

PRACTICE ADVISORY Evidence Rule 413 – Admission of Immigration Status

RULE: In a criminal case evidence of a witness’s immigration status is not admissible unless immigration status is essential to proving and element of, or defense to, a crime or to show bias or prejudice of a witness for impeachment pursuant to ER 607 or if exclusion of that evidence would violate the defendant’s constitutional rights.

Pre-Trial Procedural Requirements to Admit Immigration Status Evidence To Show Bias or Prejudice:

1. Defense counsel must submit a written motion asserting an offer of proof as to the relevancy of the evidence (See WDA’s SAMPLE MOTION);
2. The motion must include counsel’s affidavit stating and supporting the offer of proof;
3. If the court grants the motion, hearing will be held outside the presence of the jury;
4. The court’s decision must be based on determination that probative value of reliable, relevant evidence outweighs its prejudicial nature.

Constitutional Rights of Defendant at Trial Remain Paramount in ER 413

determinations. “[T]he introduction of evidence of immigration status does not result in an unfair trial when the evidence is presented for sufficiently weighty reasons.” State v. Bedada, 463 P.3d 125,132 (2020) (COA Div. I applied substance of ER 413 to overrule trial court exclusion of immigration status.)

“Nothing in this section shall be construed to exclude evidence that would result in a violation of a criminal defendant’s constitutional rights.” ER 413(a)(5). While numerous constitutional rights may be at issue,¹ the admission of a witness’ immigration status is likely to most often be tied to defendant’s right to confront adverse witnesses² by

showing they may be biased, i.e., the criminal allegations were motivated by the possibility of obtaining immigration benefits, such as a U visa or self-petition or of obtaining a conviction that would trigger defendant’s deportation.

¹ See the related WDA Practice Advisory, [Presenting Bias Evidence at Trial](#),

² See the related WDA Practice Advisory, [Presenting Bias Evidence at Trial](#),

The right to cross-examine adverse witnesses includes the right to inquire into any potential outside motivation or ulterior motive behind that witness's testimony.³ The defense need not prove that the witness actually received any concrete benefit in exchange for their testimony.⁴

PRACTICE KEY: Investigation and Discovery Regarding Immigration Status IS NOT PROHIBITED by ER 413.

ER 413 does not impact defense counsel's ability to investigate or seek discovery related to any witness' immigration status. Defense counsel's investigation into immigration status may

reveal a key defense – bias and motivation to seek immigration benefits or the desire to have defendant deported - and may be essential to assisting the client to make informed decisions as to whether to plead guilty or go to trial.⁵

Types of Immigration Status & Benefits Related To ER 413

DEFENDANT: Where defendant is not a US citizen, but is either a lawful permanent resident, has some other type of immigration status (e.g., DACA recipients, student visa holders) or is undocumented, the possibility that a witness may be motivated by a desire to see defendant deported should be considered.

CRIME VICTIM PATHS TO LAWFUL IMMIGRATION STATUS: Congress provided undocumented crime victims with two avenues to obtain lawful status related to the crimes associated with their circumstances: U visas and Self-Petitions.⁶ These lawful forms of immigration status provide eligible noncitizens with work authorization and a path to obtain lawful permanent residence and then US citizenship.

It is the possibility that eligibility to seek immigration benefits tied to being a crime survivor, such as a U visa or self-petition, may have provided a motivation to bring criminal allegations or cooperate in the prosecution of criminal charges. Defense counsel does not need to prove the alleged victim is actually seeking an immigration benefit or would be granted such benefit.

Undocumented Person: An individual who is not a US citizen and does not have authorized documents establishing lawful immigration status to remain in the US is undocumented. There are two types of undocumented persons: 1. Individuals who illegally entered the US and have never had lawful immigration status; 2. Individuals who lawfully entered the US and were present on a temporary visa that is now invalid (e.g., tourist overstays, students who have dropped out).

³ *Davis*, 415 U.S. at 316-17.

