

## PRACTICE ADVISORY: Evidence Rule 413 – Admission of Immigration Status

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**RULE:** In any criminal matter, evidence of a party’s or witness’s immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607.

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### Evidence Rule 413<sup>1</sup> requires a pretrial Motion to Admit Evidence of Immigration Status:

1. Defense counsel must submit a written motion to admit evidence of the immigration status of any witness or party (including the defendant) with an offer of proof as to the relevance of the evidence;
2. The motion must include an affidavit or affidavits in support of the offer of proof;
3. If the court grants the motion, a hearing will be held outside the presence of the jury;
4. The court may grant the motion if it finds that the information is reliable and relevant and that its probative value outweighs the prejudicial nature of evidence of immigration status.

#### 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)

“Nothing in this section shall be construed to exclude evidence if the exclusion of that evidence would violate a defendant’s constitutional rights.” ER 413(a)(5). Evidence of a party’s or witness’s immigration status will most often relate to the defendant’s right to confront adverse

witnesses<sup>2</sup> by showing bias or prejudice. For example, the criminal allegations may have been motivated by the possibility of the witness obtaining an immigration benefit, or by the witness’s desire to obtain a conviction that would result in the defendant’s deportation. 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.<sup>3</sup> The defense need not prove that the witness actually received any concrete benefit in exchange for their testimony.<sup>4</sup>

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<sup>1</sup> [ER 413\(a\) Immigration Status](#)

<sup>2</sup> See WDA Practice Advisory [Presenting Bias Evidence at Trial](#).

<sup>3</sup> See *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).

<sup>4</sup> *Id.*

**PRACTICE POINT: 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's immigration status. Information about a witness's immigration status, and the

possibility of motive or bias, could be essential to the defendant's case and to the defendant's ability to make informed decisions about the case, and counsel's failure to investigate could be ineffective.<sup>5</sup>

### **Types of Immigration Status and Benefits Relevant to ER 413**

**DEFENDANT:** Where the defendant is not a US citizen, counsel should consider the possibility that a witness may be motivated by a desire to see the defendant deported. Anyone who is not a U.S. citizen may be subject to removal. This includes Lawful Permanent Residents (LPR), regardless of how long they've been here.

#### **CRIME VICTIM PATHS TO LAWFUL**

**IMMIGRATION STATUS:** Congress provided noncitizen crime victims with two avenues to obtain lawful status in the US: U visas and Self-Petitions.<sup>6</sup> Each of these provides the applicant with work authorization and a path to lawful permanent residence, and eventually US citizenship. Eligibility for both of these depends on the applicant having been the victim of domestic abuse, or of specified criminal activity.

**It is the witness's potential eligibility for these benefits that raises the possibility of bias or prejudice. Defense counsel does not need to prove the alleged victim is actually seeking an immigration benefit or would be granted such benefit.**

#### **I. The U Visa<sup>7</sup>**

The U visa is a pathway to lawful permanent resident status for noncitizens who have been the victim of a qualifying crime and who cooperate in the investigation or prosecution of that crime.<sup>8</sup> Most applicants are undocumented, however noncitizens with temporary immigration status (e.g., DACA recipients or student visa holders) may also apply.<sup>9</sup>

"Qualifying criminal activity" includes the following, and any "substantially similar" offense:

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

<sup>6</sup> 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).

<sup>7</sup> See generally, 8 USC 1101(a)(15)(U); 8 C.F.R. 214.14.

<sup>8</sup> *Id.*

<sup>9</sup> An LPR would have no reason to apply for a U visa, since the result of U Visa approval is ultimately LPR status.

<ul style="list-style-type: none"> <li>• Abduction</li> <li>• Abusive Sexual Contact</li> <li>• Blackmail</li> <li>• Domestic Violence</li> <li>• Extortion</li> <li>• False Imprisonment</li> <li>• Felonious Assault</li> <li>• Female Genital Mutilation</li> <li>• Labor Contract Fraud</li> <li>• Held Hostage</li> </ul>	<ul style="list-style-type: none"> <li>• Incest</li> <li>• Involuntary Servitude</li> <li>• Kidnapping</li> <li>• Manslaughter</li> <li>• Murder</li> <li>• Obstruction of Justice</li> <li>• Peonage</li> <li>• Perjury</li> <li>• Prostitution</li> <li>• Rape</li> <li>• Sexual Assault</li> </ul>	<ul style="list-style-type: none"> <li>• Sexual Exploitation</li> <li>• Slave Trade</li> <li>• Stalking</li> <li>• Torture</li> <li>• Trafficking</li> <li>• Unlawful Criminal Restraint</li> <li>• Witness Tampering</li> <li>• Other related crimes with substantially similar elements to those listed above</li> <li>• Attempt, conspiracy or solicitation to commit any of the above.</li> </ul>
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If the charges in your case are one of those listed (or are substantially similar), counsel should consider the possibility that the witness is seeking a U visa and that an ER 413 motion may be appropriate.

## II. FILING A SELF-PETITION<sup>10</sup>

A noncitizen who is married to a US citizen (USC) or lawful permanent resident (LPR) can obtain LPR status through their spouse. Normally that process begins with a petition filed by the USC or LPR spouse. If, however, that spouse fails to file a petition and the noncitizen has been the victim of domestic abuse by the USC/LPR spouse, then the noncitizen may file a “self-petition” to obtain LPR status without requiring the cooperation of the allegedly abusive LPR/USC spouse.<sup>11</sup>

To file a self-petition, the noncitizen applicant must show that they (or their child) were subjected to “battery or extreme cruelty”<sup>12</sup> by the USC/LPR spouse during the marriage. “Any credible evidence” may be considered.<sup>13</sup>

<sup>10</sup> See generally, 8 USC 1154(a)(1)(A)(iii); 8 CFR 204.2(c).

