

## Bench Card on Immigration Relief for Battered Spouses, Abused Children and Immigrant Crime Victims<sup>1</sup>

By: Leslye E. Orloff, Benish Anver, and Abigail Whitmore<sup>2</sup>  
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### Forms of Immigration Relief Available to Victims of Spouse, Child and Elder Abuse

Battered spouses and children have several forms of immigration relief available to them. Under the Violence Against Women Act (VAWA),<sup>3</sup> spouses<sup>4</sup> and children<sup>5</sup> of U.S. citizens and lawful permanent residents who have been battered or subjected to extreme cruelty may be eligible for self-petitioning and for cancellation of a removal orders under VAWA. U-visas are available to spouses that are victims of domestic violence, sexual assault, human trafficking, stalking and/or other crimes under VAWA.<sup>6</sup> Under the Immigration Act of 1990,<sup>7</sup> a battered spouse waiver allows an immigrant spouse who has been battered or suffered extreme cruelty to attain lawful permanent residency without having to meet the requirement of waiting two years and having to file a joint petition with an abusive spouse.<sup>8</sup> Elder abuse victims who suffer battering or extreme cruelty perpetrated by: their over 21 year old U.S. citizen child son, or daughter in law; or their U.S. citizen; or lawful permanent resident spouse may also self-petition.<sup>9</sup> In addition child abuse victims abused, abandoned, or neglected by one of their parents are eligible for Special Immigrant Juvenile Status.<sup>10</sup>

### VAWA Self-Petitioners<sup>11</sup>

VAWA Self-Petitioning enables immigrant victims of battering or extreme cruelty, including sexual assault, to obtain lawful permanent resident status without the cooperation of their abusive spouse, parent, or adult son or daughter over 21 years of age.<sup>12</sup>

Applicant must prove the family relationship to the perpetrator, and his/her immigration status. The family relationships covered are:

- **Spouses:** Spouses, former spouses, and intended spouses<sup>13</sup> battered or subjected to extreme cruelty<sup>14</sup> during the marriage (same sex or heterosexual), or intended marriage by abusive U.S. citizens or lawful permanent residents may file for themselves and may include their under 21 year old children in their application.

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<sup>3</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322. §§ 40001-702, 108 Stat. 1796, 1902-55 (1994).

<sup>4</sup> Violence Against Women Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (self-petitioning for battered spouses or former spouses codified at INA §§ 204(a)(1)(A)(iii) and (B)(ii), 8 U.S.C. §§ 1154(a)(1)(A)(iii) and (B)(ii) (2000)).

<sup>5</sup> *Id.* at INA §§ 204(a)(1)(A)(iv) and (B)(iii), 8 U.S.C. §§ 1154(a)(1)(A)(iv) and (B)(iii) (2000).

<sup>6</sup> INA § 101(a)(15)(U)(i); 8 U.S.C. § 1101(a)(15)(U)(i).

<sup>7</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

<sup>8</sup> *Id.* at § 701(b) (codified as INA § 216(c)(4)(C); 8 U.S.C. § 1186a(c)(4)(C)).

<sup>9</sup> INA § 204(a)(1)(A)(vii); 8 U.S.C. §§ 1154(a)(1)(A)(vii).

<sup>10</sup> INA § 101(a)(27)(J).

<sup>11</sup> See Moira Fisher Preda et al., *Preparing the VAWA Self-Petition and Applying for Residence*, BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (2013), available at <https://niwaplibrary.wcl.american.edu/pubs/ch3-3-selfpetitionprep>.

<sup>12</sup> See Leslye E. Orloff et al., *Introduction to Immigration Relief for Immigrant Victims of Domestic Violence and Sexual Assault and Glossary of Terms 7*, in BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (2013), available at: <https://niwaplibrary.wcl.american.edu/pubs/ch3-1-imm-relief-victims-domestic-violence>.

<sup>13</sup> See INA § 101(a)(50); 8 U.S.C. § 1101(a)(50) for definition of "intended spouse." An immigrant victim can qualify for relief under VAWA even if the marriage is invalid due to the bigamy of the abusive spouse, provided the immigrant victim was unaware that her intended spouse was still married and a marriage ceremony was performed.

<sup>14</sup> "Battering or Extreme Cruelty" is defined under immigration law as follows: "the phrase 'was battered by or was the subject of extreme cruelty' includes, but is not limited to, being a 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... The acts mentioned in this definition – rape, molestation, incest if the victim is a minor, and forced prostitution – will be regarded by the Service as acts of violence whenever they occur. Many other abusive actions, however, may also qualify as acts of violence under this rule. Acts that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence. It is not possible to cite all perpetrations that could be acts of violence under certain circumstances. The Service does not wish to mislead a potentially qualified self-petitioner by establishing a partial list

- **Children:** Children battered or subjected to extreme cruelty by a US citizen or lawful permanent resident parent (natural, adopted or step-parent) when the child was under 21 years old are eligible to self-petition and can include their own children in their application. Abused children who can demonstrate that the battering or extreme cruelty was at least one central reason for the delay in filing, have up to age 25 to file the self-petition.
- **Immigrant Parents of Child Abuse Victims:** An immigrant parent or step-parent of and under 21-year-old and unmarried child who has been battered or subjected to extreme cruelty by the child's US citizen or lawful permanent resident parent is eligible to self-petition and to include in the application any of her/his children who are not already citizens or lawful permanent residents. The abused child may be a citizen or lawful or undocumented immigrant. The immigrant parent needs not also have been abused.
- **Elder Abuse:** Immigrant parent battered or subjected to extreme cruelty by their over 21 year old U.S. citizen child.<sup>15</sup> Elder abuse victims subjected to abuse by an over 21 year old step-child are eligible to self-petition if the step-child was under 18 that at the time of the parent and step-parent's marriage.

#### An Adult Self-Petitioner Must Also Prove:

- **Good moral character**<sup>16</sup> or qualify for a waiver as a victim of domestic violence;<sup>17</sup>
- **Residence:** That they have resided at some point with the abusive spouse, former spouse, or intended spouse;
- **Good faith marriage**<sup>18</sup> (same sex or heterosexual) to the abusive spouse, former spouse or intended bigamist spouse, or a good faith marriage to the spouse or intended bigamist spouse who abused their child or step-child;
  - *Effect of Divorce:* The victim must file within 2 years of divorce and must show a connection between the battering or extreme cruelty and the divorce;
  - *Bigamy* is not a bar if a marriage ceremony was performed, and the victim did not know about the spouse's bigamy;
  - *Death of Citizen Spouse:* Victim must self-petition within two years;
  - *Abusive Spouse Lost or Renounced Citizenship or Residency* related to domestic violence and victim must self-petition within two years.

#### A Child Victim Must Also Prove:

- **Good moral character** if the victim is over age 14 unless qualifies for waiver as a domestic violence victim.<sup>19</sup>
- **Residence:** Child must prove they resided at some point in time with the abusive parent or step parent (includes visitation).
- **Good faith marriage**<sup>20</sup> (same sex or heterosexual) between child's immigrant parent and child's abusive citizen/lawful permanent resident step-parent.

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that may be subject to misinterpretation. This rule, therefore, does not itemize abusive acts other than those few particularly egregious examples mentioned in the definition of the phrase "was battered by or was the subject of extreme cruelty." Immigration and Naturalization Service, Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13061 (March 26, 1996), available at <https://niwaplibrary.wcl.american.edu/pubs/vawa-rule>.

<sup>15</sup> If the battering or extreme cruelty was perpetrated by a son-in-law or daughter-in-law the abused father or mother in law is not eligible to self-petition but can qualify for a U visa based on this abuse.

<sup>16</sup> For details on good moral character and inadmissibility for VAWA self-petitioners see Leslye E. Orloff, *Comparing VAWA Suspension of Deportation, VAWA Cancellation of Removal, VAWA Nicaraguan and Central American Relief Act (NACARA), and VAWA Self-Petitioning* (Jan. 28, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/suspension-cancellation-nacara-self-petition-chart-4-28-20>; and CTR. FOR POL'Y STUDIES ET AL., *Good Moral Character* (Oct. 15, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/good-moral-char-tool>.

<sup>17</sup> The Department of Homeland Security (DHS) is not limited by the criminal court record in domestic violence and stalking cases when the battered immigrant was not the primary perpetrator of abuse in the relationship if DHS determines that the battered immigrant was acting in self-defense, when the crime the battered immigrant was arrested for, was convicted of or plead guilty to did not cause serious bodily injury and was connected to the battering or extreme cruelty or contrary to best practices the state court issued a ruling against the victim for violating a protection order issued to protected the battered immigrant. INA § 237(a)(7); 8 U.S.C. § 1227(a)(7).

