

# Immigrant Crime Victims and Immigrant Children

Judge Rosemary Collins (Ret.) and Leslye E. Orloff  
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# Introductions

- Judge Rosemary Collins (Ret.)
  - Presiding Judge Family Court Rockford, Illinois
- Leslye Orloff
  - NIWAP, American University, Washington College of Law

# Learning Objectives

By the end of this training you will be better able to:

- Know how accurate immigration law information results in just and fair outcomes in state courts
- Recognize facts that indicate a party qualifies for crime victim related forms of legal immigration status
- Know how Violence Against Women Act (VAWA) confidentiality laws impact discovery and courthouse immigration enforcement
- Be able to sign U and T visa certifications, understanding this role that Congress created for judges
- Make appropriate findings in state court cases that immigrant children filing for Special Immigrant Juvenile Status must obtain form a state court

What countries do the  
immigrants you see in your  
courts come from?

# National Demographics (2017)\*

- ❖ Total foreign born population – 44,525,855\*
- ❖ 13.7% of the state's 325.7 million people are foreign born
  - 49.3% naturalized citizens
  - ≈25.3% lawful permanent residents or temporary status\*\*
  - ≈25.4% undocumented\*\*
- ❖ 43.1% rise in immigrant population from 2000 to 2017
- ❖ 26.0% of children in the state under age 18 have 1 or more immigrant parents
  - 88.0% of children with immigrant parents in the state are U.S. native.

*\*Source: <http://www.migrationpolicy.org/data/state-profiles/state/demographics/US>  
(Feb. 2018)*

*\*\*DHS Population Estimates (2015)*

# National– Countries/Regions of Origin and Limited English Proficiency (2017)\*

- ▶ Latin America –50.4%
  - ▶ Mexico (25.3%)
  - ▶ Caribbean (9.9%)
  - ▶ South America (7.2%)
  - ▶ El Salvador (3.1%)
- ▶ Asia – 27.7%
  - ▶ China/Taiwan (6.4%)
  - ▶ India (5.9%)
  - ▶ Philippines (4.5%)
  - ▶ Vietnam (3.0%)
- ▶ Europe –10.8%
- ▶ Africa – 5.1%
- ▶ Middle East – 3.5%
- ▶ Canada – 1.8%
- ▶ Oceania – 0.6%

## Limited English Proficiency

(Speak English less than very well)

- ▶ Naturalized citizens (37.3%)
- ▶ Non-citizens (58.8%)

## Languages Spoken at Home

- ▶ Spanish (41,017,620)
- ▶ Chinese (3,462,091)
- ▶ Tagalog (1,746,344)
- ▶ Arabic (1,227,768)
- ▶ French (1,202,060)
- ▶ Russian (936,344)
- ▶ German (917,812)

*\*Source: <http://www.migrationpolicy.org/data/state-profiles/state/demographics/US>  
(Feb. 2018)*

# **DYNAMICS OF DOMESTIC VIOLENCE EXPERIENCED BY BATTERED IMMIGRANTS**

# Department of Homeland Security

- DHS Dynamics Video





# Coercive Control Over Immigration Status

- Among abusive spouses who could have filed legal immigration papers for survivors:
  - 72.3% never file immigration papers
  - The 27.7% who did file had a mean delay of **3.97 years.**

Hass, Dutton and Orloff (2000). "Lifetime prevalence of violence against Latina immigrants: Legal and Policy Implications." *International Review of Victimology* 7 93113

- 65% of immigrant survivors report some form of immigration related abuse (NIJ, 2003)

\*Edna Erez and Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003)

# Connection Between Abuse and Control Over Immigration Status

- Abuse rates among immigrant women
  - Lifetime as high as 49.8%
  - Those married to citizens and lawful permanent residents – 50.8%
  - U.S. citizen spouse/former spouse abuse rate rises to 59.5%
- Almost three times the national average

Hass, G. A., Ammar, N., Orloff, L. (2006). Battered Immigrants and U.S. Citizen Spouses

# Sexual Assault Rates Among Immigrant Women

- High school aged immigrant girls
  - Twice as likely to have suffered sexual assault as their non-immigrant peers, including recurring sexual assault
  - Decker, M., Raj, A. and Silverman, J., Sexual Violence Against Adolescent Girls: Influences of Immigration and Acculturation, 13 Violence Against Women 498, 503 (2007).

# Immigration Related Abuse

- 10 times higher in relationships with physical/sexual abuse as opposed to psychological abuse\*
- May predict abuse escalation
- Corroborates existence of physical and sexual abuse

\*Mary Ann Dutton, Leslye Orloff, and Giselle Hass, Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications (Summer 2000)

## When Victims are Subject to Immigration Enforcement the Cause is... (2013 and 2017)

- Perpetrators actively reporting for removal victims with pending immigration cases
  - VAWA self-petitioners 38.3%; U visa 25%
- Perpetrators got the victim arrested for domestic violence
  - VAWA self-petitioners 15.4% (2013)-17% (2017); U visa 7.5%(2013)-36% (2017)

Krisztina E. Szabo, David Stauffer, Benish Anver, *Authorization For VAWA Self-Petitioners and U Visa Applicants*, NIWAP (Feb. 12, 2014) and Rodrigues et al. *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey* (May 3, 2018)

