

# Addressing Issues that Arise in Family Court Cases Involving Immigrant Survivors and Children: Learning from Judges

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D.C. Office of Victim Services and Justice Grants

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D.C. Superior Court



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(Ret.)**  
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# Learning Objectives

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

- Implement family court litigation strategies that inform judges about the immigration related abuse and immigration remedies that protect victims;
- Counter perpetrators' attempts to use victim's immigration status to gain advantage in family court cases and prevent discovery of VAWA confidentiality protected immigration case file information; and
- Obtain U visa certifications and SIJS findings from family court judges.

# **Dynamics Of Domestic Violence Experienced By Battered Immigrants**

# Coercive Control Over Immigration Status

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

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

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

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

- Abuse rate rises to 59.5% when an immigrant's spouse/former spouse is a U.S. citizen
  - Twice the national average

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

# Sexual Assault Rates Among Immigrant Women

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

# Immigration Related Abuse

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

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



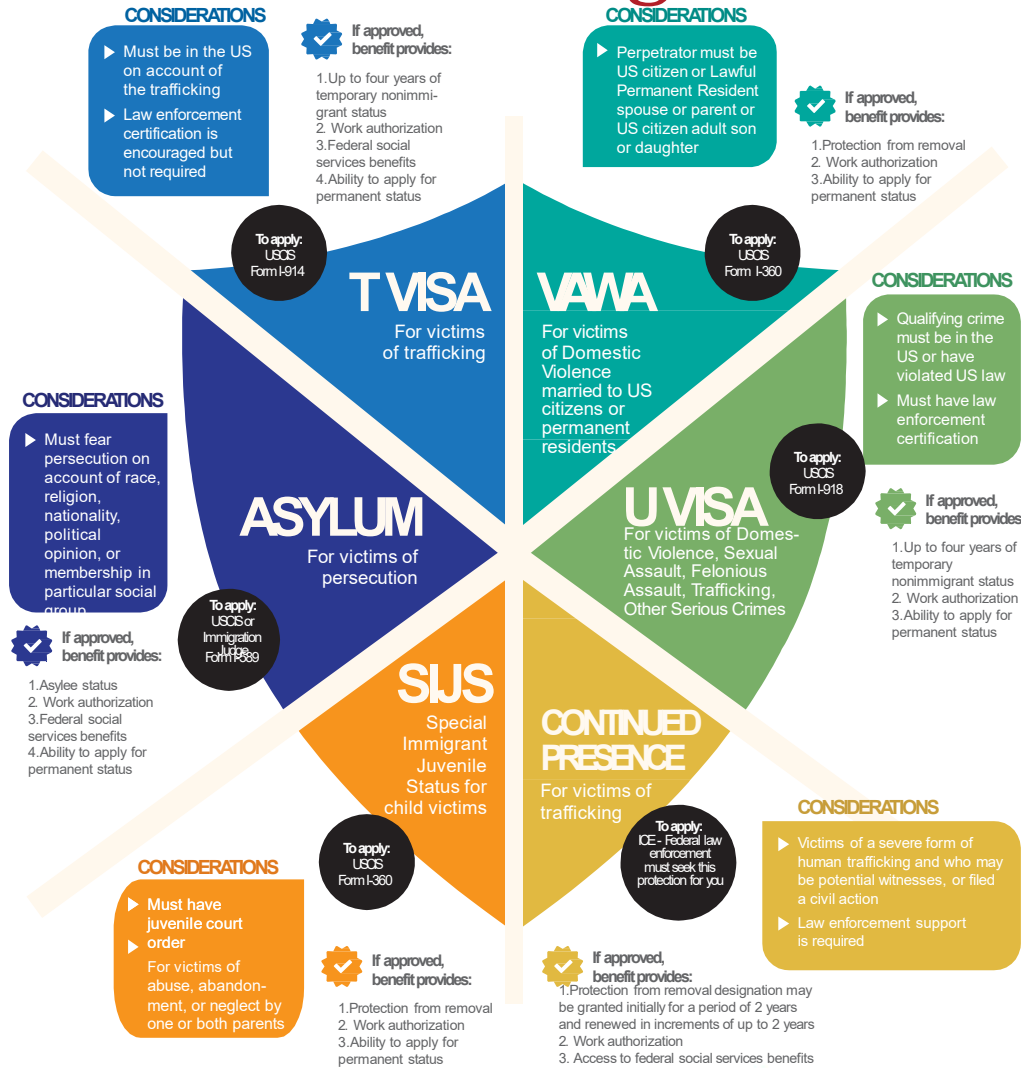
## Perpetrators Efforts to Trigger Victim's Removal

