Published in *Family Law Quarterly*, Vol. 47, No. 2 (Summer 2013) p. 191–242.

Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings

SORAYA FATA,* LESLYE E. ORLOFF,** ANDREA CARCAMO-CAVAZOS,*** ALISON SILBER,**** & BENISH ANVER*****

I. Introduction

The immigration debate is at the forefront of discourse in American society. Since 2005, there has been a growing consensus about the need for comprehensive immigration reform. In his January speech on comprehensive immigration reform, President Barack Obama urged us to remember that "this is not just a debate about policy. It's about people," and that "the overwhelming majority of these individuals aren't looking for any trouble. They're contributing members of the community. They're looking out for their families. They're looking out for their neighbors. They're

* Former Senior Staff Attorney at Legal Momentum's Immigrant Women Program, an expert in family law for immigrant parents and a consultant to the National Immigrant Women's Advocacy Project (NIWAP) at American University, Washington College of Law. This article was developed with the assistance of Natalia Lee, who authored the best interests of the child chart included herein and who provided social science research and editorial assistance in the publication of this article.

** Director of NIWAP at American University, Washington College of Law.

*** Dean's Fellow at NIWAP, American University, Washington College of Law.

**** Solo practitioner in Cambridge, Mass., specializing in family law, mediation, and negotiation.

***** Immigrant Women, Law and Policy Fellow, NIWAP, American University, Washington College of Law.

woven into the fabric of our lives."[1]

While immigration reform continues to be debated at the federal level, the immigration debate has also been underway at the local level. Some state and local jurisdictions have passed their own antiimmigrant laws in the course of this debate. The United States Supreme Court has overruled many, but not all, of these state law provisions and bias against immigrants has begun to manifest itself in a variety of ways in communities across the country. Family courts have become a new battleground in which litigants use the immigration status of the opposing party to gain advantage, particularly in custody proceedings.

This article is designed to provide accurate information about current immigration laws and policies to family court judges and attorneys representing immigrant parents, to counter efforts by litigants in family court to raise immigration status of an opposing parent to gain advantage in a custody proceeding. A key goal of this article is to give courts and parties the information needed to keep the focus of the court's decision making in custody cases on statutorily required factors—best interests of the child and primary caretaker determinations.

With a better understanding of the realities of immigration laws, courts and counsel will be better able to assess whether and to what extent an immigrant parent or child is at any real risk of deportation or removal from the United States and whether a party or a child may be eligible for immigration benefits.[2] Correct knowledge and information about immigration laws enables courts to hold hearings and issue rulings in custody cases that are free from bias and reflect the fair administration of justice.

Section I of this article provides an overview of immigrant demographics in the United States, the American Bar Association's position on how courts should respond when immigration status issues arise in custody cases, and discusses constitutional protections of the parent-child relationship that apply without regard to a parent's immigration status. Section II of this article provides a detailed overview of U.S. immigration laws and Department of Homeland Security (DHS) policies covering both enforcement and victim-protection priorities. Section III of this article will discuss the existing case law in which immigration status has been used as a factor in custody determinations.

1. President Barack H. Obama, Remarks at Del Sol High School, Las Vegas, Nevada, on comprehensive immigration reform (Jan. 29, 2013) (transcript *available at* www.whitehouse.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform).

2. Courts can play an important role in making information about immigration benefits for crime victims available to litigants at courthouses. *See generally* Brenda K. Uekert et al., *Serving Limited English Proficient (LEP) Battered Women: A National Survey of the Court's Capacity to Provide Protection Orders*, *available at* http://niwaplibrary.wcl.american.edu/language-access/language-access-info-for-service-providers/LANGAC_NIJReport_06.30. 06.pdf/view.

This article outlines how judges have mistakenly considered the immigration status of the parent to be relevant and/or related to the best-interests-of-the-child standard when making child custody decisions. This article offers contrary social science, legal arguments, as well as immigration law and policies. Section III of this article distinguishes the case law discussed in Section II from the majority of custody cases involving immigrants. Finally, Section IV discusses the best strategies for practitioners representing immigrant parents, particularly immigrant victims of domestic violence, to ensure that immigration status is not used improperly in custody determinations.

II. Demographics, ABA Position, and Constitutional Law Regarding the Protection of the Parent-Child Relationship

A. U.S. Immigrant Demographics and Comprehensive Immigration Reform

The U.S. Department of Homeland Security reports that there are 11.5 million undocumented immigrants currently living in the United States.[3] Among undocumented immigrants, 47% (5.43 million) are men, 41% (4.73 million) are women, and 12% (1.35 million) are children. As of 2011, 24.3% of all children living in the United States under the age of eighteen had at least one foreign-born parent. U.S.-born children of immigrants are 87.1% of all children living in immigrant families in the United States.[4] Additionally, a significant number of children in immigrant families were brought to the United States when they were under the age of sixteen, have grown up here and qualify for protection from deportation and work authorization through the Deferred Action for Childhood Arrivals (DACA) program.[5] Approximately 1.76 million children and young people under the age of thirty-one were eligible for DACA in

3. Michael Hoffer, Nancy Rytina, & Bryan Baker, *Estimates of Unauthorized Immigrant Population Residing in the United States: January 2011*, U.S. Dep't of Homeland Security (Mar. 2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

4. Migration Policy Institute, *Children Age 18 and Under in Immigrant and Native Families* (2011), *available at* http://www.migrationinformation.org/datahub/historicaltrends.cfm#children.

5. For information on how children in immigrant families can qualify for Deferred Action for Childhood Arrivals (DACA) program, *see* the United States Citizenship and Immigration Services (USCIS) website, www.uscis.gov/childhoodarrivals. *See also* Carson Osberg, Rocio Molina, & Leslye Orloff, *Deferred Action for Childhood Arrivals (DACA): How It Is Helpful for Immigrant Crime & Violence Survivors* (Oct. 9, 2012), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/deferred-action-for-childhood-arrivals-dreamers-can-also-help-immigrant-survivors/DACAforVictimsFINAL.pdf/view.

August 2012.[6] With growing numbers of children in the United States growing up in families where one or both parents are foreign born, it is important that courts adjudicating custody cases become familiar with the U.S. immigration laws, policies and practices, and how immigration laws are being implemented by the U.S. Department of Homeland Security.

B. Immigration Status Is Not an Appropriate Factor in Custody Cases

The emergence of family law decisions where immigration status has been used to prevent custody determinations in favor of immigrants is of major concern. Courts and attorneys representing immigrant victims of domestic violence and immigrant parents need training and information that is legally accurate on immigration laws. Most often immigration status is raised when one parent has legal immigration status and the other does not, especially in cases where domestic violence is present. Abusers trying to maintain control over their partner often try to raise the lack of immigration status of the other parent to overcome laws, policies, and legal practices that prevent abusers from obtaining custody.[7]

Many families that include immigrant family members are "mixed status" families. These are families in which one or more family members are undocumented immigrants and other family members are citizens, lawful permanent residents, or immigrants with another form of temporary legal immigration status. In families with mixed immigration statuses, the citizen parent raises the immigration status of the other parent as part of the custody case in an attempt to prejudice the court against the immigrant parent. In some cases, this can be a very effective tool to gain an advantage in a custody case. These tactics are often used by abusive parents in custody cases, attempting to turn the court's attention away from the perpetrator's abuse and toward the victim's unlawful immigration status.

Over two decades ago, the American Bar Association's (ABA) Center on Children and the Law warned courts about the dangers for children

6. *See* Migration Policy Institute, *Key Factors, Unresolved Issues in New Deferred Action Program for Immigrant Youth Will Determine Its Success* (Aug. 16, 2012), *available at* http://www.migrationinformation.org/Feature/display.cfm?ID=903. Between August 15, 2012, and February 14, 2013, over 425,000 children and youth had filed for and had their cases accepted by USCIS through the DACA program. S*ee* USCIS, *Deferred Action for Childhood Arrivals Process*, *available at* http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA2-15-13.pdf.

7. Howard Davidson, ABA Commission on Children and the Law, *Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (Aug. 1994), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/immigrant-families-and-children/The-Impact-of-Domestic-Violence-on-Children.pdf/view.

when courts in custody cases allowed information about immigration status to interfere with the focus on primary caretaker and best-interest-of-the-child determinations that are the required basis for custody decisions under state law. The ABA report found that:

> [i]mmigration status exacerbates the level of violence in abusive relationships when batterers use *the threat of deportation* and *control of information about legal status and the legal system* to lock their spouses and children in violent relationships. . . . 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. Experts who practice in the field inform us that these threats can be just as effective against victims who have all appropriate legal documents to remain in the United States, because they may not know their rights. When the judicial system condones these tactics, children suffer. . . . [P]arties 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. This change will ensure that children of immigrant domestic violence victims will benefit from reforms in the laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all other children.[8]

A primary focus of courts making decisions in custody cases between two parents is to decide in which home the children should primarily reside. In making this determination, courts take into consideration who is the primary caretaker of the children. The inquiry involves determinations that include:

- which parent is responsible for the child's daily routine;
- who takes the children to the doctor and to school;
- which parent enrolls the children in school, participates in the Parent-Teacher Association (PTA);
- to which parent is the child most bonded;
- whom does the child seek out when sick;
- who arranges the child's extracurricular activities; and
- whether either parent has perpetrated domestic violence.

The immigration status of either parent is not relevant to this core primary caretaker determination or the determination of which parent has better parenting skills.

The harmful effect on children when courts consider immigration status information that is irrelevant to the custody determination is not limited to families in which domestic violence is present. When courts are charged with determining which parent is the better parent, allowing introduction of irrelevant evidence about immigration status diverts the

8. *Id*. (emphasis added).

court's attention away from the state's custody statute requirements and may lead to custody determinations that are not in the child's best interests. Most family courts have little understanding of complex federal immigration laws. Unlawful entry into the United States or overstay of an immigrant visa are civil, and not criminal, violations of federal immigration laws. Too often when immigration status information is allowed into custody cases it results in custody decisions that are influenced by bias against immigrants in favor of U.S. citizens, rather than the more important considerations related to good parenting of children.

Courts should focus their attention only on evidence relevant to the custody determination, rather than immigration status which, as this article demonstrates, is irrelevant in most cases. No state custody law includes immigration status of either parent or the children as a factor to be considered in custody determinations. Thus, courts should require that, when a party in a custody dispute seeks to raise the immigration status of the opposing party as a factor in a custody case, the burden to demonstrate the relevance should be placed on the party seeking to introduce such evidence. When a court chooses to hear evidence about a party's immigration status, it must take steps to ensure that the information it receives is legally correct. Immigration law is complex, and judicial training on immigration laws, including immigration protections for immigrant crime victims, is essential to prevent the court from giving unfair advantage to the wrong litigant in family court.[9]

Historically, advocates and family law attorneys have been able to argue successfully that immigration status is an irrelevant factor in custody determinations. Instead, the primary caretaker and best interest of the child are the central focus under state laws when courts are making such determinations. The majority of family law courts still decide custody cases without using immigration status as a factor. Rulings often result in favor of the immigrant parent, especially when that parent has been the primary caretaker and is the nonabusive parent in families victimized by domestic violence. However, there is rising concern over the emergence of a minority of cases where immigration status is used as a factor in deciding against the immigrant parent.

9. Raising immigration status of an opposing party to gain advantage in a family court case, may constitute a Rule 11 violation. *See* Memorandum from Michael Lyons and Darcy Paul, Morgan Lewis and Bockius, LLP, *VAWA Confidentiality and Federal Civil Procedure Rule 11 Violations* and *Plaintiffs' Motion in Liminie to Strike the Defendants' Pleadings, Motions, and Advocacy for Pleadings and Motions for Violation of Federal Rule of Civil Procedure 11, in* Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections* (2011), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-confidentiality/training-materials/Ch3-SA-Man-Confidentiality-MANUAL-ES.pdf/view; *see also* Leslye Orloff & Janice V. Kaguyutan, *Offering a Helping Hand,* 10 AM. U. J. GENDER SOC. POL'Y & L. 95 (2001).

C. Constitutional Rights in the Care and Custody of Children for Undocumented, Detained, and Deported Parents

Parents have fundamental liberty and privacy interests in the care and custody of their children. This is a right protected by the United States Constitution.[10] For this reason, immigration status should not play a role in deciding whether to give custody to the immigrant parent. Several states have followed this standard when deciding whether to grant custody to an immigrant parent. In a unanimous decision, the Nebraska Supreme Court in *In re Angelica L.* overturned a lower court's termination of parental rights by returning custody to an undocumented immigrant mother from Guatemala who had been detained by the Department of Homeland Security, deported, and whose children had been put in foster care. Despite the immigrant mother's undocumented status, her detention, and deportation, the court granted her custody of her children.[11] The court stated that an immigrant mother has a constitutional right to raise her children in her own culture and with the children's older siblings in Guatemala. The Nebraska Supreme Court articulated a presumption that it is in the best interests of the child to be in the care and custody of a fit parent. The court stated that there is an:

> [o]verriding presumption that the relationship between parent and child is constitutionally protected and that the best interests of a child are served by reuniting the child with his or her parent. This presumption is overcome only when the parent has been proven unfit.[12]

This right applies to all immigrant parents without regard to their immigration status, whether or not the parent is detained or deported from the United States. The Nebraska Supreme Court responded to arguments by the state, which claimed that U.S.-citizen children were better off being raised by foster parents in the United States than by their natural mother in Guatemala because of the commodities offered. By confirming that neither immigration status nor unequal country status should be considered in the best interests of the child standard, the court stated that:

> [w]hether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests. We reiterate that the best interests of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another. The fact that the State considers certain adoptive parents, in this case the foster parents better or this environment better, does not overcome the commanding presumption that reuniting the children with Maria is in their best interest—no matter what country she lives in. As we have stated, this court has

10. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923).
11. *In re* Interest of Angelica L., 767 N.W.2d 74 (Neb. 2009).
12. *Id.* at 92.

> never deprived a parent of the custody of a child merely because of financial or other grounds a stranger might better provide.[13]

Other courts have also ruled that custody of children should be awarded to undocumented immigrants. In *In re the Welfare of R. and N. Churape*, the Washington Court of Appeals remanded the case to the trial court, which had denied custody to the parents primarily due to the ties the children had developed with foster parents.[14] After the father appealed, in remanding the case, the court urged the trial court to put emphasis on the legislative focus of keeping families together:

> [t]he legislative focus is on keeping the family unit intact. RCW 13.34.020. Hence, reuniting the family must be the principal goal of the Department of Social and Health Services. Pursuant to the policy set forth in RCW 13.34, *prior to issuing an order terminating the parent and child relationship*, the trial court must find clear, cogent and convincing evidence establishing the first six RCW 13.34.180 allegations for termination. RCW 13.34.190(1). Only after those factors are deemed established does the court focus its analysis on the best interests of the child.[15]

In *Churape*, the court's focus on the importance of keeping families together resulted in the court returning custody to the child's father over a foster home that the state argued might be a potentially better home. This case illustrates the weight that should be given to the parent-child relationship, regardless of the immigration status of the parent.

III. U.S. Immigration Laws and DHS Policies Covering Both Enforcement and Victim-Protection Priorities

A. Priorities of the U.S. Department of Homeland Security

The U.S. Department of Homeland Security (DHS) has the obligation to implement immigration laws, which include both the responsibility for immigration enforcement actions *and* the responsibility to identify and offer protection to immigrant victims of domestic violence, sexual assault, human trafficking, and many other violent crimes.[16] Under immigration law, DHS has not chosen, and it could not choose, to only carry out one of these two equally important responsibilities. However, DHS has decided to focus its immigration enforcement resources on the following categories of immigrants:

- persons who pose a clear national security risk;

13. *Id.* at 94.
14. *In re* Welfare of Churape, 719 P.2d 127 (Wash. Ct. App. 1986).
15. *Id.* at 129 (emphasis added).
16. *See generally*, Department of Homeland Security, *Blue Campaign: Law Enforcement Discussion of Immigration Relief*, Roll Call Videos for Law Enforcement on U Visa Certification and T Visa Endorsement, April 2013, *available at* http://niwap.org/training/DHS-roll-call/.

- serious felons, repeat offenders, and individuals with lengthy criminal records;
- known gang members;
- individuals who pose a clear risk to public safety; and
- persons with a record of "egregious immigration violations."[17]

In recent years, as DHS has focused the vast majority of its immigration enforcement resources on removal of these priority groups of immigrants. A series of DHS policy directives being implemented nationally are fundamentally decreasing the likelihood that an undocumented immigrant who comes before a state family court in a custody case will be an immigrant who is likely to be removed from the United States. DHS describes this shift as follows:

> U.S. Immigration and Customs Enforcement (ICE) has adopted common sense policies that ensure our immigration laws are enforced in a way that best enhances public safety, border security and the integrity of the immigration system. As part of this approach, ICE has adopted clear priorities that call for the agency's enforcement resources to be focused on the identification and removal of those that have broken criminal laws, recently crossed our border, repeatedly violated immigration law or are fugitives from immigration court.[18]

Over the past four years, through the use of targeted enforcement tools this approach has fundamentally shifted ICE's removal efforts to focus on criminal and other priorities.

B. DHS Policy Memoranda That Developed Enforcement Priorities

1. NOVEMBER 7, 2007—PROSECUTORIAL AND CUSTODY DISCRETION MEMO (JULIE L. MEYERS, ASSISTANT SECRETARY, IMMIGRANT CUSTOMS ENFORCEMENT)[19]
   - *Purpose:* "to highlight the importance of exercising prosecutorial discretion when making administrative arrest and custody determinations for aliens who are nursing mothers."

17. Memorandum from John Morton, *Exercising Prosecutorial Discretion Consistent With the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens* (June 17, 2011), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/department-of-homeland-security-dhs-memos/Morton%206.17.11prosecutorial-discretion-memo.pdf/view [hereinafter Morton *Prosecutorial Discretion Memo*].

18. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY, REMOVAL STATISTICS, *available at* http://www.ice.gov/removal-statistics/.

19. Memorandum from Julie L. Meyers, Assistant Secretary, Immigration Customs Enforcement, to All Field Office Directors and All Special Agents in Charge, *Prosecutorial and Custody Discretion* (Nov. 7, 2007), *available at* http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Myer s-Memo-Custody-Discretion-11-7-07.pdf [hereinafter Meyers Memo].

- *Policy Directives:*
  - Nursing mothers should be released, unless they are considered to be threats to national security, public safety, or their detention is statutorily mandated.
  - Discretion should be employed to avoid making arrests of nursing mothers for civil immigration-law violations.
  - The decision to detain nursing mothers must be reported up through and cleared by the chain of command.
  - If a nursing mother is detained, the unity of the mother and child should be encouraged through the use of residential centers or state social-service agencies.

2. November 16, 2007—Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees When Conducting Worksite Enforcement Operations (ICE/DHS)[20]
   - *Purpose:* to "set forth best practices for quickly identifying persons arrested who are sole caregivers or who should be released from custody for other humanitarian reasons."[21]
   - *Policy Directives:*
     - Guidelines called for a comprehensive plan to identify pregnant women, nursing mothers, primary caretakers of children, disabled or seriously ill relatives, and parents who are needed to support their spouses in caring for sick or special-needs children or relatives as early as possible when a worksite enforcement operation will be conducted that involved over 150 persons whom DHS is detaining for civil immigration-law violations.[22]
     - "Personnel should be given the time necessary to assess each arrestee's individual circumstances. The purpose of the assessment should be to determine whether the arrestee, the arrestee's children, or other people. . . have been placed at risk as a result of the arrests. The information provided in the course of such assessments should be used exclusively for humanitarian purposes."
     - ICE should act promptly to decide whether a person is to be released on humanitarian grounds.[23]

---

20. Department of Homeland Security, *Guidelines for Identifying Humanitarian Concerns Among Administrative Arrestees When Conducting Worksite Enforcement Operations* (Nov. 16, 2007), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/ice-hum-guidelines.pdf/view [hereinafter *Guidelines*].