# Historical Development of Battered Immigrant and Immigrant Crime Victim Protections

- Spousal sponsorship rooted in the legal concept of marriage
- 1907-1922 US citizen woman lost citizenship if married foreign born husband
- In 1952, the INA became gender neutral, but kept sponsorship scheme
- Control of immigration process could be in hands of a batterer, abusive employer, trafficker
- **VAWA, T and U-visa, SIJS** immigration provisions were enacted to address the problem

# Purpose of Crime Victim Protections

Congress enacted VAWA self-petitioning (1994), the U and T visas (2000) & Special Immigrant Juvenile Status (SIJS) (1990,2008) to:

- Improve community policing and community relationships
- Increase prosecution of perpetrators of crimes against immigrant victims
- Allow victims to report crimes and seek help from police, prosecutors, and courts without fear of deportation
- Improve access to justice in family/criminal/civil courts for immigrant victims of
  - domestic & sexual violence, stalking, human trafficking and child/elder abuse
- Enhance victim safety
- Keep communities safe

# **Many Immigrant Victims of Domestic Violence, Sexual Assault and Other Crimes Are Eligible for Immigration Relief**

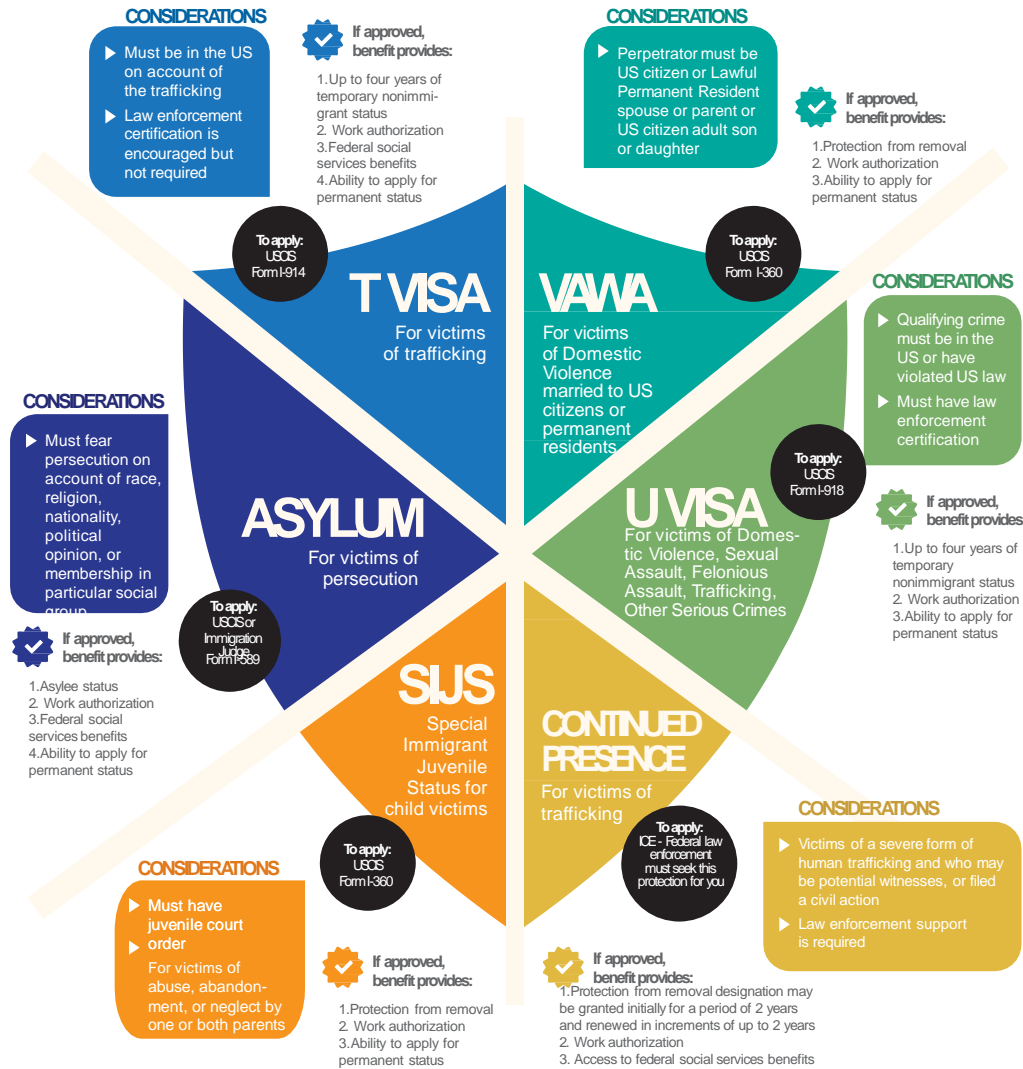


# Immigration Relief Available for Immigrant Victims of ---

- Domestic violence
  - Child abuse
- Sexual assault
- Rape
- Incest
- Prostitution
- Torture
- Felonious assault
- Manslaughter
- Murder
- Female genital mutilation
- Kidnapping
- Abduction
- Trafficking
- Involuntary servitude
- Slave trade
- Being held hostage
- Fraud Foreign Labor Contracting
- Peonage
- False Imprisonment
- Blackmail
- Extortion
- Witness tampering
- Obstruction of justice
- Perjury
- Stalking
- **Parent perpetrated**
  - **Child abuse**
  - **Child neglect**
  - **Child abandonment**

