


**Best Practices In State Court Cases:  
Special Immigrant Juvenile Status  
and Violence Against Women Act  
Confidentiality**

Judge Rosemary Collins, Commissioner Loretta Young, Judge Paula Ryan and Laura, Leslye E. Orloff and Laura C. Graham  
June 5, 2018




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**Introductions**

- Judge Rosemary Collins
  - Rockford, Illinois
- Commissioner Loretta Young
  - New Castle County, Delaware
- Judge Paula Ryan
  - Sussex County, Delaware
- Leslye Orloff
  - American University, Washington College of Law, Washington, D.C.
- Laura C. Graham
  - Community Legal Aid Society, Delaware




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

- Understand how VAWA confidentiality impacts rulings discovery motions in family, civil and criminal court cases and immigration enforcement, including at courthouses
- Carryout the role Congress delegated to State Court Judges in Special Immigrant Juvenile Status (SIJS)
- Identify minors before the court who are SIJS eligible in a wide range of state family court cases
- Know how to issue SIJS findings as part of state court orders the court issues addressing custody or placement of a child




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**Delaware Demographics (2016)\***

\*Source: <http://www.migrationpolicy.org/data/state-profiles/state-demographics4> (Feb. 2018)

- ❖ Total foreign born population – 89,391
- ❖ 9.4% of the state’s 950,000 people are foreign born
  - 49.3% naturalized citizens
  - ≈25% lawful permanent residents and temporary status
  - ≈25.7% undocumented
- ❖ 99.1% rise in immigrant population from 2000 to 2016
- ❖ 21.1% of children in the state under age 18 have 1 or more immigrant parents
  - 91.5% of children with immigrant parents in the state are U.S. native.

<http://www.americanuniversity.edu/immigrant-population/state/Del>

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**Delaware– Countries/Regions of Origin and Limited English Proficiency (2016)\***

- › Latin America – 43%
  - › Mexico (18.4%)
  - › Jamaica (2.3%)
  - › Colombia (2.0%)
- › Asia – 30%
  - › China (10.4%)
  - › India (9.9%)
  - › Philippines (3%)
  - › Korea (2.3%)
- › Africa – 11.6%
- › Europe – 10.9%
  - › Eastern Europe (3.2%)
  - › United Kingdom (2.6%)
  - › Southern Europe (2.8%)
- › Middle East – 3.0%

\*Source: <http://www.immigrationdata.com/delaware/countries-of-origin/> (Feb. 2016)

**Limited English Proficiency**  
(Speak English less than very well)

- › Naturalized citizens 22.1%
- › Non-citizens 53.3%

**Languages Spoken at Home**

- ❖ Spanish (64,049)
- ❖ Mandarin or Cantonese (10,092)
- ❖ Yoruba, Twi, Igbo (4,817)
- ❖ Haitian (4,189)
- ❖ German (2,800)
- ❖ Arabic (2,168)
- ❖ Gujarati (2,019)

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**PROTECTIONS FOR IMMIGRANT VICTIMS**

**ASYLUM**  
A person who is persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

**T VISA**  
A non-immigrant visa for victims of human trafficking who are willing to cooperate with law enforcement.

**VAWA**  
Violence Against Women Act provides relief to victims of domestic violence, dating violence, or child abuse by a U.S. citizen or permanent resident.

**U VISA**  
A non-immigrant visa for victims of certain crimes who are willing to assist law enforcement.

**SIJS**  
Special Immigrant Juvenile Status is available to children who are abused, neglected, or abandoned by their parents.

**CONTINUING PRESENCE**  
A form of temporary lawful status for victims of domestic violence who are unable to obtain a visa.