<sup>18</sup> See Leslye E. Orloff et al., *Good Faith Marriage in VAWA Self-Petitioning Cases* (Feb. 17, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/good-faith-marriage-vawa>.

<sup>19</sup> DHS is not limited by the criminal court record in domestic violence and stalking cases when the battered immigrant was not the primary perpetrator of abuse in the relationship if DHS determines that the battered immigrant was acting in self-defense, when the crime the battered immigrant was arrested for, was convicted of or plead guilty to did not cause serious bodily injury and was connected to the battering or extreme cruelty or contrary to best practices the state court issued a ruling against the victim for violating a protection order issued to protected the battered immigrant. INA § 237(a)(7) (domestic violence victim waiver); For details on good moral character and inadmissibility for VAWA self-petitioners see Leslye E. Orloff, *Comparing VAWA Suspension of Deportation, VAWA Cancellation of Removal, VAWA Nicaraguan and Central American Relief Act (NACARA), and VAWA Self-Petitioning* (Jan. 28, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/suspension-cancellation-nacara-self-petition-chart-4-28-20>; CTR. FOR POL'Y STUDIES ET AL., *Good Moral Character* (Oct. 15, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/good-moral-char-tool>.

<sup>20</sup> See Leslye E. Orloff et al., *Good Faith Marriage in VAWA Self-Petitioning Cases* (Feb. 17, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/good-faith-marriage-vawa>.

○ *Divorce* does not end abused step-child's ability to self-petition.<sup>21</sup>

- Abusive Parent or Step-Parent Lost or Renounced Citizenship or Residency: related to domestic violence and child must self-petition within two years.

#### An Elder Abuse Victim Must Also Prove:

- Good moral character or qualify for domestic violence victim.<sup>22</sup>
- Residence: Elder abuse victim must prove they resided at some point in time with the abusive child, step-child, or over 21 year old son/daughter; or
- Abusive Child, Step-Child, Son/Daughter-In-Law Lost or Renounced Citizenship or Residency: related to domestic violence; abused parent must self-petition within two years.

#### Protections for VAWA Self-Petitioners:

- Deportation: Initial protection from deportation through VAWA confidentiality<sup>23</sup> shortly after filing. Full formal protection from deportation within approximately 18-24 months through deferred action when the self-petition is approved.<sup>24</sup>
- Immigration Benefits for Children: Children receive immigration benefits along with their parents if included in their parent's application.
- Public Benefits: Access to public benefits as qualified immigrants within approximately three months (3) since the filing of VAWA self-petition.<sup>25</sup> Qualify for VAWA battered immigrant exceptions from deeming.<sup>26</sup>
- Employment authorization: Applicants with citizen abusers receive work authorization within approximately six months (6); Applicants with lawful permanent resident abusers receive work authorization within approximately 18-24 months when the self-petition is approved.
- VAWA confidentiality: protections against the release of information about the filing of the case, and its contents. The Department of Homeland Security (DHS) is precluded from relying upon information provided by an abuser or abuser's family members that may cause the denial of a victim's case, initiate immigration enforcement against a victim, or take any adverse action against the victim. (Timing: Upon marriage or creation of the parent child relationship once battering or extreme cruelty occurs).
- Non-Citizen Crime Victim Protections:<sup>27</sup> DHS staff are directed to exercise prosecutorial discretion to refrain from taking civil immigration enforcement actions against immigrant crime victims, including both those who have and those who have not filed for crime victim based immigration relief. This approach facilitates access to justice and victim based immigration benefits for non-citizen crime victims.
- Access to Lawful Permanent Residency:

<sup>21</sup> See *Arguijo v. USCIS*, et al., 99 F.3d 736 (7th Cir. 2021) (finding that, for VAWA purposes, "stepchild" status survives divorce).

<sup>22</sup> DHS is not limited by the criminal court record in domestic violence and stalking cases when the battered immigrant was not the primary perpetrator of abuse in the relationship if DHS determines that the battered immigrant was acting in self-defense, when the crime the battered immigrant was arrested for, was convicted of or plead guilty to did not cause serious bodily injury and was connected to the battering or extreme cruelty or contrary to best practices the state court issued a ruling against the victim for violating a protection order issued to protect the battered immigrant.

INA § 237(a)(7); 8 U.S.C. § 1227(a)(7). (domestic violence victim waiver); For details on good moral character and inadmissibility for VAWA self-petitioners see Leslye E. Orloff, *Comparing VAWA Suspension of Deportation, VAWA Cancellation of Removal, VAWA Nicaraguan and Central American Relief Act (NACARA), and VAWA Self-Petitioning* (Jan. 28, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/suspension-cancellation-nacara-self-petition-chart-4-28-20>; CTR. FOR POL'Y STUDIES ET AL., *Good Moral Character* (Oct. 15, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/good-moral-char-tool>.

<sup>23</sup> 8 U.S.C. § 1367. See generally Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality*, (October 11, 2013) available at <https://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-va-wa-confidentiality>.

<sup>24</sup> See Katelyn Deibler & Leslye E. Orloff, *VAWA Self-Petition Timeline with Background Checks* (Jul. 12, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/vawa-timeline>.

<sup>25</sup> What federal and state funded public benefits VAWA self-petitioners receive varies by benefit and by state. To determine what an individual victim qualifies for see NIWAP, *All State Public Benefits Charts and Map* (2021), available at <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>.

<sup>26</sup> For state-by-state information on self-petitioner access to federal and state funded public benefits see, NIWAP, *All States Public Benefits Charts and Map* (2021), available at <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>.

<sup>27</sup> See ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>; Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; Memorandum from John Morton, Director, Immigration Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (Jun. 17, 2011), available at <https://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs>.

- VAWA self-petitioners whose abusive spouse, parent or child is a U.S. citizen may apply for lawful permanent residency together with the VAWA self-petition and are immediately eligible to apply for lawful permanent residency upon approval.
- Spouses and children of lawful permanent residence who receive approved self-petitions can apply for lawful permanent residency once visas become available, which takes approximately five years (5).

## **VAWA Cancellation of Removal or Suspension of Deportation<sup>28</sup>**

### VAWA Cancellation of Removal or Suspension of Deportation: Battered Spouse or Child

Under VAWA, two forms of relief are available to immigrant victims of child or spouse abuse who are placed in immigration court removal/deportation proceedings.<sup>29</sup> These are: (1) VAWA cancellation of removal<sup>30</sup> and (2) VAWA suspension of deportation.<sup>31</sup> Only an immigration judge can grant a battered immigrant cancellation of removal or suspension of deportation. If granted, the immigrant applicant becomes a lawful permanent resident. A VAWA cancellation or suspension applicant must prove battering or extreme cruelty<sup>32</sup> and the immigration status of and their relationship to the perpetrator.<sup>33</sup>

#### The family relationships covered are:

- **Spouse:** An immigrant who has been battered or subjected to extreme cruelty by a spouse, former spouse (based upon a same sex or heterosexual marriage), or intended spouse (VAWA cancellation only) who is or was a U.S. citizen or lawful permanent resident.
- **Child:** An immigrant child or step-child<sup>34</sup> (through a same sex or heterosexual marriage) who is or was battered or subjected to extreme cruelty by a U.S. citizen or lawful permanent resident parent or step-parent.
- **Parent of Abused Child:** An immigrant who is the non-abusive parent of a child who is or was subjected to domestic violence or extreme cruelty by the child's other parent who is a U.S. citizen or lawful permanent resident parent. The immigrant does not need to have been either abused or married to the child's abusive citizen or lawful permanent resident abusive parent.<sup>35</sup>

#### A VAWA Cancellation or Suspension Applicant Must Also Prove:

- **Good moral character:**<sup>36</sup> for the 3 year period immediately preceding his or her application. The immigration judge may find good moral character if the battered immigrant's act or convictions were connected to having been battered or subjected to extreme cruelty.<sup>37</sup>
- **Good faith marriage:**<sup>38</sup> to the abusive spouse, former spouse, intended bigamist spouse (cancellation only) who abused the immigrant spouse, their child or step-child; or good faith marriage between the abused child's immigrant parent and their abusive citizen/lawful permanent resident step-parent.

<sup>28</sup> For a comparison of VAWA cancellation of removal, VAWA suspension of deportation and VAWA self-petition see Leslye E. Orloff, *Comparing VAWA Suspension of Deportation, VAWA Cancellation of Removal, VAWA Nicaraguan and Central American Relief Act (NACARA), and VAWA Self-Petitioning* (Jan. 28, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/suspension-cancellation-nacara-self-petition-chart-4-28-20>.