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

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



# Protections For Immigrant Victims



DHS.GOV/BLUE-CAMPAIGN

# VAWA Self-Petitioning Requirements

- Subjected to Battery or Extreme Cruelty
- By a U.S. Citizen or Permanent Resident
  - Spouse;
  - Parent; or
  - Citizen adult son/daughter (over 21)
- With Whom Self-Petitioner Resided
  - No time period required
- Good Moral Character
- Good Faith Marriage
- VAWA cancellation of removal has similar eligibility requirements
- Battered Spouse Waiver if perpetrator files
- **Timeline to work authorization = 4–18 months (2019)**

# Forms of Extreme Cruelty

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

# Special Immigrant Juvenile Status (SIJS)

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

# U Visa Requirements

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

# T Visa for Trafficking Victims

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

# When you identify immigrant victims they will qualify for one or more of the following:

| Abuse   | Form of Immigration Relief   |
|---|--|
| Domestic violence<br>Child abuse<br>Child abandonment or neglect  | VAWA self-petitioning<br>VAWA defenses against removal in immigration court<br>Battered spouse waiver<br>Special Immigrant Juvenile Status |
| Domestic violence/child abuse<br>Sexual assault,<br>Stalking,<br>Human trafficking,<br>Other U visa criminal activities | U visa   |
| Human Trafficking   | T visa<br>Continued presence   |



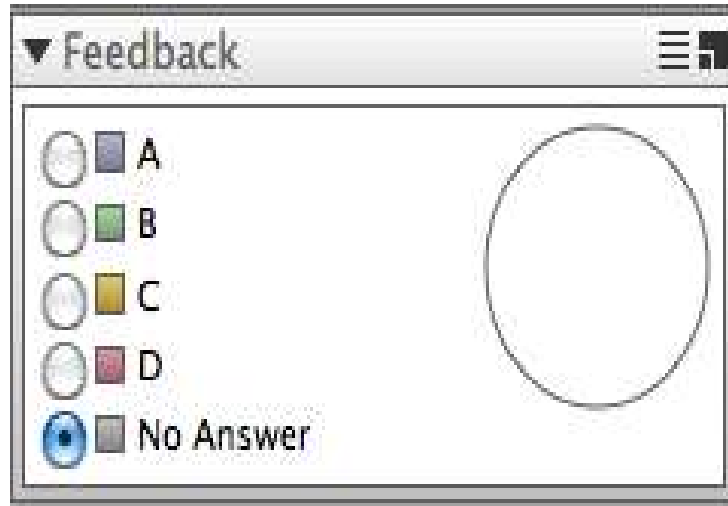
# Benefits for Survivors

- Protection from deportation
  - VAWA confidentiality
- Can include family members in application
  - VAWAs, U visas and T visas
- Access to legal immigration status
- Financial independence from perpetrator
  - Legal work authorization (3 - 48 months post filing)
  - Issuance of federally recognized ID
  - Access to some state/federal public benefits beyond programs open to all immigrants

# Case Scenario (Handout)

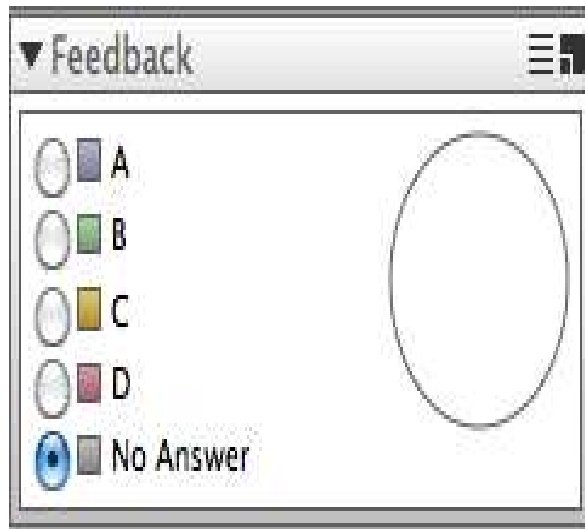
Clara met Eduardo a lawful permanent resident when he came back to his hometown to visit his family in El Salvador. Eduardo started dating, Clara who was raising her 9 year old son Miguel. After Clara became pregnant and gave birth to a baby girl Lupe, Eduardo decided to bring Clara, Miguel and Lupe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