**BLUE CAMPAIGN**  
For more support call 1-800-775-7889 or visit [www.immigrant.org](http://www.immigrant.org)

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### Risks of Removal for Victims

- Perpetrators actively reporting for removal victims with pending immigration cases
  - VAWA self-petitioners 38.3%
  - VAWA petitioners arrested at crime scene instead of the abuser 15.4%
  - U visa victims 26.7%
- Traffic stops
  - VAWA self-petitioners 28.6%
  - U visa victims 26.7%

Kristzina E. Szabo, David Stauffer, Benish Anver, *Authorization For VAWA Self-Petitioners and U Visa Applicants*, NIWAP (Feb. 12, 2014)

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### Immigrant Victims and Children Receive

- Protection from deportation
- Legal work authorization which brings access to drivers licenses upon
  - Approval or wait list approval
- Access to some federal public benefits
  - Varies by immigration case type
- VAWA confidentiality protection upon filing VAWA, T or U visa case

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### Courts Can Play a Role

- Identify potentially eligible immigrants
- Distribute information
  - DHS brochures
  - Non-profit Legal Services Agencies
- Provide language access
- Know how to obtain accurate information about current immigration laws, policies and practices
  - Court's role in SIJS findings and U visa certification



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### 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 (their family members or associates)
- **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

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### Bars Limiting Reliance Upon Information Provided by a Perpetrator

- The government cannot gather and/or use information provided solely by:
  - A domestic violence or child abuser;
  - A sexual assault or stalking perpetrator
  - A trafficker;
  - The perpetrator of any U visa listed crime
  - The perpetrator's family member
  - Other persons associated with the perpetrator
- To take an adverse action against a victim
- 8 U.S.C. 1367(a)(1)

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### Victims Protected by Non-Reliance Prohibition

- No immigration case filing required
  - Domestic violence victims
  - Child abuse victims
  - Immigrant parents of child abuse victims
  - Victims of family violence perpetrated by another family member residing in the same household
- Victims in the process of filing
  - T Visas
  - U Visas
- Filed work authorization application
  - Abused spouses of work visa holders

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### Regulations and DHS Policies

- All DHS Memo 002-02-001
  - Adverse information about the victim from a prohibited source should be treated as “inherently suspect”
- 8 C.F.R. 214.14 (3)(2)
  - “Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367”



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### All DHS Memo 002-02-001

- “whenever a DHS officer or employee receives *adverse information* from a spouse, family member of a spouse, or unknown private individual”
- “Employees will be sensitive to the fact that the alien at issue may be a victim and that a victim-abuser dynamic may be at play.”



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### Why is VAWA Confidentiality Important for State Courts?

- Prohibited enforcement locations include courthouses in connection with any:
  - Protection order case, child custody case, civil or criminal case involving or related to domestic violence, sexual assault, trafficking, stalking
- New ICE courthouse enforcement policy



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### January 2018 ICE Courthouse Enforcement Policy: Targeted Immigrant Limitation

- Civil immigration enforcement at courthouses will only occur when
  - ICE officers have information that leads them to believe that a targeted immigrant will be present at a courthouse
- To be targeted an immigrant must
  - Have criminal conviction(s)
  - Be gang members
  - Be a threat to national security or public safety
  - Have been ordered removed and failed to depart, or
  - Have re-entered the country illegally after being removed

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### Why is VAWA Confidentiality Important for State Courts?

- Perpetrators are using state court discovery to obtain federal VAWA confidentiality protected information that
  - DHS will not release
  - Cannot be released under federal law
- Confidentiality protections apply to family, civil and criminal court discovery

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### Protecting Information About a Survivor's Immigration Case

- Disclosure prohibited to all persons, not just the perpetrator
- Protections apply from the time of filing permanently unless
  - Case denied on the merits
  - All appeal options have been completed

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### Exceptions to Disclosure

- All DHS instruction 002-02-001
  - Only “in a manner that protects the confidentiality of such information”
  - “Please note, defense counsel in state cases may sometimes attempt to make the entire A-file discoverable; however the entire file is not discoverable in its entirety under this exception”



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### Disclosure Exceptions

- Judicial review exception
  - Applies to judicial review of a victim’s VAWA confidentiality protected immigration case (Hawke)
- Benefit granting or public benefits purposes
- Congressional oversight and data collection
  - Omitting personally identifying information
- All adult victims have waived confidentiality protections



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### Courts may be asked to rule on

- Motions *in limine*
- Protective orders
  - Objections to discovery
  - Regarding questioning victims about VAWA confidentiality protected case filings in court
- Rule 11 sanctions
- Case law supporting non-disclosure ...