<sup>29</sup> See generally Rebecca Story, Cecilia Olavarria, and Moira Fisher Preda, *VAWA Cancellation of Removal 2*, in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS* (2013), available at: <https://niwaplibrary.wcl.american.edu/pubs/ch3-4-va-wa-cancellation-of-removal>

<sup>30</sup> INA § 240A(b)(2); 8 U.S.C. § 1229b(b)(2).

<sup>31</sup> INA § 244 (a)(3) (as in effect on March 31, 1997). Suspension of deportation is only applicable to battered immigrants who had been placed in deportation proceedings prior to March 31, 1997.

<sup>32</sup> INA § 240A(b)(2)(A)(i); 8 U.S.C. § 1229b(b)(2)(A)(i). Leslye Orloff, Brittany Roberts and Stefanie Gitler, "Battering and Extreme Cruelty: Drawing Examples from Civil Protection Order and Family Law Cases" (February 11, 2013) available at <https://niwaplibrary.wcl.american.edu/pubs/extreme-cruelty-examples-protection-order-2>

<sup>33</sup> INA § 240A(b)(2)(A)(i); 8 U.S.C. § 1229b(b)(2)(A)(i).

<sup>34</sup> INA § 101(b)(1); 8 U.S.C. § 1101(b)(1) defines "child" as under age 21 and includes natural, adopted and step-children. A person who is now over the age of 21 yet who was abused before age 21 can also file.

<sup>35</sup> The abusive parent need not be the natural parent of the abused child and may be a step-parent. Further, the parent of an abused child may file for VAWA cancellation whether or not she was ever married to the child's abusive parent. See also 61 Fed. Reg. 13061 (March 26, 1996).

<sup>36</sup> See INA § 101(f); 8 U.S.C. § 1101(f). For more on good moral character and inadmissibility for VAWA cancellation of removal and suspension of deportation cases see <https://niwaplibrary.wcl.american.edu/pubs/suspension-cancellation-nacara-self-petition-chart-4-28-20>.

<sup>37</sup> INA § 240A(b)(2)(C); 8 U.S.C. § 1229b(b)(2)(C).

<sup>38</sup> See Leslye E. Orloff et al., *Good Faith Marriage in VAWA Self-Petitioning Cases* (Feb. 17, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/good-faith-marriage-va-wa>.

- **Continuous physical presence:**<sup>39</sup> The applicant must have lived continuously in the United States for 3 years immediately preceding the filing of the application. A single absence from the U.S. for 90 days or aggregate absences over 180 days breaks continuity of physical presence unless the absences were connected to the abuse.
- **Extreme hardship:**<sup>40</sup> The applicant must show that the applicant, their child, or the parent of the abused child would suffer “extreme hardship” if deported or removed from the United States. Extreme hardship is determined based on the facts of each case taking into account the totality of the circumstances.<sup>41</sup> Extreme hardship can be proven using traditional or special VAWA extreme hardship factors, which include but are not limited to: The impact of the abuse on the victim and children; the services and justice system; the legal protections available to spouse and child abuse victims in the immigrant’s home country.

EXAMPLES: The following are examples of immigrants who do *not* qualify for VAWA self-petitioning, but can qualify for VAWA cancellation of removal:

- The parent of an abused child, regardless of the child’s U.S. citizenship, who was never married to the child’s abusive U.S. citizen or lawful permanent resident parent;
- The abused spouse of a U.S. citizen or lawful permanent resident spouse who has died or any abused children of a U.S. citizen or lawful permanent resident parent who died over 2 years ago;
- An abused spouse who was divorced for over 2 years from the U.S. citizen or lawful permanent resident abuser spouse;
- An abused stepchild whose abusive immigrant parent has died;
- An abused spouse or child whose U.S. citizen or lawful permanent resident parent renounced citizenship or lost lawful permanent resident status over 2 years ago;
- Victims of child abuse or incest by a U.S. Citizen or lawful permanent resident parent while under 21 years of age, but who did not file their VAWA self-petition while they were under the age of 21 and who are now over 21 years of age; and
- Victims of child abuse who cannot establish that they have resided with the U.S. citizen or lawful permanent resident abuser parent.

#### Protections for VAWA Cancellation of Removal and Suspension of Deportation Applicants

- **Deportation:** Protection from deportation through VAWA confidentiality<sup>42</sup> shortly after filing.
- **Immigration Benefits for Children:** Cannot include children in their application. Once the victim’s case is granted, the victim must file a family based visa petition for his/her children and DHS is required by statute to parole the children into the United States.<sup>43</sup>
- **Public Benefits:**<sup>44</sup> Access to public benefits as qualified immigrants after filing for VAWA cancellation of removal or VAWA suspension of deportation and requesting a prima facie determination from the immigration judge.<sup>45</sup> Access begins approximately six months (6) after filing. Qualify for VAWA battered immigrant exceptions from deeming.<sup>46</sup>
- **Employment authorization and access to benefits:** After filing the VAWA cancellation of removal or VAWA suspension of deportation case, employment authorization can take between six months (6) to one year or more.

<sup>39</sup> INA § 240A(b)(2)(B); 8 U.S.C. § 1229b(b)(2)(B).

<sup>40</sup> INA § 240A(b)(2)(A)(v); 8 U.S.C. § 1229b(b)(2)(A)(v); 244(a)(3) (as in effect on March 31, 2013). For a detailed list of extreme hardship factors in VAWA cases see 8 C.F.R. §§ 1240.20(c) and 1240.58(c); and Leslye E. Orloff and Brittany Roberts, *Extreme Hardship in VAWA Cancellation of Removal and VAWA suspension of Deportation Cases* (November 26, 2012), available at <https://niwaplibrary.wcl.american.edu/pubs/hardship-va-wa-cancellation-removal-suspension>.

<sup>41</sup> 8 C.F.R. § 1240.58; Matter of Ige, 20 I. & N. Dec. 880, 882 (BIA 1994); Matter of Chumpitazi, 16 I. & N. Dec. 629 (BIA 1978); Matter of Kim, 15 I. & N. Dec. 88 (BIA 1974); Matter of Sangster, 11 I. & N. Dec. 309 (BIA 1965).

<sup>42</sup> 8 U.S.C. § 1367. See generally Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality*, (October 11, 2013) available at <https://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-va-wa-confidentiality>.

<sup>43</sup> INA § 240A(b)(4)(A); 8 U.S.C. § 1229b(b)(4).

<sup>44</sup> What federal and state funded public benefits VAWA cancellation of removal and suspension of deportation applicants receive varies by benefit and by state. To determine what an individual victim qualifies for see NIWAP, *All States Public Benefits Charts and Map (2021)*, available at <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>.

<sup>45</sup> See Memorandum from The Office of the Chief Immigration Judge, *Operating Policy and Procedure Memorandum 97-9: Motions for “Prima Facie” Determination and Verification Requests for Battered Spouses and Children* (1997), available at <https://niwaplibrary.wcl.american.edu/pubs/prima-facie-verification-requests>.

<sup>46</sup> For state-by-state information on VAWA cancellation of removal and VAWA suspension of deportation applicants access to federal and state funded public benefits see, NIWAP, *All States Public Benefits Charts and Map (2021)*, available at <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>.

- VAWA confidentiality: protects against release of information about the fact that their case was filed, the contents of the case. DHS is also precluded from relying upon information provided by abuser or abuser's family members to deny a victim's case, initiate immigration enforcement against a victim or take any adverse action against the victim.
- Non-Citizen Crime Victim Protections:<sup>47</sup> DHS staff are directed to exercise prosecutorial discretion to refrain from taking civil immigration enforcement actions against immigrant crime victims, including both those who have and those who have not filed for crime victim based immigration relief. This approach facilitates access to justice and victim based immigration benefits for non-citizen crime victims.
- Access to Lawful Permanent Residency: Victims whose VAWA cancellation of removal or VAWA suspension of deportation cases are approved are granted lawful permanent residency.