## Poll 1: What forms of immigration relief would Clara qualify for:



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

## Poll 2: What forms of immigration relief would Miguel qualify for:



- A. VAWA self-petition
- B. U visa
- C. T visa
- D. SIJS
- E. Two of the above

# In Cases of Immigrant Survivors What Role Can Judges Play?

- Make detailed findings
  - Family relationships: Marriage and Parent child relationship
  - Battering, extreme cruelty, child abuse, elder abuse, child abandonment, neglect, sexual assault, stalking
  - Apply and cite state law
- Role Congress created for state court judges in
  - U/T visa certification
  - Special Immigrant Juvenile Status findings
  - Applying VAWA confidentiality laws in ruling on discovery
  - Providing economic relief to victims and children including enforcing affidavits of support
- Make rulings on discovery consistent with VAWA confidentiality

NIWAP

Cash Assistance

# Why is it important for judges to know which immigrant victims and children qualify for which benefits in D.C.?

<http://map.niwap.org/>

# Benefits in the District of Columbia

- TANF: Continued Presence (CP), T visa bona fide
  - 5 year bar if entered US after 8/22/96 for VAWA prima facie and U visa/SIJS lawful permanent residents (LPRs)
- Child care: TANF same as above
  - Child Care Development Fund – no restrictions
- SNAP: CP, T visas
  - VAWA prima facie & SIJS/U visa-LPRs if either
    - Under 18, disabled, elderly or after 5 year bar
- Education
  - Federal: VAWA, CP, T visa applicants, SIJS/U Visa -LPRs
  - UDC: D.C. financial aid no immigration restrictions and in state tuition if attended D.C. high school 3 years or received equivalent of high school diploma from D.C. school



# Benefits in the District of Columbia

- Health Care
  - Exchanges: VAWA, CP, T visa, U visa waitlist, SIJS applicants
  - No restrictions – Healthcare for pregnant women & Emergency Medicaid includes all COVID-19 related testing and care
  - CHIP: VAWAs, CP, T visa, U visa waitlist, SIJS applicants
    - Until 21 through D.C. medical assistance
    - Immigrant Children's Program no restrictions
  - Full scope adult Medicaid: CP and T visa bona fide, VAWA prima facie (5 yr bar if entered after 8/22/96)
    - D.C. Health Care Alliance provides health care to adults who are in-eligible for Medicaid
- SSI (most limited): CP, T visa
  - VAWA & U Visa/SIJS LPRs (5 year bar+ 40 quarters work)

# Benefits in the District of Columbia

- Housing
  - Transitional – all victims + homeless + abused children
  - Public & Assisted: VAWA applicants, CP, T visas, SIJS/U visa – LPRs
- LIHEAP
  - Weatherization everyone
  - LIHEAP – VAWA, CP, T visa, SIJS/U visa LPRs
- Driver's License
  - D.C. Maryland (not federally recognized) for anyone who cannot provide a social security number
  - Federally recognized – work authorization
    - VAWA approved, T visa bona fide, CP, U visa waitlist, SIJS – LPRs, DACA
- CARES Act - Victims with legal work authorization
  - Recovery payments and unemployment insurance

# U Visa for Immigrant Victims

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

# U Visa Qualifying Criminal Activity

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

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

# Discussion with Judges:

- Which judges might attorneys seek certification from?
- Can you describe the types of helpfulness judges observe in family court cases
  - (e.g. protection orders, custody, child abuse and neglect, divorce)