21. Department of Homeland Security, Press Release, *Kennedy, Delahunt Announce New Guidelines for Immigration Raids* (Nov. 16, 2007), *available at* http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Humanitarian-release-provisions-2007.pdf/view.

22. *See Guidelines*, *supra* note 20 at 1.

23. *Id.* at 2.

3. February 7, 2008—Letter from Susan M. Cullen, Director, Office of Policy, Immigration Customs Enforcement[24]
   - *Purpose:* clarification of ICE's detention policies and practices with regard to nursing mothers.
   - *Policy Directives:*
     – "ICE has provided written guidance to our field agents and officers to encourage the use of prosecutorial discretion when they encounter women who are nursing. . . . The guidelines state that absent any statutory detention requirement or concerns such as national security, threats to public safety or other investigative interests, ICE agents should consider the conditional release of nursing mothers pending the results of their immigration removal hearings."
     – In response to an inquiry about when ICE agents usually inform primary caregivers of their guidelines during an immigration enforcement operation: "During such operations, we actively work to identify individuals that may have caregiver issues at the time of arrest. Screening for caregiver issues is done in English and Spanish and both orally and in writing to ensure that any alien with caregiver issues is not detained for any extensive period of time."

4. April 30, 2009—Department of Homeland Security Worksite Enforcement Strategy Fact Sheet[25]
   - *Purpose:* Lowered threshold of worksite enforcement operations that involve 150 people to twenty-five; plan to quickly identify caregivers and mothers remained in place and will be implemented in enforcement operations that involve fewer workers.
   - *Policy Directives:*
     – "Existing humanitarian guidelines will remain in effect, impacting worksite enforcements involving twenty-five or more illegal workers. This reflects a change from the previous threshold of 150."[26]

---

24. Letter from Susan M. Cullen, Director, Office of Policy, Immigration Customs Enforcement, to Leslye Orloff, Director, Immigrant Women Program, Legal Momentum (Feb. 7, 2008), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Nursng-Mothers-and-Prima ry-Caretaker-Letter-to-L-Mo.pdf/view [hereinafter ICE Letter].

25. U.S. Department of Homeland Security, *Worksite Enforcement Strategy Fact Sheet* (Apr. 30, 2009), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/c_Enforcement_DHSNewStrategy_04.30.09_FIN.pdf.

26. *Id.* at 2.

5. September 25, 2009—Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal (Peter S. Vincent, Principal Legal Advisor, Immigration Customs Enforcement)[27]

- *Purpose:* to "provide field guidance to ensure compliance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) regarding aliens with pending U visa petitions who are either (1) subject to a final administrative order of deportation or removal and request a stay of removal or (2) in removal proceedings."[28]
- *Policy Directives:*
  - "When deciding to stay the request, the Field Office Director should also consider favorably any humanitarian factors related to the alien or the alien's close relatives who rely on the alien for support."[29]
  - Listed adverse factors that make a stay inappropriate to grant: "(1) national security concerns; (2) evidence that the alien is a human rights violator; (3) evidence that the alien has engaged in significant immigration fraud; (4) evidence that the alien has a significant criminal history; and (5) any significant public safety concerns."[30]

6. 2009—Immigration Customs Enforcement Immigration Detention Reforms Fact Sheet[31]

- *Purpose:* This overhaul of the immigration enforcement system includes reinforcement of ICE focus on family unity and treatment of women and families.[32]
- *Policy Directives:*
  - The Office of Detention Policy and Planning is responsible for "designing a new civil detention system"[33] that includes "Special Populations Management," which has a goal of "provid[ing] atten-

27. Memorandum from Peter S. Vincent, Principal Legal Advisor, Immigration Customs Enforcement, to OPLA Attorneys, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sept. 25, 2009), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Vincent-Memo-Guid ance-Regarding-U-Nonimmigrant-Status.pdf/view.

28. *Id*. at 1.

29. *Id.* at 2.

30. *Id*.

31. U.S. Immigration and Customs Enforcement, *2009 Immigration Detention Reforms Fact Sheet*, *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/c_Detention_DHSDetentionReform_2009_FIN.pdf/view.

32. *Id*. at 1.

33. *Id*. at 2.

tion to women, families, the elderly and vulnerable populations, as well as "Programs Management," which included attention to ensure family visitation was provided to detainees.

7. August 20, 2010—Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions[34]
   - *Purpose:* To prevent investment of ICE removal resources on cases of immigrants who will be granted immigration benefits.
   - *Policy Directives:*
     - To identify cases of immigrants in removal proceedings before immigration courts and direct ICE trial attorneys to dismiss proceedings without prejudice and swift transfer of the case to the United States Citizenship and Immigration Service for expedited adjudication. This approach avoids expending ICE removal resources on immigrants with valid applications for immigration benefits that USCIS will ultimately approve.[35]
     - Cases are to be dismissed without prejudice, unless there are adverse factors including: "criminal convictions, evidence of fraud or other criminal misconduct, and national security and public safety considerations."[36]

8. October 6, 2010—Letter from Phyllis A. Coven, Acting Assistant Director, Immigration Customs Enforcement[37]
   - *Purpose:* Describes policy to be used by courts and attorneys representing immigrant parents in family court cases to have DHS transfer an immigrant parent to court to participate in a family court proceed-

34. Memorandum from John Morton, Assistant Secretary, Immigration Customs Enforcement, to Peter S. Vincent, Principal Legal Advisor, & James Chaparro, Executive Associate Director, Enforcement and Removal Operations, Immigration Customs Enforcement, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (Aug. 20, 2010), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/aliens-pending-applications.pdf/view [hereinafter Morton Memo]. *See also* U.S. Immigration Customs Enforcement Policy Memorandum, *Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings: Revisions to the Adjudicator's Field Manual* (Feb. 4, 2011), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/govern ment-documents/coordination-ad jud-removal-proceedings.pdf/view [hereinafter ICE Policy Memo].

35. *Id.* at 1.

36. *Id*. at 2–3.

37. Letter from Phyllis A. Coven, Acting Assistant Director, Immigration Customs Enforcement, to Michelle Brane, Director, Detention and Asylum Program, Women's Refugee Commission (Oct. 6, 2012) (stating that "parents have a fundamental right to care for their children and participate in the discussions that affect the interest of their child.").

ing. To reiterate the expanded service of nonmedical emergency escorted trips for the purposes of allowing detainees to visit critically ill family members as per the policy.[38]

- *Policy Directive:*
  - DHS expanded the use of the INS Detention Standard that was issued on September 20, 2000, to be used in this process to bring immigrant parents to family court. This procedure was originally designed to allow detainees to attend funerals of immediate family member."[39]

9. December 21, 2010—DHS Broadcast Message on New 384 Class of Administration Code[40]
   - *Purpose:* To help assure that immigration enforcement, detention and removal actions are not initiated against immigrant victims of domestic violence, sexual assault, human trafficking and other crimes who have applied for crime victim immigration benefits protected by VAWA confidentiality"[41]
   - *Policy Directives:*
     - The new computerized system was designed to notify all DHS officers, including enforcement officials, about persons that are to be provided VAWA confidentiality protection. The "384" flag signifies that the individual has a pending or approved VAWA confidentiality-protected case. This system will help stop perpetrators from triggering the removal of an immigrant crime-victim through reports regarding the victim's undocumented immigration status to immigration enforcement officials.
     - No information about the existence of a VAWA confidentiality protected case or about the location, status, or other identifying information of any individual with the VAWA confidentiality code "384" may be released.
   - *Impact:*
     - "VAWA Confidentiality and Victim Safety Provisions provide three types of protection to immigrant victims of violence, includ-

38. *See* Michael D. Cronin, Acting Executive Associate Commissioner, Office of Programs, & Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, INS Detention Standard, *Non-Medical Emergency Escorted Trips* (Sept. 20, 2000), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/family-law-for-immigrants/parental-rights-of-detained-immigrants/NonMedical-Escorted-Trips-DHS.pdf/view.

39. *Id.* at 1 (emphasis added).

40. U.S. Department of Homeland Security, *DHS Broadcast Message on New 384 Class of Admission Code* (Dec. 21, 2010), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-docu ments/message-to-DHS-384-COA-Final-12.21.10.pdf/view [hereinafter *DHS Broadcast*].

41. *Id*. at 1.

ing battered immigrants and immigrant victims of sexual assault, trafficking, and other U-visa-listed crimes.[42] Specifically, VAWA:

a. Protects the confidentiality of information provided to the Department of Homeland Security, the Department of Justice, or the Department of State;
b. Stops immigration enforcement agencies from using information provided by an abuser, trafficker, or U visa crime perpetrator, a relative, or a member of his or her family against the victim in an immigration case; and
c. Prohibits enforcement actions at any of the following locations: domestic violence shelter; victim services program; family justice center; supervised visitation center; or courthouse if the victim is appearing in connection with a protection order case, a child custody case, or other civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking."[43]

10. March 2, 2011—Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens Memo (John Morton, Director, Immigration Customs Enforcement)[44]

- *Purpose:* to outline "the civil immigration enforcement priorities of U.S. Immigration Customs Enforcement (ICE) as they relate to the apprehension, detention, and removal of aliens."[45]
- *Policy Directives:*
  - Priority #1—Aliens who pose a danger to national security or a risk to public safety.
  - Priority #2—Immigrants who have recently illegally entered the United States.
  - Priority #3—Aliens who are fugitives or otherwise obstruct immigration controls.
  - Detention—"Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not

42. Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections* (Sept. 25, 2012), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man-Confidentiality-MANUAL-ES.pdf/view.

43. *Id.* at 3.

44. Memorandum from John Morton, Director, Immigration Customs Enforcement, to All Immigration Customs Enforcement Employees, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [hereinafter Morton *Civil Immigration Enforcement* Memo].

45. *Id.* at 1.

expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, *pregnant, or nursing, or demonstrate that they are primary caretakers of children* or an infirm person, or whose detention is otherwise not in the public interest."[46]

– Prosecutorial discretion—"The rapidly increasing number of criminal aliens who may come to ICE's attention heightens the need for ICE employees to exercise sound judgment and discretion consistent with these priorities. . . . ICE officers and attorneys should continue to be guided by . . . the November 7, 2007 Memorandum from then Assistant Secretary Julie Meyers."[47]

11. June 17, 2011—Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (John Morton, Director, Immigration Customs Enforcement)[48]

- *Purpose:* "ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system."[49]
- *Policy directives:*
  – This policy memo set out a list of immigrants who do not fall within DHS enforcement priorities, who may have violated civil immigration laws, whose removal is a "low priority" and against whom DHS will not expend enforcement resources.[50]
  – Immigrant factors that result in an immigrant being considered a "low priority" and not likely to be removed are:[51]
    (1) the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
    (2) the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
    (3) the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a

46. *Id.* at 3, emphasis added (underlined in original).
47. *Id.* at 3–4.
48. *See* Morton *Prosecutorial Discretion* Memo, *supra* note 17.
49. *Id.* at 2 (citing the list of priorities outlined in the March 2, 2011, Morton *Civil Enforcement* Memo, *supra* note 44).
50. *Id*. at 1.
51. *Id.* at 4 (emphasis added).

U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;

(4) whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;

(5) the person's ties and contributions to the community, including family relationships;

(6) the person's ties to the home country and conditions in the country;

(7) the person's age, with particular consideration given to minors and the elderly;

(8) whether the person has a U.S. citizen or permanent resident spouse, child, or parent;

(9) whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;

(10) whether the person or the person's spouse is pregnant or nursing;

(11) whether the person or the person's spouse suffers from severe mental or physical illness;

(12) whether the person's nationality renders removal unlikely;

(13) whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;

(14) whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and

(15) whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

12. June 17, 2011—Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (John Morton, Director, Immigration Customs Enforcement)[52]

- *Purpose:* U.S. immigration laws contain requirements for victim protection that DHS has an obligation to implement to the same extent DHS has responsibilities for immigration enforcement.

52. Memorandum from John Morton, Director, Immigration Customs Enforcement, to All Field Office Directors, Special Agents in Charge, and Chief Counsel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), *available at* http://niwaplibrary.wcl.

- *Policy Directives:*
  - This policy sets out how DHS will "exercise of prosecutorial discretion in removal cases involving the victims and witnesses of crime, including domestic violence, and individuals involved in non-frivolous efforts related to the protection of their civil rights and liberties. . . [t]his memorandum builds on prior guidance on the handling of cases involving T an U visas and the exercise of prosecutorial discretion."[53]
  - "Absent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime."[54]
  - Crime victims and witnesses should receive "release from detention and deferral or a stay of removal."[55]
  - DHS officials should use the "384" Class of Admission Code that identifies "those victims of domestic violence, trafficking, or other crimes who already have filed for, or have been granted, victim-based immigration relief."[56]

13. June 15, 2012—Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children[57]
    - *Purpose:* This policy is designed "not to enforce the Nation's immigration laws against certain young people who were brought to this country as children. . . these individuals lacked the intent to violate the law" and to "ensure that our enforcement resources are not expended on these law priority cases but are instead appropriately focused on people who meet our enforcement priorities."[58]
    - *Policy Directives:*
      - "Our Nation's immigration laws. . . are not designed to be blindly

american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/department-of-homeland-security-dhs-memos/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf/view [hereinafter Morton-*Certain Victims* Memo].

53. *Id.* at 1.

54. *Id.*

55. *Id*. at 2.

56. *Id.* at 3.

57. Memorandum from Janet Napolitano, Secretary, Department of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, and John Morton, Director, U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf/view.

58. *Id.* at 1.

enforced without consideration given to the individual circumstances of each case."[59]

– The Deferred Action for Child Arrivals (DACA) program provides protection from deportation and access to work authorization for immigrant children and youth who:
  (1) came to the United States under the age of sixteen;
  (2) have continuously resided in the United States for at least five years;
  (3) are currently in school, have graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
  (4) have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
  (5) are not above the age of thirty."[60]
– "As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal."[61]

DHS's 2012 removal statistics provide courts and family lawyers with crucial information for determining whether, under actual immigration enforcement practices, a particular individual before the court in a family law case is likely to be removed from the United States by DHS. In 2012, the quantity of DHS removals that fell within the priorities discussed above was 96% (convicted criminals 55%, repeat immigration violators 21%, border removals 17%, and immigration fugitives 3%).[62]

59. *Id.* at 2.
60. *Id.* at 1.
61. *Id.* at 2.
62. Immigration and Customs Enforcement U.S. Department of Homeland Security, *FY 2012 Removals by Priorities*, *available at* http://www.ice.gov/removal-statistics/. Policy guidance has been issued directing local law enforcement to identify crime victims and witnesses who have been detained and provides a phone number for local law enforcement to call regarding cases of victims and witnesses. *See* DHS, Immigration Detainer and Notice of Action Form I-274(12/12), *available* at http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/immigration-detainer-form%20Dec%202012.pdf/view ("If the individual may be the victim of a crime, or if you want this individual to remain in the United States for prosecution or other law enforcement purposes, including acting as a witness, please notify the ICE Law Enforcement Support Center at (802) 872-6020"). DHS wants local law enforcement to identify crime victims and witnesses so that, as in the case of U.S. citizens, DHS can avoid issuing an immigration detainer in these cases. *See* DHS, ICE Detainers: Frequently Asked Questions (Dec. 2012), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/detainer-faqs%20Dec%

"Immigration fugitives," as defined by DHS, are immigrants in the United States who have outstanding orders of removal (deportation) who have not been removed from the United States. An immigrant may have an outstanding order of removal issued as an "administrative removal order" by DHS[63] or a removal order by an immigration judge. Generally, if an immigration judge issued an order of removal, one or two following scenarios occurred:

202012.pdf/view. *See* John Morton, *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems*, *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/detainer-policy%2012-21-12.pdf/view. Immigrants who have committed crimes are likely to be detained by ICE when:

- the individual has a prior felony conviction or has been charged with a felony offense;
- the individual has three or more prior misdemeanor convictions, however given limited enforcement resources, three or more convictions for minor traffic misdemeanors or other relatively minor misdemeanors alone should not trigger a detainer unless the convictions reflect a clear and continuing danger to others or disregard for the law;
- the individual has a prior misdemeanor conviction or has been charged with a misdemeanor offense if the misdemeanor conviction or pending charge involves:
  - violence, threats, or assault (this includes domestic violence which is a deportable offense);
  - sexual abuse or exploitation;
  - driving under the influence of alcohol or a controlled substance;
  - unlawful flight from the scene of an accident;
  - unlawful possession or use of a firearm or other deadly weapon;
  - the distribution or trafficking of a controlled substance; or
  - other significant threat to public safety because the individual poses a significant risk of harm or injury to a person or property;
- The individual has been found by an immigration officer or an immigration judge to have knowingly committed immigration fraud;
- The individual otherwise poses a significant risk to national security, border security, or public safety. The examples DHS provides for this category are: the individual is a suspected terrorist, a known gang member, or the subject of an outstanding felony arrest warrant; or the detainment order is issued in furtherance of an ongoing felony criminal or national security investigation.
- The individual has illegally re-entered the country the individual has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding and returned to the United States. 8 U.S.C. § 1326(a)(1). This category of immigrants accounts for nearly half (47%) of all criminal immigration prosecutions. *See* Transactional Records Access Clearinghouse at the University of Syracuse, *TRAC Immigration, Illegal Reentry Becomes Top Criminal Charge* (June 10, 2011), *available at* http://trac.syr.edu/immigration/reports/251/.
- The individual has been convicted of illegal entry. Persons with convictions for illegal entry are persons encountered by border patrol who are in the process of crossing the border (98%). This category of immigrants is very unlikely to be litigants in family court custody cases. *See* Transactional Records Access Clearinghouse at the University of Syracuse, *TRAC Immigration, Illegal Reentry Becomes Top Criminal Charge* (June 10, 2011), *available at* http://trac.syr.edu/immigration/reports/251/.

63. Examples include, when the immigrant has committed a crime that is an aggravated felony under immigration law defined in INA § 101(a)(42), when the immigrant has stipulated he or she is removable and has waived his or her right to appear before an immigration judge, and when immigrants are from countries that are subject to the visa waiver program who have overstayed their visas and do not have any opportunity to appear before an immigration judge.

(1) The immigrant was issued a "notice to appear in immigration court" and the immigrant was served with the notice. The immigrant appeared in immigration court and at the end of the proceeding, which provided the immigrant an opportunity to be heard, the immigrant was ordered removed.[64]
(2) Alternatively, DHS issued on the immigrant a notice to appear, which the immigrant did not receive. The immigrant did not appear in court, and the immigration judge issued an "in abstentia" order of removal. Immigrants receive "in absentia" orders when the notice to appear was sent to the wrong address.

Another common scenario, particularly in domestic violence, child abuse, elder abuse, and trafficking cases, is that the perpetrator triggered the enforcement action against the victim by calling and turning the victim into DHS for enforcement. When the notice to appear arrived in the mail, the perpetrator made sure that the victim never received the notice to ensue issuance of a removal order against the victim. The perpetrator's power and control over the victim is enhanced when an in absentia order is in place. Should victims try to seek help to stop the abuse, perpetrators will be much more effective in having victims removed before they learn about help available under immigration laws through VAWA, T-visa or U-visa programs if there is an outstanding order of removal in place.

