

## **Bench Card - Identifying Victims Who May Qualify for Immigration Relief**

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March 29, 2019 (Updated March 9, 2022)

This bench card provides judges and court staff a quick reference to help state family, juvenile, and criminal court judges identify victims who may qualify for forms of immigration relief designed by Congress to offer protection to immigrant victims. These statutes read together provide access to legal immigration status, protection from deportation, work authorization, and a path to lawful permanent residency for immigrant victims of domestic violence, sexual assault, stalking, dating violence, child and elder abuse, child abandonment, child neglect, sex trafficking, labor trafficking, commercial child sex trafficking and other serious criminal activities.<sup>1</sup>

### **VAWA Self-Petitions for Family Violence Victims<sup>2</sup>**

Protects immigrant victims of spouse and child abuse perpetrated by citizen and lawful permanent resident spouses, parents, or step-parents and elder abuse perpetrated by spouses or by citizen sons or daughters over 21 year old against immigrant parents. Proof of citizenship or lawful permanent residency of abusive family member required.

#### **VAWA Self-Petitioning Based on Family Relationships**

- *Immigration or citizenship status* - Must prove immigration or citizenship status of the abusive family member
- *Family relationships covered by the VAWA self-petition*
  - Spouses
    - Must file within 2 years to marriage termination
    - Covers unknowing intended spouses of bigamists;
  - Children (natural, adopted, or step-parent) who were subjected to extreme cruelty before the age of 21;
  - Immigrant parents of child abuse victims (natural or step-parent) without regard to the immigration status of the child; and
  - Elders who are battered or subjected to extreme cruelty by their citizen or lawful permanent resident spouse or their over 21-year-old U.S. citizen child.

#### **All Self-Petitioners Must Prove:**

- *Battering or extreme cruelty*
- *Good moral character* generally requires no criminal history or a waiver as a victim of domestic violence
- *Residence* - must have resided at some point with the abusive spouse, former spouse, abusive parent/step - parent, or abusive child or stepchild

<sup>1</sup> For a full list of the criminal activities covered by the U visa see the overview of the U visa below on page 4.

<sup>2</sup> Moira Fisher Preda, Cecilia Olavarria, Janice Kaguyutan, *Preparing the VAWA Self-Petition and Applying for Residence*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP), 3,

<http://niwaplibrary.wcl.american.edu/pubs/ch3-3-selfpetitionprep/>.

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- *Filing within 2 years of loss of status* - If the abusive spouse, parent, step-parent, son or daughter lost or renounced citizenship related to domestic violence, victim must self-petition within two years

An Adult Self-Petitioner Must Also Prove:

- *Good faith marriage*
  - Must prove that the immigrant entered the marriage in good faith
  - Must file within 2 years of divorce/annulment and must show a connection between the battering or extreme cruelty and divorce or annulment
  - Bigamy is not a bar if a marriage ceremony was performed and the victim did not know about the spouse's bigamy
  - If the citizen spouse dies, victim must self-petition within two years of the death

A Child Victim Must Also Prove:

- *Parent – child relationship*
- *Step-children must prove good faith marriage between natural and step-parent* – includes proof of a good faith
  - Divorce ends abused stepchild's ability to self-petition. There is no two year filing period after divorce like spouses receive

Protections for VAWA Self-Petitioners:

- Children receive immigration benefits along with their parents, if included in their parent's application
- Parents of child abuse victims receive immigration benefits along with their children, if included in their child's application
- VAWA Confidentiality protects against the release of information about the victim's immigration case and protects against deportation
- Approval = work-authorization and path to lawful permanent residency and citizenship

**VAWA Cancellation of Removal for Spouse and Child Abuse Victims<sup>3</sup>**

Provides immigration protection against removal for immigrant spouse and child abuse victims abused by their U.S. citizen and lawful permanent resident spouses, parents, and stepparents. The VAWA cancellation of removal application must be filed in immigration court.