### **Battered Spouse Waiver<sup>48</sup>**

When a spouse (same sex or heterosexual) has filed a family-based visa petition for an immigrant spouse and the couple is married for less than two years, on the couple's interview date with the Department of Homeland Security or the date that US Citizenship and Immigration Services (USCIS) approves the application the immigrant spouse will be granted 2-year conditional residence, rather than full lawful permanent residency. The immigrant and the citizen or lawful permanent resident spouse are required to file a joint petition 90 days before the end of the two-year conditional residency asking DHS to grant the immigrant spouse full lawful permanent residency. If the joint application is not filed, conditional residency ends and the immigrant spouse loses legal immigration status. An immigrant spouse (and in certain circumstances, an immigrant child) who has been battered or subjected to extreme cruelty by a citizen or lawful permanent resident spouse can apply for a "battered spouse (or child) waiver" of the joint filing requirement. Battered immigrants can apply for this waiver before or after their conditional residency ends.<sup>49</sup> They are not required to wait two years, and can file confidentially, without the knowledge, consent, or assistance of the abusive spouse.<sup>50</sup>

The family relationships covered are:

- Spouse: of a citizen or lawful permanent resident who has filed a family-based visa petition and who has been battered or subject to extreme cruelty by the citizen or lawful permanent resident spouse. The immigrant spouse also qualifies if the immigrant spouse's child or stepchild was battered or subjected to extreme cruelty by the citizen or lawful permanent resident spouse.
- Stepchild: subjected to battered or extreme cruelty by their U.S. citizen or lawful permanent resident stepparent.

### Proof Required for a Battered Spouse Waiver

- Conditional residence: has been granted by DHS to the abused immigrant spouse and abused immigrant spouse's child (step-child of the abusive spouse).
- Good Faith Marriage:<sup>51</sup> That the marriage that is the basis for conditional residence was a good faith marriage.
- Battering or Extreme Cruelty: During the marriage, the immigrant spouse or child was battered or subjected to extreme cruelty by the citizen or lawful permanent resident spouse or step-parent.
- Bigamy: It is not a bar if a marriage ceremony was performed, and victim did not know about intended spouse's bigamy.

<sup>47</sup> See ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>; Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; Memorandum from John Morton, Director, Immigration Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (Jun. 17, 2011), available at <https://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs>.

<sup>48</sup> For a discussion of battered spouse waiver see Cecilia Olavarria and Moira Fisher Preda, *Additional Remedies Under VAWA: Battered Spouse Waiver*, in *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS* (2013), available at <https://niwaplibrary.wcl.american.edu/pubs/ch3-5-battered-spouse-waiver>.

<sup>49</sup> 8 C.F.R. § 216.5(e)(3)(ii).

<sup>50</sup> 8 U.S.C. 1367(a)(2); INA 101(a)(51).

<sup>51</sup> See Leslye E. Orloff et al., *Good Faith Marriage in VAWA Self-Petitioning Cases* (Feb. 17, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/good-faith-marriage-vaaw>.

## Protections for Battered Spouse Waiver Applicants

- **Deportation:** If the victim's conditional residency ended, upon filing of the battered spouse waiver receive protections from deportation including those based on VAWA confidentiality.<sup>52</sup>
- **Immigration Benefits for Children:** Children receive immigration benefits along with their parents, if included in their parent's application.
- **Public Benefits Access:** Upon receipt of conditional residency, subject to a 5-year bar on access to federal mean-tested public benefits. Upon filing of a battered spouse waiver, victim applicants can continue receive federal and state public benefits should conditional residency end and are eligible for VAWA battered immigrant exceptions from deeming.<sup>53</sup>
- **Employment authorization:** is included in conditional residency. If the battered spouse waiver is filed while the victim is still a conditional resident, employment authorization continues. If the battered spouse waiver is filed after conditional residency ends, applicant receives employment authorization within approximately six months of filing the battered spouse waiver.
- **VAWA confidentiality protections:** The release of information about the filing of the case, the contents of the case is confidential. DHS is precluded from relying upon information provided by the abuser or abuser's family members to deny a victims case, initiate immigration enforcement against a victim, or take any adverse action against the victim.
- **Non-Citizen Crime Victim Protections:**<sup>54</sup> DHS staff are directed to exercise prosecutorial discretion to refrain from taking civil immigration enforcement actions against immigrant crime victims, including both those who have and those who have not filed for crime victim based immigration relief. This approach facilitates access to justice and victim based immigration benefits for non-citizen crime victims.

## **U Visas for Immigrant Crime Victims<sup>55</sup>**

The U-visa is available to noncitizens who are victims of criminal activity.<sup>56</sup> Domestic violence, sexual assault, stalking, human trafficking, child abuse and other family violence cases make up approximately 75% of U visa applications annually. The U visa is a form of humanitarian relief designed to encourage noncitizen crime victims to report crime. Thus, eligibility for a U visa does not require that the perpetrator be a citizen or lawful permanent resident, and does not require any family relationship between the victim and the perpetrator.

### U visa eligibility requirements

- **Victim of Criminal Activity:** The immigrant must be a victim of one of the following statutorily listed criminal activities:
  - Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking, female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18,

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<sup>52</sup> 8 U.S.C. § 1367. See generally Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality*, (October 11, 2013) available at <https://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-vawa-confidentiality>.

<sup>53</sup> Battered spouse waiver applicants receive the same access to federal and state public benefits as VAWA self-petitioners. For state-by-state information on self-petitioner access to federal and state funded public benefits see, NIWAP, *All States Public Benefits Charts and Map (2021)*, available at <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>. Many battered spouse waiver applications will have been granted conditional residency. Conditional residents receive the same access to federal and state public benefits as lawful permanent residents.

<sup>54</sup> See ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>; Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; Memorandum from John Morton, Director, Immigration Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (Jun. 17, 2011), available at <https://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs>.

<sup>55</sup> For a comprehensive toolkit for state court judges on U and T visa certification see Sylvie Sheng et al., *U VISA CERTIFICATION AND T VISA DECLARATION TOOLKIT FOR FEDERAL, STATE AND LOCAL JUDGES, COMMISSIONERS, MAGISTRATES AND OTHER JUDICIAL OFFICERS (2020)*, available at <https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2>.

<sup>56</sup> Any immigrant who is a victim of a U visa criminal activity including those who are documented (e.g., work, student, and diplomatic visa holders, children with Deferred Action for Childhood Arrivals (DACA)) and who are undocumented are eligible to apply for U visa protections.

United States Code); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes or any similar activity in violation of federal, state, or local criminal law.

- Both direct victims and, in limited instances, indirect victims can apply.
- **Information:** The immigrant has information about the criminal activity;<sup>57</sup>
- **Helpfulness:** The immigrant has been, is being, or is likely to be helpful in detection, investigation, prosecution, conviction or sentencing related to the criminal activity;<sup>58</sup>
- **Criminal Activity Occurred in the U.S.** or violated U.S. law;
- **Certification Requirement:**<sup>59</sup> The immigrant must obtain a certification from a state, local or federal, judge, prosecutor, law enforcement officer, child/adult protective services official, state or federal labor law agency, EEOC, FBI or other government agencies with criminal, civil or administrative authority involved in detecting, investigating, prosecuting, convicting, or sentencing individuals involved in criminal activities. Certifications attest to the criminal activity, that immigrant is the victim, helpfulness, and that the criminal activity occurred in the U.S.<sup>60</sup>
- **The Immigrant Applicant for a U Visa Must Additionally Prove:**
  - **Substantial Harm:** The immigrant suffered substantial physical or mental abuse as a result of having been a victim of criminal activity.
  - **Admissibility to the U.S.:** The U visa application includes a full criminal and immigration history background check on each applicant. Victims with criminal histories or other grounds of inadmissibility applying for a U-Visa must obtain a waiver of inadmissibility that DHS has the discretion to issue.<sup>61</sup>

### Protections for U Visa Applicants

- **Deportation:** Initial protection from deportation through VAWA confidentiality<sup>62</sup> shortly after filing. Full formal protection from deportation through deferred action when the victim receives a bona fide determination or wait list approval from DHS, which takes approximately twelve to sixty months.<sup>63</sup>
- **Immigration Benefits for Children, Spouses, and Parents:**<sup>64</sup> Adult U visa applicants can include their spouses, and under 21 year old children in their applications. Child victims can include their spouses, children, parents and unmarried siblings under the age of 18 in their U visa applications. Family members generally receive their U visas at the same time as the applicant crime victim.
- **Public Benefits:** U visa victims and their children are not eligible for federal public benefits until after they are granted lawful permanent residency. For health care purposes U visa applicants who receive bona fide determinations or waitlist approvals will be granted deferred action at which time they become lawfully present which expands their access to prenatal and child health care. Some states offer state funded benefits to U visa applicants. Whether a U visa applicant or U visa holder is eligible for state funded subsidized health care or any other state funded public benefits varies by state.<sup>65</sup>

<sup>57</sup> For children under 16 years old, that his/her parent, guardian, or “next friend” information about the criminal activity.