An outstanding order of removal against an immigrant does not mean that the immigrant will ultimately be removed from the United States. Immigration laws contain provisions that allow immigrants with outstanding orders of removal to file motions to reopen and request stays of removal that allow the immigrant to pursue immigration relief either in immigration court or from DHS.[65] Special motion to reopen and stay of removal laws apply to cases in which the immigrant crime victim is pursuing VAWA, T-visa and U-visa immigration relief.[66] Immigrant crime victims with victims and witnesses with outstanding orders of removal are generally highly unlikely to be removed from the United States.[67] This includes immigrants who are witnesses in criminal cases and immigrants pursuing nonfrivolous civil enforcement for civil rights violations (e.g., against employer perpetrated sexual violence or other discrimination). Similarly, immigrants with pending applications for immigration benefits

64. Generally, a removal order will be issued after a contested hearing, unless the immigrant agrees to voluntary departure.

65. INA § 240(c)(7).

66. INA § 240(c)(7)(c)(iv). Special more generous motion to reopen and stay of removal rules apply in cases of battered immigrants eligible to file VAWA self-petitions and VAWA cancellation of removal applications. Vincent Memo, *supra* note 27. *See also* ICE Policy Memo, *supra* note 34; August 2010 Morton Memo, *supra* note 34.

67. *See* June 2011 Morton *Certain Victims* Memo, *supra* note 52.

that are likely to be approved by DHS are to be afforded protection from deportation and are not to be removed from the United States pending final adjudication of their petition.[68]

Immigrants entering the country illegally after a removal order was entered against them can be subject to reinstatement of removal procedures, as well as prosecution for criminal violation of immigration law. These procedures allow DHS to remove the immigrant from the United States immediately without affording the immigrant the ability to contest the removal in immigration court. However, 8 U.S.C. § 1326(a)(2)(A) authorizes DHS to exercise its discretion in consenting to the alien's admission into the United States. This process allows DHS to agree to readmission of an immigrant who has been previously removed. One of the largest groups of immigrants who apply for and receive consent to readmission are applicants for lawful permanent residency, applicants for work visas, family member of U.S. citizens and lawful permanent residents, and fiancés of U.S. citizens.[69]

In the Violence Against Women Act of 2005,[70] Congress directed the DHS to exercise its continued "discretion to consent to an alien's reapplication for admission after a previous order of removal, deportation, or exclusion." Congress also explicitly stated that DHS should use this discretion particularly to grant consent to reentry for immigrant crime victims eligible for immigration protections under VAWA self-petitioning, VAWA cancellation of removal, VAWA suspension of deportation, the T visa for human trafficking victims, and the U visa for immigrant crime victims.

In 2012, only 4% of all removals of immigrants from the United States were of immigrants for civil immigration violations.[71] It is clear from the DHS removal data that the vast majority of immigrant litigants before the courts in custody cases will be parents who have no criminal history and no history of egregious immigration violations that will lead to the deportation of the parent. Immigrant parents who have been victims of domestic violence, sexual assault, or human trafficking, and immigrant parents who are primary caretakers of children, the elderly, the disabled or those who are ill, will not be at risk of deportation under current DHS policies developed since 2007, and which are discussed more fully below. This is true even when an opposing party would like the court to believe the contrary.

68. *See* August 2010 Morton Memo, *supra* note 34.

69. *See* DHS, Instructions for Form I-212, Application for Permission to Reapply for Admission to the United States After Deportation or Removal, *available at* http://www.uscis.gov/files/form/i-212instr.pdf.

70. *See* § 813(b) of VAWA 2005, Pub. L. No. 109–62, 119 Stat. 2960 (2005).

71. Immigration and Customs Enforcement (ICE) U.S. Department of Homeland Security, *FY 2012 Removals by Priorities*, *available at* http://www.ice.gov/removal-statistics/.

The Department of Homeland Security has policies designed to prevent the break up and destruction of immigrant families. As the DHS enforcement priorities discussed above show, DHS has constantly reiterated that immigrants who are primary caretakers of children, the elderly, the sick or the disabled are not DHS enforcement priorities.[72]

In response to a series of immigration enforcement workplace raids in 2007, Senator Edward M. Kennedy and Congressman William D. Delahunt engaged in a conversation with DHS about the detrimental separation between parent and child that these raids were having on immigrant families; these discussions eventually led to new DHS guidelines.[73] The goal turned to developing sensible prioritization of immigration enforcement mechanisms in an effort to mitigate the impact of separating children from their parents. In November 2007, Immigration and Customs Enforcement Assistant Secretary Julie L. Meyers issued a memorandum regarding prosecutorial and custodial discretion that represented DHS's priority to prevent the severing of the mother/child relationship.[74] Field agents were given a directive to "coordinate with federal and local health service agents to screen immigrants who are arrested to determine if they are caring for young children or other dependents who may be at risk."[75] The issuance of the new guidelines for DHS enforcement agents reflected the DHS's recognition of the unique needs of immigrant parents and their children that should apply in all cases, except for those that involve national security interests, public safety, or statutorily required mandatory detention.[76]

The issuance of this policy indicated a significant shift in DHS policies. DHS standards of practice no longer placed any enforcement priority on detention of immigrant parents of minor children unless they are a threat to national security. The 2007 memorandum urged officers to "maintain the unity of the mother and child," stressing the importance of keeping an

72. *See* June 2011 Morton *Prosecutorial Discretion* Memo, *supra* note 17.

73. *See* DHS Press Release, *supra* note 21.

74. *See* Meyers Memo, *supra* note 19.

75. Julia Preston, *Immigration Quandry: A Mother Torn from Her Baby*, N.Y. TIMES, Nov. 17, 2007, *available at* http://www.nytimes.com/2007/11/17/us/17citizen.html.

76. *See* Meyers Memo, *supra* note 19, at 1:

> Absent any statutory detention requirement or concerns such as national security, threats to public safety or other investigative interests, the nursing mother should be released on an Order of Recognizance or Order of Supervision and the Alternatives should be considered as an additional enforcement tool.
>
> In situations where ICE has determined, due to one of the above listed concerns or a statutory detention requirement to take a nursing mother into custody, the filed personnel should consider placing a mother with her non-U.S. citizen child in [a] . . . family residential center. For a nursing mother with a U.S. citizen child, the pertinent state social service agencies should be contacted to identify and address any caregiver issues the alien mother might have in order to maintain the unity of the mother and child. . . .

immigrant parent with her child.[77] Choosing to devote DHS enforcement staff time to actions that result in separating immigrant parents and their children goes against the best use of DHS's resources. Detention of immigrants who are not a threat to national security severs the ties between parent and child, harming the health and development of children without serving any public or enforcement interest of DHS.[78] It takes crucial resources[79] away from high-priority threats to national security, including those that pose a risk to public safety. A March 2, 2011, memorandum from Immigration and Customs Enforcement Director John Morton *mandated* that DHS officers "obtain approval" before detaining low-priority aliens who are not subject to mandatory detention for posing a risk to public safety or national security.[80] Implicit in these directives is the notion that the bond between mother and child should not be severed unless the mother poses an actual risk to public safety or national security. These directives follow from the traditional function of DHS in immigration enforcement. Since 2000, it has been a DHS priority to urge its officers to exercise discretion in a judicious and efficient manner to prevent waste of resources on cases of immigrant parents and immigrant crime survivors.[81] In clarifying the reasons for prioritizing to enforce immigration laws effectively, Commissioner Meissner stated that "[a]n agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management."[82] U.S. immigration laws place multiple mandates on DHS. These include conferring immigration benefits on persons whom Congress deemed eligible to receive immigration benefits, while at the same time enforcing U.S. immigration laws. Exercising prosecutorial discretion to target certain undocu-

77. *See* Meyers Memo, *supra* note 19, at 1.

78. *Id.* at 1–2 ("Morton issued three blanket priorities. . . [t]he first being the highest priority and the second and third constituting equal, but lower, priorities[:]. . . 1. Aliens who pose a danger to national security or risk to public safety. . . . 2. Recent illegal entrants. . . 3. Aliens who are fugitives or otherwise obstruct immigration controls.")

79. *See* June 2011 Morton *Prosecutorial Discretion* Memo, *supra* note 17, at 3 ("Absent extraordinary circumstances or the requirements of mandatory detention, field office directors *should not expend detention resources on aliens who are*. . . pregnant, or nursing, or demonstrate that they are primary caretakers of children. . . or whose detention is otherwise not in the public interest.").

80. *Id.* at 3–4.

81. Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Officers, and Regional and District Counsel, *Exercising Prosecutorial Discretion* (Nov. 17, 2000), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminnal-justice/government-documents/IMM_EDCJ_Prosecutorial_Discretion.pdf/view.

82. *Id.* at 4.

mented immigrants for removal and deeming others a low priority for removal facilitates accomplishment of both these congressionally mandated goals.

In January 2009, the DHS Office of the Inspector General (OIG) issued a 2007 report finding that in that year, 18,237 removals of aliens were those of noncitizen parents who had U.S. citizen children.[83] This enforcement practice subverts the goals and directives of DHS. Maintaining consistency in enforcement of immigration laws is key to an efficient immigration system. To implement DHS enforcement priorities, in June 2011, Immigration and Customs Enforcement Director John Morton issued a memorandum to all DHS staff in which he stressed the need for consistency among field agents, officers, and attorneys in considering the same set of factors when deciding when to exercise prosecutorial discretion.[84] This list deems certain groups of immigrants to be "low priority" for removal. The list of "low priority" immigrants included those who are caretakers of minors and specifically identified pregnant or nursing women as being part of a "certain class of individuals that warrant particular care."[85] These policies seek to prevent harm to children due to mother-child separations, as well as recognize the fact that many immigrant mothers also fall into another category of immigrants that DHS has places a priority on assisting for humanitarian, law enforcement, and community safety reasons—immigrant crime victims and witnesses. Many immigrant crime victims will not be removable from the United States because they are eligible to access immigrations relief designed to offer them protection from removal.

IV. Family Law and Immigration Law: A Guide in Custody Case Determinations Based on Accurate Information, Immigration Law, and Immigration Enforcement Policies

Custody determinations under state laws nationwide uniformly use a "Best Interests of the Child" standard when determining custody.[86] Multiple factors are used to determine who should have legal and/or phys-

83. Department of Homeland Security, Office of the Inspector General, *Removals Involving Illegal Alien Parents of U.S. Citizen Children* (Jan. 2009), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/research-reports-and-data/c__Removals%20Involving%20Alien%20Parents_Jan09.pdf/view.

84. *See Myers* Memo, *supra* note 19, at 4–5.

85. *Id.* at 4.

86. *See* U.S. Department of Health & Human Services, Administration for Children & Families, Child Welfare Information Gateway, *Determining the Best Interests of the Child: Summary of State Laws* (2010), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes /best_interest.cfm.

ical custody of the child(ren), including factors such as the stability of the child(ren), the prior involvement of each parent in the child(ren)'s lives, and the ability of each parent to support the child(ren).[87] The factors that go into the best-interests determination are fairly uniform nationwide, with some variation from state to state. Appendix I summarizes the most commonly stated guiding principles, required factors, and considerations under the best-interests of the child state laws. It is important to note that no state's best-interests-of-the-child statute lists immigration status as a factor to be considered. *See* Appendix I: State-by-State Best Interests Chart on page 244.[88]

Most courts make a custody determination after evaluating the child's best-interest factors contained in their state's custody statute and determining who has been the child's primary caretaker; custody is then awarded to the noncitizen parent, allowing immigration status issues to overtake and refocus the determination. In a growing number of domestic violence cases, counsel for immigrant parents are choosing present evidence about the noncitizen parent's immigration status as a determinative part of their custody case. In bringing evidence about a party's own immigration status into the custody case, the immigrant parent has an opportunity to explain to the court that, under the DHS policies discussed in section II above, the immigrant parent is not likely to be removed from the United States and to provide evidence that the undocumented or temporary immigrant parent is in the process of being granted legal immigration status under the Violence Against Women Act, the T-visa or the U-visa protections.[89] When domes-

87. UNIF. MARRIAGE & DIVORCE ACT § 402 (1970) amended 1970 and 1973. (For example, in D.C., the factors for the best-interest-of-the-child standard include: the wishes of the child; the wishes of the parents; child's relationship with each parent and siblings; child's adjustment to home, school, and community; the health of all parties; the capacity of the parents to communicate and reach shared childrearing decisions; the willingness of the parents to share custody; the prior involvement of each parent in the child's life; the potential disruption of the child's life; the location of the parents' homes; the demands of the parents' employment; the age and number of children; the sincerity of each parent's request; the parent's finances; the public benefits the child receives; and the benefit to parents. D.C. CODE § 16-914 (2008)).

88. State law research current as of March 1, 2013.

89. Courts should know that there are safety risks that counsel for the abused-immigrant parent need to carefully weigh before raising immigration status in family court. Special federal VAWA confidentiality laws allow battered immigrants and other immigrant crime victims seeking protection under U.S. immigration laws to file for and be awarded immigration relief under confidentiality protections that preclude anyone, including courts and perpetrators, from learning from federal government agencies that the victim's immigration case even exists. Thus, in many cases of immigrant victims pursuing crime-victim-related immigration relief, victims may choose not to raise the fact that they are in the process of obtaining legal immigration status in the custody case because of the risks of retaliation from the perpetrator. Orloff, *VAWA Confidentiality*, *supra* note 42. The discovery of the existence or the contents of a VAWA-confidentiality-protected case in family court through discovery violates federal VAWA-confidentiality protections, *see also* Brief for Legal Momentum as Amici Curiae Supporting

tic violence is present in the family, if the nonabusive-immigrant parent includes information about immigration status affirmatively in the custody case, it provides an opportunity to educate the court about immigration laws protecting the immigrant parent and provide expert testimony to help the judge make a decision that is based on a correct understanding of immigration laws.

Raising immigration status in this context, and in other contexts, is not always detrimental to the undocumented-immigrant parent seeking custody. A number of reported cases across the country document the fact that courts are granting custody to the undocumented-immigrant parent without making the immigration status of the undocumented parent a factor in the custody case.[90] However, in some cases, raising immigration status in family law court results in custody determinations based on incorrect information and assumptions about immigration laws, or biases, which leads to immigrant parents unjustly losing custody of their children. It is this narrow subset of cases that is being addressed in this article.

Often the parent who has U.S. citizenship, lawful permanent residency status, or some other form of legal immigration status in the United States, raises the lack of immigration status of the other parent to gain an advantage in the custody case. This is especially true if there is domestic violence involved in the case. The abuser tends to use the victim's lack of immigration status as a tactic to increase the victim's susceptibility and vulnerability, thereby enhancing the abuser's power and control over the victim. In many instances, the undocumented parent could have obtained immigration status through the U.S. citizen or legal permanent resident spouse. However, when domestic violence is present, the abuser often fails to file immigration papers on behalf of the victim or files an

---

Defendant (2011), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/vawa-confidentiality/AmicusinVAWADiscoveryCase%20DI-10-10-12.pdf/view. Similarly, discovery of a VAWA-confidentiality case in criminal court proceedings has been severely limited, *see* § 810(a)(1)(C) of the Violence Against Women Reauthorization Act of 2013.

90. Castro v. United States, 560 F.3d 381 (5th Cir. 2009). (The father was an unlawful immigrant from Mexico, whereas the mother, who abandoned the family, was a U.S. citizen. Since the mother did not seek custody, the local police department and child protective services, as recognized by the court, held that the father had custody of the child); *see also* Rory H. v. Mary M., 2003 WL 23204304 (N.Y. Fam. Ct. Dec. 23, 2003) (determining that the best interests of the child was to be with the mother, a native of Ireland, even though she could not continue to live in the United States legally. The court determining custody did consider immigration status, stating that it would be preferable for the U.S.-citizen child to stay in this country and receive all its benefits. The court ultimately held that the children's mother should receive custody because she could still provide the best opportunities for their child, including nearby family, free medical care, schooling, and rent-free living with the mother's parents in Ireland, with support payments from the father.).

immigration case and withdraws it. These forms of abuse related to the immigration status of a victim give the abuser the ability to create a situation in which he gains power and control over the partner by denying immigration status that is, as a matter of immigration law, available to the immigrant spouse, and then uses the immigrant parent's lack of legal immigration status to win custody of their children.

All parents have a fundamental right to raise their child, and immigration status should not preclude this fundamental right. Under the United States Constitution, a parent has a fundamental right to the care, custody, and control of his or her child, absent a compelling state interest.[91] As the court in *In re Interest of Minor T.* discussed, "the right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child."[92] Where immigration status is raised, it is also critical to understand how to obtain a just outcome for the immigrant parent once counsel for the citizen or lawful-resident parent has decided to use immigration status to attack the immigrant parent.

When a party raises the immigration status of the opposing party in a custody case, in order for the court to carry out its objective fact-finding role, it is very important for the court to determine:

- Did one party in the custody case play a role in assuring that the immigrant parent lacks legal immigration status?
- Did one party play a role in triggering a DHS enforcement action against the other parent (e.g., by reporting the immigrant parent to DHS, failing to inform the immigrant parent about removal proceedings notices, having the immigrant parent detained by DHS)
- Is one parent trying to use family court discovery to find out information about any case the opposing party may have filed for immigration relief that is protected by federal VAWA confidentiality laws?[93]

In cases involving domestic violence, the lack of legal status of one parent can be used by the nonimmigrant parent to make a case for custody. The fact that an immigrant parent does not have lawful immigration status, but is eligible through the other nonimmigrant parent, provides evidence that the nonimmigrant parent is using the immigration status of the victim as a tool to maintain power and control. It is important for courts and counsel to ask whether the abuser submitted a relative petition on behalf of the immigrant parent and/or the abuser withdrew his sponsorship

91. *See* Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645, 651, 92 (1972).

92. *See In re* Interest of Minor T., 674 N.W.2d 442 (Neb. 2004).

93. 8 U.S.C. § 1367 (2013).

of the application. This information is relevant and can build a case for the immigrant parent. It is important for the custody court judge to know that immigration remedies for battered immigrants exist precisely due to this phenomenon, including VAWA self-petitions, cancellation of removal, and suspension of deportation. Particularly in cases in which there is evidence in the record documenting battery or extreme cruelty,[94] obtaining testimony from an immigration lawyer who has significant expertise on special protections for immigrant crime victims can help inform a court about immigration relief that will be available to an immigrant victim.

The majority of courts that have taken immigration status into account have ruled that, while it can be considered, it cannot be the dispositive factor in a custody determination.[95] A national review of family court cases found a limited number of instances where courts were convinced to consider the opposing parties' immigration status in a custody case. Often, when courts consider immigration status in custody cases, the court's findings and conclusions contain information about immigration law that is either legally incorrect or makes assumptions about the potential for removal or deportation that are inconsistent with policies issued by the U.S. Department of Homeland Security.[96] The reported cases in which courts have erroneously put undue weight on immigration status as a factor in custody matters fall into one of the following five categories, each of which will be discussed fully below:

1. Immigration status has an impact on the child's citizenship opportunities;
2. A parent's undocumented or temporary immigration status means that the parent before the court is at risk of or is likely to be removed (deported) from the United States;
3. Immigration status impacts the child's stability and the parent's ability to provide for the child;
4. Immigration status impacts the parent's ability to obtain public benefits on the child's behalf; and

94. *See* Leslye Orloff, Brittnay Roberts, & Stefanie Gitler, *Battering and Extreme Cruelty: Drawing Examples from Civil Protection Order and Family Law Cases* (Feb. 19, 2013), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/reports-memos-social-science-research-and-related-data/Extreme-Cruellty-BIA-training-memo.pdf/view.

95. *See In re* Parentage of Florentino, 113 Wash. App. 1002 (2002) (determining that the father's immigration status did not affect the child and awarding him custody); *In re* Dependency of J.B.S., 863 P.2d 1344 (Wash. 1993); Alfred v. Braxton, 659 A.2d 1040 (Pa. Super. Ct. 1995) (holding that immigration status can only be considered in relation to the best interests of the child, or its "effect upon the child's physical, intellectual, moral and spiritual well-being").

