and
15 require admission of the complaining witness' immigration status.

16 ¹ ER 413 reads in relevant part:

17 (a) Criminal Cases; Evidence Generally Inadmissible. In any criminal matter, evidence of a party's or a witness's
18 immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or
19 a defense to, the criminal offense with which the defendant is charged [not at issue in the instant case], or to show
bias or prejudice of a witness pursuant to ER 607. The following procedure shall apply prior to any such proposed
uses of immigration status evidence to show bias or prejudice of a witness:

(1) A written pretrial motion shall be made that includes an offer of proof of the relevancy of the proposed
evidence.

(2) The written motion shall be accompanied by an affidavit(s) in which the offer of proof shall be stated.

(3) If the court finds the offer of proof sufficient, the court shall order a hearing outside the presence of the jury.

(4) The court may admit evidence of immigration status to show bias or prejudice if it finds the evidence is
reliable and relevant, and its probative value outweighs the prejudicial nature of evidence of immigration status.

(5) Nothing in this section shall be construed to exclude evidence that would result in the violation of a
defendant's constitutional rights.

1 **A. Due to Their Immigration Status, the Complaining Witness Could Benefit From the**
2 **Defendant’s Conviction.**

3 **1. Defendant’s conviction would satisfy a requirement to establish the complaining**
4 **witness’s eligibility to pursue a path to lawful immigration status.**

5 **NOTE:** A complaining witness can be eligible for a U visa or self-petition or both, avenues to
6 obtain lawful status. Edit brief to include whichever avenues your CW could be eligible to
7 pursue – the U visa AND/OR self-petition.

8 **a. The U visa path to lawful immigration status.**

9 The U visa is a path to lawful immigration status for noncitizen crime survivors if they
10 cooperate with the investigation and prosecution of the alleged crime(s).³ A person granted a U
11 visa is eligible to apply for lawful permanent resident status after three years, and U.S.
12 citizenship five years after that.⁴ To qualify for a U visa⁵ an applicant must establish, *inter alia*,
13 that they:

- 14 1) Do not have lawful permanent resident status;
15 2) Have suffered “substantial physical or mental abuse” as the victim of a qualifying crime;⁶
16 3) Have information about that crime and obtain a law enforcement certification showing they
17 have been or will be willing to help with investigation or prosecution of that crime.

18 The complaining witness has admitted that she [or he] does not have permanent resident
19 status. They are, in fact, **CHOOSE ONE:** [undocumented.] [**OR:** here with only temporary
immigration status _____ (INSERT CW’s CURRENT IMMIGRATION STATUS)].

20 ³ See the Trafficking Victim’s Protection Act, Pub.L 106-386 (2000).

21 ⁴ 8 USC 1427(a).

22 ⁵ 8 USC 1101(a)(15)U).

23 ⁶ Qualifying crimes include: Abduction, Abusive Sexual Contact, Blackmail, Domestic Violence, Extortion, False
24 Imprisonment, Felonious Assault, Female Genital Mutilation, Hostage, Incest, Involuntary Servitude, Kidnapping,
25 Manslaughter, Murder, Obstruction of Justice, Peonage, Perjury, Prostitution, Rape, Sexual Assault, Sexual
26 Exploitation, Slave Trade, Torture, Trafficking, Unlawful Criminal Restraint, Witness Tampering or “any similar
27 activity.

1 The alleged conduct constitutes the requisite abuse and the current charge(s) [INSERT
2 CHARGES] [is] [are] a qualifying crime. See fn.5. Thus, conviction of the defendant would
3 establish key requirements for the complaining witness to qualify for a U visa and subsequently
4 pursue lawful permanent resident status and US citizenship. As such, the complaining witness
5 has a motivation to provide biased testimony to help secure the defendant's conviction.