VAWA Cancellation of Removal Based on Family Relationships

- *Immigration or citizenship status* - Must prove immigration or citizenship status of the abusive family member
- *Family relationships covered* by the VAWA cancellation of removal
  - Spouses
    - Covers unknowing intended spouses of bigamists;
  - Children (natural, adopted, or step-parent) who were subjected to extreme cruelty before the age of 21;
  - Immigrant parents of child abuse victims (natural or step-parent) without regard to the immigration status of the child;

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<sup>3</sup> Rebecca Story, Cecilia Olavarria, Moira Fisher Preda, *VAWA Cancellation of Removal*, Preparing the VAWA Self-Petition and Applying for Residence (July 1, 2013) <http://niwaplibrary.wcl.american.edu/pubs/ch3-4-vawa-cancellation-of-removal/> .

- Can qualify even when the immigrant parent is not married to the abusive parent of the child

#### All VAWA Cancellation or Suspension Applicants Must Prove:

- *Battering or extreme cruelty*
- *Good moral character* for the three years immediately preceding his/her application
  - Generally requires no criminal history or a waiver as a victim of domestic violence
- *Good faith marriage*
  - *Adults* - to the abusive spouse, former spouse, or intended spouse who was a bigamist;
  - *Children* – between the child’s natural parent and the child’s abusive stepparent.
- *Continuous physical presence* in the United States for 3 years immediately preceding filing the application
- *Extreme Hardship* - Applicant must show the applicant, their child, or parent of the abused child would experience extreme hardship if deported or removed from the U.S.

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

- Approval results the applicant being granted lawful permanent residency
- VAWA Confidentiality protects against the release of information about the victim’s immigration case and protects against deportation
- VAWA Cancellation of Removal applicants 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.

#### Battered Spouse Waiver for Spouse and Child Abuse Victims<sup>4</sup>

When a spouse has filed a family-based visa petition for an immigrant spouse and the couple is married for less than two years when the immigrant spouse is granted residency, the immigrant spouse receives 2-year conditional residence, rather than lawful permanent residency.

- The spouses are required to file a joint petition 90 days before the end of the two-year period asking DHS to grant the immigrant spouse full lawful permanent residency.
- Immigrant spouses and their children or stepchildren who are victims of *battering or extreme cruelty* perpetrated by the U.S. citizen or lawful permanent resident spouse can file for a *battered spouse waiver* of this joint filing requirement.

#### Battered Spouse Waiver eligibility requires proof of

- *Battering or extreme cruelty* during the marriage
- *Citizenship or lawful permanent residency status* of abusive spouse, parent or stepparent
- *Good faith marriage*
  - *Adults* - to the abusive spouse, former spouse, or intended spouse who was a bigamist;
  - *Children* – between the child’s natural parent and the child’s abusive stepparent.
- *Receiving conditional permanent residency*

#### Battered spouse waiver

- *Confidentiality* – can be filed without the knowledge, cooperation, or consent of the abusive spouse
- *No waiting period* – can be filed at any time without a two year waiting period

#### Protections for Battered Spouse Waiver Applicants

- Approval results the applicant being granted lawful permanent residency

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<sup>4</sup> Cecilia Olavarria, Moira Fisher Preda, *Additional Remedies Under VAWA: Battered Spouse Waiver*, 3, (July 1, 2013), <http://niwaplibrary.wcl.american.edu/pubs/ch3-5-battered-spouse-waiver/>.

- VAWA Confidentiality protects against the release of information about the victim's immigration case and protects against deportation
- Children receive immigration benefits along with their parents, if included in their parent's application

## U Visas for Crime Victims<sup>5</sup>

The U-Visa is a form of humanitarian relief designed to encourage non-citizen crime victims to report a crime and participate in the detection, investigation, prosecution, conviction, and/or sentencing of the criminal activity.

### U Visa Eligibility Requirements

- *Victim of criminal activity*
  - Both direct, and in limited instances, indirect victims can apply;
  - *Criminal activities covered* - 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; 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
- *Possess information* - The immigrant must have information about the criminal activity
- *Helpfulness* - The immigrant has been, is being, or is likely to be helpful in detection, investigation, prosecution, conviction or sentencing of a criminal activity
- *Covers criminal activities in the U.S.* - or that violated U.S. law
- *U visa certification required prerequisite to filing* - The immigrant must obtain a certification from a state, local, or federal --
  - Judge;
  - Prosecutor;
  - Law enforcement officer;
  - Child/adult protective services agency;
  - State or federal labor law agency (including the Equal Employment Opportunity Commission and the Department of Labor); or
  - Other state or federal government agency involved in detecting, investigating, prosecuting, convicting or sentencing facts that constitute listed criminal activities
- *Substantial physical or emotional abuse* -- The immigrant must have suffered substantial physical or mental abuse as a result of the criminal activity
- *Background check and waivers* – Application process includes multiple background checks. The U.S. Department of Homeland Security can grant discretionary waivers.