96. *See* discussion of DHS policies, *infra* section II.

5. A parent's undocumented immigration status places the child at risk of parental kidnapping.

Each example of a court's consideration of immigration status in custody cases is summarized in the sections below. Social science data, immigration laws and policies, and legal arguments are provided for each section to demonstrate why for each of these areas undue weight should *not* be given to immigration status. The DHS data and information about immigration laws, policies and practices can assist courts and attorneys representing immigrant parents without legal immigration status to counter the misuse of immigration status in custody cases.

V. Legally Incorrect Rulings That Immigration Status Has an Impact on a Child's Citizenship Opportunities

The Nevada Supreme Court, in *Rico v. Rodriguez*, considered the parents' immigration status as a factor in custody, claiming that it may affect a child's citizenship opportunities.[97] Although both parents were from Mexico, the father was a lawful permanent resident in the United States, and the mother was undocumented.[98] In the custody determination, the district court considered the immigration status and its effects for both parents.[99] The Nevada Supreme Court recognized that the lower court had mistakenly relied on a memorandum stating that Rodriguez could obtain U.S. citizenship on behalf of his children if he was awarded physical custody.[100] In reality, Rodriquez, as a lawful permanent resident, could file the paperwork necessary for his children to obtain legal status regardless of physical custody.[101] Nevertheless, the Supreme Court of Nevada established that "in evaluating the child's best interests, the district court has the discretion to consider a parent's immigration status to determine its derivative effects on the children."[102] Thus, the court affirmed the district court's order, regardless of its finding that custody did not affect the ability of the children to obtain status, ruling that immigration status can be considered when it is evaluated in the best interest of the child related to the ability to pass on some type of immigration benefit.[103]

97. Rico v. Rodriguez, 120 P.3d 812 (Nev. 2005).
98. *Id.* at 815.
99. *Id.* at 816.
100. *Id.*
101. *Id.*
102. *Id.* at 818–19.
103. *Id.* at 819.

A. Correct Information and Application of Immigration Law

Under immigration law, the ability to pass on citizenship is only contingent on custody for citizenship purposes in two situations: (1) when the child is a legal permanent resident and the parent is filing for the child to become a naturalized U.S. citizen; and (2) when the child is born and resides outside of the United States and has a citizen parent. In the first situation, the child automatically derives U.S. citizenship if: (1) at least one parent of the child is a citizen of the United States; (2) the child is under the age of eighteen; and (3) the child is residing in the legal and physical custody of the citizen parent pursuant to lawful admission for permanent residence.[104] The children affected by this provision are those who are already lawful permanent residents. As a lawful permanent resident, the child will independently qualify to file for naturalization five years after the date in which the child became a lawful permanent resident.[105] In sum, being under the custody of a citizen parent can speed up a child's access to citizenship, but will not prevent a child from becoming a citizen.

In the second situation, in order for the child to acquire citizenship, several factors must be satisfied, including that the citizen parent has legal and physical custody of the child.[106]

The above circumstances are rare. In the vast majority of cases, under immigration law, a parent without custody of a child can still apply for that child's immigration status. Thus, even if the custodial parent does not have legal immigration status, the child can obtain legal status through the noncustodial parent. Many children of immigrant parents are already citizens by virtue of having been born in the United States, which makes this section moot.[107] If they do not have status, children can become permanent residents or citizens through the relative petition process if:

(1) they are under twenty-one years of age, or over age twenty-one and are the unmarried son or daughter of a United States citizen, or
(2) they are the unmarried son or daughter of any age of a lawful permanent resident or citizen.[108]

Except in the two instances discussed above, custody is not required to pass on citizenship or lawful permanent residence status. Examples of various forms of immigration cases in which a parent can include a child,

104. Immigration and Nationality Act § 320(a), 8 U.S.C. § 1431 (1952).
105. INA § 316(a)(1), 8 U.S.C. § 1427(a)(1).
106. *See* INA § 322(a); 8 U.S.C. § 1433.
107. *See* Randy Capps & Karina Fortuny, *Immigration and Child and Family Policy* 10, prepared for The Urban Institute and Child Trends Roundtable on Children in Low-Income Families (Jan. 12, 2006), *available at* http://www.urban.org/UploadedPDF/311362_lowincome_children3.pdf.
108. *See* INA §§ 203(a)(2)(A), 203(h); 8 U.S.C. § 1153.

regardless of whether they have custody, include:

- Lawful permanent residency,[109]
- A temporary visa,[110]
- A form of humanitarian relief (e.g., Temporary Protected Status, Asylum, Refugee Humanitarian parole, Violence Against Women Act protection, a trafficking victim T visa or a crime victim U visa)[111]

Parents and children who have legal immigration status who come before the court may have forms of legal immigration status other than lawful permanent residency. These forms of immigration status include, but are not limited to: Temporary Protected Status (TPS),[112] student visas, diplomatic visas, and a range of work visas. To demonstrate the insignificance of custody in the ability of a noncustodial parent to pass on immigration status to a child, Appendix II tracks which forms of legal immigration status allow immigrants to include their children in an immigrant-parent's application so that the child receives legal immigration status along with the applicant parent. If parents do not initially include their children in the application for a visa, they can, at a later date, have their children rejoin them in the United States.[113]

An immigrant father can pass on his status, regardless of custody, if the father's name is on the child's birth certificate. In cases where the father's name is not on the birth certificate, secondary evidence may be sufficient to show paternity. Once paternity is established, as a matter of federal law, the child can receive legal immigration status through an application filed by the father. A citizen parent who demands an award of custody of a child as a precondition to filing a family-based visa petition for the child is encouraging bias and seeking to manipulate the fact finder to gain advantage in the custody case.

109. *See* INA § 203(a)(2)(A); 22 C.F.R. § 42.53(a).

110. *See* Appendix II: Visa Chart—Immigration Status & Children's Benefits, page 248.

111. *See* VAWA INA §§ 204(a)(1)(A)(iii)-(v); Asylum 8 C.F.R. §§ 208.3(a), 1208.3(a); Refugees INA § 207(c)(2), 8 U.S.C. § 1157(c)(2); U Visa INA § 101(a)(15)(U)(ii), 8 C.F.R. § 214.14(a)(10), (f); T Visa INA § 101(a)(15)(T)(ii); 22 C.F.R. § 41.84(a); TPS C.F.R § 244.2(f)(iv*); see also* HRIFA 8 C.F.R. §§ 245.15(i)-(k), 1245.15(i)-(k); NACARA 8 C.F.R. § 245.13.

112. INA § 244; 8 U.S.C § 1254a; 8 C.F.R. § 244. TPS is a temporary immigration benefit that allows qualified individuals from designated countries who are in the United States for a limited time period. A TPS country designation may be based on ongoing armed conflict, environmental disaster, or other extraordinary and temporary conditions in the country. At this moment, nationals from El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria are TPS designees. *See Countries Currently Designated for TPS, available* at http://www.uscis.gov/.

113. *See* Appendix II: Visa Chart—Immigration Status & Children's Benefits, page 248.

B. If the Immigrant Parent Is a Victim of Domestic Violence

Courts and attorneys representing abused-immigrant parents should always look for patterns of immigration-related abuse in custody cases. Immigration-related abuse is a form of coercive control that is present in relationships plagued by domestic and sexual violence.[114] It is helpful for judges and lawyers involved in custody cases to know about the remedies included in U.S. immigration laws that offer a route to lawful permanent residency for immigrant victims of crimes or abuse. Each of the following forms of immigration relief offers immigrant crime victims a safe avenue to legal status and does not include or require the cooperation, knowledge, or help of the abusive individual. The following special immigration remedies allow crime victims to include their children in their applications:

- VAWA self-petitions (for immigrants battered or subjected to extreme cruelty[115] by their U.S. citizen or lawful-permanent-resident spouse or parent, or their U.S.-citizen child over twenty-one year old);[116]
- VAWA cancellation of removal and VAWA suspension of deportation (for immigrants battered or subjected to extreme cruelty by their U.S.-citizen or lawful-permanent-resident spouse or parent when the immigrant victim has been placed in removal proceedings before an immigration judge);
- U visas (for immigrant victim of domestic violence, sexual assault, child abuse, human trafficking, stalking, elder abuse, kidnapping, felonious assault, extortion and other mostly violent crimes);[117] and
- T visas (for immigrant victims of either sex trafficking or labor trafficking).[118]

In the vast majority of circumstances, allegations that one parent needs to be awarded custody in order to be able to provide the children access to legal immigration status are legally incorrect as a matter of immigra-

114. *See* Giselle Aguilar Hass, Mary Ann Dutton, & Leslye Orloff, *Lifetime Prevalence of Violence Against Latina Immigrant: Legal and Policy Implications*, *in* DOMESTIC VIOLENCE: GLOBAL RESPONSE 93–113 (2000), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/cultural-competency/dynamics-of-violence-against-immigrant-women/RSC H_Lifetime_Prevelence_DV_Latinas.pdf/view; *see also* Rocio Molina, Leslye Orloff, & Benish Anver, *Considerations for the Board of Immigration Appeals in Violence Against Women Act Cases* (Feb. 19, 2013), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/reports-memos-social-science-research-and-rela ted-data/BIA-VAWA-Cases-Report-2.21.13.pdf/view.

115. *See* Orloff, *supra* note 42.

116. VAWA: INA §§ 204(a)(1)(A)(iii)-(v).

117. INA § 101(a)(15)(U)(ii), 8 C.F.R. §§ 214.14(a)(10), (f).

118. T Visa INA § 101(a)(15)(T)(ii); 22 C.F.R. § 41.84(a).

tion law. Courts must be cautious when such allegations are raised and, thus, take steps to ensure that they are receiving up-to-date information about immigration laws, policies, and practices. When parties are represented and arguing that they must be granted custody of the children in order to confer immigration status to them, asking counsel to brief the issues before moving forward can be helpful, as is the court's independently verifying its understanding of the immigration laws it is being asked to consider.[119] Remember, only two circumstances exist in which this argument accurately reflects immigration law. If these are not the facts of the case, the argument that custody will affect the ability of the child to obtain status is not legally sound under immigration law.

VI. A Parent's Undocumented or Temporary Status Impacts the Child's Stability and Means That the Parent Is at Risk or Likely to Be Removed from the United States

Another emerging trend in custody cases is that some courts consider immigration status as it relates to a parent's ability to provide a stable environment for the children. Research demonstrates that having a parent without citizenship does not impact a child's stability.[120] More children of immigrant families live in two-parent households, a factor that leads to a substantial advantage in social relationships over children with U.S.-born parents.[121] All of these factors combined provide social stability to a child who has at least one immigrant parent. Immigrants are not only able to provide a stable home for their children, but also instill in them positive values that Americans generally consider important. Hispanic parents value higher education at a higher rate than other parents (86% to 54%) and report a higher rate than other parents of helping their children with homework three or more days a week.[122] Students in multicultural families also report a high rate of parental encouragement to go to college

119. Up-to-date information on U.S. immigration laws and DHS policies can be found at http://iwp.legalmomentum.org/reference/additional-materials/materials-for-adjudicators-and-judges. Technical assistance for courts and lawyers on immigration and family law issues is available from the National Immigrant Women's Advocacy Project, American University, Washington College of Law, (202) 274-4457; niwap@wcl.america.edu.

120. Randy Capps, Michael Fix, et al., *The Health and Well-Being of Young Children of Immigrants*, The Urban Institute (2004), *available at* http://www.urban.org/UploadedPDF/311139_ChildrenImmigrants.pdf.

121. Donald J. Hernandez & Jeffrey S. Napierala, *Children in Immigrant Families: Essential to America's Future*, FCD Child and Youth Well-Being Index (CWI) Policy Brief—Foundation for Child Development (June 2012), *available at* http://fcd-us.org/sites/default/files/FINAL%20Children%20in%20Immigrant%20Families%20_0.pdf

122. Deborah A. Santiago, *Latino Parents in Education*, EXCELENCIA IN EDUCATION (Dec. 2008), *available at* http://www. ed_excelencia.org/sites/default/files/LatinoParents-2008_0.pdf.

(59% Hispanic, 61% African-American, and 86% Asian-American).[123] Further, 76% of immigrants have reported volunteering their time or contributing money to an organization or church in their community.[124] Research also found that a majority of immigrants find it extremely important to work and stay off welfare (73%) and to keep fully informed about news and public issues (62%); nearly half (49%) said it was extremely important to serve in the military if drafted.[125]

A national review of family court decisions shows courts have struggled with the issue of whether or not to take immigration status into consideration in the context of its relationship to the potential removal of the immigrant parent from the United States. In an unreported case from Nebraska, the mother was a cocaine user who disappeared for days at a time, and the father was a convicted felon who had returned to the United States illegally.[126] When considering which parent should have custody, the court discussed the mother's drug addiction and the father's status as an undocumented immigrant. In analyzing the case, the court considered the father's potential removal and any impending impact that his removal would have on the child. The court stated that, "future presence to provide any supervision of the care of Margarita can be measured only one day at a time, as he is here only so long as he can avoid deportation."[127] Ultimately, the court decided that neither the father nor the mother should have custody. However, this was due to the mother's drug addiction and the father's failure to protect the child from the mother's abuse and neglect, and *not* based on the father's immigration status.

The Court of Appeals of Kentucky also considered the potential removal of an immigrant parent.[128] In this instance, both parents sought sole custody of the child. The father was an undocumented immigrant from Mexico and the mother a U.S. citizen. Under Kentucky family law, immigration status is not a factor for determining the best interests of the child.[129] However, the family law court considered immigration status in relation to the father's potential removal from the United States and how

123. Paul Geejbarra & Jean Johnson, *A Matter of Trust: Ten Key Insights from Recent Public Opinion Research on Attitudes About Education Among Hispanic Parents, Students and Young Adults*, PUBLIC AGENDA (2008), at 21, *available at* http://www.publicagenda.org/files/amateroftrust.pdf.

124. *Now That I'm Here—What America's Immigrants Have to Say About Life in the U.S. Today*, PUBLIC AGENDA (2003), at 27, *available at* http://www.publicagenda.org/files/now_that_im_here.pdf.

125. *Id.* at 26.

126. *In re* Margarita T., No. A-95-530, 1995 WL 749701 (Neb. Ct. App. Dec. 19, 1995).

127. *Id.*

128. Ramirez v. Ramirez, 2007 WL 1192587 (Ky. Ct. App. Apr. 13, 2007).

129. KY. REV. STAT. ANN. § 403.270.

this would affect his ability to take care of his child.[130] The Court of Appeals of Kentucky upheld the lower court's decision, stating that the statute's list of factors was "illustrative, not exclusive" and that the lower court was correct in considering the father's immigration status where it led to a "significant risk" of deportation of the parent.[131] The court reasoned that deportation of the parent is relevant because it affects the parent's ability to serve as residential custodian for the child. Following this analysis, and establishing that there was a high risk of deportation solely on the assessment of the domestic relations commissioner, the court denied sole custody to the father, and instead awarded joint custody.[132]

A. Accurate Information and Application of Immigration Law

As early as November 2007, ICE issued a memorandum regarding prosecutorial and custodial discretion representing DHS's priority to prevent the severing of the mother/child relationship.[133] Field agents were given a directive to "coordinate with federal and local health service agents to screen immigrants who are arrested to determine if they are caring for young children or other dependents who may be at risk."[134] The issuance of the new guidelines for agents represented DHS's recognition of the unique needs of immigrant parents and their children, regardless of them being subject to detention based on a threat to security or a statutory requirement.[135]

This means that on the list of immigrants that ICE is looking to apprehend, an undocumented immigrant with a child is at the lowest end, even if he or she presents a threat to security or because of a statutory requirement. At this time, it is less likely for an immigrant parent with the custody of a child to get detained, or even deported. Separating immigrant parents from their children goes against the best use of DHS's resources. Thus, because the possibility of deportation of a parent is extremely low, the possibility of deportation should never be considered in custody determinations when analyzing the best interests of the child.

Relying on the claim that lack of immigration status will result in removal from the United States incorrectly assumes that being undocumented means the parent is in imminent danger of deportation. Under current policies DHS, immigration enforcement officials are

130. *See Ramirez*, 2007 WL 1192587 (2007).

131. *Id.* at 3.

132. *Id.* The court also made the point that it did not allow immigration status to be the dispositive factor in its BIOTC analysis.

133. *See* Meyers Memo, *supra* note 19.

134. *See* Preston, *supra* note 75.

135. *See* Meyers Memo, *supra* note 19, at 1.

directed to exercise prosecutorial discretion, not to detain or remove an immigrant parent who may be the primary caretaker of a minor, be pregnant or nursing, or be the spouse of a pregnant or nursing parent.[136]

Under current DHS policies, it is not likely that an immigrant parent with no record of criminal conviction involved in a family court custody case will be removed from the United States. When the immigrant parent has been a victim of domestic violence, sexual assault, human trafficking or other U-visa-listed crime, removal is less likely. Even in cases in which the nonimmigrant parent, who is a perpetrator, tries to gain an advantage in family court by reporting the immigrant-victim parent to DHS for immigration enforcement, the new DHS computerized system that tracks cases of immigrant crime victims is designed to prevent such actions.[137] As a result, speculation about deportation of an opposing party does not provide courts evidence that should be relied upon in a custody case. Further, if detention or removal results after a custody ruling, parties can return to court to modify custody, or a temporary guardianship can be put in place as a precaution.[138] Also, removal proceedings generally provide a long enough time for parents to make alternate custody arrangements if necessary.[139] Immigration status should not be considered unless there is an imminent threat of deportation, such as an order of removal. However, as discussed in Section II above, many immigrant parents with outstanding removal orders will not be removed from the United States. If the parent before the court has no criminal record, even in cases with removal orders, removal may not be imminent and the parent may have very good potential for staying in the country.[140]

Many immigrant parents with outstanding deportation or removal orders will not be removed from the United States. Examples include but

136. *See* June 2011 Morton *Certain Victims* Memo, *supra* note 52; *see also* ICE Letter, *supra* note 24.

137. *See* DHS Broadcast Message on New 384 Class of Admission Code, *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf.

138. For information on temporary guardianships, *see* Leslye Orloff, *Detention and Termination of Parental Rights Tool Kit, available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/VictimParent-and-Detention-Tool-Kit.

139. Only one-third of removals are expedited so, generally, there is sufficient time, *see* U.S. Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2007* (Dec. 2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.

140. http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-6.17.11prosecutorial-discretion-memo.pdf/; *see also* Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively,* 92 CAL. L. REV. 541 (2004).

are not limited to:

- applicants for lawful permanent residency,
- applicants for work visas,
- family member of U.S. citizens and lawful permanent residents,
- fiancés of U.S. citizens,
- VAWA self-petitioners and their children,
- VAWA cancellation of removal applicants,
- VAWA suspension of deportation applicants,
- T-visa applicants and their children,
- U-visa applicants and their children,
- children and youth who qualify for Deferred Action for Child Arrivals (DACA), and
- children who qualify for special immigrant juvenile status.