# Which Judicial Officers Can Certify?

- Federal, state, & local
  - Associate Judges, Magistrate Judges, Commissioners, Judicial Referees, Masters, Alderman, ALJs, Surrogates, Chancellors
  - Others with delegated decision-making authority
- Judge will need to amend the form
- Certification based on helpfulness to courts
  - Detection(family/juvenile /civil/criminal)
    - Pleadings
    - Testimony
    - Attending court
    - Seeking orders
    - Working with police/prosecutors
  - Conviction/Sentencing (criminal misdemeanor and felony cases)

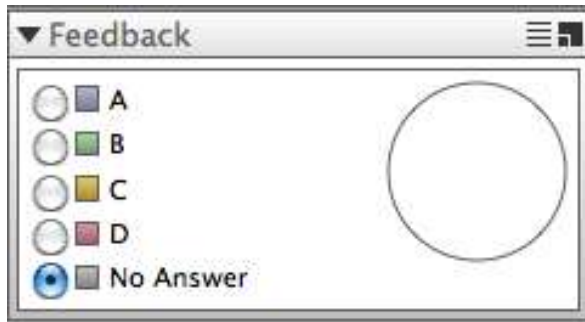
# U Visa Regulations Definitions

Although terms are used interchangeably

- *Helpfulness required for certification*
  - Was helpful, is helpful, is likely to be helpful in the “investigation or prosecution” always means
    - “Detection, investigation, prosecution, conviction, or sentencing”
  - To provide early access “crime” always means
    - “criminal activity”
- *After certification & filing ongoing responsibility to provide assistance/cooperation reasonably requested by law enforcement/prosecutors*
  - Cannot unreasonably refuse to cooperate



## Poll 3: Why would victims seek U visa certification from state courts?



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

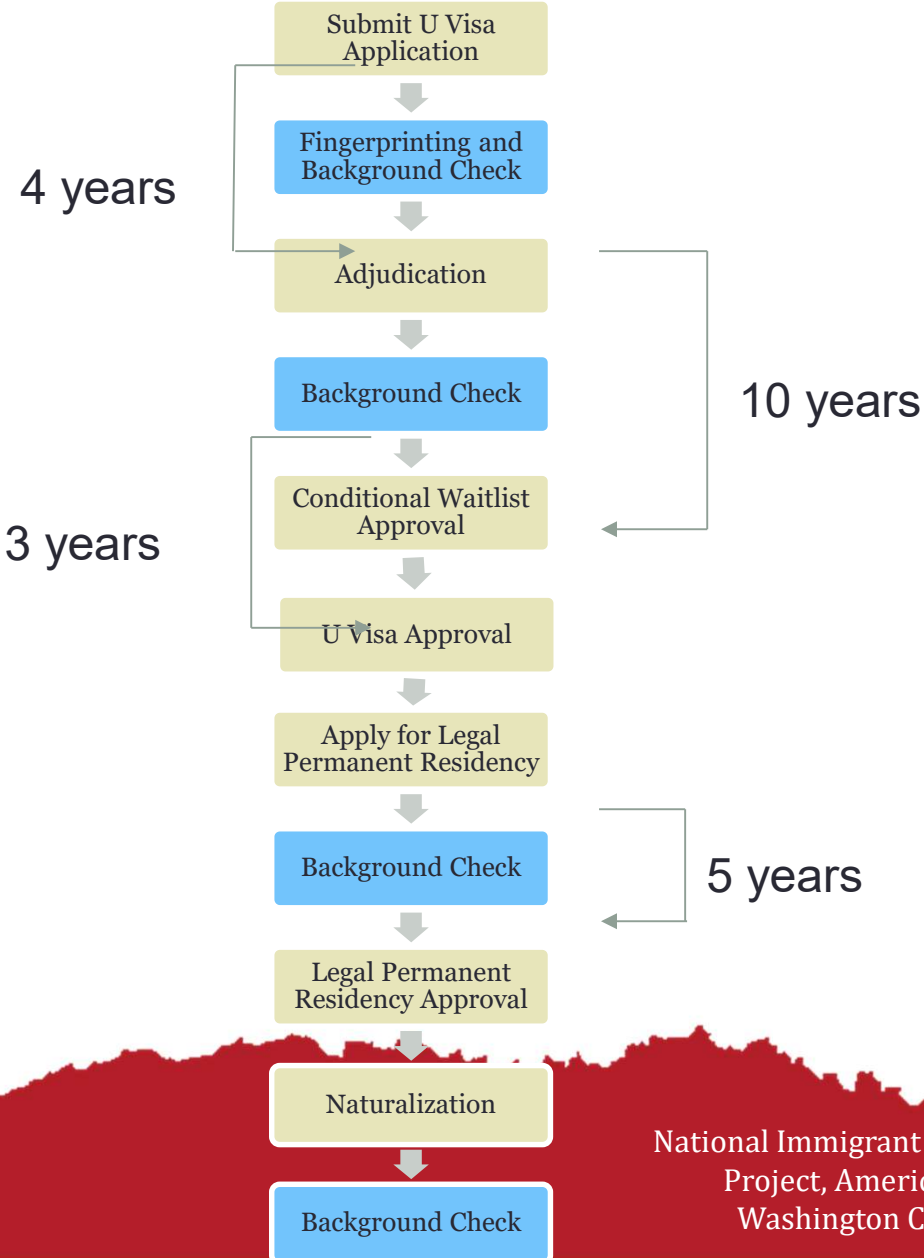
## According to DHS, a U/T Visa Certification Tells USCIS Only 3 Things:

