

**DRAFT**  
**Standard Operating Procedures Directive**  
**Applicable to All ICE, CBP and OPLA Officials who Encounter Victims of Crime or Abuse,<sup>1</sup>**  
**VAWA Confidentiality Protected Persons,<sup>2</sup> and/or Victims, Witnesses or Parties in Legal**  
**Proceedings<sup>3</sup>**

February 28, 2022

**1. Overview<sup>4</sup>**

This Standard Operating Procedure sets forth policy and procedure to ensure that noncitizen crime victims, noncitizen VAWA confidentiality (1367 Confidentiality) protected persons, and noncitizen victims, witnesses or parties in civil or criminal proceedings who Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) encounter, who are in ICE or CBP custody, or who are involved in cases being handled by the Office of the Principle Legal Advisor (OPLA) including all ICE trial attorneys are effectively-identified, provided assistance, informed of legal protections for noncitizen victims of crime or abuse under U.S. immigration laws, and referred to victims' service providers,<sup>5</sup> and when appropriate to law enforcement agencies.<sup>6,7</sup> Generally, ICE and CBP personnel, including OPLA attorneys, will not

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<sup>1</sup> ICE Directive No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (DHS Jun. 17, 2011); Alejandro N. Mayorkas, *Guidelines for Enforcement of Civil Immigration Law* 3 (Sept. 30, 2021) (stating that “status as a victim of crime, or a victim, witness, or party in legal proceedings” can be a mitigating factor that militates in favor or declining an enforcement action for persons who might otherwise fall within enforcement priorities).

<sup>2</sup> 8 U.S.C. § 1367, *Penalties for disclosure of information* (originally enacted as Section 384 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA)); DHS Directive No. 002-02, Implementation of Section 1367 Information Provisions (Nov. 1, 2013); DHS Instruction No. 002-02-001, Implementation of Section 1367 (Nov. 7, 2013).

<sup>3</sup> Alejandro N. Mayorkas, *Guidelines for Enforcement of Civil Immigration Law* (Sept. 30, 2021) at 3 (stating that “status as a victim of crime, or a victim, witness, or party in legal proceedings” can be a mitigating factor that militates in favor or declining an enforcement action for persons who might otherwise fall within enforcement priorities). *See also*, John D. Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* 6 (May 27, 2021) (explaining that relevant mitigating factors include: “status as a victim, witness or plaintiff in civil or criminal proceedings”).

<sup>4</sup> For purposes of this Directive, “noncitizen” means any person as defined in section 101(a)(3) of the Immigration and Nationality Act (INA).

<sup>5</sup> The term “victim service providers” is defined in the Violence Against Women Act 32 U.S.C. § 12291(a)(43) (“VICTIM SERVICE PROVIDER- The term ‘victim service provider’ means a nonprofit, nongovernmental or tribal organization or rape crisis center, including a State or tribal coalition, that assists or advocates for domestic violence, dating violence, sexual assault, or stalking victims, including domestic violence shelters, faith-based organizations, and other organizations, with a documented history of effective work concerning domestic violence, dating violence, sexual assault, or stalking.) As used there the definition includes nongovernmental organizations “with expertise in the protection of victims of severe forms of trafficking in persons.” 22 U.S.C. § 7105(b)(1)(G)(iv)(II).

<sup>6</sup> ICE Directive 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims 6, 9 (DHS Aug. 10, 2021) (such referrals are required of ERO FODs, ICE agents and officers, and OPLA attorneys).

<sup>7</sup> To be effective the referrals to law enforcement agencies should be made to the agency’s victim witness staff and to U and T visa certifying officials at the agency. Making referrals to law enforcement agencies without also making referrals to victim services providers undermines the effectiveness of the referral in serving VAWA’s victim protection, victim access to services, or crime fighting goals. Victims working with victim advocates and attorneys are more likely to call the police for help, work with police and prosecutors, file for a protection order and to file for crime victim-based immigration relief. *See* : Leslye E. Orloff, Haley Iesha Magwood, Yasmin Campos-Mendez, and Giselle A. Hass, Executive Summary Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Victims and their Children After Work-Authorization and Legal Immigration Status (June 8, 2021) <https://niwaplibrary.wcl.american.edu/pubs/executive-summary-final>; Dutton, M. A., Ammar, N., Orloff, L., & Terrell, D. (2006). Use and outcomes of protection orders by battered immigrant women (Revised final technical report #2003-WG-BX-1004). Washington, DC: National Institute of Justice Office of Justice Programs, U.S. Department of Justice. <https://niwaplibrary.wcl.american.edu/pubs/fam-gov-nijtechnicalreportprotectionorders11-10-06>; USCIS U Visa Demographics 7 (March 2020) (Only 2.8% of U visa applicants filed pro se)

detain, arrest, take into custody, execute the removal of, undertake an enforcement action, or initiate or continue to pursue removal proceedings against a noncitizen who is a crime victim, who is protected by 1367 Confidentiality laws, or who is a victim, witness, or party in legal proceedings.