A recent decision reflects an understanding of these immigration law realities and illustrates how a court should approach the assessment of custody when one of the parents is undocumented, and the question of risk of deportation comes up.[141] The Georgia Court of Appeals reversed the family court's decision to terminate a father's parental rights based on the possibility that he could someday be deported. The court stated, "Our decisions must be based on clear and convincing evidence of parental misconduct or inability and that termination is in the best interest of the child, and not speculation about 'the vagaries or vicissitudes that beset every family on its journey through the thickets of life.'"[142] The court established that the father's potential deportation was not clear and convincing evidence of his ability to care for the child, and thus ruled that termination of the father's parental rights on this basis was an error.[143]

Giving undue weight to the fact that undocumented immigrants will face removal is an erroneous assumption. As discussed above in section II, only four percent of removals of immigrants from the United States in 2012 were for civil violations of immigration laws, and another three percent were immigrants with outstanding orders of removal.[144] The vast majority of removals are against immigrants with criminal convictions for serious felonies, who pose a risk to national security or serious risk to public safety. Living in the United States without immigration status is not likely to result in removal. Countless undocumented immigrants live for years without ever facing removal proceedings. For those who are placed

141. *See generally In re* M.M., 587 S.E.2d 825 (Ga. Ct. App. 2003).
142. *Id.* at 833.
143. *Id.* at 834.
144. Immigration and Customs Enforcement (ICE) U.S. Department of Homeland Security, *FY 2012 Removals by Priorities*, *available at* http://www.ice.gov/removal-statistics/.

in removal proceedings, the outcome in immigration court can include different options that may allow the immigrant parent to remain in the country. These include:

1. Actions in Immigration Court That Stop or Delay for a Significant Period of Time Removal of an Immigrant from the United States
   - Motions to reopen and reconsider;
   - Motions for stays of removal;
   - Continuation of the removal case for DHS to adjudicate a family-based petition, work-based petition, VAWA self-petition, T visa or U visa;
   - Voluntary departure instead of deportation.[145]

2. Immigration Relief Available in Immigration Court
   - Asylum;
   - Being awarded lawful permanent residency from the immigration judge who grants the immigrant "adjustment of status";
   - VAWA cancellation of removal;
   - VAWA suspension of deportation;
   - Cancellation of removal;
   - Withholding of removal;
   - Suspension of deportation;
   - Status under the Convention Against Torture (CAT).

B. If Immigrant Parent Is a Victim of Domestic Violence

An immigrant victim of domestic violence, sexual assault, human trafficking or other U-visa crime can apply for relief under the VAWA, the T visa or the U visa. If a parent has a pending T visa, U visa or VAWA immigration case, the immigrant parent cannot be deported. Thus, the parent will be highly likely to avoid deportation and ultimately receive legal permanent residency in the United States. The process from application to approval of lawful permanent residency status for a VAWA self-petitioner, T-visa or U-visa applicant can take as long as four years.[146] Throughout

145. This can be a last resort to avoid deportation or removal for many immigrants. INA § 240B (Voluntary Departure makes it easier for the immigrant parent to return in the future and may grant the immigrant a reasonable period of time to reside in the country).

146. It takes DHS between six months and two years to adjudicate VAWA self-petitions and U-visa cases. *See* Leslye Orloff, *National Survey on Timing of Access to Work Authorization by Immigrant Victim VAWA Self-Petitioners and U-Visa Applicants*, Legal Momentum (Sept. 28, 2011), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Timing-of-Access-to-Work-Authorization-6.4.12.pdf/. Once the VAWA self-petition is granted, abused spouses, children, or parents of U.S. citizens can file for lawful permanent residency immediately, but it takes some time to adjudicate the

this time period the immigrant victim and her children are protected from deportation.[147] Parents who are in this application process are generally barred from travel outside of the United States. Moreover, once the abused or crime-victim parent's application for VAWA, T-visa or U-visa relief is granted, they receive legal work authorization,[148] some access to public benefits,[149] and ongoing protection from deportation.[150]

VII. Immigration Status Has an Impact on the Parent's Ability to Work and Provide for the Child

Some courts consider the impact that legal immigration status has on a parent's ability to work. The reasoning some courts use is that a parent's immigration status may affect his or her ability to attain employment and provide financial stability to the child, and thus should be considered in a best-interests-of-the-child analysis.

A. Immigrant Parent's Ability to Provide for the Children

An Iowa court looked at several factors, including the parents' immigration status, when analyzing the best interests of the child. The court found custody in favor of the father because it assumed that he would be able to provide the most stability to the child, in part due to his legal per-

application. Spouses and children of lawful permanent residents cannot apply for lawful permanent residency until a visa becomes available. This can take up to or more than four years. *See* Visa Bulletin: around four years for children of LPRs to obtain LPR status, *available at* http://travel.state.gov/visa/bulletin/bulletin_5885.html. Crime victims awarded U visas cannot apply for lawful permanent residency until they have had their U visa for three years. INA § 245(m).

147. DHS set up a specialized computer system that DHS employees are required to review before initiating removal actions against immigrants. Immigrant victims with pending or approved VAWA, T-visa or U-visa cases are not to be subject to deportation or removal. *See DHS Broadcast*, *supra* note 40.

148. 8 CFR § 274a.12(c)(31); 8 C.F.R. § 274a.12(a)(16); 8 C.F.R. § 274a.12(a)(19).

149. *See* Leslye Orloff & Jordan Tacher, *Trafficking Victim Benefits Eligibility Process*, *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/access-to-benefits-and-sevices-by-immigration-relief-for-immigrant-crime-victims/Trafficking-Victims-Benefits-Eligibility-Process.pdf; Leslye Orloff & Jordan Tacher, *U Visa Victim Benefits Eligibility Process*, *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/access-to-benefits-and-sevices-by-immigration-relief-for-immigrant-crime-victims/U-Benefits-Eligibility-Process.pdf; Leslye Orloff & Jordan Tacher, *VAWA Public Benefits Eligibility Process*, *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/access-to-benefits-and-sevices-by-immigration-relief-for-immigrant-crime-victims/VAWA-Benefits-Eligibility-Process.pdf.

150. VAWA self-petitioners receive protection from deportation through deferred action status until they can file for and be granted lawful permanent residency. Victims may be in this state for many years until a lawful permanent residency visa becomes available; they apply for and are granted lawful permanent residency status. Victims awarded a T visa or a U visa receive legal immigration status for four years. INA §§ 214(0), 214(p). After three years, they can apply for lawful permanent residency. INA §§ 245 (l), 245(m).

manent resident status.[151] However, as is the case in many family-court custody decisions in which the court refers to or lists immigration status as a factor considered, there were other factors at play in the best-interest-of-the-child analysis that could have supported an award of custody to the father without considering the mother's lack of legal immigration status. The court also evaluated the parents' ability to work and the parents' relationships with other family members in the area when it considered which parent could provide the most stability to the child. Had the undocumented mother been able to show she was capable of providing stability through other factors, the case might have been decided in her favor.[152]

B. Correct Information and Application of Immigration Law

The correct application of immigration status in a custody case can be found in *In re Interest of Aaron D.*[153] In this case, the state sought to take custody away from the mother, an undocumented immigrant from Mexico. The court stated that the mother's immigration status was not relevant to the analysis in the appeal, except as it affected her ability to obtain transportation and employment. Despite the mother's inability to speak English and her admission that it was difficult to attain stable employment, the court held that her parental rights should not be terminated because the state did not present clear and convincing evidence that the termination of custody was in the best interest of the child.[154]

Often courts will underestimate undocumented immigrant parents' ability to work and provide for their children. It is incorrect for courts to assume that lack of legal work authorization means that an immigrant parent is not working. The reality is that many immigrants are working as an essential part of a United States underground economy.[155] Many

151. *See In re* Nunes Duenas*,* 2006 WL 3314553, 725 N.W.2d 658 (Iowa Ct. App. Nov. 16, 2006).

152. *Id.*

153. *In re* Interest of Aaron D, 691 N.W. 2d 164 (Neb. 2005).

154. *Id*. at 164, 167, 168, 261.

155. President Barack H. Obama, *supra* note 1. *See also* Randy Capps, Michael Fix et al., *A Profile of the Low-Wage Immigrant Workforce*, IMMIGRANT FAMILIES AND WORKERS, Brief no. 4 (Nov. 2003), *available at* http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc. pdf; Immigrants are critical to the growth of the U.S. economy. Immigrants are eleven percent of all U.S. residents, but fourteen percent of all workers, and twenty percent of low-wage workers. *See* National Immigration Law Center, *Immigration & Immigrant Workers* (Apr. 2009), *available at* http://v2011.nilc.org/immsemplymnt/IWR_Material/Attorney/The_Basics.pdf; Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES (Apr. 5, 2005), *available at* http://www.nytimes.com/2005/04/05/business/05immigration.html?_r=0; Derrick Z. Jackson, *Undocumented Workers Contribute Plenty*, BOSTON GLOBE (Apr. 12, 2006), *available at* http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/04/12/undocumented_workers_contribute_plenty (Immigrants con-

immigrant parents work one or more jobs to support their children, despite the fact that they do not have legal work authorization.[156]

The ability to provide for a child is not limited to providing financial support through an immigrant parent's own wages through work. Immigrant parents who are awarded custody of children can receive court-ordered financial support in the form of child support, spousal support, and court orders requiring the children be maintained on the noncustodial parent's health insurance policy. Obligations to pay child support cannot be circumvented, even by undocumented immigrant parents who are actually working or who have other forms of economic support. Family courts have ordered that not having lawful work authorization is not a defense that prevents an immigrant parent from being ordered to pay child support.[157]

In addition, many immigrants can be eligible for work authorization or are in the process of obtaining a form of imitation status through which the applicant will become eligible for work authorization. This includes immigrant victims of domestic violence, sexual assault, human trafficking and other U-visa crimes for which work authorization is part of the immigration relief available to immigrant crime victims.[158] Examples of immigration statuses that lead to work authorization are:[159]

- asylees and asylum seekers;[160]
- refugees;[161]
- students seeking particular types of employment;[162]
- applicants seeking to adjust to permanent residence status;[163]
- people in or applying for temporary protected status;[164]
- fiancés of American citizens;[165]

---

tribute $7 billion/year in taxes.); Rakesh Kochhar, Pew Hispanic Center, *Growth in the Foreign-Born Workforce Employment of the Native Born* (Aug. 10, 2006), *available at* http://pewhispanic.org/files/reports/69.pdf.

156. David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45 (2005).

157. *See* Asal v. Asal, 960 P.2d 849 (Okla. Civ. App. 1998).

158. *See generally* Leslye E. Orloff & Janice v. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95 (2001).

159. *See* U.S. Citizenship and Immigration Services, Employment Authorization Chart, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnex toid=f3c02af9f0101310VgnVCM100000082ca60aRCRD.

160. 8 C.F.R. §§ 274a.12(a)(5), 274a.12(c)(8) (2012).

161. 8 C.F.R. §§ 274a.12(a)(3), 274a.12(a)(4) (2012).

162. 8 C.F.R. §§ 274a.12(c)(3)(A), 274a.12(c)(3)(B), 274a.12(c)(3)(C), 274a.12(c)(3)(ii), 274a.12(c)(3)(iii), 274a.12(c)(6) (2012).

163. 8 C.F.R. § 274a.12(c)(9) (2012).

164. 8 C.F.R. § 274a.12(a)(12) (2012).

165. 8 C.F.R. § 274a.12(a)(6) (2012).

- dependents of foreign government officials;[166]
- immigrants granted deferred action;[167]
- approved VAWA self-petitioners and their children;[168]
- U-visa recipients;[169]
- T-visa recipients;[170]
- trafficking victims with continued presence;[171]
- approved special immigrant juvenile applicants;[172] and
- DACA (Deferred Action for Childhood Arrival) recipients.[173]

Immigrants who attain legal immigration status based on an employment visa receive work authorization. For some work visas, the immigrant is required to work for the particular employer that sponsored the immigrant for the visa. Immediate relatives of U.S. citizens, including spouses, children, and parents can obtain work authorization once the family-based visa petition or VAWA self-petition has been filed if the immigrant also filed a lawful permanent residency application at the same time.[174]

VIII. Immigration Status and Parental Kidnapping

Another common instance in which one party raises the immigration status of the other party to gain advantage in a custody proceeding involves cases in which there are allegations of the potential for parental kidnapping. When parental kidnapping allegations arise in custody proceedings involving a foreign-born parent, the court, in evaluating whether such allegations have merit, should focus on the same factors the court would consider in custody cases involving citizen parents. These factors include what evidence has been presented by either parent that the court deems credible as to the following:[175]

166. 8 C.F.R. § 274a.12(c)(1) (2012).

167. 8 C.F.R § 274a.12(c)(14) (2012).

168. 8 C.F.R. § 274a.12(c)(14) (2012). *See also* Memorandum from Paul Virtue, Acting Executive Associate Commissioner, INS Office of Programs, to Regional Directors, District Directors, Officers-in-Charge, & Service Center Directors, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997), *available at* http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/government-memoranda-and-factsheets/VAWA_INSOP%20VAWA%20Self-Petition%20memo_5.6.97_OVW_3.31.09.pdf/.

169. INA § 214(p)(3)(B); 8 C.F.R. § 274a.12(a)(19).

170. 8 C.F.R. § 274a.12(a)(16).

171. Must file for employment authorization. 8 C.F.R. § 274a.12(a)(3) (2012); Trafficking Victims Protection Act § 107(b).

172. When the special immigrant juvenile status is approved, the child is granted lawful permanent residency and is authorized to work as a lawful permanent resident.

173. *See* DACA information, *supra* note 5.

174. *See* Appendix II, page 248, for information by immigration status about whether and when work authorization may be available to any particular immigrant.

175. *See generally* Leslye Orloff, Joyce Noche et al., *Countering Abuser's Attempts to Raise*

- What evidence exists that the immigrant parent is planning to leave with the children?
- What evidence supports a conclusion that flight is imminent?
- How often does the parent travel to the home country?
- What evidence is there that the immigrant parent plans to leave the jurisdiction or the United States?
- What are the immigrant parent's contacts or family relationships in another jurisdiction or country?
- Does the parent have a job in another location?
- Does the immigrant parent have the economic capacity to move with the child(ren) to another country or jurisdiction?

The American Bar Association Center on Children and the Law conducted a study funded by the Department of Justice, Office of Juvenile Justice and Delinquency Prevention that identified risk factors for international child abduction. Characteristics which this research found in common among international child abductors included: having strong ties to another country; involvement in a marriage or intimate partner relationship with a partner from a different ethnicity, culture, and/or country of origin; threats to abduct the children or some prior form of actual abduction; feelings of alienation from the U.S. legal system; harboring suspicious beliefs that the child has been abused; having paranoid or delusional tendencies; or exhibiting psychopathic behavior.[176] In assessing the likelihood a parent may abduct a child from the United States, it is important to consider as well whether the parent is foreign born, has dual citizenship in the United States and in another country, has residency in another country; has work in another country or works for a company that could transfer his job to another country.[177] Interestingly, when accessing the risk of parental kidnapping, when kidnapping allegations are being brought against an immigrant who does not have lawful immigration status in the United States, the likelihood that the immigrant parent will flee the United States with the children is quite low.

Immigrant parents who live in the United States and are undocumented or pursuing VAWA, T-visa or U-visa immigration relief or other forms of immigration benefits are highly unlikely to leave the country. Traveling

---

Immigration Status of the Victim in Custody Cases, *in* BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (2004), *available at* http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/custody/BB_Family_Custody_Countering-Abusers-MANUAL-BB.pdf/.

176. Janet Chiancone, Linda Girdner & Patricia Hoff, U.S. Department of Justice, *Issues in Resolving Cases of International Child Abduction by Parents*, JUV. JUSTICE BULL. (Dec. 2001), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf.

177. *See generally* Orloff, *supra* note 42.

outside of the United States could cut off an immigrant crime victim from VAWA, T-visa or U-visa immigration protections or strand the immigrant abroad for years with no way to legally re-enter the United States. United States citizens, naturalized citizens, lawful permanent residents, and immigrants with work visas or other forms of multiple entry visas have significantly greater ability to leave the United States with children.

The following cases provide examples in which courts determined the likelihood that a parent may engage in parental kidnapping, by examining the evidence presented in the individual cases. The courts in these cases arrived at custody determinations that considered the risk of parental kidnapping based on the facts of each individual case and the actions of the parents in each case without reliance on immigration status as a factor.

In *Welsh v. Lewis,* the New York Appellate Division added conditions to the previous grant of sole custody to the immigrant mother based on evidence that the mother was planning to move to her home country with her children.[178] The father presented evidence that the mother's work visa had expired and presented a letter she had written to an aunt in England, in which she indicated that she was considering returning with the children. The court deemed this enough evidence to modify the previous order, granting both parents joint custody and prohibiting the mother from removing the children from the United States without the father's consent.[179]

In *Rory H. v. Mary M.*, the court upheld an appeal from a lawful permanent resident father, in which the lower court granted principal custody to the undocumented immigrant mother.[180] In its analysis, the court took into consideration many aspects, including immigration status, to determine who was to obtain custody. In this case the mother had already relocated with the child to Ireland. Despite that fact, the court ruled that because the mother provided consistent care and stability, and because the father was an alcoholic in denial, it was in the best interest of the child to remain with the mother in Ireland.[181]

In *Ish-Shalom v. Wittman*, the court upheld the family court's ruling granting physical custody to the mother but joint legal custody to the father.[182] The decision was based on the fact that the mother was a German national who entered the United States with a tourist visa. The family court had ordered the mother not to leave the jurisdiction and, in violation of the court's order, the mother relocated with her children from

178. Welsh v. Lewis, 292 A.D.2d 536 (N.Y. App. Div. 2002).
179. *Supra* note 42. *Id.* at 537–38.
180. *See* Rory H. v. Mary M., 786 N.Y.S.2d 195 (App. Div. 2004).
181. *Id.* at 374.
182. *See* Ish-Shalom v. Wittman, 797 N.Y.S.2d 111 (App. Div. 2005).

New York to Florida. Joint custody was granted as a preventive measure, so the father would be able to petition for custody under the terms of the Hague Convention if the mother left with the children. Thus, although the court took her lack of immigration status into consideration, the mother's behavior was crucial to the court's decision to grant the father joint custody of the children.[183]

In *Welsh* and *Ish-Shalom*, although the court heard evidence about the parent's immigration status, the court's decisions rested not on the parent's immigration status, but upon evidence of behavior suggesting that the immigrant parent is likely to leave the country. In the first case, the court relied on a letter stating that the immigrant mother was planning to leave the country; in the second case, the court relied on the fact the mother removed her children from one state to another, disregarding the court's directions not to do so. In *Rory H.*, the court upheld the family court's ruling granting principal custody to the mother, even though the court was aware the mother had already relocated to Ireland.

IX. Immigration Status and Ability to Obtain Public Benefits

The final argument commonly made in custody cases by parents arguing that an immigrant parent should be denied custody is that the immigrant parent does not qualify for and cannot access public benefits needed to support the children. Family law courts have also considered immigration status as it relates to a parent's ability to obtain public benefits when using the best-interests-of-the-child analysis. This argument is made in both child custody proceedings and in child-abuse-and-neglect proceedings against immigrant parents.

In *In re Kittridge,* an undocumented immigrant mother[184] of a special needs child was accused of neglecting her child as a result of her addiction to drugs and painkillers.[185] New York City Child Protective Services (NYC CPS) tried to remove the child from the mother claiming neglect. NYC CPS argued in court that the mother was not eligible to obtain the public benefits needed to raise her child because she lacked immigration status. However, the court found that she was already a recipient of emergency public assistance, Medicaid for her child, and emergency housing. There was legal precedent prohibiting the termination of benefits to needy recipients based on race, religion, sexual orientation, or immigration status.[186] Ultimately, the court ruled that the Department of Social Services must provide the mother with the necessary benefits based on her funda-

183. *Id.*
184. *See In re* Kittridge, 714 N.Y.S.2d 653 (Fam. Ct. 2000).
185. *Id.* at 655.
186. *Id.* at 656.

mental right to care for her child: "New York State law and public policy require that Ms. Kittridge be given the opportunity to raise her child, notwithstanding her immigration status."[187]

A. Correct Information and Application of Immigration and Public Benefits Laws

All parents, including undocumented immigrant parents, can file applications seeking public benefits for their citizen, qualified immigrant, and lawfully present children.[188] When an immigrant parent applies for public benefits on a child's behalf without seeking benefits for themselves, benefit-granting agencies can only ask for immigration status and Social Security number documentation regarding the child applicant.[189] Immigration status of a parent does not impact whether a parent can receive benefits if the child qualifies for them. Immigrant parents can file applications for their children to receive a wide range of state and federal public benefits including: TANF, SSI, health care, SNAP (food stamps), child care, and other state and federal public benefits.[190]

Additionally, there are many programs and services funded by the government that are open to all persons without regard to the immigration status of the applicant. These include:

- All benefits available to immigrants regardless of status, including benefits and services necessary to protect life and safety;[191]

187. *Id.* at 657.