### Protections for U Visa Applicants

- Children and spouses receive immigration benefits along with their parents, if included in their parent's or spouse's application
- Parents of child victims receive immigration benefits along with their children, if included in their

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<sup>5</sup> Sylvie Sheng, Alina Husain, Alisha Lineswala, Benish Anver, Karen Dryhurst, Lucia Macias, and Leslye E. Orloff, *U Visa Certification and T Visa Declaration Toolkit for Federal, State, and Local Judges, Commissioners, Magistrates, and Other Judicial Officers*, (August 12, 2021), <https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2020>.

- child's application
- VAWA Confidentiality protects against the release of information about the victim's immigration case and protects against deportation
- Wait-list approval = work-authorization
- The U visa lasts for four years and includes a path to lawful permanent residency and citizenship
- Applicants for lawful permanent residency based on a U visa must prove
  - That the victims continued to provide assistance regarding the criminal activity; or
  - That the victim did not unreasonably refuse to provide assistance with the prosecution and investigation of the criminal activity; and
  - That the victim's continued presence in the U.S. is justified --
    - Based on humanitarian need
    - To ensure family unity or
    - As in the public interest.

### **Special Immigrant Juvenile Status for Abused, Abandoned, or Neglected Children<sup>6</sup>**

Special Immigrant Juvenile Status (SIJS) provides humanitarian immigration relief for undocumented immigrant children who have suffered abuse, abandonment, neglect or similar harm perpetrated by one or both of the child's parents. The harm could have occurred in the U.S. or abroad. Federal law requires that each application for SIJS include an order from a state court that had jurisdiction under state law to make determinations about the placement, care, or custody of children.

#### **Eligibility - An SIJS applicant must**

- Be unmarried;
- Under the age of 21 at the time of application; a
- Submit a state court order as part of the SIJS application that contains findings that:
  - The court has exercised jurisdiction as authorized by state law and has issued orders regarding the custody, care, or placement of the immigrant child
  - The child was abused, abandoned, neglected or suffered similar harm perpetrated by one or both of the child's parents
    - Findings should be made separately as to each parent
    - The child may be living with the child's protective parent
  - It is not in the child's best interest to return to the home country, or last habitual residence, of the child or the child's abusive parent
  - Reunification with one or both of the child's parents is not viable due to either abuse, abandonment, neglect, **or** a similar basis under state law

#### **Protections for SIJS Children**

- SIJS applicant children are able to purchase health insurance on the state healthcare exchanges and in many states this includes healthcare subsidies<sup>7</sup>
- Approved SIJS applicant children are eligible to apply for lawful permanent residency and work authorization and have a path to citizenship

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<sup>6</sup> Leslye E. Orloff, Rafaela Rodrigues, *Special Immigrant Juvenile Status Bench Book: A National Guide to Best Practices for Judges and Courts*, (Mar. 2018), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/SIJS-Bench-book-complete.pdf>.

<sup>7</sup> As of June 2021, 31 states provide state funded health care subsidies to lawfully present immigrant children including SIJS applicant children. See Leslye E. Orloff, *State-Funded Public Benefits Comparison Chart* (April 12, 2021) <https://niwaplibrary.wcl.american.edu/pubs/state-benefits-comparison-chart>.

## T Visa for Victims of Human Trafficking<sup>8</sup>

The T-Visa is a form of humanitarian immigration relief for victims of severe forms of human trafficking including both sex and labor trafficking. Victims of severe forms of human trafficking who are potential witnesses in a trafficking prosecution may qualify to have law enforcement officials request that they be granted continued presence. Continued presence is a temporary form of immigration relief that offers early temporary protection for trafficking victims while they prepare to file their T or U visa applications.