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**Demaj v Sakaj (D. Conn, 2012) –U Visa 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

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

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

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**Hawke v. Dep’t of Homeland Security (N.D. CA, 2008) – VAWA Self-Petition Case**

- 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”

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### State v. Marroquin-Aldana

2014 ME 47, ¶ 20, 89 A.3d 519, 525

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

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### People v. Alvarez Alvarez

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

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

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### Discussion, Question and Answer on VAWA Confidentiality and State Court Discovery with Commissioner Young and Judge Collins

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**Special Immigrant Juvenile  
Status: Newest Tips, Tools,  
Bench Book and Best Practices  
for Judges**



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**Special Immigrant Juvenile Status (SIJS)**

- SIJS is a form of humanitarian immigration relief that provides for a path to lawful permanent resident status
- For children who are unable to be reunited with one or both parents due to abuse, abandonment, neglect
- SIJS provides the hope of stability and safety for vulnerable immigrant children.



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**SIJS: Congressional Goals**

- Included a role for state court judges as experts in child best interests, custody, child welfare matters.
- State court expertise:
  - Adjudicating facts of child abuse, neglect and abandonment
  - Issuing orders regarding child care, custody and placement that further the best interests of children
- Only the DHS can issue SIJS & permanent residency
- DHS uses the state court order as evidence in adjudicating the immigration application



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### Special Immigrant Juvenile Status (SIJS)

- Immigration relief for unmarried children under the age of majority under state law who have been
  - Victims of abuse, abandonment, neglect
  - By at least **one parent**
- Eligibility requires state court jurisdiction over
  - the care, custody, or dependency of the child
  - has issued a court order, finding, or declaration on three statutorily required issues
- The state court order does **not** award SIJS
  - **ONLY DHS can provide legal immigration status**



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### State Court Findings Needed for SIJS

#### \*State Law Applies To Each\*

- The court issued orders regarding the care or custody, of an immigrant child with
  - An individual (e.g. non-abusive parent, grandparent, kinship care, guardian, next friend) *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 the parent's abuse, abandonment, or neglect



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### SIJS Vocabulary

- What is a juvenile court according to DHS
  - Any "court located in the United States having jurisdiction under State law to make judicial determinations about custody and care of juveniles."



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### SIJS Vocabulary

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



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### Types of Proceedings With Jurisdiction To Make SIJS Findings:

- Dependency
- Delinquency
- Termination of parental rights
- Guardianship
- Protection orders
- Paternity
- Custody and child support
- Divorce
- Legal Separation
- Adoption
- Motions for a declaratory judgment

Courts with jurisdiction under state law to make judicial determinations regarding the custody, placement, care of children = juvenile courts for SIJS immigration purposes



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### Apply State Law

- Apply state law without regard to where abuse, abandonment or neglect occurred
- Definitions: abuse, abandonment, neglect
  - Includes child endangerment, domestic violence as child abuse, forced marriage
- Jurisdiction
  - UCCJEA – Temporary Emergency Jurisdiction
- Follow your state court procedures



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### Apply State Law

- Best Interests
  - Placement
  - Non-viability
  - Not returning child to their home country

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Where in your state statutes are there definitions of abuse, abandonment, and neglect?