**Attempt, conspiracy or solicitation to commit any of these crimes or any similar activity**

# PROTECTIONS FOR IMMIGRANT VICTIMS



DHS.GOV/BLUE-CAMPAIGN

# Story: How Immigration Relief for Victims Improves Community Safety

# Battered Spouse Waivers

- For domestic violence survivors, provides for waiver of the “condition” placed on the status of immigrant spouses of marriages less than two years old
- Waives both the joint filing requirement and two year wait for full lawful permanent resident status
- Requires proof that
  - Marriage to U.S. citizen or permanent resident entered into in good faith *and*
  - Spouse or child was battered or subjected to extreme cruelty
    - Child can include step-child

Immigration and Nationality Act § 216(c)(4)

# VAWA Self-Petitioning Requirements

- Subjected to Battery or Extreme Cruelty
- By a U.S. Citizen or Permanent Resident
  - spouse;
  - parent; or
  - Citizen adult son/daughter (over 21)
- With Whom Self-Petitioner Resided
  - No time period required
- Good Moral Character
- Good Faith Marriage
- VAWA cancellation of removal has similar eligibility requirements
- **Timeline to formal protection = 4-18 months (2019)**

# Special Immigrant Juvenile Status (SIJS)

- Immigration relief for unmarried children
- Under the age of majority under state law
- Victims of abuse, abandonment, neglect, or dependency
  - By at least **one parent**
- To apply must submit required findings from a state court with jurisdiction over
  - the care, custody, or dependency of the child
- **Timeline to formal protection = 6 – 36 months (2019)**

# U Visa Requirements

- Victim of a qualifying criminal activity
- Has been, is being, or is likely to be helpful in
  - Detection, investigation, prosecution, conviction or sentencing
- Suffered substantial physical or mental abuse as a result of the victimization
- Possesses information about the crime
- Crime occurred in the U.S. or violated U.S. law
- **Timeline to formal protection = 4-6 months**  
**(2019)**

# T Visa for Trafficking Victims

- A victim of a severe form of trafficking in persons
  - Sex or labor trafficking involving victim under 18 or and adult subject to force, fraud or coercion
- Victim is physically present in the U.D. on account of trafficking
- Victim must comply with reasonable requests for helpfulness in investigating or prosecuting trafficking.  
Exceptions
  - Under age 18
  - Physical or psychological trauma impede helpfulness/cooperation
- Removal from the U.S. would cause extreme hardship
- **Timeline to formal protection = 3-12 months (2019)**



# Protections for Abused Children and Family Members

- VAWA self petitioner = Abused Child, Parent of abused child, Abused parent
  - Family included: applicants' children and an under 21 year old child can include their parent
- U and T visa applicant = Child victim or their parent
  - Family included:
    - Under 21: spouse, children, parents, unmarried siblings under 18
    - Over 21: spouse and children
- Special Immigrant Juvenile Status = child victim
  - Family included: None

# Benefits for Survivors

- Protection from deportation
- Access to legal immigration status
- Financial independence from perpetrator
  - Legal work authorization (3-48 months from filing)
  - Issuance of federally recognized ID
- VAWA confidentiality

# Case Scenario

Clara met Eduardo a lawful permanent resident when he came back to his hometown to visit his family in El Salvador. Eduardo started dating, Clara who was raising her 9 year old son Miguel. After Clara became pregnant and gave birth to a baby girl Lupe, Eduardo decided to bring Clara, Miguel and Lupe to the U.S. to live with him. When they arrived in the U.S. Eduardo took Clara, Miguel and Lupe's passports and became physically and sexually abusive of Clara and abusive of Miguel who tried to protect his mother from Eduardo's abuse. Eduardo also physically beat Lupe when he said she "misbehaved". Within a year following their arrival in the U.S. Eduardo forced both Clara and Miguel to work for his family's business and never paid them for their labor. One night when Miguel was 13 and Lupe was 5, Eduardo's rage led to severe beatings with a belt of Miguel and of Lupe. When Clara intervened to protect the children, Eduardo strangled her until she passed out. The neighbors call the police for help, Clara talked to police when they arrived. The police arrested Eduardo for attempted murder and child abuse, took Clara to the hospital and placed the children in the care of the state.

# What forms of immigration relief would Clara qualify for:

- A. U visa
- B. VAWA self-petition as the parent of Lupe
- C. T visa
- D. All of the above

Feedback

A

B

C

D

No Answer

# What forms of immigration relief would Lupe and Miguel qualify for:

Feedback

A

B

C

D

No Answer

- A. Both can VAWA self-petition
- B. Both qualify for a U visa
- C. Lupe qualifies for a T visa
- D. All of the above

# Judicial Role

- Make detailed findings
  - Family relationships: Marriage and Parent child relationship
  - Battering, extreme cruelty, child abuse, elder abuse, child abandonment, neglect, sexual assault, stalking
  - Apply and cite state law
- Role Congress created for state court judges in
  - U/T visa certification
  - Special Immigrant Juvenile Status findings
  - Applying VAWA confidentiality laws in ruling on discovery
- Make rulings on discovery consistent with VAWA confidentiality
- Distribute DHS-produced “Know Your Rights” information at your courthouse

