

Immigration Law Protections for Immigrant Victims of Violence Against Women Act: The Intersection with Family Courts and Child Custody

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Learning Objectives

- To understand the range of immigration benefits available when a party is a non-citizen victim of domestic violence, sexual assault, human trafficking or other U-visa listed crime
- To identify how issues regarding immigration status can arise in family court cases and the importance of courts having correct information about immigration and benefits options for immigrant victims
- To understand the potential types of family court decisions that can have unintended consequences for immigrant victims

Immigration-Related Abuse

- Keeps victims from
 - Seeking help
 - Calling police
 - Cooperating in prosecutions
 - Getting protection order
- Affects victims documented and undocumented
- 65% of immigrant victims report some form of immigration related abuse (NIJ)
- Locks victims in abusive relationships

Immigration Status Affects Willingness to Call Police

- Significant difference between victims willingness to call the police related to their immigration status:
 - Stable (citizen/permanent resident) - 34.4%
 - Temporary (temporary visa) - 16.7%
 - Undocumented - 14.8%

Immigration Relief for Immigrant Victims of Domestic Violence, Sexual Assault, Child Abuse and Human Trafficking

Potential Immigration Remedies

- Applications filed with DHS
 - VAWA self petition (spouse/child/elder abuse)
 - Battered spouse waivers (spouse/child abuse)
 - U-visa (crime victims)
 - T-visa (victims of trafficking)
 - Special Immigrant Juveniles
- Forms of relief from removal- granted by Immigration Judge
 - VAWA cancellation of removal
 - VAWA suspension of deportation

Battered Spouse Waiver

Conditional Residence & Battered Spouse Waivers

- Battered Spouse Waiver
- Waives the joint filing requirement [Form I751]
- Requires proof of
 - Good faith marriage to U.S. citizen *and*
 - Battered or subjected to extreme cruelty by the citizen spouse

Battered Spouse Waivers

- The battered spouse waiver allow victim to obtain lawful permanent residency status without:
 - Relying on the batterer
 - The batterer having any knowledge of the case the victim has filed
 - Having to remain in abusive relationship for 2 years

Family Violence Victims' VAWA Self-Petition For Lawful Permanent Residency



General VAWA Self-Petitioning Requirements

- Subjected to Battery or Extreme Cruelty
- By a U.S. Citizen or Permanent Resident
 - Spouse/former spouse
 - Parent/current step-parent
 - adult son/daughter (over 21)
- With Whom self-petitioner resided
 - No time period required
- Good Moral Character
- Good Faith Marriage

Forms of Extreme Cruelty

- Emotional Abuse
- Economic Abuse
- Sexual Abuse
- Coercion
- Deportation threats
- Immigration related abuse
- Intimidation
- Social Isolation
- Degradation
- Possessiveness
- Harming pets

VAWA self-petitioning available

- Must file within 2 years of marriage termination
- When abuser has committed bigamy
- Child abuse victim has up to age of 25 to file
- Abused step-child can obtain benefits
 - If file before parents' divorce is final
- *Any credible evidence* standard of proof
- Police report, law enforcement certification, protection order, medical records NOT required

Timing of VAWA self-petitioner's application for lawful permanent residency

- Immediately eligible if the abuser is a US citizen
 - Spouse
 - Parent
 - Adult (21+) son or daughter
- 5 – 7 year wait if abuser is a lawful permanent resident
 - Spouse
 - Parent
 - During wait (deferred action & work authorization)

VAWA Cancellation of Removal and Suspension of Deportation

VAWA Cancellation Requirements

- Relationship to abusive party
 - Same as VAWA self-petitioner or the following:
 - Mother of child abused by the child's other parent who is a citizen or lawful permanent resident
 - Over 2 years since divorce from the abuser
- Battered or Subject to Extreme Cruelty
- Good moral character
- Extreme Hardship to return to the home country
- Three years physical presence in the U.S.
- Not inadmissible

U-Visas for Immigrant Crime Victims

The Crime Victim U-visa Requirements

- Victim of a qualifying criminal activity
- Has been, is being, or is likely to be helpful
- Suffered substantial physical or mental abuse as a result of the victimization
- Possesses information about the crime
- Crime occurred in the U.S./violated U.S. law
- A U-visa certification signed by a government official must be included with the application

Who can certify?