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### Apply State Law

- Where are best interest factors in state law?
  - Child welfare statutes
  - Custody statutes
  - Case law

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**Approach:**

1. Make findings about the facts of harm to the child in US or abroad
2. Determine applying state law if = abuse, abandonment, neglect, similar basis
3. If yes apply state best interest factors to
  - Custody, placement, commitment
  - If not in child's best interests to return to home country
  - Viability of reunification with abuser



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**Court Order: Custody, Dependency, Placement**

- Declaring the minor is dependent on the court\*; **OR**
- Placing the child in the custody or guardianship of:
  - An individual person;
    - Order should include in the name of the person and their relationship to the child
      - Parent, family member, friend, next friend, other
  - A state agency or department; OR
  - A private agency

*\*Statutory Amendment 2008, no longer requires the child is dependent on the state, the child may be placed with an individual including relatives.*



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**State Courts Regularly Make Custody & Placement Determinations**

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



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### All of the Following are Potentially Eligible for SIJS

- A minor who is:
  - Abused, abandoned or neglected
    - In the U.S.
    - In the home country
  - Living with their
    - Non-abusive parent
    - Guardian
    - Adopted parent
    - State foster care
    - Federal foster care (ORR)



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### 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



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### Factors to consider...

- Risk of danger to the child
- Healing from trauma needs
- Help the child is receiving
- Family support system
- Emotional well being
- Educational resources
- State laws that preclude or discourage placement with abusive parent



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### Viability Factors and Best Interests

- Family violence, abuse, neglect, abandonment
- Trauma child has suffered and child's physical, emotional, safety, mental health needs
- Child's wishes and fears
- Parent's fitness and caregiving capacity
- Parent's demonstrated capacity to provide stability continuity of care



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### Finding: Reunification Not Viable

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



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### SIJS: State and Federal Roles

#### State Courts With Jurisdiction Over Children

- Issue orders providing evidence to help DHS adjudicate SIJS application
- Make findings of fact **under state law** on
  - Custody, dependency, placement, care of a child
  - Child suffered abuse, abandonment, or neglect by at least one parent
  - Parental reunification
  - Child's best interests

#### DHS Adjudicators

- Adjudicate application filed by child
- Reviews evidence, including the state court's order, to determine if the child applicant is eligible for SIJS
- Determine if state court order was sought primarily
  - To provide the child relief from harm caused by abuse, abandonment or neglect; OR
  - For immigration purposes



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### “One *or* Both Parent” Requirement



A child can receive SIJS findings if they were abused, abandoned or neglected by one parent and are living with the other parent.

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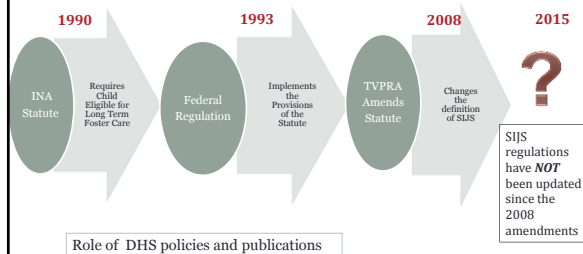
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### Statute vs. Regulation



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### SIJS in State Courts

- Many SIJS cases are for 15-17 year old minors
  - State court order + filing before the child ages out
  - Up to age of majority set by state law
- SIJS is an option any time an abused, abandoned or neglected child is not a
  - Citizen or lawful permanent resident

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**Best Practice for Findings**

- Make factual findings regarding
  - Facts of abuse, abandonment and/or neglect
  - Regarding each parent
- Cite the state statute(s) on
  - Abuse, abandonment and/or neglect
  - Jurisdiction over the minor
- If “similar basis” explain in court order how it is similar to one of the following
  - Abuse, abandonment and/or neglect



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**Best Practice for Findings**

- Issue orders that demonstrate to DHS that the court made an informed decision
  - Make factual findings regarding abuse, abandonment and/or neglect
    - Separately for each abusive parent
  - Finding that the child is in need of protection as a result of having been abused, abandoned or neglected
  - Trauma research



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**Panel Discussion With Judge Ryan and Commissioner Young**



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### Technical Assistance and Materials

- Power Point presentations and materials for this conference at [www.niwap.org/go/DEBenchBar2018](http://www.niwap.org/go/DEBenchBar2018)
- Judicial Training Manual at [www.niwap.org/go/sji](http://www.niwap.org/go/sji)
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