6 **b. The self-petition path to lawful immigration status.**

7 The "self-petition" process is available to noncitizens who are able to file petitions on their
8 own for themselves and their children seeking permanent resident status where their US
9 Citizen or lawful permanent resident spouse or parent's failure or refusal to do so was
10 connected to domestic violence.⁷ Three years after obtaining lawful permanent resident status,
11 self-petitioners can apply for U.S. citizenship.⁸ To be eligible to apply for a self-petition, a
12 noncitizen must show, *inter alia*, they:

- 13 1) Do not have permanent resident status;
- 14 2) Are the current/former spouse, child or parent of a US citizen or lawful permanent resident;
- 15 3) Reside or have resided with their US citizen or permanent resident spouse, parent or child;
- 16 4) Suffered battery or extreme cruelty⁹ by the US citizen/permanent resident spouse/ parent;
- 17 5) Are a person of good moral character¹⁰ under immigration law.¹¹

18 The complaining witness does not have lawful permanent resident status. . They are, in fact,
19 **CHOOSE ONE:** [undocumented.] [OR: here with only temporary immigration status
_____] (INSERT CW'S CURRENT IMMIGRATION STATUS)]. They [are] [were]
married to [and have children with] defendant, who is a [US citizen] [OR: lawful permanent
_____]

17 ⁷ See The Violence Against Women Act of 1994 (VAWA), Pub.L. 103-322 (1994).

18 ⁸ 8 USC 1430(a).

19 ⁹ Battery or extreme cruelty includes any act or threatened act of violence, including forced detention, psychological or sexual assault, abuse or exploitation and prostitution. 8 CFR 204.2.

¹⁰ 8 USC 1101(f).

¹¹ 8 USC 1154(a)(1)(A).

1 resident]. Thus, conviction of the defendant would establish some of the requirements for the
2 complaining witness to file a self-petition to pursue lawful permanent resident status. The
3 complaining witness has motivation to provide biased testimony to help secure the
4 defendant's conviction.

5 **B. The Court Should Admit Immigration Status Evidence Because It Is Relevant and**
6 **Reliable and Its Probative Value Outweighs Its Prejudicial Nature as ER 413(a)(4)**
7 **Requires.**

8 The credibility of a witness may be attacked by any party. ER 607. One method for
9 impeaching the credibility of a witness is to show the witness may be biased. Tegland, Karl, 5D
10 Washington Practice, *Courtroom Handbook on Washington Evidence*, 2017-18 edition, p. 278;
11 See also *In re Detention of Law*, 146 Wn.App. 28, 37 (2008) (citing *Delaware v. Van Arsdall*, 475
12 U.S. 673 (1986)) (under ER 607 "a party has a right to cross-examine a witness to reveal bias,
13 prejudice, or a financial interest in the outcome"). A witness may be biased for a variety of
14 reasons. See, e.g., *U.S. v. Roberts*, 618 F.2d 530, 535 (9th Cir. 1980) ("Evidence that a witness is
15 testifying pursuant to a plea agreement is usually admissible to show bias"); *State v. Munguia*,
16 107 Wn.App. 328, 339 (2001) (witness' fear of defendant admissible to show bias); *State v.*
17 *Wilder*, 4 Wn.App. 850 (1971) (young woman's desire to stay out of trouble with her parents
18 admissible to show bias).

19 Here, the complaining witness' testimony may be biased because it could further their
eligibility to apply for lawful permanent resident status. That bias casts doubt on the
complaining witness' credibility. Evidence of the complaining witness' eligibility to pursue
lawful permanent resident status is akin to other evidence showing bias that courts have found

1 admissible. Here, establishing the complaining witness' immigration status is key to challenging
2 their credibility.

3 **1. Evidence of immigration status is relevant to the complaining
4 witness' motivation to provide biased testimony.**

4 "Relevant evidence" means evidence having any tendency to make the existence of any fact
5 that is of consequence to the determination of the action more probable or less probable than
6 it would be without the evidence. ER 401. In other words, to be relevant, evidence must be
7 probative and material. *State v. Sargent*, 40 Wn.App. 340, 349, n.3 (1985). Probative value is
8 the "tendency to prove or disprove a fact." Materiality means that that fact "is of consequence
9 in the context of the other facts and the applicable substantive law." *Id.*

9 The CHOOSE ONE OR BOTH [U visa] [and] [OR self-petition process] [are] [is an] avenue[s]
10 for noncitizens who do not have it to get lawful permanent resident status, and then pursue US
11 citizenship. The fact that the complaining witness in this case does not have lawful permanent
12 resident status but may be eligible to get it based on the criminal case against the defendant is
13 probative because it casts doubt on the complaining witness' testimony. Specifically,
14 establishing that the complaining witness does not have lawful permanent resident status and
15 may be eligible [for a U visa] [and] [OR to self-petition] would show that the complaining
16 witness has a motive to testify that they were a victim of crime.