- Police officer
- Prosecutor
- *Judge*
- Immigration Officer
- Other authority with responsibility for investigation or prosecution of criminal activity
 - Adult/child protection worker
 - EEOC, US Department of Labor
 - State Departments of Labor
 - University/Military Police



What criminal activities are covered under the “U” visa?

- **Rape**
- **Torture**
- **Trafficking**
- **Incest**
- **Domestic violence**
- **Sexual assault**
- **Prostitution**
- **Female genital mutilation**
- **Involuntary servitude**
- **Slave trade**
- **Being held hostage**
- **Kidnapping**
- **Abduction**
- **Peonage**
- **False Imprisonment**



Criminal Activities Covered -- Continued

- **Blackmail**
- **Extortion**
- **Manslaughter**
- **Murder**
- **Felonious assault**
- **Witness tampering**
- **Obstruction of justice**
- **Perjury**
- **Attempt, conspiracy or solicitation to commit any of these crimes**
- **Any similar activity**

The U-visa Process

- Certification from government official
- Application
- Approval
- U-Visa status 4 years
- Some will qualify for lawful permanent residence
- U.S. citizenship: Only after legal permanent residency for 5 years + proof of good moral character

Which U-Visa Recipients Can Obtain Lawful Permanent Residence?

- Did not unreasonably refuse to cooperate in the detection, investigation or prosecution of criminal activity; AND
 - Humanitarian need; OR
 - Family unity: OR
 - Public Interest
- Homeland Security reviews cooperation or determines whether the victim's non-cooperation was unreasonable

Judges as Certifying Officials

- Judges in family, criminal or administrative law courts can sign certifications
- Certifying victim's helpfulness or willingness to be helpful with regard to criminal activity in any of the following:
 - Detection
 - Investigation
 - Prosecution
 - Conviction
 - Sentencing

What the U-visa Certification Form Asks From a Certifier?

- What criminal activity occurred?
- Identify the victim
 - Note injuries observed, if any
- Helpfulness of the victim
 - Current
 - Past or
 - Willingness to be helpful
- Any family members implicated in the crime

Special Immigrant Juvenile Status

Special Immigrant Juvenile Status

Special immigrant juvenile status requires a finding by a court of juvenile jurisdiction (e.g. dependency, guardianship, probate, delinquency) in the U.S. that:

- The juvenile is dependent on the court;
- Reunification with one or both parents is not viable due to abuse, neglect, or abandonment or a similar basis; &
- It would not be in the best interest of the juvenile to be returned to the juvenile's country of origin.
- The juvenile must concurrently apply for lawful permanent resident status
- Juvenile court ruling required for application
- DHS decision to grant or deny SJI status
- Inadmissibility applies

VAWA Confidentiality and Its Implications for State Courts

VAWA Confidentiality

- DHS barred from making inadmissibility or deportability decisions based solely upon information provided by abusers, including family members of abusers (any victim)
- Enforcement locational prohibitions (any victim)
- DHS cannot disclose VAWA information to anyone (except in limited circumstances)
 - (protects applicants for immigration benefits)

INA § 239(e) –DHS must disclose when filing a removal case if any part of the enforcement action occurred a prohibited location --

- A shelter
- Rape crisis center
- Supervised visitation center
- Family justice center
- Victim services program or provider
- Community based organization
- Courthouse in connection with any
 - Protection order case, child custody case, civil or criminal case involving or related to domestic violence, sexual assault, trafficking, stalking

Immigration and Customs Enforcement VAWA Confidentiality Policy

- ICE officers are discouraged from making arrests at sensitive locations
- Only with a clear evidence that the person is not entitled to victim based benefits and with supervisor approval can immigration enforcement take place at a prohibited location
- If VAWA confidentiality is violated the immigration judge can dismiss the immigration case that resulted from the violation

Prohibition on disclosure of information about a VAWA confidentiality protected case

- Bars disclosure of
 - Information about the existence of the case
 - Any information contained in the case
 - Action taken on the case by DHS
- Limited exceptions
 - Legitimate law enforcement purposes
 - For judicial review (in immigration court only)
 - Statistical data collection
 - Benefit granting or public benefits purposes
 - Congressional judiciary Chairs and Ranking Members for oversight without personal or locational information
 - With the victim's permission DHS may communicate with victim's services organizations to secure assistance for the victim