# DHS Immigration Options for Victims of Crime Brochure



- Languages Offered
  - Spanish
  - Mandarin
  - English
  - Korean
  - Russian

# VAWA Confidentiality in State Court Proceedings



# Why is VAWA Confidentiality Important for State Courts?

- Promotes access to justice and just and fair outcomes in state courts
- Perpetrators may attempt to use state court discovery to obtain federal VAWA confidentiality protected information
- Prohibited immigration enforcement locations include courthouses

# VAWA Confidentiality Prongs

- **Abuser-Provided Information:** DHS, DOJ, and the State Department are barred from taking action against a victim based *solely* upon information provided by abusers and crime perpetrators (and their family members)
- **Location Prohibitions:** Enforcement locational prohibitions unless comply with specific statutory and policy safeguards
- **Non-Disclosure:** Unless one of the enumerated exceptions apply, DHS, DOJ and the State Department cannot disclose VAWA information to anyone
  - VAWA self-petitioners, VAWA cancellation/suspension, T visa, U visa, Battered Spouse Waiver, Abused Visa Holder Spouses

# DHS VAWA Confidentiality Computer System

- Directs to check for “384” computer system flag that identifies victims who have already filed for or have been granted victim-based immigration relief
- Reminds immigration officers, agents, and attorneys about immigration law protections for
  - Survivors of domestic violence
  - Crime victims survivors
  - Human trafficking survivor

# VAWA Confidentiality Violations

- Each violation
  - Disciplinary action and/or
  - \$5,000 fine for the individual
- Violations also include making a false certifications in a Notice to Appear
- VAWA Confidentiality Enforcement Guidance CRCL (2008)
- ICE required to certify compliance to immigration judge = violations can be basis for dismissal



# *Hawke v. Dep't of Homeland Security*

(N.D. CA, 2008) – VAWA Self-Petition Case

(Judicial review exception)

- VAWA Confidentiality Protects cases:
  - All cases unless denied on the merits
- Judicial exception applies to appeals of victim's immigration case
  - Does not apply to civil or criminal court proceedings
- 6<sup>th</sup> Amendment right to compulsory process does not permit access to absolutely privileged information
- “Primary purposes of the VAWA confidentiality provision, namely to prohibit disclosure of confidential application materials to the accused batterer”

## Demaj v Sakaj (D. Conn, 2012) –U Visa/Custody Case

- Although relevant to credibility and impeachment
- Family court discovery barred as contrary VAWA confidentiality purpose --
  - Prevent disclosure of documents & information in a protected case file to alleged criminals
  - Stop perpetrator's actions to interfere with & undermine a victim's immigration case
- Seeking to obtain protected information through discovery in a custody case = interference with the victim's immigration case barred by the federal statute
- VAWA confidentiality applies to protect the case file contents, including in cases when
  - The victim discloses in state court that DHS has approved her protected immigration case

# EEOC v Koch (5<sup>th</sup> Circuit)

- In civil discovery court must consider
  - How discovery of U visas might intimidate victims outside of the case before the court
  - Compromising the U visa program and law enforcement investigations and prosecutions more broadly
  - Koch: limited discovery crafted to maintain anonymity may be allowable
  - That is not possible in a family or criminal court case

# State v. Marroquin-Aldana – Criminal Case

2014 ME 47, ¶ 20, 89 A.3d 519, 525

- “Insufficient justification” to disclose additional documentation when the defense had the certification form
- Provided defense opportunity to cross-examine victim and call credibility into question
- Court noted the “high level of protection” given to documents filed with immigration



# People v. Alvarez Alvarez- Criminal Case

No. G047701, 2014 WL 1813302, at \*5 (Cal. Ct. App. May 7, 2014),  
review denied (July 16, 2014)

- “The visa was a tangential, collateral issue, and allowing evidence about it invited speculation about the legal status...which was completely irrelevant to this case.”
- The trial court was well within its discretion in excluding reference to the U visa

# Gomez v. State

District Court of Appeals of Florida, Fourth Circuit

- The defendant in a criminal case complained of a *Brady* violation for the State's failure to allow discovery of the information contained in the victim's U Visa application.
- The Florida Court denied discovery of the U visa file which was not in the state's possession or control. Thus, the State had no obligation to produce it.

# Protections for Crime Victims

- DHS commitment to minimize impact of immigration enforcement on victims still in effect April 2019
- Enforcement actions at VAWA protected sensitive locations actions are not to be taken:
  - “[A]bsent clear evidence that the alien is not entitled to victim-based benefits”
  - Actions taken must “be handled properly given that they may ultimately benefit from VAWA’s provisions”
  - Officers are to follow a specific process aimed at protecting victims that includes obtaining advance permission from a supervisor or ICE general counsel for enforcement actions at statutorily protected sensitive locations
- John P. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007)

# VAWA Sensitive Location Prohibitions

- Enforcement actions are not to be taken unless the action specific procedures designed to protect victims are followed:
  - 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



VAWA confidentiality is likely violated when a DHS official comes to the courthouse in response to a “tip” from the perpetrator and arrests a victim who has come to court.....