16 This evidence of immigration status is material because whether the complaining witness'
17 testimony is truthful is of consequence since they are a key witness to the crime. Given that the
18 complaining witness' immigration status and possible path to lawful permanent resident status
19 are inextricably linked to the instant charges, they bear on the credibility of the complaining

1 witness' testimony. *State v. Rice*, 48 Wn.App. 7, 12 (1987). The partiality of a witness is
2 "always relevant as discrediting the witness and affecting the weight of his [or her] testimony."
3 *Davis*, 415 U.S. at 316–17 (quoting 3A J. Wigmore, Evidence s 940, p. 775 (Chadbourn rev.
4 1970)).

5 **2. Evidence of the complaining witness' immigration status is reliable.**

6 Here, the evidence includes statements made by complaining witness [and/or someone else
7 interviewed as part of discovery] during the defense interview that provide reliable evidence
8 that the complaining witness does not have lawful permanent residence and CHOOSE ONE [is
9 an undocumented person] [OR has only temporary immigration status].

10 [INCLUDE IF APPLICABLE] Additionally, during a defense interview the complaining witness
11 provided information that she [or he] is aware of the [U visa] [and/or] [self-petition process] as
12 an avenue to obtain lawful immigration status. Further, she [or he] disclosed that they [intend]
13 [OR are taking steps] to apply for a [U Visa] [and/or] [self-petition]. The complaining witness has
14 no motive to provide information that damages her [or his] credibility.

15 [INCLUDE IF APPLICABLE] The prosecutor also provided evidence that the prosecutor's
16 office has discussed providing the complaining witness with the requisite law enforcement
17 certification to obtain a U visa, pursuant obligations under *Brady v. Maryland*. 373 U.S. 83, 87
18 (1963); *See also U.S. V. Bagley*, 473 U.S. 667, 676 (1985) (*Brady* rule requires prosecutors to
19 provide both impeachment and exculpatory evidence). If untrue, the prosecutor had no reason
to provide this evidence especially since the evidence hurts the prosecutor's case.

1 court admitted “gruesome” photographs of decedent because severity of injuries was relevant
2 to intent to kill and premeditation).

3 The Court of Appeals has held that under ER 413 the probative value of a party’s
4 immigration status may outweigh the prejudicial nature of that evidence. *State v. Bedada*, ___
5 Wn. App.2d ___, 463 P.3d 125 (2020). In *Bedada*, defendant and his wife, who was the
6 complaining witness, were immigrants from Ethiopia. Mr. Bedada sought to introduce evidence
7 of his noncitizen status to show that a conviction could cause him to be deported, giving his
8 wife, who wanted his deportation, a motive to fabricate her allegations. The trial court
9 excluded the evidence of Mr. Bedada’s immigration status, finding it prejudicial. The Court of
10 Appeals reversed, reasoning that immigration status may always provoke generalized prejudice
11 and finding ER 413 requires a particularized showing of prejudice. *Id.* at 133. The Court of
12 Appeals noted the necessity to “pay heed to the entirety of the rule, including the calculation
13 that....the introduction of evidence of immigration status does not result in an unfair trial when
14 the evidence is presented for sufficiently weighty reasons.” *Id.* at 131. Recognizing that the
15 opportunity to demonstrate bias on the part of a key witness has “long been deemed an
16 important element of a defendant’s right to present a defense”, the court reversed Mr.
17 Bedada’s related convictions. *Id.* at 134.