<sup>58</sup> If the victim is under 16 years old, that the victim’s parent, guardian, or “next friend” has been helpful, is being helpful, or is likely to be helpful.

<sup>59</sup> Certifying officials include, but are not limited to, federal, state or local police, sheriffs, prosecutors, judges, magistrates, adult or child protective services; the U.S. Department of Labor, Equal Employment Opportunity Commission, the U.S. Department of Homeland Security, or state labor investigation boards.

<sup>60</sup> SYLVIE SHENG ET AL., U VISA CERTIFICATION AND T VISA DECLARATION TOOLKIT FOR FEDERAL, STATE AND LOCAL JUDGES, COMMISSIONERS, MAGISTRATES AND OTHER JUDICIAL OFFICERS (2020), available at <https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2>; LESLYE E. ORLOFF ET AL., U VISA CERTIFICATION AND T VISA DECLARATION TOOLKIT FOR LAW ENFORCEMENT AGENCIES AND PROSECUTORS (2021), available at <https://niwaplibrary.wcl.american.edu/pubs/u-t-visa-toolkit-law-enforcement-prosecutor>; LESLYE ORLOFF ET AL., TOOLKIT FOR ADULT PROTECTIVE SERVICES’ USE OF THE U VISA (2014), available at <https://niwaplibrary.wcl.american.edu/pubs/aps-u-visa-toolkit>.

<sup>61</sup> For a full list of inadmissibility grounds waivable in U visa cases see Limayli Huguet et al., *Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases* (Jan. 28, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-vawa-t-u-sijs>.

<sup>62</sup> 8 U.S.C. § 1367. See generally Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality*, (October 11, 2013) available at <https://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-vawa-confidentiality>.

<sup>63</sup> On June 14, 2021, DHS implemented new procedures for U visa adjudications designed to speed up access to deferred action protection from deportation and to work authorization for U visa applicants. The United States Citizenship and Immigration Services (USCIS) will make conduct initial reviews of U visa cases and issues bona fide determinations to victims with valid cases who clear background checks instead of conducting full waitlist adjudications. USCIS, *Bona Fide Determinations Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners* (June 14, 2021) available at <https://niwaplibrary.wcl.american.edu/pubs/u-visa-bona-fide>.

<sup>64</sup> Sylvie Sheng and Leslye E. Orloff, *U Visa Protections for Family Members* (Jul. 3, 2020), available at <https://niwaplibrary.wcl.american.edu/pubs/u-visa-family-member>.

<sup>65</sup> For information on access to government funded assistance by state for U visa victims. See, NIWAP, *All States Public Benefits Charts and Map* (2021) <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>.



- Employment authorization: is granted to applicants who receive bona fide determinations approximately one year to sixty months after the application has been filed. Victims who received waitlist approval or were granted a U visa also receive work authorization.<sup>66</sup>
- VAWA confidentiality protections against release of information about the filing of the case, and the contents of the case. Moreover, DHS is precluded from relying upon information provided by the abuser or abuser’s family members to deny a victim’s case, initiate immigration enforcement against a victim or take any adverse action against the victim.
- Non-Citizen Crime Victim Protections:<sup>67</sup> DHS staff are directed to exercise prosecutorial discretion to refrain from taking civil immigration enforcement actions against immigrant crime victims, including both those who have and those who have not filed for crime victim based immigration relief. This approach facilitates access to justice and victim based immigration benefits for non-citizen crime victims.
- Access to Lawful Permanent Residency: U-Visa recipients can apply for lawful permanent residency after three years by proving:
  - That the victim either continued to provide assistance, or did not unreasonably refuse to provide assistance in the investigation or prosecution of the criminal activity; and
  - The victim’s continued presence in the U.S. is justified on humanitarian grounds, to ensure family unity, or is in the public interest.
- Upon Approval: Victim receives a U visa that lasts for four years.<sup>68</sup>

## T Visas/Continued Presence<sup>69</sup>

The T visa process allows a victim of a severe form of trafficking, who is present in the United States on account of trafficking, and who complies with reasonable requests to assist in the investigation or prosecution of sex or labor trafficking, to remain in the United States.<sup>70</sup> Continued presence is a temporary immigration status that federal law enforcement, prosecution, and other government officials can request on behalf of immigrants identified as victims of human trafficking who are potential witnesses in an investigation or prosecution.<sup>71</sup> It allows a victim of human trafficking to continue to remain present in the United States for two-year increments of time during an investigation, prosecution, or civil court action against the trafficker.<sup>72</sup>

### ► T-Visa

#### A T Visa Applicant Must Prove<sup>73</sup>

- Severe Form of Human Trafficking: The immigrant is or has been the victim of a severe form of human trafficking.<sup>74</sup>
  - Labor trafficking: In order to constitute a “severe form of trafficking” in persons, three elements must be present in cases involving labor or services.

<sup>66</sup> See Katelyn Deibler & Leslye E. Orloff, *U Visa with Background Checks* (Sept. 15, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/u-visa-timeline>.

<sup>67</sup> See ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>; Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; Memorandum from John Morton, Director, Immigration Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (Jun. 17, 2011), available at <https://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs>.

<sup>68</sup> The U visa can be extended if the law enforcement agency that completes the certification confirms that the victim’s presence in the U.S. is required to assist in the investigation or prosecution of the criminal activity. INA § 214(p)(6); 8 U.S.C. § 1184(p)(6).

<sup>69</sup> For a comprehensive toolkit for state court judges on U and T visa certification which includes a discussion of the role judges can play in continued presence, see Sylvie Sheng et al., *U VISA CERTIFICATION AND T VISA DECLARATION TOOLKIT FOR FEDERAL, STATE AND LOCAL JUDGES, COMMISSIONERS, MAGISTRATES AND OTHER JUDICIAL OFFICERS* (2020), available at <https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2>.

<sup>70</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (2000). See also INA § 101(a)(15)(T)(i); 8 U.S.C. § 1101(a)(15)(T)(i); 8 C.F.R. § 214.11(b).

<sup>71</sup> Federal law enforcement or prosecution officials or Federal government agency staff (e.g., Equal Employment Opportunity Commission (EEOC) or U.S. Department of Labor) file continued presence applications for trafficking victims that they or state and local law enforcement, prosecutors, or judges have identified. See USCIS CTR. FOR COUNTERING HUMAN TRAFFICKING, *CONTINUED PRESENCE RESOURCE GUIDE FOR SUBMITTING LAW ENFORCEMENT AGENCIES AND CIVIL ATTORNEYS* (2021), available at <https://niwaplibrary.wcl.american.edu/pubs/continued-presence-resource-guide-2021>.

<sup>72</sup> INA § 214(o)(7)(B)(i); 8 U.S.C. § 1184 (o)(7)(B)(i).

<sup>73</sup> 8 C.F.R. § 214.11(a).

<sup>74</sup> Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”) § 103(8); 22 USC § 7102(11) (2000).

1. The Process through which the labor is attained was by recruiting, harboring, transporting, providing, or obtaining a person for labor;
  2. The Means used to procure the labor included force, fraud, or coercion; and
  3. The End: the labor has to be procured for a certain purpose. Involuntary servitude,<sup>75</sup> peonage, debt bondage,<sup>76</sup> or slavery.
- Sex trafficking: Victims of a “severe form of trafficking” must prove:
    1. The End: A commercial sex act; and
    2. The Means: that was induced by force, fraud, or coercion.
    3. Under 18 year old sex trafficking victims are only required to prove the commercial sex and are not required to prove the means.
  - Physically present on account of trafficking: Means being subjected to trafficking now, when the victim escaped their trafficker, steps they have undertaken to deal with the consequences of having been trafficked, the victim’s involvement in investigations or prosecutions, and whether the victim left and returned to the U.S.<sup>77</sup>
  - Extreme hardship involving unusual and severe harm to the victim will occur if the victim is removed from the United States; and
  - Cooperation:<sup>78</sup> The victim is under 18 years of age and is not required to cooperate; or the victim meets one of the following conditions:
    - The victim has cooperated and is willing to cooperate with reasonable requests for assistance by federal, state, or local law enforcement in investigating or prosecuting crimes related to human trafficking; or
    - The victim is exempt from failing to cooperate with reasonable requests for assistance by law enforcement or prosecutors investigating or prosecuting the trafficker because of physical or psychological trauma.<sup>79</sup>
  - Admissibility to the U.S.: The T visa application includes a full criminal and immigration history background check on each applicant. Victims with criminal histories or other grounds of inadmissibility applying for a T Visa must obtain a waiver of inadmissibility from DHS.<sup>80</sup>

### Protections for T Visa Applicants

- Upon Approval: Victim receives a T visa that lasts for four years<sup>81</sup>
- Deportation: Initial protection from deportation through VAWA confidentiality<sup>82</sup> shortly after filing. Deferred action offering full protection from deportation with receipt of bona fide determination.<sup>83</sup>
- Immigration Benefits for Children, Spouses, and Parents:<sup>84</sup> Adult T visa applicants can include their spouses, and under 21 year old children in their applications; Child victims can include their spouses, children, parents and unmarried siblings under the age of 18 in their T visa applications. Each of the adult or child family members who are included in the trafficking victim’s application as family members can include their own children (of any age) in their T visa applications if the children face a present danger of retaliation as a result of

<sup>75</sup> 22 U.S.C. § 7102(8)

<sup>76</sup> 22 U.S.C. § 7102(7)

<sup>77</sup> 8 CFR §214.11(g)(4) (2016).