Noncitizen victims, witnesses, or parties who fall within Department of Homeland Security (DHS) enforcement priorities<sup>8</sup> (threats to national security, current public safety, or border security) may be subject to an immigration enforcement action, immigration court proceedings, detention, or removal after a full assessment of the individual and the totality of the facts and circumstances, consideration of mitigating and aggravating factors, and review by Headquarters Responsible Officials that is fully documented as required by this Directive .

The duty of DHS officials and personnel to protect and assist noncitizen crime victims is enshrined in numerous U.S. laws and their respective reauthorizations.<sup>9</sup> Congress created victim-based immigration benefits including VAWA self-petitions, VAWA cancellation of removal, battered spouse waivers, T visas, U visas and SIJS to encourage noncitizen victims of crime and abuse, who may be undocumented or who have a form of temporary immigration status, to seek assistance and report crimes and abuse committed against them. When crime victims have access to humanitarian protection, regardless of their immigration status, and can feel safe in coming forward, it strengthens the ability of local, state, and federal courts, prosecutors, law enforcement agencies, including DHS, and other government agencies (e.g. labor, employment, child and adult protective services, civil rights) to detect, investigate, and prosecute crimes.

## 2. Definitions

### a. Headquarters Responsible Officials (HROs).

- i. **(ICE):** Executive Associate Directors of ERO, HSI, and Management and Administration (M&A); the Principal Legal Advisor (OPLA), the Associate Director of the Office of Professional Responsibility (OPR); and the Assistant Directors, or equivalent positions who report directly to the Director, Deputy Director, or Chief of Staff.
- ii. **(CBP):** Executive Assistant Commissioners of U.S. Border Patrol, Office of Field Operations, Assistant Commissioner of Professional Responsibility, and the

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<https://niwaplibrary.wcl.american.edu/pubs/uscis-u-visa-demographics>. This approach also fosters the initiation of or further development of relationships and trust between state and local law enforcement and victim serving agencies that leads to better language access for victims, more U and T visa certification, and greater ability of law enforcement agencies to hold perpetrators accountable. See, Natalia Lee, Daniel J. Quinones, Nawal Ammar & Leslye E. Orloff, National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access (April 16, 2013) <https://niwaplibrary.wcl.american.edu/pubs/national-survey-on-police-response-u-visas-language-access-report-4-16-13-final>

<sup>8</sup> Alejandro N. Mayorkas, *Guidelines for Enforcement of Civil Immigration Law* 3-4 (Sept. 30, 2021).

<sup>9</sup> Some examples include The Violence Against Women Act VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, Pub. L. No. 103-322, 108 Stat. 17 (1994); The Trafficking Victim's Protection Act VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); Special Immigrant Juvenile Status which was first created in the Immigration and Nationality Act of 1990. IMMIGRATION AND NATIONALITY ACT OF 1965, Pub. L. No. 101-649, § 153(a)(3), 104 Stat. 4978, 5005-06 (1990).

Executive Assistant Commissioners, Officers or equivalent positions who report directly to the Commissioner, the Deputy Commissioner or the Chief of Staff.

- b. **Field Responsible Official (FRO).** The highest-ranking official in any ICE, CBP or OPLA field location. This includes SACs, FODs, and any other officials who have been designated in writing by the ICE Director or CBP Commissioner.
- c. **ICE and CBP Personnel.** All ICE and CBP employees and contractors, including but not limited to officers, agents, immigration enforcement officers, warrant service officers, OPLA attorneys, OPLA officials, and all other ICE, CBP and OPLA field office, supervisory and headquarters staff.
- d. **Enforcement Action.**<sup>10</sup> Enforcement actions are defined to include but not be limited to the following activities: stopping, questioning, interviewing, surveillance, apprehension, arrest, or detention of an individual, deciding to initiate a removal proceeding, issuing, reissuing, serving, and filing of a notice to appear or a detainer, deciding whether to take a person into custody, pursuing expedited removal or reinstatement of removal, executing a final order of removal, deciding to detain or continuing to detain a crime victim, opposing motions in immigration proceedings, initiating, prosecuting or continuing with an immigration court proceeding against a crime victim (including contributing to ongoing appearances of a crime victim in immigration court), pursuing appeals of removal proceedings, service of subpoenas, searches, and seizures.
- e. **Prosecutorial Discretion.** ICE and CBP personnel, including OPLA attorneys have the ability to exercise prosecutorial discretion in in noncitizen crime victim cases in a wide variety of actions that include but are not limited to the following:<sup>11</sup>
  - Deciding whether to issue a detainer, or whether to assume custody of a noncitizen subject to a previously issued detainer;
  - Deciding whether to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
  - Deciding whether to focus resources only on administrative violations or conduct;
  - Deciding whether to stop, question, or arrest a noncitizen for an administrative violation of the civil immigration laws;
  - Deciding whether to detain or release from custody subject to conditions or on the individual's own recognizance;
  - Deciding whether to settle, dismiss, oppose, or join in a motion on a case, narrow the issues in dispute through stipulation, or pursue or waive appeal in removal proceedings;
  - Deciding when and under what circumstances to execute final orders of removal;
  - Deciding whether to grant deferred action or parole;