- A. Seeking a protection order
- B. For a child custody case
- C. For an eviction case when the perpetrator stopped paying rent required in a protection order
- D. As a State’s witness in a criminal case
- E. All of the above

# Sensitive Locations

- Enforcement actions by ICE and CBP are not to occur or be focused at sensitive locations:
  - Schools
  - Medical treatment and health care facilities
  - Places of worship
  - Religious or civil ceremonies: e.g. weddings, funerals
  - During a public demonstration: e.g., march, rally, parade
- Very limited exceptions:
  - Exigent circumstances
  - Prior approval by a designated supervisor
  - Other law enforcement action led ICE/CBP there

# January 2018 ICE Courthouse Enforcement Policy: Targeted Immigrant Limitation

- Civil immigration enforcement at courthouses will only occur when
  - ICE officers have information that leads them to believe that a *targeted immigrant* will be present at a courthouse
- No immigration enforcement against other persons including
  - Victims
  - Witnesses
  - Family members
  - People accompanying others to court

# January 2018 Policy:

## Avoid Non-Criminal Proceedings

- Avoid enforcement in courthouses or areas within a courthouse that are dedicated to non-criminal proceedings
  - Applies to courts and cases
  - Family cases
  - Civil cases
- Requires Field Office Director/Special Agent in Charge Approval
  - Will involve screening for VAWA confidentiality protected victim's cases



# Policy Directives: Immigration Enforcement at Courthouses

- Civil enforcement actions at courthouses will be planned
- Minimize impact on court proceedings
- Take place in non-public areas
- Be conducted in collaboration with court staff and security
- Use non-public entrances and exits
- Substantial efforts will be made to not alarm the public

What policies or procedures might courts implement with regard to VAWA confidentiality and courthouse enforcement?

# Steps Courts Are Taking

- Restrict activities that interfere with courtroom operations
- Enforcement restricted to non-public areas of the courthouse\*
- Courts ask ICE to coordinate with court security staff and use of non-public entrances & exits\*
- Some courts do not allow ICE into courtrooms
- No enforcement in civil and family proceedings absent written authorization from ICE Field Office Director or Special Agent in Charge\*
- No interruptions during court proceedings or until case is completed
- No enforcement against victims, witnesses, family members, people accompanying others to court\*
- Call courthouse security if ICE fails to comply with court orders

When judges know which immigrant victims, children or family members can access which benefits, how might this impact state court orders?



# NIWAP's Public Benefits Map and Public Benefits Charts

- Public benefits map
  - <http://map.niwap.org/>
- Public benefits charts
  - <http://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts/>

# Both documented and undocumented immigrants can access:

- Family Court – e.g. divorce, custody, child support, protection orders, child welfare
- Language Access
- Police Assistance
- Have perpetrators prosecuted
- Obtain public benefits for their children
- Elementary & Secondary education
- School lunch/breakfast
- Soup kitchens, food banks, nutrition assistance
- Communicable disease immunizations, testing, treatment, treatment from public health centers
- Services necessary to protect life and safety
- Legal Services
- Assistance for Crime Victims
- Emergency Medicaid
- Emergency Shelter
- Transitional Housing
- Child and Adult protective services
- Crisis counseling and intervention
- Violence/abuse prevention services

# When children qualify and their parents do not:

- If a child qualifies for benefits as a citizen or qualified immigrant the benefits granting agency may only ask questions about the child's eligibility
- No questions may be asked about the immigration status of the child's parent if the parent is not applying for additional benefits for themselves



# Qualified Immigrant Children and Crime Victims -Examples

- Qualified Immigrants
  - Lawful permanent residents
    - Includes U visas and SIJS
  - Refugees/Asylees
  - VAWA self-petitioners
  - Trafficking victim with
    - Continued presence or
    - Bona fide determination in T visa case
- Not Qualified Immigrants
  - Asylum applicants
  - DACA recipients
  - U visa applicants & recipients
  - Work/Student visa holders
  - Undocumented

# **Partial List of Federal Public Benefits/Community Programs Open to All “Qualified Immigrants”**

- **Public and assisted housing**
- **Post-secondary educational grants & loans**
- **Driver’s Licenses**
- **Access to most subsidized child care (Not TANF)**
- **Adoption assistance**
- **Foster care**
- **Low income and residential energy assistance programs**
- **Disability benefits**
- **Assistance to developmentally disabled**
- **Job opportunities for low income individuals**

# Custody of Children in Immigrant Families

Tool: Immigrant Victims and Custody Bench Card

# Protecting Immigrant Mothers Protects Children

- Immigrant victims who receive help, including immigration relief, child abuse likelihood drops significantly (77% to 23%).
- Children of help seekers 20% less likely to have abuser threaten them
- One third less likely to have abuser threaten to take them away from their mother

Ammar, Orloff, Hass and Dutton, "Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status." (September 2004)

<http://niwaplibrary.wcl.american.edu/pubs/co-occurencedvchildabuse/>

# Is Immigration Status Relevant to Custody?

- Relevant to: Immigrant crime victim presents evidence of immigration related abuse, power and control suffered
  - Either not filing or withdrawing immigration papers
  - Threats to turn victim in for deportation
  - Part of history of violence
- Not relevant to:
  - Core primary caretaker determination
  - Evaluation of parenting skills
  - Best interests of the child determination
  - Requirements regarding custody awards to non-abusive parent



# Myth vs. Fact:

## Parents without Legal Immigration Status

### Myth

1. Deportation is imminent
2. Parent is likely to flee U.S. with child
3. The parent has no livelihood
4. Legally present parent must have custody in order to file for benefits for child

### Fact

1. DHS policies prevent detention/removal of immigrant parents who are crime victims
2. US citizens and lawful permanent residents are more likely to flee with children, especially when
  - There have been threats of kidnapping children
  - They are dual nationals
  - They travel freely to and from U.S.
3. Abused immigrant parents in family court have a path to immigration relief, work authorization & some benefits
4. Custody does not affect parent's ability to file for or gain immigration benefits for his children.