Hawke vs. DHS

208 U.S. District Lexis 87603, Sept. 29, 2008

- Judicial review exception applies only to reviews of immigration decisions
- No exception to VAWA confidentiality that would allow civil, family or criminal courts access to this information
- Implications: Civil and family court judges should not allow or facilitate access to information that federal law bars DHS from releasing including through
 - Discovery
 - Motions seeking release of protected information
 - Cross-examination
- Courts are granting protective orders & motions in limine

VAWA Confidentiality Violations

- Filed with and investigated by the DHS Office of Civil Rights and Civil Liberties
- Each violation sanctions
 - Disciplinary action and/or
 - \$5,000 fine for the individual
- Dismissal of the immigration proceeding against the non-citizen
- Violations include
 - Seeking or using information from a prohibited source
 - Disclosing or permitting disclosure of information in or about any VAWA, T or U visa case
 - Making a false certifications in a Notice to Appear

Protection Orders and Immigrant Victims

Protection Orders and Immigration Status

- Issuance of a protection order has no effect on immigration status of the abuser
- Violation of a protection order is a deportable offense
 - Violations of “ the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable”
 - Not custody and support provisions
- Dangers for victims of a protection order issued against her

Creative Protection Order Remedies

- Catch all provisions included in all state statutes
- Offer any additional relief that may potentially
 - Curb future abuse, harassment
 - Interfere with abuser/perpetrators ability to exert power and/or control
 - Offer victim remedy-relief for past abuse
 - Help victim overcome victimization and build new post abuse life
- Nexus With Victimization
- Opportunity for courts to counter immigration related abuse

Suggestions For Court Orders That Help VAWA Applicants -- Examples

- Cooperate in and not withdraw any immigration case filed on the victim's behalf
- Turn over documents/evidence in abuser's control that she needs for her immigration case. E.g.,
 - Passports
 - Identification documents
 - Copies of documents from any immigration case filed on the victim's or the children's behalf
 - Love letters
 - Family photos

Catch-all Provisions Preventing Immigration Related Abuse

- Defendant must obtain prior court approval before contacting any government agency (immigration officials, CPS, IRS, Welfare etc.) concerning the petitioner except
 - Police emergency
 - Subpoena
- Cooperate in and not withdraw any case he has filed for petitioner with immigration authorities

Other Protection Order Provisions Helpful to Non-Citizen Victims

- Full contact protection orders for battered immigrants who stay (order no future violence + counseling)
- To Deter Parental Kidnapping
 - Not remove the children from the court's jurisdiction
 - Turn over passports of parties and/or children
 - Sign statement that no visa or passport should be issued to children absent court order.
 - Supervised visitation
 - Bond

Important Economic Provisions

- Maintain medical, car, house insurance, mortgage, rent, utility and/or debt payments
- Child support and spousal support
- Injunctions against third party institutions not to respond to acts by the abuser that would harm her (banks, retirement funds, utility companies)
- Taxes
 - Turn over income tax statements
 - Victim named trustee for receipt of tax return funds, respondent ordered to sign check
 - Victim awarded exclusive right to claim children as tax exemptions
 - Respondent pays victim $\frac{1}{2}$ of return

Immigration Status Issues and Family Law Cases

**Special considerations for cases involving
non-citizen family members**

Immigration status not relevant to establishing jurisdiction in family court cases

- Protection order case
 - domestic violence crime committed in state or
 - victim needs protection in state
- Divorce case
 - residency of party in state
 - Legal immigration status not required to establish residency under state family laws
- Custody case
 - (UCCJEA, Federal PKPA, Hague Convention) often the home state of children
- Child support case
 - where child or non-custodial parent lives

- VAWA self-petitioners
 - Must file within two years of final divorce
- Spouses and children of visa holders ends legal immigration status in the United States:
 - Students, Persons with legal work visas, Diplomats
- Divorce cuts off access to lawful permanent residency for spouses and children of people seeking lawful permanent residency based on:
 - Employment based
 - Asylees
 - Family based
 - Cancellation of removal applicants

Annulment Instead of Divorce

- Annulment can lead to a marriage fraud finding that
 - Permanently bars approval of any visa petition
 - Is a ground for deportation
 - Can lead to an unfavorable exercise of discretion by an immigration judge not to immigration relief

- No state family code lists immigration status or English language competency as a factor
- All have provisions that encourage courts not to award custody to batterers
- As a general rule immigration status is not relevant to
 - Core primary caretaker determination
 - Evaluation of parenting skills
- Immigration information distracts the judge from focusing on best interest factors listed in the statute
- Many immigrant victims involved in custody cases will qualify for VAWA, T or U visa immigration relief but do not know it.
- Which party is raising the immigration issue and why?