### A T Visa applicant must prove

- *Severe Form of Human Trafficking* – That they suffered a “severe form of trafficking,”
  - *Labor trafficking* three elements must be present
    - **The process** – the trafficker recruits, harbors, transports, provides, or obtains a person for labor;
    - **The means** used to procure the labor include force, fraud, or coercion unless the trafficking victim was a child under age 18; and
    - **The end** the labor has to be procured for a certain purpose of involuntary servitude, peonage, debt, bondage, or slavery
  - *Sex Trafficking* – two elements required
    - **The end:** a commercial sex act; and
    - **The means:** that was induced by force, fraud, or coercion
      - Under 18-year-old sex trafficking victims do not need to prove the means
- *Presence on account of trafficking* -- Must be physically present on the account of trafficking
  - Is being subjected to trafficking now;
  - Was recently liberated from trafficking; or
  - Is here because of past trafficking and their current presence in the U.S. is directly related to the original trafficking
  - Does not require that the human trafficker brought them over a border into the U.S.
- *Extreme hardship* involving unusual and severe harm will occur if the victim is removed from the U.S.
- *Cooperation requirement*
  - 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 under 18 years of age; or
  - The victim is excused from the cooperation requirement by the Attorney General due to physical or psychological trauma.

### Protections for T Visa Applicants

- Children and spouses receive immigration benefits along with their parents, if included in their parent’s or spouse’s application
- Parents and under 18 year old siblings of child trafficking victims receive immigration benefits along with their children, if included in their child’s application
- VAWA Confidentiality protections against release of information about or in the victim’s immigration case and protections against deportation
- Bona Fide determination = work-authorization and access to state and federal public benefits
- The T visa lasts for four years and includes a path to lawful permanent residency and citizenship

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<sup>8</sup>Carole Angel and Leslye Orloff, *MANUAL: EMPOWERING SURVIVORS, Human Trafficking and the T-Visa*  
<http://niwaplibrary.wcl.american.edu/pubs/ch11-human-trafficking-and-t-visa/>.

- Applicants for lawful permanent residency based on a T visa must prove that the victim
  - Was admitted to the U.S. and has a T visa
  - Maintained continuous physical presence for three years
  - Is admissible at the time of lawful permanent residency application (may be waived)
  - Has had good moral character during their continuous physical presence
  - Has compiled reasonable request for assistance during continuous presence or show extreme hardship upon removal
  - Has provided evidence to support a DHS decision grant lawful permanent residency

### **Continued Presence for Victims of Human Trafficking**

Continued Presence is a temporary immigration designation provided to individuals identified by law enforcement as victims of a severe form of human trafficking and who may be potential witnesses to such trafficking. Continued Presence allows eligible noncitizen trafficking victims to lawfully remain and work in the United States temporarily during the investigation into the human trafficking-related crimes committed against them or for the duration of their civil case filed against their traffickers.

#### **A Continued Presence Applicant Must Prove<sup>9</sup>**

- *Severe Form of Human Trafficking* – That they suffered a “severe form of trafficking,”
- *Witness* -- Must be a potential witness in an investigation or prosecution of the trafficker.
- *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>10</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.
- 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 or in the victim’s immigration case. DHS is precluded from relying upon information provided by the abuser or abuser’s family members to deny the victim’s case, initiate immigration enforcement against a victim or take any adverse action against the victim.
- Initial protection from deportation through VAWA confidentiality<sup>11</sup> shortly after filing. Protection from deportation upon approval.

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<sup>9</sup> USCIS, Center for Countering Human Trafficking, *Continued Presence Resource Guide: for submitting law enforcement agencies and civil attorneys* 7 (July 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/continued-presence-resource-guide-2021>.

<sup>10</sup> USCIS, 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>11</sup> 8 U.S.C. § 1367. USCIS, 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>.

- 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.<sup>12</sup>
- Employment authorization is provided as part of continued presence.
- 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>13</sup>
- Continued presence recipients have no access to lawful permanent residency. To obtain lawful permanent residency they must additionally file for a T visa.

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<sup>12</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>13</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>.