## Immigrant victims involved in custody cases will qualify for one or more of the following:

- Domestic violence/child abuse= VAWA self-petitioning, VAWA defenses against removal in immigration court, Battered spouse waiver, Special Immigrant Juvenile Status
- U visa = Domestic violence, sexual assault, stalking, human trafficking, other U visa crimes
- T visa and continued presence = human trafficking cases both sex and labor trafficking

# ICE Removal Data

## 2013

- Convicted criminals 82%
- Repeat immigration violators 7.8%
- Ordered removed and failed to depart 1.6%
- Other immigrants 7.7%

<https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>

## 2017

- Criminal convictions 73.7%
- Pending criminal charges 15.5%
- Outstanding notices to appear in immigration court 5.3%
- Ordered removed and failed to depart + reinstatement 2.8%
- Other immigrants 2.6%

<https://www.ice.gov/removal-statistics/2017>



# PROTECTION ORDERS



# Protection Orders

- All persons are eligible to receive civil protection orders without regard to the immigration status of any party or child
- Protection order issuance = no effect on immigration status
- A conviction *or finding* of violation of the “*protection against abuse provisions*” of a protection order is a deportable offense
- Immigrant victims and their children often need creative protection order remedies using the state catch all provisions

# Use Creative Remedies to...

- Stop immigration related abuse
- Protect victims still living with their abusers
- Obtain documents the victim needs for an immigration case or for care of child
- Deter parental kidnapping
- Child/Spousal support
  - Affidavit of support
- Health insurance

## Nebraska Maria Luis Case

Maria Luis is an undocumented Quiche-speaking Guatemalan who had 2 children with her in the U.S. the youngest (Angelica) was born in the U.S. with respiratory problems. Maria Luis took Angelica to the emergency room for treatment and she was given a Spanish (not Quiche) interpreter. She thought she was told to bring the child back for a follow up visit if Angelica did not get better. The hospital said that she was told to bring the child back for a follow up appointment. Angelica got better, so Maria Luis did not return for the follow up visit. The hospital reported her to CPS. CPS arrived with police, took her 2 children who were placed in foster care. Maria Luis was detained and turned over to DHS for deportation. While she in DHS custody, Nebraska sought termination of parental rights. The notice that arrived in detention was not in her native language and DHS did not take her to the dependency court proceeding. Maria Luis was deported to Guatemala and Nebraska called her to explain her parenting plan explained to her in Spanish over the phone. She found a priest in Guatemala who helped her try to comply with the plan from Guatemala. Her parental rights to both her children were terminated her children remained in foster care.

# Immigrant Parents and Child Custody

*In re Interest of Angelica L., 277 Neb. 984 (2009)*

- Parents have a constitutional right to custody (absent unfitness)
- Applies to all families without regard to:
  - Undocumented immigration status
  - Immigration detention
  - Deportation
- Overriding presumption that:
  - Parent-child relationship is constitutionally protected
  - In children's best interest to stay with/be reunited with their parent(s)
- Child's best interests is most important
  - A comparison of natural vs. adoptive parent's cultures, countries or financial means is not to be made

# A Family Reunited



# Detained Parent Directive Aug. 2017

- If parents are detained:
  - Placement near family court when ongoing family court/child welfare cases
  - Bring parents to family court to participate in cases involving children
    - Alternate: video or teleconference participation
  - Facilitate visitation when required by family/child welfare court order
  - Help children travel with deported parent – obtain passports for children

# U Visa Certification By Judges



# U Visa for Immigrant Victims

- A victim of qualifying criminal activity is eligible for a U Visa when:
  - The criminal activity occurred in the U.S. **or** violated U.S. law;
  - The victims possesses information about the crime;
  - The victim has been, is being, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing of the offense; and
  - The victim has suffered substantial physical or mental abuse as a result of the victimization

# U Visa Qualifying Criminal Activity

- Domestic violence
- Sexual assault
- Rape
- Incest
- Prostitution
- Torture
- Felonious assault
- Manslaughter
- Murder
- Female genital mutilation
- Kidnapping
- Abduction
- Trafficking
- Involuntary servitude
- Slave trade
- Being held hostage
- Fraud Foreign Labor Contracting
- Peonage
- False Imprisonment
- Blackmail
- Extortion
- Witness tampering
- Obstruction of justice
- Perjury
- Stalking

*Attempt, conspiracy or solicitation to commit any of these crimes any similar activity*