- “Parties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce or child support proceedings.”
- “Batterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution for battering and to shift the focus of family court proceedings away from their violent acts...When the judicial system condones these tactics, children suffer.”
- “This ... will ensure that children of immigrant domestic violence victims will benefit from ...laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all other children.”

- Lack of legal immigration status does not mean
 - Deportation is eminent
 - Parent is likely to flee U.S.
 - Victim parent does not qualify for immigration relief
- Legal immigrants/naturalized citizens are more likely to flee with children
 - When have been threats of kidnapping children
 - When they are dual nationals
 - Because they can travel freely to and from U.S.
- Need to be awarded custody to give child immigration benefits and citizenship
 - Parent can apply for child to have immigration benefits whether or not they have custody

- Undocumented parent cannot financially support child
 - Could the parent making claim have filed immigration papers for the immigrant parent?
 - Immigrant victim parents are likely eligible for immigration benefits that include:
 - legal work authorization
 - some access to benefits
 - Child support can be ordered
- Undocumented parent cannot receive public benefits for the child
 - Incorrect, they can apply for “child only” benefits

- Court should treat as in any other case
- Evidence court should examine includes evidence of the victim's:
 - Connections to the US
 - Connections to the home country
 - Plans to leave
 - History of traveling to and from the home country
 - Whether she has purchased airline tickets
- Immigration status may be relevant to determine
 - Whether her deportation is imminent
 - Whether the parent making allegations could have filed immigration papers for the abused immigrant parent and did not
 - The history of immigration related abuse in the relationship
 - Expert testimony on these issues useful to the court

Special Custody Issues When Immigrant Parents Are for Detained

Emerging Trend: Termination of Parental Rights of Immigrant Parents

- Immigration enforcement against an immigrant parent can lead to loss of child and placement in foster care
- Loss of child when immigrant parent seeks services
 - Example: Hospitals
- Many cases problem compounded by hospitals, police, child protective services and courts not providing
 - Meaningful language access
 - Recent letter from Attorney General Eric Holder to Courts on language access to courts

How Victims End Up In DHS Custody

- Abusers/crime perpetrators report them
- Employers or co-workers report them
- Traffic stops
- Immigration enforcement at the worksite
- Reports by CPS
- Reports by welfare worker
- Reports by health care providers
- Reports by others
- Victims call the police for help and police
 - Make a dual arrest
 - Arrest the victim
 - Language access issues

Immigrant Parents' Constitutional Right to Custody of Their Children

- Constitution right to custody absent finding of unfitness
- Overriding presumption that parent child relationship is constitutionally protected and
- In child's best interest to stay with/be reunited with their parent
- Applies to all families without regard to
 - Immigration status; and
 - Whether or not the parent is
 - In immigration detention or deported
- Child's best interests not comparison of natural vs. adoptive parent's
 - cultures, countries, or financial means

Challenges of Reunification for Immigrant Parents and Victims

- Lack of language access to system
- Lack of information about immigrant parent victim's legal rights
- Limited or lack of eligibility for public-funded services
- Limited timeframe for filing termination of parental rights (TPR) petitions under the Adoption and Safe Families Act
 - conflict with immigration case time frames
- DHS not bringing immigrants in custody to family courts

Lessons Learned

- Due Process: Court documents and proceedings in immigrant parents' native languages
- Improper for Court to weigh where children "better off"
- Consular Notification, Consular Notification, Consular Notification!!!
- Preventive Measure: Execute Power of Attorney