- Certifier believes the applicant is a victim of a qualifying criminal activity
- Victim had knowledge of the criminal activity
- U visa: Victim was, is, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing
- T visa: Victim complied with reasonable requests for assistance from law enforcement or prosecutors unless exempt
  - Under 18 or physical or psychological trauma

# Helpfulness Requirement Met *Even When:*

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

# U Visa Process Timeline



## Part 6. Certification

I am the head of the agency listed in **Part 2**, or I am the person in the agency who was specifically designated by the head of the agency to issue a U Nonimmigrant Status Certification on behalf of the agency. ~~Based upon investigation of the facts, I certify, under penalty of perjury, that the individual identified in Part 1. is or was a victim of one or more of the crimes listed in Part 3. I certify that the above information is complete, true, and correct to the best of my knowledge, and that I have made and will make no promises regarding the above victim's ability to obtain a visa from U.S. Citizenship and Immigration Services (USCIS), based upon this certification. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS.~~

1. Signature of Certifying Official (sign in ink)



2. Date of Signature (mm/dd/yyyy)

3. Daytime Telephone Number

4. Fax Number

Judges can amend the form

Examples: Based upon ...

- My findings of fact or ruling in [name type of proceeding]
- Probable cause
- My issuance of a protection order
- My sentencing of the defendant
- My having presided over a criminal case

**REMEMBER:** This is a certification that you believe the applicant was a victim of a crime.

Certification provides evidence to DHS.

DHS adjudicates and decides whether to grant the victim immigration relief.

# Resource

<https://niwaplibrary.wcl.american.edu/pubs/judges-u-t-certification-toolkit>



**NIWAP**



**U VISA CERTIFICATION**  
*and*  
**T VISA DECLARATION**  
**TOOLKIT**  
*for*  
**FEDERAL, STATE AND LOCAL**  
**JUDGES, COMMISSIONERS,**  
**MAGISTRATES AND OTHER JUDICIAL**  
**OFFICERS**

By Sylvie Sheng, Alina Husain, Alisha Lineswala, Benish Anver, Karen Dryhurst, Lucia Macias, and Leslye E. Orloff

*(Last updated August 12, 2020)*





# Special Immigrant Juvenile Status (SIJS)

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



# D.C. Definitions

## **Abuse, abandonment, neglect**

- D.C. Code § 16-2301
  - Physical child abuse
  - Neglect
    - Includes abandonment
    - Parental incapacity
  - Sexual Abuse
  - Emotional abuse
  - Failed to make reasonable efforts to prevent the infliction of abuse upon a child

## **Other similar basis that include abuse or neglect**

- Forced marriage
  - D.C. Code § 22-2705
- Cruelty to children
  - D.C. Code § 22-1101
- Domestic Violence
  - D.C. Code § 4-551