188. Dep't Health & Human Servs., Dep't of Agric., *Policy Guidance Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANIF), and Food Stamp Benefits* (2000), *available at* http://www.hhs.gov/ocr/civilrights/resources/specialtopics/origin/policyguidanceregardinginquiriesintocitizenship-immigrationstatus.html.

189. *Id.*; *see also* Anna Pohl, Hema Sarangapani et al., *Barriers to Accessing Services: The Importance of Advocates Accompanying Battered Immigrants Applying for Public Benefits*, Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants (2004), *available at* http://niwaplibrary.wcl.american.edu/public-benefits/benefits-for-qualified-immigrants/PB_BB-Accompanying_Immigrants_Applying_for_Benefits-MANUAL-BB.pdf/view.

190. For an up-to-date overview of the legal rights of children in immigrant families to receive federal and state public benefits, *see* National Immigration Law Center, *Guide to Immigrant Eligibility for Federal Programs*, *available at* http://www.nilc.org/guideupdate.html.

191. For more information about the benefits available to all immigrants regardless of status, *see Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 66 Fed. Reg. 3613 (Jan. 16, 2001), *available at* http://niwaplibrary.wcl.american.edu/public-benefits/unrestricted-benefits/AG_order.protection_life_or_safety.pdf/view. These programs include, but are not limited to: (a) crisis counseling and intervention programs; services and assistance relating to child protection, adult protective services, violence and abuse prevention, victims of domestic violence or other criminal activity; or treatment of mental illness or substance abuse; short-term shelter or housing assistance

- Short-term shelter (emergency shelter and transitional housing)—*open to all immigrants who are victims of domestic violence, homeless, or abused, abandoned or neglected children for up to two years*;[192]
- Health care funded by the Health Resources and Services Administration (HRSA);[193]
- Emergency Medicaid;
- Special Supplemental Nutrition Program for Women, Infants and Children (WIC);[194]
- Substance Abuse and Mental Health Services;[195]
- Victims of Crime (VOCA) Victim Compensation—*state requirements vary*;[196]

---

for the homeless, for victims of domestic violence, or for runaway, abused, or abandoned children; programs, services, or assistance to help individuals during periods of heat, cold, or other adverse weather conditions; soup kitchens, community food banks, senior nutrition programs; such as meals on wheels, and other such community nutritional services for persons requiring special assistance; (e) medical and public health services (including treatment and prevention of diseases and injuries), and mental health, disability, or substance abuse assistance necessary to protect life or safety; activities designed to protect the life or safety of workers, children and youths, or community residents; and any other programs, services, or assistance necessary for the protection of life or safety).

192. *See* U.S. Department of Housing and Urban Development, Secretary Andrew Cuomo (January 19, 2001), *available at* http://www.legalmomentum.org/assets/pdfs/2_hud_letter.pdf.

193. Health Resources and Services Administration (HRSA). HRSA offers health care and support to uninsured, underserved, and special needs populations. HRSA issues grants to federally funded health centers that are available to anyone regardless of their ability to pay. The health centers charge patients using a sliding fee scale, based on their income. Health centers provide well-care checkups, treatment for sick patients, complete care for pregnant patients, immunizations and checkups for children, dental care, prescription drugs, as well as mental health and substance abuse care. Health centers are located in most cities and many rural areas. To find a health center, go to HRSA's locator; visit HRSA's website for more information or call 1-888-ASK-HRSA.

194. For more information on WIC eligibility and how to apply for the benefits, see the USDA's website.

195. SAMSHA information at its treatment website; Substance Abuse Resources: For a listing of state substance abuse agencies, go to SAMSHA's list of state substance abuse agencies; to find a substance abuse and/or mental-health treatment program, go to SAMSHA's facility locator; Mental Health Resources: To find a mental-health treatment program near you, go to SAMSHA's mental-health treatment facility locator; National Suicide Prevention Lifeline: call 1-800-273-TALK (8255). *See* the National Suicide Prevention Lifeline website.

196. *See* the National Association of Crime Victim Compensation Board's website for state-specific details. Generally, the victim must (a) report the crime promptly to law enforcement, and cooperate with police and prosecutors (many states allow exceptions to this requirement, particularly for child victims); (b) submit a timely victim compensation application (some states provide exceptions); (c) have a cost or loss not covered by insurance or another government benefit program; and (d) not have committed a criminal act or some substantially wrongful act that caused or contributed to the crime (domestic violence, sexual assault, and human trafficking victims are not considered to have contributed to the crime). Apprehension or conviction of the offender is not required. Only two states place immigrant restrictions on access to VOCA victim assistance (Alabama and Nevada); in both states trafficking victims with ORR certification or eligibility letters or T visas should be able to receive VOCA victim assistance to the same extent as refugees.

- Victim Rights and Services—Federal Victim Witness Coordinators, Emergency Witness Assistance. Witness Security Program;
- Legal Services Corporation funds can be used to represent victims of U-visa-listed crimes, including domestic violence, sexual assault, and human trafficking;[197] and
- Disaster Assistance.[198]

B. If the Immigrant Parent Is a Victim of Domestic Violence

Immigrant victims of domestic violence, sexual assault, and human trafficking who file applications for immigration relief under the Violence Against Women Act (VAWA) will be able to access federal and state public benefits for themselves and for any of the immigrant children the crime victim includes in their application. These victims can receive such benefits, in addition to any public benefits that their citizen children or lawful-permanent-resident children qualify to receive. The qualification of an immigrant to receive benefits will vary by:

- the form of immigration status the immigrant applies for;
- whether the immigrant first entered the United States before or after August 22, 1996; and
- the state in which the immigrant lives.

X. Conclusion: Children in Immigrant Families Need Courts to Keep Focused on Children's Best Interests, Rather Than Extraneous Immigration Status Issues

Having accurate information about immigration laws and DHS policies will help courts keep decision-making in custody cases focused on the best interests of the child and primary caretaker determinations. Maintaining this focus helps judges ensure that all parties coming to family court with cases that include custody issues come before a fair and unbiased judiciary. Parties that raise the immigration status of the opposing party in a custody case do so as a tactic to shift the focus of the court's inquiry away from the best interests of the child[199] and toward immigra-

197. Access to legal services is based on victimization, and immigrant crime victims are eligible for legal services that can include any assistance connected to the abuse. Legal services are not limited to seeking immigration relief or what form of immigration relief the victim might pursue. For further guidance, *see* the October 2005 LSC program letter, *available at* http:// www.lsc.gov/sites/default/files/LSC/pl2005-2.pdf. *See also*, LSC-Funded Legal Services Free legal advice and representation in public benefits, family law, evictions, and other civil matters, *available at* http://nilc.org/guideupdate.html; 45 C.F.R. § 1626.5 (2012).

198. *See* Disaster Assistance: Help for Victims, *available at* http://nilc.org/disaster-help.html.

199. Howard Davidson, *ABA Commission on Children and the Law, Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (Aug. 1994),

tion status issues that may bias the court against the immigrant parent.

In order to reduce this potential, state family law codes should be amended to prohibit or severely limit the situations in which immigration status can be included in the custody analysis.[200] The policies and priorities set out in the immigration laws and DHS policies, designed to prevent immigration enforcement, detention, or removal of immigrant parents, and immigrant crime victims would be furthered if state family courts were generally barred from considering immigration status in custody cases. These laws would go far toward preventing litigants from gaining an advantage in custody cases by misleading courts about immigration laws, policies, and practice.

In the meantime, there is a great need for training the judiciary by providing accurate information about immigration laws, policies, and enforcement priorities. Having accurate information gives courts correct guidance on whether to allow evidence about immigration status to be introduced in a custody proceeding. If such evidence is allowed, the proper training will help the court determine whether a party is providing legally correct information about immigration laws and policies, and how those laws and policies impact the litigants in a custody case. Judicial training must also include information about the special legal rights and options for immigrant crime victims and immigrant children so the court can identify those who qualify for legal immigration status but are unaware that the immigration option exists. For example, when a court makes a finding that a litigant has been a victim of domestic violence, if the court knows or suspects that the litigant is a noncitizen, the court should provide the litigant with a copy of educational material on the immigrant crime victim's legal rights and options for immigration benefits.[201] Judicial training should also be designed to help courts improve cultural sensitivity and dispel the negative myths about immigrants.[202]

The following is a custody case ruling that illustrates the correct analy-

---

available at http://iwp.legalmomentum.org/reference/additional-materials/research-reports-and-data/immigrant-families-and-children/The-Impact-of-Domestic-Violence-on-Children.pdf/view.

200. Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL'Y & L. 87 (2006). She discusses a list of conditions that need to be present in order to consider immigration status, such as an order of removal being present or where status has been used as a tool of abuse.

201. The U.S. Department of Homeland Security has a brochure that courts could distribute for this purpose, *available at* http://www.dhs.gov/xlibrary/assets/ht_uscis_immigration_options.pdf. *See also National Center for State Courts White Paper*, *available at* http://niwaplibrary.wcl.american.edu/language-access/language-access-info-for-service-providers/WhitePaperNCSC.pdf/.

202. Lindsey Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers,* 49 WM. & MARY L. REV. 1011, 1036–39 (2007).

sis in a ruling when one party raises the immigration status of the opposing party. In *In re M.M.*, the lower court judge told the immigrant father that he (the judge) had "a problem with [the father's] INS situation"[203] and that he would need to "resolve" the issue before he could have custody of his child.[204] The case of *Mathews v. Lucas* provides an illustration of family court animus toward an immigrant parent.[205] This case ultimately reached the U.S. Supreme Court. Justice Stevens, in a dissenting opinion, criticized judicial discrimination against immigrants in the lower courts.[206] He wrote that

> [h]abit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship other than pure prejudicial discrimination to the stated purpose for which the classification is being made.

Over the last decade, as states have passed local immigration laws which have in large part been overturned by the U.S. Supreme Court,[207] some family court judges are allowing immigration status concerns raised by litigants to influence court rulings in custody proceedings. The cases discussed in this article illustrate what could be an emerging area for concern for family courts in which litigants provide legally incorrect information and family courts rely upon it when making rulings and publishing opinions in custody cases.[208]

Many family courts across the country do not generally admit evidence of immigration status in custody cases. Attorneys representing immigrant victims of domestic violence have been successful in winning motions *in limine* to keep immigration status issues out of custody cases based on Rule 11 and the history and range of VAWA's immigration protections.[209]

---

203. *In re* M.M., 587 S.E. 2d 825 (Ga. Ct. App. 2003).

204. *Id.*

205. Mathews v. Lucas, 427 U.S. 495 (1976).

206. *Id.* at 520–21.

207. Arizona v. United States, 183 L. Ed. 2d 351 (2012); *See also* Rocio Molina, Leslye Orloff & Benish Anver, *Federal Preemption of State Laws That Attempt to Restrict Immigrant Access to Services Necessary to Protect Life and Safety*, NIWAP (Jan. 11, 2013), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-ad-criminal-justice/federal-preemption/State%20Services%20and%20Preemption%201-11-13%20%20FINAL.pdf.

208. *See, e.g.,* Rico v. Rodriguez, 120 P.3d 812 (Nev. 2005); *In re* Margarita T., No. A-95-530 1995 WL 749701 (Neb. Ct. App. Dec. 19, 1995); Ramirez v. Ramirez, 2007 WL 1192587 (Ky. Ct. App. Apr. 13, 2007).

209. For sample motions *in limine* with supporting points and authorities, go to http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-confidentiality/training-materials.

Further, consideration of immigration status is not necessarily insurmountable for immigrant parents trying to obtain custody. This is particularly true when the court handling the matter is not acting on its own bias or allowing antiimmigrant stereotypes to influence the court's decision-making. By keeping the focus of family-court custody proceedings on the state law's best-interests-of-the-child factors, courts will avoid being distracted by issues extraneous to the custody determination, which include, but as Justice Stevens noted, may not be limited to, immigration issues. Using immigration status as part of the court's analysis of best interest of the child remains, as the American Bar Association found almost two decades ago, harmful to children in immigrant families and, in the interests of justice, should be avoided.

Appendix II: Visa Chart—Immigration Status & Children's Benefits*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency			
Immigration Status	**Immigration Intent**	**Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application**	**Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?**
Lawful and Conditional Permanent Residency and Humanitarian Relief			
Lawful permanent residents INA § 101(a)(20); 8 U.S.C. § 1101	Stay in the U.S.	Are lawful permanent residents. Cannot be outside of the U.S. for more than six months any year without permission; can lose status if they commit certain crimes. Immigrant controls the application. Immigrant files own application	Lawful permanent residents can file for their children and can include their children in the immigrant's application for lawful permanent residency. 22 C.F.R. § 42.53(a)
Conditional permanent residents INA § 216; 8 U.S.C. § 1186a	Stay in the U.S.	Citizen or lawful permanent resident spouse files a family-based visa petition for the immigrant spouse and the parties are married for less than two years when the parties attend their DHS interview. The immigrant spouse receives permanent residency that is conditioned upon filing of a joint application by the applicant and their sponsoring citizen or lawful permanent resident spouse to remove conditions OR a self-petition by the applicant for a waiver of the joint filing requirement based upon divorce, battering or extreme cruelty, extreme hardship, or bigamy of citizen or lawful permanent resident spouse	Child gets the conditional permanent residency for being the son or daughter of an immigrant with a qualifying marriage to a U.S. citizen. INA § 216(h)(2); 8 U.S.C. § 1186a.
Persons paroled into the United States for a period of at least one year-Indefinite, Humanitarian, significant public benefit (DHS granted indefinite or humanitarian parole) INA § 212(d)(5); 8 U.S.C 1182(d)(5)	Stay in the U.S.	Parolees usually ultimately file for a form of legal immigration status. In this case, a family-based petition filed by their battered immigrant parent who received VAWA cancellation of removal; if they fail to file they could fall out of legal status	Cannot include children. Children would need to separately qualify for parole.
Children of VAWA cancellation of removal recipients (DHS granted Humanitarian Parole)	Stay in the U.S.	Parolees usually ultimately file for a form of legal immigration status; if they fail to file, they could fall out of legal status	Cannot be included in the victim's, application. However, once the victim is granted cancellation of removal, the victim's children automatically eligible for parole into the United States under INA § 240A(b)(4)
Cuban and Haitian entrants (U.S. granted indefinite or humanitarian parole) PL 99-603, 100 Stat. 3359 § 202	Stay in the U.S.	Parolees with status that leads to lawful permanent residency so long as no intent to abandon residence in the U.S.	Cannot include their children

Access to Federal and State Funded Public Benefits					
When do they receive legal work authorization?	**When is the immigrant considered PRUCOL?**	**When do they become lawfully present, granting access to health care?*** **	**When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?**	**Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)**	**When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?**
Lawful and Conditional Permanent Residency and Humanitarian Relief					
Applicants with pending applications for work authorization can file for work authorization. 8 C.F.R. § 274a.12(c)(9). Upon receipt of status. No need to apply for employment authorization 8 C.F.R. § 274a.12(a)(1) and § 1274a.12(a)(1)	Upon filing	When the immigrant is granted lawful permanent residency (Due to status as qualified alien - 8 U.S.C. § 1641(b)(1))	When they are granted lawful permanent resident status	Eligible for Federal and State Public Benefits as Qualified Aliens	5-year bar (unless exempt from 5 year bar**)
Upon receipt of status. No need to apply for employment authorization. 8 C.F.R. § 274a.12(a)(1) and § 1274a.12(a)(1)	Upon filing	When the immigrant is granted conditional residency (due to status as qualified alien - 8 U.S.C. § 1614(b)(6))	When they are granted lawful permanent resident status	Eligible for Aid as Qualified Aliens	5-year bar (unless exempt from 5 year bar**)
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(11)	When Paroled into the U.S.	At the time the immigrant was paroled into the United States (due to status as qualified alien - 8 U.S.C. § 1614(b)(4))	When granted parole for at least one year	Eligible for Aid as Qualified Aliens	5-year bar
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(11)	When Paroled into the U.S.	At the time the immigrant was paroled into the United States (due to status as qualified alien - 8 U.S.C. § 1614(b)(4))	When they are granted lawful permanent resident status	When they are granted lawful permanent resident status	5-year bar
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(10)	When Paroled into the U.S.	At the time the immigrant was paroled into the United States (due to status as qualified alien - 8 U.S.C. § 1614(b)(7))	When status is granted	Eligible for Aid as Qualified Aliens	EXEMPT from 5-year bar

Immigration Status & Children's Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency

Immigration Status	Immigration Intent	Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application	Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?
Amerasian immigrant children (family-based self-petition)	Stay in the U.S.	Leads to LPR status; children under 21 enter as first priority – all other entrants follow the Visa bulletin, includes showing of humanitarian need, public interest or family unity	This visa status is provided to children born in Indochina after 1950, fathered by a U.S. citizen who has provided a legal guarantee of cusody and financial reponsibility for the child. Amerasians can include their own children and natural mother.
VAWA self-petitioners (pending, with deferred action or approved) and their children included in their applications (family based self-petition) INA §204(a)(1)(A); 8 U.S.C. §§ 1153(a)(1)(A)(ii), (iii), (iv)	Stay in the U.S.	Once approved apply for lawful permanent residency (immediately eligible if perpetrator family member is a citizen) must wait 2-5 years if the perpetrator family member is a lawful permanent resident)	VAWA self-petitioners can include their children as derivatives when the petition is filed with USCIS. There is no need for the partner's consent or knowledge when applying. INA §§204(a)(1)(A)(iii)-(v).
VAWA suspension of deportation INA § 244(a)(3); 8 U.S.C. §1254(a)(3) as in effect on March 31, 1997)	Stay in the U.S.	Once approved are granted lawful permanent residency, cannot be outside of the U.S. for more than 6 months in any year without permission; can lose status if commit certain crimes	Children of parent who obtains cancellation of removal under VAWA may obtain parole under section 212(d)(5). INA § 240A(b)(4)(A)(i).
VAWA cancellation of removal and VAWA suspension of deportation applicants INA § 240A(b)(2); 8 U.S.C. §1229b(	Stay in the U.S.	Once approved are granted lawful permanent residency, cannot be outside of the U.S. for more than 6 months in any year without permission; can lose status if commit certain crimes	Children of parent who obtains cancellation of removal under VAWA may obtain parole under section 212(d)(5). INA § 240A(b)(4)(A)(i).
Cancellation of Removal recipients (immigrant files their own application) INA § 240A; 8 U.S.C. § 1229	Stay in the U.S.	When cancellation of removal application is granted, the applicant receives lawful permanent residency from the immigration judge. *Cannot be outside of the U.S. for more than 6 months in any year without permission; can lose status if commit certain crimes*	Cannot include their children. Once they attain lawful permanent residency, they can file an application for their children. Children must wait for a visa to become available, which can take 2-3 years.
Immigrant Status That Allows Individual to File for Lawful Permanent Residency			
Asylees (file their own application) INA § 208; 8 U.S.C. § 1158	Stay in the U.S.	Can file their own application for LPR status after 1 year	Asylees can include their children when applying for Asylum with the BCIS center or, if in removal proceedings, before the Immigration Judge. to 8 C.F.R. §§ 208.3(a), 1208.3(a).