Legal Options for Immigrant Victims of Human Trafficking

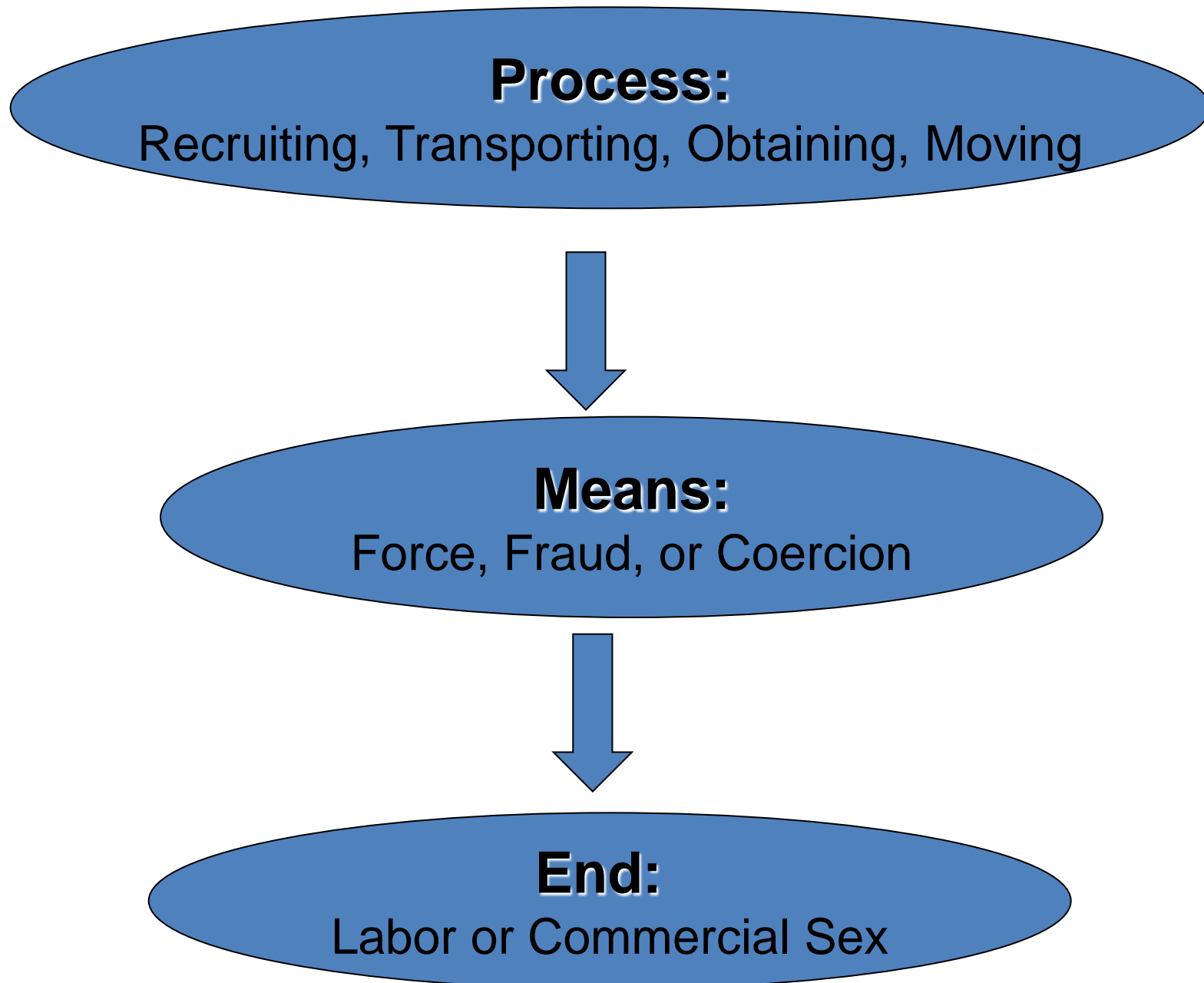
A Severe Form of Trafficking in Persons

(22 USC sec. 7102)

- **Labor Trafficking:** the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of **force, fraud, or coercion** for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery; or
- **Sex Trafficking:** the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act in which a commercial sex act is induced by **force, fraud, or coercion**, or in which the person induced to perform such act has not attained 18 years of age.

Force, Fraud, or Coercion

- Debt servitude
- Surveillance
- Physical barriers
- Threats to safety
- Physical isolation
- Psychological isolation
- Threats to deport or report to law enforcement
- Holding passports or identity documents
- Threats to family members



Trafficking Smuggling

- a crime against a person
- contains as element of coercion
- entails subsequent exploitation
- Treats trafficked people as victims.
- an unauthorized border crossing
- contains no element of coercion
- facilitated entry by another person
- Treats smuggled people as criminals

For further assistance

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