<sup>78</sup> See DEP’T OF HOMELAND SEC., T VISA LAW ENFORCEMENT RESOURCE GUIDE (2021), available at <https://niwaplibrary.wcl.american.edu/pubs/t-visa-resource-guide>.

<sup>79</sup> INA § 101(a)(15)(T)(i)(III)(bb), 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb); 8 CFR 214.11(b)(3)(ii).

<sup>80</sup> For a full list of inadmissibility grounds waivable in T visa cases see Limayli Huguet et al., *Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases* (Jan. 28, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-vawa-t-u-sijs>.

<sup>81</sup> The T visa can be extended if the law enforcement agency that completes the certification confirms that the victim’s presence in the U.S. is required to assist in the investigation or prosecution of the criminal activity, or eligible for lawful permanent resident status, or the Secretary of Homeland Security determines an extension is necessary. INA §§ 214(o)(7)(B)(i)-(iii); 8 U.S.C. §§ 1184 (o)(7)(B)(i)-(iii).

<sup>82</sup> 8 U.S.C. § 1367. See generally Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality*, (October 11, 2013) available at <https://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-vawa-confidentiality>.

<sup>83</sup> Richard Flowers, USCIS, *Response to Recommendation 39: “Improving Process for Victims of Trafficking and Certain Criminal Activity: The T and U Visas”* 3 (May 22, 2009), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-may-22-2009-u-t-visas>.

<sup>84</sup> See Sylvie Sheng & Leslye E. Orloff, *T Visa Protections for Family Members* (Jul. 3, 2020), available at <https://niwaplibrary.wcl.american.edu/pubs/t-visa-family-member>.

the victim's escape from trafficking or cooperation with law enforcement.<sup>85</sup> Family members generally receive their T visas at the same time as the applicant trafficking victim.

- **Public Benefits:** Victims who receive bona fide determinations in T visa cases or approved T visas will receive a certification letter from the U.S. Department of Health and Human Services. Trafficking victims granted continued presence automatically receive certification.<sup>86</sup>
- **Employment authorization:** Is provided as part of continued presence. T-visa applicants who did not receive continued presence receive work authorizations with bona fide determinations (≈ 6 months).<sup>87</sup>
- **VAWA confidentiality**<sup>88</sup> protections against release of information about the filing, and contents of the case. DHS is precluded from relying on information provided by abuser or abuser's family members to deny a victim's case, initiate immigration enforcement against a victim or take an adverse action against the victim.
- **Non-Citizen Crime Victim Protections:**<sup>89</sup> DHS staff are directed to exercise prosecutorial discretion to refrain from taking civil immigration enforcement actions against immigrant crime victims, including both those who have and those who have not filed for crime victim based immigration relief. This approach facilitates access to justice and victim based immigration benefits for non-citizen crime victims.
- **Access to Lawful Permanent Residency:** To be eligible to attain lawful permanent residency, an applicant must:
  - Have been admitted to the United States;
  - Have current T-visa status;
  - Have maintained continuous physical presence for 3 years (may be less if an investigation or prosecution is complete) exempting any individual absence of 90 days or less or an aggregate of 180 days or less<sup>90</sup>;
  - Be admissible at the time of application (this provision may be waived);<sup>91</sup>
  - Have good moral character during his or her continuous physical presence;<sup>92</sup>
  - Have complied with any reasonable request for assistance during continuous presence<sup>93</sup> or show extreme hardship upon removal;<sup>94</sup> and
  - Offer evidence to support a favorable grant of lawful permanent residency.<sup>95</sup>

### ► **Continued Presence**

#### A Continued Presence Applicant Must Prove<sup>96</sup>

- **Trafficking Victimization:** The identified individual must be a victim of a severe form of human trafficking; and
- **Witness:** A potential witness in an investigation or prosecution of the trafficker.

<sup>85</sup> Trafficking Victims Protection Reauthorization Act of 2013 § 1221(a); See U.S. CITIZENSHIP & IMMIGRATION SERV., *Victims of Human Trafficking, T Nonimmigrant Status: Eligibility for Qualifying Family Members* (2021), available at <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status>.

<sup>86</sup> For information on access to government funded assistance by state for trafficking victims applying for T visas, see, NIWAP, All States Public Benefits Charts and Map (2021), available at <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>.

<sup>87</sup> See Katelyn Deibler & Leslye E. Orloff, *T Visa Timeline with Background Checks* (Jun. 12, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/t-visa-timeline>.

<sup>88</sup> 8 U.S.C. § 1367. See generally Leslye E. Orloff and Benish Anver, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality*, (October 11, 2013), available at <https://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-va-wa-confidentiality>.

<sup>89</sup> See ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>; Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; Memorandum from John Morton, Director, Immigration Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (Jun. 17, 2011), available at <https://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs>.

<sup>90</sup> 8 CFR § 235.23(a)(3) (2008).

<sup>91</sup> 8 CFR § 245.1(4), (b)(4), (c)(2) and (3) (2008). For a full list of inadmissibility grounds waivable in T visa cases see Limayli Huguet et al., *Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases* (Jan. 28, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-va-wa-t-u-sijs>.

<sup>92</sup> 8 CFR § 245.23(g) (2008).

<sup>93</sup> 8 CFR § 245.23(d), § 245.23(f)(1) (2008).

<sup>94</sup> 8 CFR § 245.23(d), § 245.23(f)(2) (2008).

<sup>95</sup> 8 CFR § 245.23(e)(3) (2008).

<sup>96</sup> USCIS, Center for Countering Human Trafficking, *Continued Presence Resource Guide: for submitting law enforcement agencies and civil attorneys* (July 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/continued-presence-resource-guide-2021>.

- Federal law enforcement, prosecution or government officials will make the initial determination if the individual meets the federal definition of a victim of a severe form of trafficking.
- Continued presence application must be submitted by a federal agency on the victim's behalf. Agencies authorized to submit applications include: DHS (Homeland Security Investigations I HIS); DOJ (FBI, US Attorneys' Offices, Civil Rights Division, and Criminal Section); U.S. Marshals Service, U.S. Department of Labor; and the Equal Employment Opportunity Commission.<sup>97</sup>

#### Protections for Continued Presence Recipients

- Continued Presence authorization lasts for one year and can be renewed if the federal investigation or prosecution is ongoing, and the victim is cooperating with reasonable requests from law enforcement.
- Deportation: Initial protection from deportation through VAWA confidentiality<sup>98</sup> shortly after filing. Protection from deportation upon approval.
- Parole upon Written Request for Certain Family Members: Adults receiving continued presence can include their spouse and under 21 year old children. Child continued presence victims can receive parole for their spouse, child, parent and unmarried sibling under the age of 18.
- VAWA confidentiality protections against release of information about the filing of the case, and the contents of the case. DHS is precluded from relying upon information provided by the abuser or abuser's family members to deny a victim's case, initiate immigration enforcement against a victim or take any adverse action against the victim.
- Non-Citizen Crime Victim Protections:<sup>99</sup> DHS staff are directed to exercise prosecutorial discretion to refrain from taking civil immigration enforcement actions against immigrant crime victims, including both those who have and those who have not filed for crime victim based immigration relief. This approach facilitates access to justice and victim based immigration benefits for non-citizen crime victims.
- Public Benefits: Continued presence is issued along with a U.S. Department of Health and Human Services certification letter which provides access to federal and state public benefits and other services available to refugees.<sup>100</sup>
- Employment authorization: Is provided as part of continued presence.
- Lawful Permanent Residency: Continued presence recipients have no access to lawful permanent residency. To obtain lawful permanent residency they must additionally file for a T visa.