Access to Federal and State Funded Public Benefits

When do they receive legal work authorization?	When is the immigrant considered PRUCOL?	When do they become lawfully present, granting access to health care?***	When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?	Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)	When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?
Either after their application for lawful permanent residency is pending, if eligible, or upon receipt of status. 8 CFR § 274a.12(a)(1), respectively.	At the time of admittance into the U.S.	When granted lawful permanent resident status	When the I-360 petition is granted	Eligible for Aid as Qualified Aliens	EXEMPT from 5-year bar
Receive employment authorization once their VAWA self-petition has been approved. INA § 201(a)(1)(k); 8 CFR § 274a.12(c)(31)	Upon filing	Connection between battery and need for benefits, and receiving prima facie determination from DHS (8 U.S.C. § 1641(c)(1))	Receiving prima facie determination from DHS	Eligible for Aid as Qualified Aliens	5-year bar (unless exempt from 5-year bar**)
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(10)	Upon filing	Connection between benefits and battery, and receiving prima facie determination from an immigration judge (qualified alien under 8 U.S.C. § 1641(c)(1)(B)(iii))	Receiving prima facie determination from an immigration judge	Eligible for Aid as Qualified Aliens	5-year bar (unless exempt from 5-year bar**)
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(10)	Upon filing	Connection between benefits and battery, and receiving prima facie determination from an immigration judge (8 U.S.C. §1641(c)(1)(B)(v))	Receiving prima facie determination from an immigration judge	Eligible for Aid as Qualified Aliens	5-year bar (unless exempt from 5-year bar**)
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(10)	Upon filing	When they receive their lawful permanent residency, although someone applying for cancellation may already be a permanent resident and so may have access to health care alreadt before applying for cancellation	After LPR status granted upon approval of their cancellation of removal application	After LPR status granted	5-year bar (unless exempt from 5-year bar**)
Immigrant Status That Allows Individual to File for Lawful Permanent Residency					
Receive employment authorization within 180 days of filing the asylum application. INA § 208(d)(2); 8 C.F.R. § 274a.12(c)(8). Must file and for employment authorization. Once asylum is granted, work authorization from that point on is included in asylee status 8 C.F.R. §§ 274a.12(a)(5)	Upon filing	When applicant has received EAD and Asylum application continues to be pending (qualified alien once received Asylum 8 U.S.C. § 1641(b)(2))	Asylum Granted	Eligible for Aid as Qualified Aliens	EXEMPT from 5-year bar

Immigration Status & Children's Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency

Immigration Status	Immigration Intent	Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application	Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?
Refugees (file their own application) INA §207; 8 U.S.C. §1157	Stay in the U.S.	Can file their own application for LPR status after 1 year	Refugees can include their children in the application. INA §207(c)(2), 8 U.S.C. § 1157(c)(2)
U-1 Victims of crime (file their own application) INA §101(a)(15)(U); 8 U.S.C. §1101(a)(15)(U).	Temporary visa; most victims intend at the time of application to stay in the U.S. due to humanitarian need or public interest	Self-petition for lawful permanent residency status after three years of continuous physical presence. Have direct path to lawful permanent resident not dependent on an employer of family member; wait three years and the lawful permanent residency status is immediately available to those who meet eligibility criteria (cooperation or not unreasonably refuse to cooperate) and public interest, humanitarian need or family unity	Victims of crimes applying for a U-Visa can include their children in their application. INA § 101(a)(15)(U)(ii). 8 C.F.R. § 214.14(a)(10), (f)
U-2 spouse of U-1 (included in crime victim spouse's application)	Temporary visa; most victims intend at the time of application to stay in the U.S. due to humanitarian need or public interest	Self-petition for lawful permanent residency status after three years of continuous physical presence. Have direct path to lawful permanent resident not dependent on an employer of family member; wait three years and the lawful permanent residency status is immediately available to those who meet eligibility criteria (cooperation or not unreasonably refuse to cooperate) and public interest, humanitarian need or family unity	See U-3 visa status
U-3 children of U-1 (included in crime victim parent's application)	Temporary visa; most victims intend at the time of application to stay in the U.S. due to humanitarian need or public interest	Self-petition for lawful permanent residency status after three years of continuous physical presence must show public interest, humanitarian need or family unity	Cannot include their children. Once they attain lawful permanent residency they can file an appliction for their children. Children must wait for a visa to become available which can take 2-3 years.
U-4 parent of U-1 children victim (included in crime victim child's application)	Temporary visa; most victims intend at the time of application to stay in the U.S. due to humanitarian need or public interest	Self-petition for lawful permanent residency status after three years of continuous physical presence must show public interest, humanitarian need or family unity	See U-5 visa status
U-5 minor siblings of U-1 children victim (included in crime victim sibling's application)	Temporary visa; most victims intend at the time of application to stay in the U.S. due to humanitarian need or public interest	Self-petition for lawful permanent residency status after three years of continuous physical presence must show public interest, humanitarian need or family unity	Cannot include their children. Once they attain lawful permanent residency they can file an appliction for their children. Children must wait for a visa to become available which can take 2-3 years.
T-1 visa or prima facie determination of T-visa (file their own application) INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T)	Temporary visa; most victims intend at the time of application to stay in the U.S. due to a showing of hardship in returning to home country	Self-petition for lawful permanent residency status after three years of continuous physical presence and must show proof that they have assisted in the investigation and/or prosecution; exceptions for those under 18 or those that can show extreme hardship upon returning to home country	Victims of Traffiking can include their children when applying for a T-Visa. INA § (a)(15)(T)(ii); 22 C.F.R. § 41.84(a)

Access to Federal and State Funded Public Benefits

When do they receive legal work authorization?	When is the immigrant considered PRUCOL?	When do they become lawfully present, granting access to health care?***	When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?	Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)	When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?
Refugees paroled into the United States can apply for work authorization. 8 C.F.R §274a.12(a)(4) . Upon receipt of status. Must file and for employment authorization. 8 C.F.R. § 274a.12(a)(3)	Upon filing	Entered U.S. under Refugee status (qualified alien under 8 U.S.C. § 1641(b)(3))	Entered U.S. under Refugee status	Eligible for Aid as Qualified Aliens	EXEMPT from 5-year bar
U-visa victims receive work authorization once their U-visa has been granted. INA § 214(p)(3)(B); 8 C.F.R. § 274a.12(a)(19)	Upon filing	U-visa status granted	After LPR status granted	After LPR status granted	After LPR status granted
Must file and for employment authorization. 8 C.F.R. § 274a.12(a)(20)	Upon filing	U-1 visa status granted	After LPR status granted	After LPR status granted	After LPR status granted
Must file and for employment authorization. 8 C.F.R. § 274a.12(a)(20)	Upon filing	U-1 visa status granted	After LPR status granted	After LPR status granted	After LPR status granted
Must file and for employment authorization. 8 C.F.R. § 274a.12(a)(20)	Upon filing	U-1 visa status granted	After LPR status granted	After LPR status granted	After LPR status granted
Must file and for employment authorization. 8 C.F.R. § 274a.12(a)(20)	Upon filing	U-1 visa status granted	After LPR status granted	After LPR status granted	After LPR status granted
Includes work authorization 8 C.F.R. § 274a.12(a)(16); Lose work authorization when T status ends. 8 C.F.R. § 274a.12(c)(21)	Upon filing	T-visa granted or a prima facie case determination (qualified alien under 8 U.S.C. §1641(c)(4))	T-visa is approved	Eligible for Aid as Qualified Aliens	EXEMPT from 5-year bar

Immigration Status & Children's Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency

Immigration Status	Immigration Intent	Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application	Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?
T-2 spouses, children and unmarried siblings under 18 at the age of application of T-1 applicants (included in trafficking victim's application)	Temporary visa; most victims intend at the time of application to stay in the U.S. due to a showing of hardship in returning to home country	Able to apply for lawful permanent residency when principal T-visa family member becomes a lawful permanent resident	Cannot include their children. Once they attain lawful permanent residency, they can file an application for their children. Children must wait for a visa to become available which can take 2-3 years.
T-3 children of T-1 (included in trafficking victim parent's application)	Temporary visa; most victims intend at the time of application to stay in the U.S. due to a showing of hardship in returning to home country	Able to apply for lawful permanent residency when principal T-visa family member becomes a lawful permanent resident	Cannot include their children. Once they attain lawful permanent residency they can file an application for their children. Children must wait for a visa to become available which can take 2-3 years.
T-4 parents of T-1 victim children (included in trafficking victim child's application)	Temporary visa; most victims intend at the time of application to stay in the U.S. due to a showing of hardship in returning to home country	Able to apply for lawful permanent residency when principal T-visa family member becomes a lawful permanent resident	The T-1 victim must file for unmarried siblings under the age of 18 at the time of filing under T-3
Trafficking victims with continued presence	Temporary status for the duration of the criminal case, often preceeds the victims T-visa application. many, but not all, intend to stay in the U.S.	Must apply for a T-visa or U-visa before status ends	Trafficking victims who receive continued presence cannot obtain continued presence for their children. If the trafficking victim applies for a T-1 visa, they can include their children as T-2s
Special Immigrant Juvenile Status (self-petition) INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J)	Stay in the U.S.	Cannot be outside of the U.S. for more than 6 months any rear without permission; can lose status if commit certain crimes	Cannot include their children. Once they attain lawful permanent residency they can file an appliction for their children. Children must wait for a visa to become available which can take 2-3 years.
NACARA Cubans (self-petition) PL 105-100, 111 Stat. 2160, 2193 (Nov. 19, 1997)	Stay in the U.S.	Have direct path to lawful permanent residency	If NACARA recipient seeks lawful permanet residency, as long as the child is physically present in the United States can include the child in the Adjustment of Status Application. 8 C.F.R. § 245.13
HRIFA (self-petition) 8 C.F.R. §§245.15, 1245.15	Stay in the U.S.	Have direct path to lawful permanent residency	When HRIFA recipients seek to adjust status to permanent residence, they can include a child who is physically present in the United States. 8 C.F.R. §§245.15(i)-(k), 1245.15(i)-(k)

Access to Federal and State Funded Public Benefits

When do they receive legal work authorization?	When is the immigrant considered PRUCOL?	When do they become lawfully present, granting access to health care?***	When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?	Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)	When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?
Includes work authorization 8 C.F.R. § 274a.12(a)(16); Lose work authorization when T status ends. 8 C.F.R. § 274a.12(c)(21)	Upon filing	T-1 visa granted or a prima facie case determination	T-1 visa principle is approved	Eligible for Aid as Qualified Aliens	EXEMPT from 5-year bar
Includes work authorization 8 C.F.R. § 274a.12(a)(16); Lose work authorization when T status ends. 8 C.F.R. § 274a.12(c)(21)	Upon filing	T-1 visa granted or a prima facie case determination	T-1 visa principle is approved	Eligible for Aid as Qualified Aliens	EXEMPT from 5-year bar
Includes work authorization 8 C.F.R. § 274a.12(a)(16); Lose work authorization when T status ends. 8 C.F.R. § 274a.12(c)(21)	Upon filing	T-1 visa granted or a prima facie case determination	T-1 visa principle is approved	Eligible for Aid as Qualified Aliens	EXEMPT from 5-year bar
When trafficking victims are granted continued presence that status includes work authorization. 8 C.F.R. § 274a.12(a)(16). Work authorization is included if the trafficking victim files for and is awarded a T visa or U visa. 8 CFR § 2741.12(a)(19) or (20) for U visas. T and U-visa applicants gain earlier access to work authorization if they are granted continued presence first	When victim receives HHS certification	When victim receives HHS certification	When victim receives HHS certification treated as refugees	When victim receives HHS certification treated as refugees	EXEMPT from 5-year bar
When Special Immigrant Juvenile Status is granted, the child is granted lawful permanent residency and recieves work authorization under that status	When child has a pending SIJS	When child has a pending SIJS.	After LPR status granted	After LPR status granted	5-year bar (unless exempt from 5-year bar**)
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(10)	Upon filing	When they acquire LPR status (LPR is a qualified alien)	After LPR status granted	Eligible for Aid	EXEMPT from 5-year bar
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(10)	Upon filing	When they acquire LPR status (qualified alien)	After LPR status granted	Eligible for Aid	5-year bar

Immigration Status & Children's Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency

Immigration Status	Immigration Intent	Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application	Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?
HRIFA family members (Haitian spouse, child or unmarried son or daughter of HRIFA applicant-self-petition) 8 C.F.R. §§ 245.15, 1245.15	Stay in the U.S.	Have direct path to lawful permanent residency	Cannot include their children. Once they attain lawful permanent residency, they can file an application for their children. Children must wait for a visa to become available which can take 2-3 years.
VAWA Cubans (treated as refugees) *Cuban Refugee Adjustment Act PL 89-732, 80 Stat 1161 (1966); 1996 U.S.C.C.A.N. 3792; AFM 23.11.*	Stay in the U.S.	Have direct path to lawful permanent residency	Refugees can include their children in the application. INA §207(c)(2), 8 U.S.C. §1157(c)(2)
Immigrant Status that Allows Individual to File for Lawful Permanent Residency			
O-1 Temp worker or trainee in extraordinary ability INA § 101(a)(15)(O); 8 U.S.C. § 1101(a)(15)(O); 8 C.F.R. § 214.2(o)(1)(i)	Dual Intent (DHS acknowledges and accepts that entering on temporary visa intending to stay permanently)	May not need a sponsor but subject to visa bulletin; may also qualify as priority worker	Children of O-1 are entitled to O-3 status subject to the same time requirements as O-1. 8 C.F.R. §214.2(o)(6)(iv)
O-3 Spouses or Children of O-1 INA § 101(a)(15)(O); 8 U.S.C. § 1101(a)(15)(O); 8 C.F.R. § 214.2(o)(6)(iv)	Dual Intent (DHS acknowledges and accepts that entering on temporary visa intending to stay permanently)	May not need a sponsor but subject to visa bulletin; may also qualify as priority worker	Cannot include their children. If they attain lawful permanent residency, they can file an application for their children. Children must wait for a visa to become available which can take 2-3 years.
P-1 Athlete or Entertainer INA §101(a)(15)(P); 8 U.S.C. § 1101(a)(15)(P); 8 C.F.R. § 214.2(p)	Dual Intent (DHS acknowledges and accepts that entering on temporary visa intending to stay permanently)	May not need a sponsor but subject to visa bulletin; may also qualify as priority worker	If P-1 is granted a visa through sponsor, can apply for a visa for a child through P-4, who is granted the same term of admission as P-1. 8 C.F.R. § 214.2(p)(15).
Immigrant Status that Allows Individual to File for Lawful Permanent Residency			
K-1 Fiancées of U.S.C. INA § 101(a)(15)(K)(i); 8 U.S.C. § 1101(a)(15)(K)(i); 9 FAM 41.81	Dual Intent (DHS acknowledges and accepts that entering on temporary visa intending to stay permanently	Must marry within 90 days, and sponsoring spouse must file an application for lawful permanent residency within 6 months	If U.S. Citizen petitioner files for K-1 fiance, can also petition for K-1's children in the petition as K-2. 8 C.F.R. §214.2(k)(6)(ii)
K-2 Children of K-1	Dual Intent (DHS acknowledges and accepts that entering on temporary visa intending to stay permanently)	Child's parent must marry within 90 days and sponsoring parent must file an application for lawful permanent residency within 6 months	Cannot include their children. If they attain lawful permanent residency, they can file an application for their children. Children must wait for a visa to become available which can take 2-3 years.
K-3 spouses of U.S.C. INA § 101(a)(15)(K)(ii); 8 U.S.C. § 1101(a)(15)(K)(ii); 22 C.F.R. § 214.2(k).	Dual Intent (DHS acknowledges and accepts that entering on temporary visa intending to stay permanently)	Sponsoring spouse must apply for lawful permanent residency status within 2 years	If the spouse of a U.S. citizen, petitioner U.S. citizen can petition for both parent and child. (K-3 and K-4 respectively)

Access to Federal and State Funded Public Benefits

When do they receive legal work authorization?	When is the immigrant considered PRUCOL?	When do they become lawfully present, granting access to health care?***	When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?	Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)	When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(10)	Upon filing	When they acquire LPR status (qualified alien)	After LPR status granted	Eligible for Aid	5-year bar
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(10)	Upon filing	When they acquire LPR status (qualified alien)	After LPR status granted	Eligible for Aid	EXEMPT from 5-year bar
Immigrant Status that Allows Individual to File for Lawful Permanent Residency					
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(13)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(13)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(14)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)
Immigrant Status that Allows Individual to File for Lawful Permanent Residency					
Eligible to apply for work authorization 8 C.F.R. § 274a.12(a)(6)	At time of inspection and admittance into the U.S. (within their authorized stay)	At time of inspection and admittance into the U.S. (within their authorized stay)	After LPR status granted	After LPR status granted	5-year bar (unless exempt from 5-year bar**)
Eligible to apply for work authorization 8 C.F.R. § 274a.12(a)(6)	At time of inspection and admittance into the U.S. (within their authorized stay)	At time of inspection and admittance into the U.S. (within their authorized stay)	After LPR status granted	After LPR status granted	5-year bar (unless exempt from 5-year bar**)
Includes work authorization 8 C.F.R. § 274a.12(a)(9)	At time of inspection and admittance into the U.S. (within their authorized stay)	At time of inspection and admittance into the U.S. (within their authorized stay)	After LPR status granted	After LPR status granted	5-year bar (unless exempt from 5-year bar**)

Immigration Status & Children's Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency

Immigration Status	Immigration Intent	Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application	Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?
K-4 Children of K-3	Dual Intent (DHS acknowledges and accepts that entering on temporary visa intending to stay permanently)	Sponsoring parent must apply for lawful permanent residency status within 2 years	Cannot include their children. If they attain lawful permanent residency, they can file an application for their children. Children must wait for a visa to become available which can take 2-3 years.
S-5 Aliens assisting Law Enforcement INA § 101(a)(15)(S) 8 U.S.C. §1101(a)(15)(S) ; 8 C.F.R. §§121.4(i), 212.1, 214.2, 245.11, 248.3(h), 1212.1, 1212.4(i), 1245.11; 22 C.F.R. § 41.83	Temporary visa up to 3 years	In limited circumstances when law enforcement files on the immigrant's behalf, the S-visa holder may have an avenue to lawful permanent residency	Once granted S-5 status, can apply to bring child as S-7 if DHS or the Department of State consider it appropriate to provide status to the child. INA § 101(a)(15)(S)(ii)(IV)
S-6 Aliens assisting Law Enforcement	Temporary visa up to 3 years	In limited circumstances when law enforcement files on the immigrant's behalf, the S-visa holder may have an avenue to lawful permanent residency	Once granted S-6 status, can apply to bring child as S-7 if DHS or the Department of State consider it appropriate to provide status to the child. INA § 101(a)(15)(S)(ii)(IV)
S-7 Children & Spouses of S-5 & S-6	Temporary visa up to 3 years	In limited circumstances when law enforcement files on the immigrant's behalf the S-visa holder may have an avenue to lawful permanent residency	Cannot include children.