18 **B. Denying the Admission of the Complaining Witness’s Immigration Status Violates**
19 **Defendant’s Sixth Amendment Right to Confrontation.**

The court must admit evidence of immigration status if excluding that evidence would
violate the defendant’s constitutional rights. ER 413(a)(5). The right to cross-examine adverse

1 witnesses includes the right to inquire into any potential outside motivation or ulterior motive
2 behind that witness's testimony. *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). The defense need
3 not prove that the witness actually received any concrete benefit in exchange for his/her
4 testimony. *Id.*

5 A defendant has a Sixth Amendment right to confront the witnesses against them. One way
6 a defendant may assert that right is through cross-examination. *Davis v. Alaska*, 415 U.S. 308,
7 315 (1974). The right to cross-examine an adverse witness includes the right to ask about the
8 witness' bias or motive in testifying. *Davis*, 415 U.S. at 316–17 (“[T]he exposure of a witness'
9 motivation in testifying is a proper and important function of the constitutionally protected
10 right of cross-examination”). A defendant may also introduce evidence of an adverse witness'
11 bias or motive to testify through a second witness. *State v. Spencer*, 111 Wn. App. 401 (2002)
12 (trial court violated defendant’s constitutional right to impeach prosecution witness with bias
13 evidence when it refused to let defense call a second witness who could testify that
14 prosecution witness was afraid CPS would take her child if she did not testify against the
15 defendant).

16 A trial court must admit evidence of bias even if the bias arose after the alleged crime.
17 *State v. Dolan*, 118 Wn.App. 323, 328. For example, the Washington Court of Appeals has held
18 that a trial court erred when it refused to allow a defendant to cross-examine a prosecution
19 witness about a custody dispute between the two, even though that dispute arose after the
prosecution witness alleged the crime occurred. The Court of Appeals said that regardless of
when the custody dispute arose, “its existence at the time of trial had a tendency to show [the

1 prosecution witness] was biased against [the defendant],” who had a right to present such bias
2 to the jury. *Id.*

3 Here, evidence that the complaining witness may be eligible to seek immigration benefits,
4 specifically lawful permanent resident status, through a [U visa] [and] [OR [self-petition]
5 constitutes bias evidence that the court must admit because it casts doubt on the complaining
6 witness’ testimony. It is probative to determine whether the complaining witness’ testimony is
7 credible and whether the complaining witness is motivated to provide biased testimony in
8 order to establish eligibility for a [U visa] [and] [OR [self-petition]. Such tainted motives and bias
9 would clearly prejudice the defendant.

10 Bias of the complaining witness in this case is similar to the bias of an important factual
11 witness in *Davis v. Alaska*. 415 U.S. 308. In *Davis* the United States Supreme Court held that Mr.
12 Davis had a constitutional right to introduce evidence that the State’s witness, a juvenile with a
13 criminal record, was biased even though Alaska had a policy interest in protecting juveniles with
14 criminal records. Similarly, Washington’s interest in protecting a witness’ immigration status
15 cannot require yielding of the defendant’s constitutional right to introduce evidence that the
16 complaining witness is biased. Eligibility for a [U visa] [and] [OR [self-petition] directly relates to
17 potential bias of the complaining witness. Admitting evidence of the complaining witness’s
18 immigration status is necessary to permit defendant to confront the complaining witness and
19 conduct effective cross-examination.

17 IV. CONCLUSION

1 The complaining witness is not a permanent resident. This fact, coupled with the
2 crime[s] at issue, demonstrate her [or his] eligibility to pursue lawful immigration status
3 pursuant to a[U visa] [and] [OR [self-petition]. Such opportunity provides the complaining
4 witness with a motive to provide biased testimony and other evidence against the defendant.
5 The defendant has met the requirements of ER 607, as referenced in ER 413, by establishing
6 that the complaining witness' immigration status is relevant, reliable and its probative value
7 outweighs its prejudicial nature. Upholding defendant's Sixth Amendment right requires an
8 opportunity to confront the complaining witness regarding their motives and any relation they
9 may have to the complaining witness' pursuit of lawful permanent resident status. The
10 arguments and evidence presented in this motion meet the requirements of ER 413(a). For the
11 foregoing reasons, the defendant requests that this court admit evidence of the complaining
12 witness' immigration status.

12 Respectfully submitted this ____ day of _____, _____

14 **LAW OFFICE NAME**

15 _____

16 **NAME OF ATTORNEY, WSBA No.**

17 **Attorney for NAME OF CLIENT**