#### **Special Immigrant Juvenile Status (SIJS)<sup>101</sup>**

##### Special Immigrant Juvenile Status Applicant Must Prove

- The immigrant child is unmarried;<sup>102</sup>
- The immigrant child is in the United States;<sup>103</sup>
- The immigrant child is under the age of 21;<sup>104</sup>

<sup>97</sup> See ICE, Center for Countering Human Trafficking, *Continued Presence Resource Guide: for submitting law enforcement agencies and civil attorneys* 8 (July 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/continued-presence-resource-guide-2021>.

<sup>98</sup> 8 U.S.C. § 1367. ICE, Center for Countering Human Trafficking, *Continued Presence Resource Guide: for submitting law enforcement agencies and civil attorneys* 14 (July 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/continued-presence-resource-guide-2021>.

<sup>99</sup> See ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>; Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; Memorandum from John Morton, Director, Immigration Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (Jun. 17, 2011), available at <https://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs>.

<sup>100</sup> For information on access to government funded assistance by state for trafficking victims receiving continued presence, see, NIWAP, *All States Public Benefits Charts and Map* (2021), <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>.

<sup>101</sup> For detailed information for state court judges on SIJS findings see Leslye E. Orloff & Rafaela Rodrigues, *SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A NATIONAL GUIDE TO BEST PRACTICES FOR JUDGES AND COURTS* (2018), available at <https://niwaplibrary.wcl.american.edu/sijs-manual-table-of-contents>.

<sup>102</sup> 8 C.F.R. § 204.11(c)(2).

<sup>103</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(3).

<sup>104</sup> 8 C.F.R. § 204.11(c)(1).

- The immigrant child must submit a state court order containing detailed state court findings addressing issues required by the SIJS statute<sup>105</sup> that was issued by a court with state court jurisdiction over the child<sup>106</sup> when the immigrant child was under the age of majority as defined by state law (generally 18-21 depending on the state’s legal definition of “child”);<sup>107</sup>
  - *Finding 1:* The court has exercised jurisdiction as authorized by state law and issued orders regarding the custody, care or placement of the immigrant child.<sup>108</sup>
  - *Finding 2:* It is not in the child’s best interest to return to the home country, or last habitual residence, of the immigrant child or the immigrant child’s abusive parent. The court applies the state best interests of the child laws to decide who will be granted custody or placement of the child discussing why it is not in the child’s best interests to be placed with the parent who abused, abandoned, or neglected the child. The order makes findings as to why it is not in the child’s best interests to be returned to their home country.<sup>109</sup>
  - *Finding 3:* Reunification with one or both of the immigrant child’s parents is not viable due to either abuse, abandonment, neglect, or a similar basis under state law.<sup>110</sup>
    - The child is the victim of abuse, abandonment or neglect or a similar harm<sup>111</sup> defined in state law perpetrated by one or both of the child’s parents;
    - State courts decide applying state law definitions which harms the child suffered constituted “abuse,” “abandonment,” “neglect,” or another similar harm against which children are protected under state law.<sup>112</sup>
- Criminal History: Most grounds of inadmissibility either do not apply or are waivable for children applying for SIJS. The limited exceptions are adult criminal convictions related to drug trafficking or gang involvement.<sup>113</sup>

### Protections for SIJS Applicants

- Deportation: SIJS applicant children receive protection some protection from deportation upon filing offering protection while their case is being adjudicated. Formal protection from deportation is received when a child whose SIJS application is approved is granted lawful permanent residency.
- Employment Authorization:
  - *Applicants Not in Removal Proceedings:* Children who have filed SIJS petitions and applications for lawful permanent residency at the same time are granted employment authorization while their SIJS cases and lawful permanent residency applications are pending.
  - *Applicants in Removal Proceedings:* Children in removal (deportation) proceedings cannot obtain work authorization until their SIJS application has been approved by USCIS and their application for lawful permanent residency is filed with the immigration judge.

<sup>105</sup> See INA § 101(a)(27)(J); 8 U.S.C. 1101(a)(27)(J) (defining Special Immigrant Juveniles).

<sup>106</sup> 8 C.F.R. § 204.11(c)(3); 8 C.F.R. § 204.11(a).

<sup>107</sup> See U.S. CITIZENSHIP & IMMIGRATION SERV., 6 USCIS-PM J.2, USCIS POLICY MANUAL (2021), available at <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2>.

<sup>108</sup> Leslye E. Orloff, *Chapter II: Details About Special Immigrant Juvenile Status (SIJS) Findings*, SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A NATIONAL GUIDE TO BEST PRACTICES FOR JUDGES AND COURTS 1-3 (2017), available at <https://niwaplibrary.wcl.american.edu/pubs/details-about-special-immigrant-juvenile-status-sijs-findings>.

<sup>109</sup> Meaghan Fitzpatrick and Leslye E. Orloff, Chapter V-6, Quick Reference Guide, SPECIAL IMMIGRANT JUVENILE STATUS FINDINGS IN DEPENDENCY PROCEEDINGS 2-3 (December 18, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/chapter-v-6-dependency-quick-reference>.

<sup>110</sup> Meaghan Fitzpatrick and Leslye E. Orloff, Chapter V-6, Quick Reference Guide, SPECIAL IMMIGRANT JUVENILE STATUS FINDINGS IN DEPENDENCY PROCEEDINGS 3-4 (December 18, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/chapter-v-6-dependency-quick-reference>.

<sup>111</sup> Rafaela Rodrigues and Leslye E. Orloff, *Chapter III: Abuse Abandonment or Neglect: The Role of State Law Definitions in Special Immigrant Juvenile Status*, Findings SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A NATIONAL GUIDE TO BEST PRACTICES FOR JUDGES AND COURTS 1-5 (December 19, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/abuse-abandonment-or-neglect> (apply state law to facts of abuse occurring in abroad, in the child’s home country, or in the United States).

<sup>112</sup> Rafaela Rodrigues and Leslye E. Orloff, *Chapter III: Abuse Abandonment or Neglect: The Role of State Law Definitions in Special Immigrant Juvenile Status Findings*, SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A NATIONAL GUIDE TO BEST PRACTICES FOR JUDGES AND COURTS 6-7 (December 19, 2017) <https://niwaplibrary.wcl.american.edu/pubs/abuse-abandonment-or-neglect>.

<sup>113</sup> Leslye E. Orloff, *Special Immigrant Juveniles (SIJS): Inadmissibility Factors That Do and Do Not Apply to SIJS Cases* (June 12, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-factors-sijs>; Limayli Hugué et al., *Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases* (Jan. 28, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-vaawa-t-u-sijs>.

- **Public Benefits:** SIJS applicant children are lawfully present for health care purposes, can purchase health care on the exchanges and may be eligible for state funded healthcare subsidies. Once SIJS children are granted lawful permanent residency they become eligible for some federal and state funded public benefits.<sup>114</sup>
- **Non-Citizen Crime Victim Protections:**<sup>115</sup> Child victims of abuse, abandonment, or neglect or similar harms are treated and protected as victims of crime and abuse receiving protections akin to those designed to protect immigrant victims of domestic violence, sexual assault, stalking, human trafficking and other crimes. DHS staff are directed to exercise prosecutorial discretion to refrain from taking civil immigration enforcement actions against immigrant crime victims, including both those who have and those who have not filed for crime victim based immigration relief. This approach facilitates access to justice and victim based immigration benefits for non-citizen crime victims.
- **Family Members:** SIJS Children cannot include any family members in their applications and can never sponsor immigration applications for any of their parents.<sup>116</sup>
- **Lawful Permanent Residency:** Upon approval SIJS children can apply for lawful permanent residency.

## Employment Authorization for Battered Spouses of Certain Visa Holders<sup>117</sup>

### Battered Spouses Must Prove<sup>118</sup>

- Applicant is the an abused immigrant spouse with a visa that was granted allowing them to reside in the United States to accompany their spouse who was granted a work visa under one of the following programs:
  - INA 101(a)(15)(A)(diplomats and government officials);
  - INA 101(a)(E)(iii)(Australian in specialty occupations);
  - INA 101(a)(G)(international organizations and foreign government representatives); or
  - INA 101(a) (H)(specialty occupation workers,<sup>119</sup> temporary workers agricultural and non-agricultural, and special exchange visitors).
- The immigrant spouse was battered or has been subjected to extreme cruelty perpetrated by their work visa holder spouse during the marriage and after the abused immigrant spouse was admitted to the U.S. on a visa issued under INA section 101(a)(15)(A), (E)(iii), (G), or (H);
- The abused immigrant spouse was married to the work visa holder spouse; or
- Was married to a work visa holder spouse and
  - The spouse died within two years of filing the EAD application;
  - The spouse lost their work visa due to an incident of domestic violence; or
  - The marriage to the abusive work visa holder spouse was terminated within the two years prior to filing for the INA section 106 employment authorization for abused spouses of work visa holders, and there is a connection between the termination of the marriage and the battery or extreme cruelty;
- The abused immigrant spouse was last admitted with a spousal visa under one of the following sections INA section 101(a)(15)(A) (E)(iii), (G), or (H); and

<sup>114</sup> For state-by-state information on SIJS children's access to federal and state funded public benefits see, NIWAP, All States Public Benefits Charts and Map (2021), available at <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>.