# State Court Findings Needed for SIJS

## \*State Law Applies To Each\*

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

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

- Dependency/Delinquency
- Civil protection order cases
- Custody cases
- Divorce cases
- Paternity and child support cases
- Adoption cases
- DHS states: All are of the above = *Juvenile courts*
  - Juveniles = all children
- Bench Book chapters on each case type

# Apply Same Jurisdiction and Procedural Rules as All Other Cases

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

# Best Interest Factors

## D. C. Code Section 16-914

- Family Violence
- Child's needs
- Mental and physical health of all individuals
- Adjustment to home, school, community
- Children's Family Relationships
- Wishes of child and parents
- Parental cooperation and conflict
- Prior involvement of each parent in child's life
- Parent's fitness and capacity to be a caregiver
- Parent's job demands, number/age of children and parent's ability to financially support a joint custody arrangement

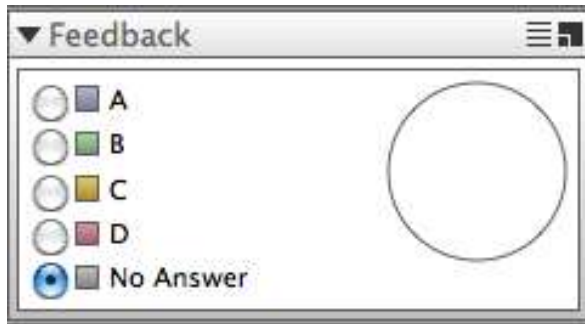
# Home country not in child's best interests

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

# Finding: Reunification Not Viable

- Does not require termination of parental rights
- Viability of reunification does not necessitate no contact with parent – Visitation can occur
- Order must include the finding that reunification with the parent is not viable
  - Explain reasons in court order
- Using state best interests law

**Poll 4: In the Clara and Eduardo scenario in which of the following cases could the court NOT issue SIJS findings for Lupe as part of the court's order?**



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



# Best Practice for Court Order

- Make factual findings regarding
  - Facts of abuse, abandonment and/or neglect
  - Separately regarding each parent
  - Articulating trauma impact on child helpful
  - Connect the dots
    - Explain why the orders and findings the court is issuing
    - Are needed for child protection, healing, stability
    - Because of the abuse/abandonment/neglect the child suffered
  - Why court orders in the child's best interest
- Cite D.C. statutes

# VAWA Confidentiality in State Court Proceedings

# Why is VAWA Confidentiality Important for State Courts?

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

# VAWA Confidentiality Prongs

- **Abuser-Provided Information:** DHS, DOJ, and the State Department are barred from taking action against a victim based *solely* upon information provided by abusers and crime perpetrators (and their family members) –
- **Location Prohibitions:** Enforcement locational prohibitions unless comply with specific statutory and policy safeguards
- **Non-Disclosure:** Unless one of the enumerated exceptions apply, DHS, DOJ and the State Department cannot disclose VAWA information to anyone
  - VAWA self-petitioners, VAWA cancellation/suspension, T visa, U visa, Battered Spouse Waiver, Abused Visa Holder Spouses
- *DHS notifies staff through “384” computer system*

# VAWA Confidentiality Statutes and DHS Policies and Regulations

- Protect Information About Victim's Immigration Case
- Prohibit disclosure of any information about
  - The existence of a VAWA, T or U visa application
  - Decisions made in the case
  - Information contained in the #A file
  - Disclosure prohibited to all persons, not just the perpetrator

# State and Federal VAWA Confidentiality and Discovery Case Law

- Family law - VAWA and U visa case information not discoverable
- Criminal law – only U visa case certification discoverable
  - File not in prosecutors' custody or control
- Civil cases not discoverable except potentially as needed to prove damages to a specific individual
  - In chambers review judge can redact

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

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

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

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

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



# Immigrant Victims and Custody Cases

# Protecting Immigrant Mothers Protects Children

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

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

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

# Is Immigration Status Relevant to Custody?

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



# Myth vs. Fact:

## Parents without Legal Immigration Status

| Myth   | Fact   |
|--|--|
| Deportation is imminent  | DHS policies prevent detention/removal of immigrant parents who are crime victims  |
| Parent is likely to flee U.S. with child   | US citizens and lawful permanent residents are more likely to flee with children, especially when <ul style="list-style-type: none"> <li>- There have been threats of kidnapping children</li> <li>- They are dual nationals</li> <li>- They travel freely to and from U.S.</li> </ul> |
| The parent has no livelihood   | Abused immigrant parents in family court have a path to immigration relief, work authorization & some benefits   |
| Legally present parent must have custody in order to file for benefits for child | Custody does not affect parent's ability to file for or gain immigration benefits for his children   |