⁴ *Id.*

⁵ *St v. A.N.J.* 168 Wn.2d 91, 225 P.3d 956 (2010), *Lafler v. Cooper*, 566 US 156, 132 S.Ct. 1376 (2012).

⁶ Most U visa applicants or self-petitioners are undocumented people. However, these avenues to permanent resident status are also available to noncitizens who have temporary nonimmigrant status (e.g., DACA recipients or student visa holders).

I. OBTAINING A U VISA – See Also WDA’s Immigration Project U Visa Advisory

Anyone who is not a lawful permanent resident can pursue a U visa. People who do so are primarily undocumented. However, other noncitizens with temporary immigration status (e.g., DACA recipients or student visa holders) can also apply.

A. Eligibility Requirements To Be Granted a U visa:⁷

- ✓ Was victim of a “qualifying criminal activity” or similar activity in the US;
- ✓ Suffered substantial physical or mental abuse as a result;
- ✓ Obtained the requisite certification from a federal, state or local law enforcement authority (including prosecutors) verifying that the U visa applicant has information about the crime and has been, currently is or is likely to be helpful to law enforcement in the investigation or prosecution of the crime⁸;
- ✓ Qualifies for admission to the US, i.e., not trigger any grounds of inadmissibility under immigration law.⁹

B. What constitutes “qualifying criminal activity?” The U visa applicant must establish that he or she is the victim of one if the following types of “qualifying criminal activity”¹⁰:

<ul style="list-style-type: none"> • Abduction • Abusive Sexual Contact • Blackmail • Domestic Violence • Extortion • False Imprisonment • Felonious Assault • Female Genital Mutilation • Labor Contract Fraud • Held Hostage 	<ul style="list-style-type: none"> • Incest • Involuntary Servitude • Kidnapping • Manslaughter • Murder • Obstruction of Justice • Peonage • Perjury • Prostitution • Rape • Sexual Assault 	<ul style="list-style-type: none"> • Sexual Exploitation • Slave Trade • Stalking • Torture • Trafficking • Unlawful Criminal Restraint • Witness Tampering • Attempt, conspiracy or solicitation to commit “any similar criminal activity”.
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II. FILING A SELF-PETITION¹¹ – See WDA’s Immigration Project Self-Petition Advisory

Noncitizens married to US citizens and lawful permanent residents (LPR) can be granted lawful permanent resident status (and then US citizenship) when their spouse files a petition on their

⁷ 8 USC 1101(a)(15).

⁸ The U-visa petition and instructions, and the law enforcement certification, a.k.a. form I-918 Supplement B are Available at <https://www.uscis.gov/i-918>

⁹ See the grounds of inadmissibility at 8 USC 1182.

¹⁰ 8 USC 1101(a)(15)(iii).

¹¹ 8 USC 1154.

behalf. Congress passed a law to permit people whose US citizen or LPR spouse failed to petition for them, and who are victims of domestic violence, to “self-petition” for LPR status.

Requirements To Be Granted A Self-Petition:

- ✓ Good faith marriage to a US citizen or LPR spouse.
- ✓ They or their child (including step child) were subjected to battery or extreme cruelty¹² by their US citizen or LPR spouse during the marriage;
- ✓ They lived with the abuser at some time; they do not have to be living together now or when the self-petition is submitted.
- ✓ They qualify for admission to the US, i.e., do not trigger any grounds of inadmissibility¹³ under the immigration law.