# U Visa Statistics

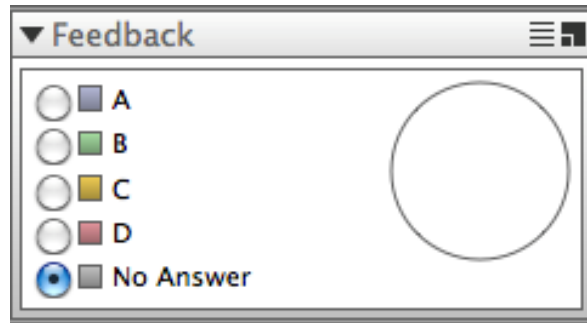
11 / 2011

% of U Visas	Criminal Activity
<b>76.1% = Domestic Violence, Sexual Assault, Child/Elder Abuse, Human Trafficking</b>	
9.9%	Felony Assault, Murder, Manslaughter
8.47%	Kidnapping, Being Held Hostage, Unlawful Criminal Restraint, Torture
5.3%	Blackmail, Extortion, Perjury, Obstruction of Justice, Attempts, Conspiracy, Solicitation

# U/T Visa Certification: Who Can Certify?

- Federal, state, and local
  - Police, sheriffs, FBI, HSI, ATF...
  - Prosecutors
  - **Judges, Magistrates, Commissioners, Judicial Referees, Masters, Alderman, ALJs, Surrogates, Chancellors**
- Departments of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC)
- Child and Elder Abuse investigators and agencies
- Other government agencies

# Why would victims seek U visa certification from state courts?



A screenshot of a feedback form window titled "Feedback". The window contains five radio button options: A (blue square), B (green square), C (yellow square), D (red square), and No Answer (grey square). The "No Answer" option is selected. To the right of the options is a large empty circle.

- A. Only justice system contact a custody, protection order, civil employment or child welfare case
- B. No language access to police when victim called for help
- C. Judge observed victim's attendance and participation in criminal case
- D. All of the above

# U Visa Regulations Definitions

Although terms are used interchangeably

- As a matter of law (U visa regulations)
  - Helpfulness in the “investigation or prosecution” always means
    - “Detection, investigation, prosecution, conviction, or sentencing”
  - “Crime” always means
    - “criminal activity”
- “Criminal activity” chosen to offer early access to justice system protection
  - Improving stability for crime victims

# What Evidence of “Criminal Activities” and “Helpfulness” Could be Present in These Cases?

- Family
  - ✓ Civil Protection
  - ✓ Custody
  - ✓ Divorce
  - ✓ Paternity
  - ✓ Adoption
- Juvenile
  - ✓ Child Abuse, Neglect, or Termination of Parental Rights
  - ✓ Delinquency
- Criminal
- Probate
  - ✓ Elder / Dependent Adult Abuse
  - ✓ Guardianship
  - ✓ Conservatorship
- Civil
  - ✓ Employment
  - ✓ Tort damages against a perpetrator

# Criminal Case Examples: Evidence of Helpfulness

- Evidence in case that the victim:
  - Called 911
  - Participated in a criminal investigation
  - Identified perpetrator at line up
  - Testified before a grand jury or at trial
  - Appearance in a case
  - Attended criminal court hearings in the case
  - Victim impact statement
  - Testimony at sentencing



# Family/Civil Case Examples: Evidence of Helpfulness

- Filed and/ or appeared at hearing for full protection order
- Plead and or testified about abuse or sexual assault in a court case (e.g. protection order, divorce, custody, small claims, housing, employment)
- Evidence in case that victim called the police, made a police report, cooperated in a criminal or EEOC investigation
- Serving the perpetrator with notice of a
  - temporary protection order
  - A case in which the pleadings contain allegations of facts that constitute domestic violence, sexual assault or other U visa criminal activities

# Helpfulness Requirement Met *Even When:*

- Victim reports a crime and there's no further investigation or prosecution
- Perpetrator absconds or is deported
- Perpetrator is being prosecuted for a different crime
- Victim is not needed as a witness
- Victim is dead (indirect victim is applying)
- Perpetrator is dead
- The criminal case did not result in a guilty plea or conviction
- Victim is applying for a civil protection order or custody but domestic violence is not being criminally prosecuted

# Minnesota Judicial Ethics Opinion U Visa Certification (June 26, 2015)

- Judge may sign certifications when
  - “adequate basis for the averments made in the certification”
- Certification after the criminal or civil case is completed does not raise impartiality issues
  - In open cases should disclose certification to the parties
- Certification describes immigrant victim’s past/present helpfulness -- Does not vouch for character
- In civil and criminal cases whether to sign a U visa certification is a an issue of law that does not implicate judicial ethics codes

Full Opinion Available at: <http://www.bjs.state.mn.us/file/advisory-opinions/opinion-2015-2-final.pdf>  
Hon. Pendleton also published a training update based on the opinion at <http://pendletonupdates.com/>

# U-visa Facts and Benefits

- Only 10,000 U-visas can be granted annually
  - Waitlist approval backlog 110,000 visas
- The U-visa grants a temporary 4 year stay
- Work authorization ( ≈ 28-48 months)
- Limited state benefits
- Lawful permanent residency after 3 years if
  - Cooperation or not unreasonably refuse to cooperate
  - + humanitarian need, family unity or public interest
- U.S. citizenship after 5 years of lawful permanent residency + proof of good moral character