# ICE Removal Data

## 2013

- Convicted criminals 82%
  - Repeat immigration violators 7.8%
  - Ordered removed and failed to depart 1.6%
  - Other immigrants 7.7%
- <https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>

## 2017

- Criminal convictions 73.7%
  - Pending criminal charges 15.5%
  - Outstanding notices to appear in immigration court 5.3%
  - Ordered removed and failed to depart + reinstatement 2.8%
  - Other immigrants 2.6%
- <https://www.ice.gov/removal-statistics/2017>

# Who Does Information About Sensitive Locations Protected From Immigration Enforcement Help Courts?

## **VAWA Confidentiality**

- Victims protected at courthouses in connection with civil/family/criminal cases related to
  - Domestic violence, sexual assault, trafficking, stalking
- Shelters, rape crisis centers
- Supervised visitation centers
- Family Justice Centers
- Programs serving victims

## **DHS Policies (ICE & CBP)**

- Schools
- Medical treatment & health care facilities
- Places of worship
- Religious or civil ceremonies e.g. weddings and funerals
- Public demonstrations e.g. march, rally, parade

# Immigrant Parents and Child Custody

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

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

# Detained Parent Directive, Aug. 2017

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



## Discussion with Judges

- How might it be helpful to a judge deciding a contested custody case to know that a parent or a child is pursuing or has been granted immigration relief (e.g. VAWA, T U, SIJS)?
  - Recommendations for lawyers about best practices

# PROTECTION ORDERS



# Immigration Law Definition of Domestic Violence

- “Battery or Extreme Cruelty”
- Includes
  - All forms of abuse covered in state civil protection order statute
  - All forms of abuse that constitute domestic violence under state criminal laws
  - Plus – Forms of abuse that are extreme cruelty
    - No physical harm or crime required

# Protection Orders

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

## Findings of Certain Protection Order Violations = Deportable Offenses

- Even if no criminal prosecution or conviction
- Deportable Offense = An immigrant “enjoined under a protection order issued by a court and whom **the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.**”
- 8 U.S.C. § 1227(a)(2), INA § 237(a)(2)(E)(ii) (emphasis added).

# Best Practices

- Issue Padilla advisals in protection order cases
- In cases in which parties seek protection orders against each other
  - When one party is pro se and the other is represented consider appointing counsel for the unrepresented party

## *Discussion with Judges*

# What Creative Protection Order Remedies Might Help an Immigrant Victim?





# Use Creative Remedies to...

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

# Using Catch-all Provisions to Stop Immigration Related Abuse

- Defendant must obtain prior court approval before contacting any government agency (immigration officials, CPS, IRS, Welfare, etc.) concerning the petitioner except
  - Police emergency
  - Subpoena
- Cooperate in and not withdraw any case he has filed for petitioner with immigration authorities (e.g. work visa holders, I-130s)

# Child Support in Mixed Immigration Status Families

# Child Support & Immigration: The Parent Paying Child Support

- Payment of child support through the court provides a non-citizen parent with a history of child support payments
- This is helpful evidence of good moral character for immigration cases
  - Cancellation of removal
  - Naturalization
  - Obtaining relief in immigration court
    - Can be used to show hardship to family members

# Child Support & Immigration: The Parent Receiving Child Support

- Provides a custodial immigrant parent with evidence of child support that can be used as income in when applying for lawful permanent residency
  - Avoids public charge
- Importance of court orders maintaining immigrant children on their non-custodial parent's health insurance policies

# Immigration Issues Arising in Child Support Cases

- Lack of legal work authorization is not a valid defense to non-payment of child support
- Can order child support, but not a job search, of an undocumented non-custodial parent
- Can order non-custodial parent to obtain an ITIN and pay taxes
- Criminal convictions for willful failure to pay child support can be deportable theft/fraud related crimes of moral turpitude