Access to Federal and State Funded Public Benefits

When do they receive legal work authorization?	When is the immigrant considered PRUCOL?	When do they become lawfully present, granting access to health care?***	When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?	Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)	When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?
Includes work authorization 8 C.F.R. § 274a.12(a)(9)	At time of inspection and admittance into the U.S. (within their authorized stay)	At time of inspection and admittance into the U.S. (within their authorized stay)	After LPR status granted	After LPR status granted	5-year bar (unless exempt from 5-year bar**)
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(21)	When they are inspected and admitted into U.S.	When they are inspected and admitted into U.S.	Not eligible	Not eligible	Not eligible
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(21)	When they are inspected and admitted into U.S.	When they are inspected and admitted into U.S.	Not eligible	Not eligible	Not eligible
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(21)	When they are inspected and admitted into U.S.	When they are inspected and admitted into U.S.	Not eligible	Not eligible	Not eligible

Immigration Status & Children's Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency

Immigration Status	Immigration Intent	Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application	Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?
Immigrant Visas That Allow the Granting of Lawful Permanent Residence Status Through Employment (Sponsor Required)			
E-1 Treaty Investor INA § 101(a)(15)(E)(i); 8 U.S.C §1101(a)(15)(E)(i)	Limited Dual Intent -- must keep ties in home country, but may intend to stay permanently	Need to have family or employment-based sponsorship and must wait for a visa to become available before they can apply for lawful permanent residency	Can include children subject to the same terms of E-1, can apply for child through H-4, 8 C.F.R. § 214.2(e)(4); 22 C.F.R. §§ 41.51(a)(3) and (b)(3)
E-2 Treaty Trader INA §101(a)(15)(E)(ii), 8 U.S.C. § 1101(a)(15)(E)(ii); 22 C.F.R. §41.51.	Limited Dual Intent -- must keep ties in home country, but may intend to stay permanently	Need to have family or employment-based sponsorship and must wait for a visa to become available before they can apply for lawful permanent residency	Can include children subject to the same terms of E-2, can apply for child through H-4, 8 C.F.R. § 214.2(e)(4); 22 C.F.R. §§ 41.51(a)(3) and (b)(3)
H-1B Temporary Worker Specialized 8 C.F.R. § 214.2(h)	Dual Intent (Statutorily Recognized) DHS acknowledges and accepts that entering on temporary visa intending to stay permanently.	Need to have family or employment-based sponsorship and must wait for a visa to become available before they can apply for lawful permanent residency	Once H-1B is a granted, H-1B can to apply for child as H-4 subject to the same conditions and limitations. 8 C.F.R. § 214.2(h)
H-4 Spouse & children of H-1B	Dual Intent (Statutorily Recognized) DHS acknowledges and accepts that entering on temporary visa intending to stay permanently.	Need to have family or employment-based sponsorship and must wait for a visa to become available before they can apply for lawful permanent residency	Cannot include their children. If they attain lawful permanent residency they can file an application for their children. Children must wait for a visa to become available which can take 2-3 years.
L-1 Intercompany Transferee Principle INA § (a)(15)(L), 8 U.S.C. § 1101(a)(15)(L), 8C.F.R. § 214.2(l)	Dual Intent (Statutorily Recognized) DHS acknowledges and accepts that entering on temporary visa intending to stay permanently.	Need to have family or employment-based sponsorship and must wait for a visa to become available before they can apply for lawful permanent residency	If a parent has been granted L-1 visa, child qualifies for L-2 and it's subject to certain limits and restrictions. 8 CFR § 214.2(l)(1)(ii). INA § 101(a)(15)(l)
L-2 Spouses & Children of L-1	Dual Intent (Statutorily Recognized) DHS acknowledges and accepts that entering on temporary visa intending to stay permanently.	Need to have family or employment-based sponsorship and must wait for a visa to become available before they can apply for lawful permanent residency	Cannot include their children. If they attain lawful permanent residency, they can file an application for their children. Children must wait for a visa to become available which can take 2-3 years.
R-1 Religious workers INA § 101(a)(15)(R), 8 U.S.C. § 1101(a)(15)(R); 22 C.F.R. § 41.58; 8 C.F.R. § 214.2(r)	Dual Intent (DHS acknowledges and accepts that entering on temporary visa intending to stay permanently	Need to have family or employment-based sponsorship and must wait for a visa to become available before they can apply for lawful permanent residency	Can include child under the same conditions as R-1, except R-2 cannot accept employment. C.F.R. § 214(r)(4)(ii)

Access to Federal and State Funded Public Benefits

When do they receive legal work authorization?	When is the immigrant considered PRUCOL?	When do they become lawfully present, granting access to health care?***	When are they considered "qualified aliens" for federal/state public beneifts eligibility purposes?	Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)	When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?
Immigrant Visas That Allow the Granting of Lawful Permanent Residence Status Through Employment (Sponsor Required)					
Upon receipt of status. Can only work for a specific employer. 8 C.F.R. § 274a.12(b)(5) No need to apply for employment authorization. 8 C.F.R. § 274a.12(a)(5) and § 1274a.12(b)(5); may apply for work authorization 8 C.F.R. § 274a.12(c)(2)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)
Upon receipt of status. Can only work for a specific employer. 8 C.F.R. § 274a.12(b)(5) No need to apply for employment authorization. 8 C.F.R. § 274a.12(a)(5) and § 1274a.12(b)(5)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(9); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(9); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(12)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)
Receive work authorization along with their L-2 visa. No application for work authorization required.	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(16)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)

Immigration Status & Children's Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency

Immigration Status	Immigration Intent	Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application	Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?
R-2 Spouses & Children of R-1	Dual Intent (DHS Acknowledges and accepts that entering on temporary visa intending to stay permanently)	Need to have family or employment based sponsorship and must wait for a visa to become available before they can apply for lawful permanent residency	Cannot include their children. If they attain lawful permanent residency they can file an appliction for their children. Children must wait for a visa to become available which can take 2-3 years.
Immigration Status That Does Not Lead to Lawful Permanent Residency			
Persons granted withholding of deportation INA § 241(b)(3); 8 U.S.C. § 1231	Protected from deportation but not path to lawful permanent residency	Does not lead to lawful permanent residency or citizenship	Cannot include children
Temporary Status or Temporary Protection from Deportation at DHS Discretion			
Temporary Protected Status (TPS) INA § 244; 8 U.S.C § 1254a	Protected from deportation but not path to lawful permanent residency	Does not lead to lawful permanent residency or citizenship	Parents may register children for TPS after the parent has completed initial registration, C.F.R § 244.2(f)(2)(iv)
Deferred action Meissner, Comm. Memo, HQOPP 50/4 (Nov. 17, 2000).	Protected from deportation but not path to lawful permanent residency	Does not lead to lawful permanent residency or citizenship	Cannot include children. Except that children included in a VAWA self-petitioner's application will receive deferred action status along with their parent self-petitoner and parents included in a VAWA self-petitioner's child's application will receive deferred action status along with the child self-petitioner.
Deferred Action for Childhood Arrivals (DACA) immigrants who came to the U.S. as children (June 15, 2012 Memo issued by Janet Napolitano, Secretary of Homeland Security: Exercising Prosecutorial Discretion Not to Remove These Children from the U.S.	Protected from deportation but not path to lawful permanent residency	Does not lead to lawful permanent residency or citizenship	Cannot include children
Temporary Visas Called "Nonimmigrant" Visas			
A-1 Foreign Govt INA § 101(a)(15)(A), 8 U.S.C. § 1101(a)(15)(A)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	A-1 can file for child as A-3 if child habitually resides with A-1 recipient, or dependent. 8 C.F.R. § 214.2(a)(2)

Access to Federal and State Funded Public Benefits

When do they receive legal work authorization?	When is the immigrant considered PRUCOL?	When do they become lawfully present, granting access to health care?***	When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?	Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)	When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Only if lawful permanent residency granted	Only if lawful permanent residency granted	5-year bar (unless exempt from 5-year bar**)
Immigration Status That Does Not Lead to Lawful Permanent Residency					
Includes work authorization 8 C.F.R. § 274a.12(a)(10); applicants can apply for work authorization. 8 C.F.R. § 274a.12(c)(8)	Upon filing	Only after witholding is granted and so long as it remians in effect	Statutorily eligible despite not having path to LPR or citizenship status Date Judge grants Withholding	Eligible for Aid as Qualified Aliens	EXEMPT from 5-year bar
Temporary Status or Temporary Protection from Deportation at DHS Discretion					
Applicants with pending applications for work authorization can file for work authorization. 8 C.F.R. § 274a.12(c)(19). Includes work authorization 8 C.F.R. § 274a.12(a)(12)	Upon filing	TPS applicants who have received work authorization	Not eligible	Not eligible	Not eligible
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(14)	Upon filing	When deferred action is granted	Not eligible	Not eligible	Not eligible
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(14)	Upon filing	Not eligible	Not eligible	Not eligible	Not eligible
Temporary Visas Called "Nonimmigrant" Visas					
Visa requires that the immigrant work is authorized to work for a specific employer only. 8 C.F.R. § 274a.12(b)(1); spouses, unmarried children, sons or daughters of visa holder may apply for work authoization. 8 C.F.R. § 274a.12(c)(1); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible

Immigration Status & Children's Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency

Immigration Status	Immigration Intent	Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application	Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?
A-2 Foreign Govt	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	A-2 can include a child as an A-3 if child habitually resides with A-2 recipient, or dependent. 8 C.F.R. § 214.2(a)(2)
A-3 Family of Foreign Govt	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children
B-1 Visitors for Business INA §101(a)(15)(B); 8 U.S.C. §1101(a)(15)(B); 22 C.F.R. §41.31	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Children traveling alone or with their parents will receive their own B2 (tourist) visa
B-2 Visitors for Pleasure INA §101(a)(15)(B); 8 U.S.C. §1101(a)(15)(B); 22 C.F.R. §41.31	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	22 C.F.R. §41.32. B-2 visa recipient has to apply for children as well.
C-1 Transits and TWOV INA § 101(a)(15)(C); 8 U.S.C. § 1101(a)(15)(C); C.F.R. § 214.1(a)(2)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children
C-2 UN Transits INA § 101(a)(15)(C); 8 U.S.C. § 1101(a)(15)(C)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children
C-3 Foreign Government INA §212(d)(8). 8 U.S.C. §1182(d)(8)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children
D Crewmen INA § 101(a)(15)(D); 8 U.S.C. § 1101(a)(15)(D)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children
E-3 Treaty: AFTA INA § 101(a)(15)(E); 8 U.S.C. § 1101(a)(15)(E)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include child. 22 C.F.R. §41.5 (c)(2)
F-1 Academic Studies INA § 101(a)(15)(F)(i); 8 U.S.C. § 1101(a)(15)(F)(i)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Yes. Once parent has F-1 can apply for children through F-2. 8 C.F.R. § 214.2(f)(3)
F-2 Spouses and children of F-1 INA § 101(a)(15)(F)(ii); 8 U.S.C. § 1101(a)(15)(F)(ii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children.

Access to Federal and State Funded Public Benefits

When do they receive legal work authorization?	When is the immigrant considered PRUCOL?	When do they become lawfully present, granting access to health care?***	When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?	Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)	When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?
Visa requires that the immigrant is authorized to work for a specific employer only. 8 C.F.R. § 274a.12(b)(1); spouses, unmarried children, sons or daughters of visa holder may apply for work authorization. 8 C.F.R. § 274a.12(c)(1); Spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Visa requires that the immigrant is authorized to work for a specific employer only. 8 C.F.R. § 274a.12(b)(2); Spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Only a subset of this group can apply for work authorization if they are the personal or domestic servant of a U.C. citizen or a (B), (E) (F), (H), (I), (J), (L) visa holder or a person engaged in international transportation. 8 C.F.R. § 274a.12(c)(17)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Eligible to apply for work authorization 8 C.F.R. § 274a.12(b)(3)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Eligible to apply for work authorization 8 C.F.R. § 274a.12(b)(3)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106 see also 8 C.F.R. § 1274a.12(c)(2)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Employment limited to on-campus employment up to 20 hours a week or curricular practical training, or 17 month STEM extention, or following application for H-1B status. 8 C.F.R. § 274a.12(b)(6); 8 C.F.R. § 274a.12 (c)(3)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible

Immigration Status Children Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency			
Immigration Status	**Immigration Intent**	**Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application**	**Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?**
F-3 Academic Studies: Canadian & Mexican commuters INA § 101(a)(15)(F)(iii); 8 U.S.C. § 1101(a)(15)(F)(iii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children
G-1 Reps. of international orgs. INA § 101(a)(15)(G)(i), 8 U.S.C § 1101(a)(15)(G)(i), 9 FAM 41.24	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include child. 8 C.F.R. § 214.2(g) INA § 101(a)(15)(N)
G-2 Reps. of international orgs. INA § 101(a)(15)(G)(ii), 8 U.S.C § 1101(a)(15)(G)(ii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include children § 214.2(a)(2) and (3); 8 C.F.R. 9 FAM 41.24 N.1(2)
G-3 Reps of international orgs. INA § 101(a)(15)(G)(iii), 8 U.S.C § 1101(a)(15)(G)(iii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include children § 214.2(a)(2)
G-4 Reps of international orgs. Other employees INA § 101(a)(15)(G)(iv), 8 U.S.C § 1101(a)(15)(G)(iv	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include children § 214.2(a)(2) INA § 101(a)(15)(N)
G-5 Attendants, servants of Gvisa holders INA § 101(a)(15)(G)(v), 8 U.S.C § 1101(a)(15)(G)(v)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children
H-2A Seasonal Agriculture Workers INA § 101(a)(15)(H)(ii)(a), 8 U.S.C § 1101(a)(15)(H)(ii)(a)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Once H-2A is a granted, H-2A entitled to petition for child as H-4 subject to the same conditions and limitations. 8 C.F.R. § 214.2(h)(9)(iv)
H-2B Seasonal Workers INA § 101(a)(15)(H)(ii)(b), 8 U.S.C § 1101(a)(15)(H)(ii)(b)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Once H-2B is a granted, H-2B entitled to petition for child as H-4 subject to the same conditions and limitations. 8 C.F.R. § 214.2(h)(9)(iv)

Access to Federal and State Funded Public Benefits					
When do they receive legal work authorization?	**When is the immigrant considered PRUCOL?**	**When do they become lawfully present, granting access to health care?*****	**When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?**	**Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)**	**When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?**
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R § 274a.12(b)(7); spouse or unmarried child, son or daughter may apply for employment authorization 8 C.F.R. § 274a.12 (c)(4); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(7); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(7); spouse or unmarried child, son or daughter may apply for employment authorization 8 C.F.R. § 274a.12 (c)(4); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(7); spouse or unmarried child, son or daughter may apply for employment authorization 8 C.F.R. 274a.12 (c)(4); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(8); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(9); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(9); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible

Immigration Status & Children's Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency			
Immigration Status	**Immigration Intent**	**Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application**	**Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?**
H-3 Trainee INA § 101(a)(15)(H)(iii), 8 U.S.C §1101(a)(15)(H)(iii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Once H-3 is a granted, H-3 entitled to petition for child as H-4 subject to the same conditions and limitations. 8 C.F.R. § 214.2(h)(9)(iv)
I Visas representatives of media INA § 101(a)(15)(I), 8 U.S.C § 1101(a)(15)(I)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include child INA § 101(a)(15)(I)
J-1 Exchange visitor INA § 101(a)(15)(J), 8 U.S.C § 1101(a)(15)(J)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include children as J-2
J-2 Spouses & Children of J-1 INA § 101(a)(15)(J), 8 U.S.C § 1101(a)(15)(J)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children
M-1 Vocational Students INA § 101(a)(15)(M)(i), 8 U.S.C § 1101(a)(15)(M)(i)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include children as M-2
M-2 Spouses & Children of M-1 INA § 101(a)(15)(M)(ii), 8 U.S.C § 1101(a)(15)(M)(ii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children
M-3 Canadian & Mexican Vocational Students INA § 101(a)(15)(M)(iii), 8 U.S.C § 1101(a)(15)(M)(iii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include children
NATO TN visa 8 C.F.R. § 214.2(s); 22 C.F.R. §§ 41.21, 41.25	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include children INA § 101(a)(27)(L) in the same manner as described in § 214.2(a)(2)
O-2 Accompanying or Assisting O-1 INA § 101(a)(15)(O)(ii), 8 U.S.C § 1101(a)(15)(O)(ii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include their children
P-2 Artist & entertainers in exchange programs INA § 101(a)(15)(P)(ii), 8 U.S.C § 1101(a)(15)(P)(ii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include children as P-4 granted same term of admission 8 C.F.R. § 214.2(p)(15).
P-3 Artist or entertainers in cultural program INA § 101(a)(15)(P)(iii), 8 U.S.C § 1101(a)(15)(P)(iii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include children as P-4 granted same term of admission 8 C.F.R. § 214.2(p)(15).
P-4 Spouses & Children of P-1, P-2, P-3 INA § 101(a)(15)(P)(iv), 8 U.S.C § 1101(a)(15)(P)(iv)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include their children
Q-1 International cultural exchange program INA § 101(a)(15)(Q)(i), 8 U.S.C § 1101(a)(15)(Q)(i)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Cannot include their children

Access to Federal and State Funded Public Benefits					
When do they receive legal work authorization?	**When is the immigraut considered PRUCOL?**	**When do they become lawfully present, granting access to health care?*****	**When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?**	**Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low Income Energy Assistance, Child Care)**	**When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?**
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(9); spouses who are battered or subjected to extreme cruelty by A-1 visa holders can apply to the VAWA Unit at DHS for work authorization INA § 106	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer; Spouse and children can apply for work authorization 8 C.F.R. § 274a.12(b)(10);	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(11)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Eligible to apply for work authorization 8 C.F.R. § 274a.12(c)(5)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Eligible to apply for work authorization for practical training related to field of study endorced by University official. 8 C.F.R. § 274a.12(c)(6)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work for a only for a specific employer 8 C.F.R. § 274a.12(b)(17) and (18); Parent or dependent child eligible to apply for work authorization 8 C.F.R. § 274a.12(a)(7); 8 C.F.R. § 274a.12 (c)(7)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(14)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(14)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Authorized to work only for a specific employer 8 C.F.R. § 274a.12(b)(15)	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible

Immigration Status & Children's Benefits *(continued)*

Immigration Status: Duration, Ability to Sponsor Children and Path to Permanent Residency			
Immigration Status	**Immigration Intent**	**Lawful Permanent Residency: Path to, Requirements of Maintaining and Who Controls the Application**	**Can they include their children in their application, or file an application asking DHS to grant their children legal immigration status?**
Q-2 nonimmigrant from Northern Ireland INA § 101(a)(15)(Q)(ii), 8 U.S.C § 1101(a)(15)(Q)(ii)	Intend to return to foreign country	Does not lead to lawful permanent residency or citizenship	Can include their children INA § 101(a)(15)(Q)(ii)(II)
Undocumented			
Undocumented	Not applicable	Does not lead to lawful permanent residency or citizenship	Undocumented

Access to Federal and State Funded Public Benefits					
When do they receive legal work authorization?	**When is the immigrant considered PRUCOL?**	**When do they become lawfully present, granting access to health care?*****	**When are they considered "qualified aliens" for federal/state public benefits eligibility purposes?**	**Eligible for "federal public benefits" (e.g., Housing, Foster Care, Low-Income Energy Assistance, Child Care)**	**When are they eligible for "federal mean-tested public benefits" - (e.g., TANF, Food Stamps,TANF: Child Care, Full Medicaid, SSI benefits) and meet all program requirements?**
No lawful work authorization	Date entered the U.S. as long as visa terms have not been violated	Date entered the U.S. as long as visa terms have not been violated	Not eligible	Not eligible	Not eligible
Undocumented					
No lawful work authorization	Not eligible	Not eligible	Not eligible	Not eligible	Not eligible

* The National Immigrant Women's Advocacy Project, American University, Washington College of Law, Leslye E. Orloff, Andrea Carcamo-Cavazos & Lucia Macias.

** Immigrant exempt from 5-year bar: Refugees, Asylees, Persons granted withholding of deportation, Cuban and Haitian entrants, Amerasian entrants, Iraqi/Afghan, and Victims of trafficking.

*** Department of Health & Human Services. Centers for Medicare & Medicaid Services Report, *Medicaid and CHIP Coverage of "Lawfully Residing" Children and Pregnant Women* (July 1, 2010).