# Special Immigrant Juvenile Status (SIJS)

- Humanitarian immigration relief for unmarried children who cannot be reunified with one or both parents who
  - abused, abandoned or neglected the child
- State court findings are required as evidence
  - The court using state best interests laws makes a child custody or placement decision and includes SIJS findings
  - The state court order does **not** provide immigration status
  - The order is one required piece of evidence in a federal adjudication process

# Why Congress Wanted Input From State Court Judges

- Included a role for state court judges as experts in child best interests, custody, and child welfare matters.
- State court expertise that are an inherent part of court's decision-making when courts:
  - Adjudicate facts of child abuse, neglect and abandonment
  - Issue orders regarding child care, custody, and placement that further the best interests of children

# SIJS State Court Findings Required for the Child to file

- State Court SIJS findings are a statutorily required prerequisite to an eligible child being able to file the SIJS immigration case
- DHS uses the state court order as evidence in adjudicating the immigration application
- The state court order does **not** award SIJS
  - **ONLY DHS can provide SIJS a form of legal immigration status and permanent residency**

# State Court Findings Needed for SIJS

## \*State Law Applies To Each\*

- The court has jurisdiction to issue orders regarding the care, custody, or placement of an immigrant child (under age of majority and unmarried) with
  - An individual (e.g. non-abusive parent, grandparent, kinship care, guardian, next friend, adopting parent) OR
  - State agency, private agency, including foster care system
- It is not in the child's best interest to return to their home country
  - Best caregiver identification/often not necessary to compare countries
- Reunification of the child is not viable with a parent due to at least ONE PARENT'S abuse, abandonment, or neglect



# State Courts Regularly Make Custody & Placement Determinations

- Who will be the custodian/guardian of the minor
- With whom will the child live
- Whether the minor will be committed to the custody of the state or private agency for care, treatment, or rehabilitation

# Department of Homeland Security Confirms

- A juvenile court according to DHS
  - The “title and the type of court that may meet the definition of a juvenile court will vary from state to state. Examples of state courts that may meet this definition include: juvenile, family, dependency, orphans, guardianship, probate, and delinquency courts.”
  - “Juveniles” = all children

# Decisions about care and custody of children arise in family court proceedings

- Civil protection order cases
- Custody cases
- Divorce cases
- Paternity and child support cases
- Adoption cases
- Motions for declaratory judgements
- Bench Book chapters on each case type

## Home country not in child's best interests

- Identify each potential custodian in U.S. and home country
- Apply state best interests factors to each placement
- States in court order the factual findings that support chosen placement
- Make findings that illustrate why under state best interest factors court is not choosing placements in child's home country
- Compare the supports, help, services child needs U.S vs. home country
  - Example of factors VAWA Extreme hardship

# Finding: Reunification Not Viable

- Does not require termination of parental rights
- Viability of reunification does not necessitate no contact with parent – Visitation can occur
- Means granting the abusive parent custody is not envisioned by the court as a viable option
- Changes in circumstances can occur
  - But not granting full legal/physical custody to abusive parent

# Apply Same Jurisdiction and Procedural Rules as All Other Cases

- Include a statement of the court's jurisdiction citing the state statute, court rule, or other authority under which the court is exercising jurisdiction.
- Follow your state court procedures and note that you do so to demonstrate that the court made an informed decision.

In the Clara and Eduardo Scenario in which of the following cases could the court NOT issue SIJS findings for Lupe as part of the court's order?

Feedback

A

B

C

D

No Answer

- A. A protection order case in which the order grants Clara custody
- B. A custody case brought by Clara
- C. The criminal prosecution of Eduardo
- D. A child welfare case in which the court made findings of Eduardo's abuse and placed the children with Clara

# Resources Available to Assist Courts

- SJI Funded Materials for Judges in the NIWAP Web Library
  - Bench book on SIJS
  - U visa certification toolkit for judges
  - Bench cards for family court judges
- State by state Directory programs with expertise serving immigrant victims



# NIWAP Web library

[niwaplibrary.wcl.american.edu](http://niwaplibrary.wcl.american.edu)



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[Legislative History](#)

[Regulations and Policies](#)

[Multilingual Materials](#)

# SJI Funded Resources: Menu of Topics

- Victim protection based forms of immigration relief: (VAWA, U and T Visas, SIJS)
- VAWA confidentiality limitations on courthouse immigration enforcement and state court discovery (family, civil, criminal)
- Using legally correct information to address immigration allegations in custody, divorce, protection order, child/spousal support & child welfare cases
- U and T Visa certification by state court judges
- Special Immigrant Juvenile Status findings best practices
- Public benefits access for immigrant victims
  - Health care, housing, TANF, SNAP, Education and more
- Improving access to justice for immigrant and LEP persons

# Technical Assistance and Materials

- Power Point presentations and materials for this conference at <http://niwaplibrary.wcl.american.edu/aja-2019/>
- Judicial Training Manual at <http://niwaplibrary.wcl.american.edu/sji-jtn-materials/>
  - **NIWAP Technical Assistance**
  - Call (202) 274-4457
  - E-mail [info@niwap.org](mailto:info@niwap.org)
- Web Library: [www.niwaplibrary.wcl.american.edu](http://www.niwaplibrary.wcl.american.edu)

# Evaluation