# Importance of Wage Withholding

- Creates documented track record of payment
- Improves safety for immigrant victims
- Courts have found employers who willfully violate wage withholding orders liable to the custodial parent for the amount of child support ordered withheld.
  - State v Filipino, Conn. Super. LEXIS 266 (2000)
  - Belcher v Terry, 420 S.E.2d 909 (1992)
  - Child Support Recovery Srvs., Inc. ex rel S.C. v. Inn at the Waterfront, Inc., 7 P3d 63 (Alas. 2000)

When a non-custodial immigrant parent is working in the informal economy how might a lawyer prove income for child support purposes?



# Proof of Non-Custodial Immigrant Parent's Income

- Undocumented workers can be ordered to pay child support based on
  - Child Support Guidelines
  - Actual earnings
  - Employer's statements
  - Evidence of earning capacity
  - Attributed income (e.g. minimum wage)
- Undocumented workers can pay state & federal taxes on income earned using an IRS issued
  - Tax ID number (ITIN)

# Divorce and Affidavits of Support

# Impact of Divorce

- VAWA self-petitioners:
  - Spouse must file within two years of final divorce
  - Step-children must file before divorce
- Ends legal immigration status for spouses and children of visa holders:
  - Students, Work Visa Holders, Diplomats
- Divorce cuts off access to lawful permanent residency for spouses and children of people seeking lawful permanent residency based on:
  - Employment
  - Asylum
  - Family relationships
  - Cancellation of removal
- Annulment instead of divorce can lead to federal marriage fraud charges

# Background

- Spousal control over filing for immigration relief
  - Work authorization
  - Drivers' licenses
- Many forms of visas do not allow spouses and children of visa holders to work in the United States
  - Employment visas (H)
  - Student visas (F)
  - Diplomatic visas (A)
  - International organizations (G)
  - Investor visas (E)
- Immigrant victims have limited access to the public benefits safety net

# Affidavits of Support

- Each person who files a petition for a family member to immigrate to the U.S. required to sign a legally enforceable affidavit of support
- These affidavits are of increasing importance in resolving support issues in immigrant families, sometimes decades after the act of immigration is complete.

# Evidence in Affidavit of Support

- 3 years of tax returns
- Evidence of current employment
  - Including self-employment
- Proof of income sufficient to sustain the immigrant(s) being sponsored at or above 125% of poverty

## Affidavit of Support: Duration and Enforceability

- Promise to support family member for up to 10 years
- This responsibility lasts until the non-citizen either:
  - Becomes a U.S. citizen = Naturalizes;
  - Credited with forty (40) hours of work under the Social Security Administration - INA §213A;
  - Ceases to hold the status of an alien lawfully admitted for permanent residence and departs the U.S.;
  - Obtains in removal proceedings a new grant of adjustment of status;
  - Dies
- Courts have relied on the Affidavit of Support to set spousal and child support obligations

# Enforceability of the Affidavit Support

- Courts have found the Affidavit of Support enforceable and have ordered support payments to a former spouse.
  - *See, Shumye v. Felleke*, 555 F.Supp.2d 1020(N.D. Cal.2008); *Stump v. Stump*, 2005 WL 2757329 (N.D. Ind. Oct. 25, 2005); *Cheshire v. Cheshire*, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010, at \*2-4 (M.D. Fla. May 4, 2006)
  - *Kumar v. Kumar* A145181 (Cal. App. Div. II, July 28, 2017)(enforceable and no duty to mitigate)
- As part of a family law property settlement, the sponsored immigrant may surrender his or her right to sue to enforce the Affidavit of Support.
  - 71 F.R. 35732, 35740 (June 21, 2006).



# Technical Assistance and Materials

- Power Point presentations and materials for this conference at <https://niwaplibrary.wcl.american.edu/aug-2020-family-law-dc>
- Judicial Training Manual at <http://niwaplibrary.wcl.american.edu/sji-jtn-materials/>
  - **NIWAP Technical Assistance**
  - Call (202) 274-4457
  - E-mail [info@niwap.org](mailto:info@niwap.org)
- Web Library: <https://niwaplibrary.wcl.american.edu/>