<sup>11</sup> *Id.*

<sup>12</sup> See 8 CFR 204.2(c)(1)(vi) (“battery or extreme cruelty” “includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence”).

<sup>13</sup> See 8 CFR 204.2(c)(2)(iv) for types of evidence considered.

## PRACTICE TIPS

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; 2) The charge(s) constitute a “qualifying crime” for U-visa purposes; and/or 3) A witness alleging abuse (that may constitute “battery or extreme cruelty”) is or was married to the defendant, and may be seeking to self-petition.<sup>14</sup>

- 1) Identify defendant’s immigration status and possible immigration consequences of conviction.<sup>15</sup>
  - 2) Is alleged crime(s) on U visa list of qualifying crimes? AND/OR is defendant a US citizen or LPR and a witness is or was married to defendant and no petition for status was previously filed?
  - 3) Investigate witness’s immigration status.
- Be prepared to make the argument that ER 413 does not apply to investigation and discovery. The State may try to argue to the judge that the defense cannot ask about immigration status during the investigation and discovery phase without first having the ER 413 motion and hearing. ER 413, however, only governs admissibility at trial; it does not address or limit the defense’s ability to ask about immigration status during investigation and discovery. Counsel should also be prepared to respond if the prosecutor tries to advise a witness not to answer questions about immigration status.<sup>16</sup>
  - Determine whether an immigration law expert might be necessary to explain the immigration law and benefits at issue.<sup>17</sup>

**WDA’S [IMMIGRATION PROJECT](#) CAN ASSIST IN ASSESSING THE RELEVANCE OF IMMIGRATION STATUS AND THE NECESSITY FOR AN ER 413 MOTION.**

**[INTERVIEW QUESTIONS](#)** to determine if an immigration benefit or consequence may be at issue and thus provide evidence of witness prejudice or bias.<sup>18</sup> Have an investigator conduct, or be present at, all interviews. If a witness’s testimony at trial is contradictory, the investigator can be called to impeach. Remember there are two potential avenues to lawful status: the U visa and a self-petition, and if both might be at play in your case to ask about both.

- Ask witnesses to disclose their immigration status.

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<sup>15</sup> Contact [WDA’s Immigration Project](#) for an individual case consultation.

<sup>16</sup> *State v. Hoffstetter*, 75 Wn. App. 390, 398, 878 P.2d 474 (1994)(witnesses do not belong to the State and it is improper for the State to provide witnesses legal advice to not respond to questions, or to interfere with defense counsel’s interview by objecting to defense questions).

<sup>17</sup> WDA’s Immigration Project may be able to assist in this regard.

<sup>18</sup> Such interviews should be conducted with awareness and careful consideration of the risks and fears undocumented people face and with assurances that defense counsel will not contact immigration authorities.

- Ask if they know what a U-Visa is, [and what a self-petition (VAWA petition) is], and if so, how they know.
  - Ask if the DPA or police advised them of their eligibility to seek a U-Visa in relation to the case.
  - Ask if any information was provided to them, by anyone, about a U-Visa [and/or self-petition].
  - Ask if they requested information from anyone about a U-Visa [and/or self-petition] (e.g. from the DPA, the police, an advocate, friends, family, an immigration attorney, etc.) or whether they looked up information about it. If the answer is yes, find out when so you can see if statements or facts changed or were added after they learned about the requirements for the U visa [or self-petition].
  - Ask similar questions of any witnesses who are not U.S. citizens or LPRs.
  - Ask each witness what they know about whether the complaining witness or other witnesses may be eligible for (or have already sought) status based on the present case.
  - If the defendant is not a US citizen, ask witnesses if anyone involved in the case has expressed a desire for the defendant to be deported.
- If there is evidence indicating that the complaining witness has consulted or is being assisted by an advocate or attorney in relation to a U-visa or self-petition, consider a subpoena to obtain records.
  - If the charged offense and/or conduct would qualify CW for a U-visa, ask the prosecutor if their office is assisting, or has made an offer to assist, CW in that application.<sup>19</sup> The prosecutor must disclose that information to the defense under *Brady* and its progeny.
  - Ask involved law enforcement officers if they or their office has provided or offered to provide a U visa certification to the CW or other witness in the case.<sup>20</sup>
  - Remember the ER 413 motion must be filed pre-trial and must include the defense attorney's affidavit in support of the offer of proof. Be sure to include case-specific evidence supporting the assertion that bias or prejudice may impact the case and why admitting immigration status is required: e.g., defendant is undocumented and charged offense would qualify the witness to seek a U-visa or self-petition, or a witness is motivated by desire to see defendant deported.

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<sup>19</sup> The U visa application requires certification from a Law Enforcement Agency.

<sup>20</sup> The prosecutor must disclose any U-Visa related information to defense, including if the complaining witness asked about one, if the State told the witness about one. If an application arrives for signature defense is to get a copy, whether signed at that time or declined for a later time etc. It isn't only if the prosecutor is helping with an application -- any related information is mandatory discovery.

WDA's Immigration Project provides free, confidential [case-specific consultations](#). Defense counsel should consult the WDA Immigration Project or other immigration expert in *every case* involving a noncitizen.