<sup>115</sup> See ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>; Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; Memorandum from John Morton, Director, Immigration Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (Jun. 17, 2011), available at <https://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs>.

<sup>116</sup> INA § 101(a)(27)(J)(iii)(II).

<sup>117</sup> NIWAP and RAKSHA, Spouses Battered or Subjected to Extreme Cruelty by A, E (3), H or G Visa Holders Are Eligible to Apply for Work Authorization (February 14, 2017), available at <https://niwaplibrary.wcl.american.edu/work-authorization-abused-visa-holder-spouses>.

<sup>118</sup> See USCIS Policy Memorandum, *Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants: Revisions to the Adjudicator's Field Manual (AFM); Revision of Chapter 30.13 (AFM Update AD 16-01)* (Mar. 8, 2016), available at <https://niwaplibrary.wcl.american.edu/pubs/h-visa-765-2>.

<sup>119</sup> Includes but is not limited to work-visa holders working in the following fields: computer related, architecture, engineering, education, physicians, health care professionals, accountants, and scientists. USCIS, *Characteristics of H-1B Specialty Occupation Workers Fiscal Year 2017 Annual Report to Congress October 1, 2016 – September 30, 2017* 16 (April 9, 2018), available at [https://www.uscis.gov/sites/default/files/document/foia/Characteristics\\_of\\_H-1B\\_Specialty\\_Occupation\\_Workers\\_FY17.pdf](https://www.uscis.gov/sites/default/files/document/foia/Characteristics_of_H-1B_Specialty_Occupation_Workers_FY17.pdf).

- The abused immigrant spouse currently resides in the United States.<sup>120</sup>

### Protections for Battered Spouse of Certain Visa Holders EAD Applicants

- **Deportation:** applicants have a visa (G, H, A, or E-iii). However, if there is a divorce from the abusive work visa holder spouse, the victim's visa will terminate. Immigrant spouses and their children who have been subjected to battering or extreme cruelty by their visa holder spouses will qualify for U visas and should file U visa applications at the same time as or soon after filing their work authorization applications under these protections which provide work authorization while they await receipt of work authorization as part of their U visa case.
- **Public benefits:** recipients of employment authorization are not eligible for any federal public benefits. Some state fund health coverage for children and pregnant women regardless of immigration status. Additionally, work authorization recipient battered immigrants can access benefits and services that are open to all persons without regard to immigration status.<sup>121</sup>
- **Employment Authorization:** issued for a period of two (2) years. USCIS may approve requests for renewals in two-year intervals.<sup>122</sup> It takes applicants about 5 to 7 months to receive the employment authorization.
- **VAWA Confidentiality:** protections against release of information about the filing of the case, and the contents of the case. DHS is precluded from relying upon information provided by the abuser or abuser's family members to deny a victim's case, initiate immigration enforcement against a victim or take any adverse action against the victim.
- **Non-Citizen Crime Victim Protections:**<sup>123</sup> DHS staff are directed to exercise prosecutorial discretion to refrain from taking civil immigration enforcement actions against immigrant crime victims, including both those who have and those who have not filed for crime victim based immigration relief. This approach facilitates access to justice and victim based immigration benefits for noncitizen crime victims.
- **Lawful Permanent Residency:** recipients are not eligible<sup>124</sup> and will need to file for a separate U visa application which includes a path to lawful permanent residency.

### **Protections for Victims and Witnesses**<sup>125</sup>

For over two decades since 2000 the Department of Homeland Security has implemented immigration enforcement policies directing its immigration enforcement officers and immigration trial attorneys to exercise prosecutorial discretion not to enforce immigration laws against immigrant victims of crime and abuse. These policies offer protection to both documented and undocumented victims and witnesses and apply in addition to and

<sup>120</sup> See INA § 106; 8 U.S.C. § 1105(a). See also U.S. CITIZENSHIP AND IMMIGRATION SERV., PM-602-0130: *Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants* (Mar. 8, 2016), available at <https://niwaplibrary.wcl.american.edu/pubs/h-visa-765-2>.

<sup>121</sup> For information on access to government funded assistance by state see, NIWAP, All States Public Benefits Charts and Map (2021) <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>. Work visa holder spouses are considered lawfully present for public benefits eligibility purposes which in most states provides them access to subsidized health care for children and pregnant women. See *Centers for Medicare and Medicaid Services (CMS): Medicaid and CHIP Coverage of "Lawfully Residing" Children and Pregnant Women* <https://niwaplibrary.wcl.american.edu/pubs/pb-gov-hhslawfullyresidingmedicaid-07-01-10-also-in-qualified-immigrants>; and State-Funded Public Benefits Comparison Chart (December 22, 2021) <https://niwaplibrary.wcl.american.edu/pubs/state-benefits-comparison-chart>.

<sup>122</sup> See U.S. CITIZENSHIP AND IMMIGRATION SERV., PM-602-0130: *Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants* (Mar. 8, 2016), available at <https://niwaplibrary.wcl.american.edu/pubs/h-visa-765-2>.

<sup>123</sup> See ICE Directive No. 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>; Memorandum from John Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/trasvina-opla-interim-guidance-civil-enforcement-priorities-5-27-21>; Memorandum from John Morton, Director, Immigration Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (Jun. 17, 2011), available at <https://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs>.

<sup>124</sup> See INA § 101(15)(A), (E)(iii), (G), (H).

<sup>125</sup> ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (August 10, 2021), <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>; ICE Confirms Continued Effectiveness of Victim Witness Protections (April 19, 2019), <https://niwaplibrary.wcl.american.edu/pubs/ice-confirmation-of-continued-effect-victim-witness-memo>; ICE Directive No. 10076.1, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), <https://niwaplibrary.wcl.american.edu/pubs/dhs-memo-june-17-2011-prosecutorial-discretion-for-victims>; Memorandum from William I. Howard, Principal Legal Advisor, VA WA 2005 Amendments to Immigration and Nationality Act and 8 U.S.C. § 1367 (Feb. 1, 2007), <https://niwaplibrary.wcl.american.edu/pubs/iceopla-va-wa-confidentiality-2007-foia>; Memorandum from Julie L. Myers, Assistant Secretary of ICE, *Prosecutorial and Custody Discretion* (Nov. 7, 2007); Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion* (Nov. 17, 2000), <https://niwaplibrary.wcl.american.edu/pubs/exercising-prosecutorial-discretion>.

whether or not an immigrant victims files for one of the victim based forms of immigration relief described in this bench card. Immigration and Customs Enforcement in 2021 in discussing these policies confirmed that:

“The duty to protect and assist noncitizen crime victims is enshrined in, among other laws, the Violence Against Women Act (VAWA), the Trafficking Victims Protection Act (TVPA), and their respective reauthorizations. Congress created victim-based immigration benefits to encourage noncitizen victims to seek assistance and report crimes committed against them despite their undocumented status. When victims have access to humanitarian protection, regardless of their immigration status, and can feel safe in coming forward, it strengthens the ability of local, state, and federal law enforcement agencies, including ICE, to detect, investigate, and prosecute crimes.”

The victim and witness protections under U.S. immigration policies require immigration enforcement officials and immigration trial attorneys to ---

“[E]xercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice... To avoid deterring individuals from reporting crimes and from pursuing actions to protect their civil rights, ICE officers, special agents, and attorneys are reminded to exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints. Particular attention should be paid to:

- victims of domestic violence, human trafficking, or other serious crimes;
- witnesses involved in pending criminal investigations or prosecutions;
- plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and
- individuals engaging in a protected activity related to civil or other rights... who may be in a non-frivolous dispute with an employer, landlord, or contractor.”<sup>126</sup>

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<sup>126</sup> CE Directive No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs 1 (June 17, 2011), <https://niwaplibrary.wcl.american.edu/pubs/dhs-memo-june-17-2011-prosecutorial-discretion-for-victims>