PRACTICE STRATEGIES & SAMPLE MOTION

Three factors indicate the duty to investigate whether immigration status is relevant to a defense and warrants an ER 413 motion: 1. Defendant or a witness is not a US citizen or lawful permanent resident; 2. Charge(s) is/are a U Visa “qualifying crime”; and/or 3. A witness is or was married to the defendant, who is a US citizen or permanent resident, and alleged conduct constitutes “battery or extreme cruelty”.¹⁴

- ❖ STEP ONE: Identify defendant’s immigration status and possible immigration consequences of conviction.
- ❖ STEP TWO: Is alleged crime(s) on U visa list of qualifying crimes? AND/OR is defendant a US citizen or LPR spouse who did not file a petition for CW to obtain lawful status? For more information on U visas or self-petitions see specific advisories at the WDA’s Immigration Project resource page or contact WDA’s Immigration Project Staff.
- ❖ STEP THREE: Investigate witness’ immigration status.
- ❖ Prosecutorial objections and interference: Be prepared to make the argument that ER 413 does not apply to investigation and discovery, particularly where prosecutor is advising a witness to not answer immigration status questions.
- ❖ Consider if an expert with immigration law expertise will be necessary to explain immigration law and benefits (such as U visas & self-petitions). Contact WDA’s Immigration Project for this.

WDA’S IMMIGRATION PROJECT PROVIDES EXPERTISE IN ASSESSING RELEVANCE OF IMMIGRATION STATUS, NECESSITY FOR ER 413 MOTION, AND EXPERT TESTIMONY AS NEEDED.

¹² Any credible evidence (including police reports, criminal charges and conviction documents) that establishes evidence of battery or extreme cruelty, such as the following: Threatening to beat or terrorize; Hitting, punching, slapping, kicking, or hurting in any way; Emotionally abuse, such as insulting at home or in public; Forced sex; Threatening to take away or hurt children away or hurt; Threatening to deport or report to immigration authorities; Controlling where spouse goes, what they can do, and who they can see; Forcible detention; Engaging in a pattern of behavior that cumulatively constitutes abuse. 8 C.F.R. 204.2(c)(iv).

¹³ See the grounds of inadmissibility at 8 USC 1182.

¹⁴ See footnote 13.

- ❖ **INTERVIEW QUESTIONS** to determine if an immigration benefit may be at issue and, thus, provide motivation for prejudice or bias:¹⁵
 - Ask witnesses to disclose their immigration status to determine if they are undocumented (if US Citizen or LPR, their immigration status is not at issue);
 - Ask if witnesses are aware that CW may be able to apply to get lawful immigration status (a U visa, self-petition (if married to defendant who is a US citizen or LPR), a greencard) if they can provide evidence that defendant has abused them or they are the victim of a crime.
 - Ask witnesses if CW has applied for lawful immigration status, specifically a U visa or a self-petition;
 - Ask witnesses if CW has ever consulted with a lawyer or legal advocate or anyone else who has advised them about applying for a greencard, U visa or self-petition (or any other lawful immigration status).
 - If defendant is not a US citizen, ask witness if anyone involved in the case has expressed a desire for defendant to be deported.
 - Have an investigator conduct, or be present at, all interviews. If a witness' testimony at trial is contradictory, investigator can be called to impeach.
- ❖ If evidence to indicate CW has consulted, or is being assisted by advocates or attorneys in relation to a U visa or self-petition, consider a subpoena to obtain records.
- ❖ If CW is undocumented and charged offense and/or conduct would qualify them for a U visa or self-petition, ask the prosecutor if their office is assisting, or has made an offer to assist, in helping a CW or witness to obtain a U visa or other immigration benefits.¹⁶ The prosecutor must disclose that information to the defense under *Brady* and its progeny.
- ❖ **See WDA SAMPLE MOTION.** Pre-trial motion must include defender affidavit to support the offer of proof. INCLUDE: Case-specific evidence supporting statement that bias or prejudice may impact the case and why immigration status is material: e.g., defendant is undocumented and charged offense would qualify them to seek a U visa or self-petition; OR CW is motivated by desire to see defendant deported.

¹⁵ Such interviews should be conducted with awareness and careful consideration of the risks and fears undocumented people face and assurances that defense counsel will not contact immigration authorities.

¹⁶ Since an LEA certification is not required to self-petition, prosecutor is not likely to have involvement with that avenue to obtain immigration benefits