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<sup>10</sup> John D. Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* 4 (May 27, 2021); Tae Johnson (ICE), and Troy Miller (CBP), *Civil Immigration Enforcement In or Near Courthouses* 2 (Apr. 27, 2021); ICE, *What is an enforcement action? FAQs: Protected Areas and Courthouse Arrests* 2 (Oct. 28, 2021); ICE Directive 11005.3, *Using a Victim-Centered Approach with Noncitizen Crime Victims* 3 (DHS Aug. 10, 2021).

<sup>11</sup> John D. Trasvina, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* 4, 11,12 (May 27, 2021); ICE Directive No. 11005.3, *Using a Victim-Centered Approach with Noncitizen Crime Victims* 2-3, 8 (DHS Aug. 10, 2021).

- Moving to administratively close or continue proceedings;
  - Moving to dismiss proceedings;
  - Entering stipulations;
  - Agreeing to or stipulating to a bond amount, or alternative or other conditions of release, and taking positions in bond proceedings;
  - Revisiting and granting prosecutorial discretion in a case where prosecutorial discretion has been previously considered and denied;
  - Joining motions for relief and motions to reopen;
  - Identifying and actively remedying violations of 1367 Confidentiality (8 U.S.C. §1367);
  - Deciding to defer decisions on civil immigration enforcement actions against a noncitizen crime victim while USCIS issues a bona fide or prima facie determination, makes a final determination, or grants lawful permanent residency in a pending case for victim-based immigration benefits, only moving forward with decisions regarding enforcement actions once a case is denied and appellate rights exhausted and return A-files to USCIS to facilitate this process;
  - Issuing stays of removal;
  - Deciding to release crime victims on their own recognizance;
  - Any other actions that preserve ICE, CBP and OPLA resources for cases that fit within DHS enforcement priorities, that protect and assist crime victims, and promotes crime victim access to victim-based immigration benefits.
- f. **Exceptional Circumstances** exist when: (1) the individual poses national security concerns; or (2) the individual poses an imminent risk of death, violence, or physical harm to any individual.
- g. **Crime Victim:** For the purposes of this and all ICE, CBP and OPLA policies an individual is considered a crime victim in each of the following circumstances:
- A noncitizen applicant for or the beneficiary of a victim-based immigration benefit;
  - A noncitizen who is known by DHS to be, or who DHS personnel have or should have a reasonable suspicion, is a victim of crime, battery or extreme cruelty, human trafficking, child abuse, abandonment or neglect, or any other U visa listed criminal activity whether or not the individual has filed an application for victim-based immigration benefits;;
  - An individual is a victim of battery or extreme cruelty or is a crime victim entitled to protections under 1367 Confidentiality (8.U.S.C. §1367), which includes, but does not require, the filing of an application for a victim-based immigration benefit by the individual.
- h. **VAWA Confidentiality (1367 Confidentiality).** 8 U.S.C. §1367 prohibits
- Perpetrator Provided Information Bar: These provisions bar all DHS officers, attorneys, and employees from making an adverse determination of admissibility or deportability against a noncitizen using information furnished solely by a prohibited source associated with the battery or extreme cruelty, sexual assault, stalking, human trafficking or substantial physical or mental abuse, regardless of whether the

noncitizen has applied for VAWA benefits, or T or U nonimmigrant status. For example, in domestic violence and child abuse cases, this prohibition applies anytime there is a spousal or parent-child relationship and there is reasonable suspicion that the noncitizen has been a victim of battering or extreme cruelty. This prohibition also applies any time the case involves a noncitizen who is in the process of filing for victim-based immigration benefits.<sup>12</sup>

- **Enforcement Location Bar:** 1367 Confidentiality bars immigration enforcement actions against crime victims at courthouses, domestic violence shelters, rape crisis centers, family justice center, and a range of agencies that provide victim services.
- **Protected Case Confidentiality:** The 1367 Confidentiality statute also prohibits DHS officers, attorneys, and employees from permitting the use by or disclosure to anyone of the existence of, actions taken in, or information or documents contained in any immigration case file involving a 1367 Confidentiality protected individual (with narrowly limited exceptions) including but not limited to applications and petitions for crime victim-based immigration relief.

- i. **DHS and Persons “Known by DHS to be” Crime Victims.** In this Directive the words “known by DHS to be” regarding noncitizen crime victims means any crime victim with:
- 1367 Confidentiality protection (8 U.S.C. §1367); or
  - With a pending or approved application for victim-based immigration relief as defined by this Directive.

DHS for purposes of this Directive “DHS” means any DHS staff, officer, agent, attorney, supervisor working at ICE, CBP, OPLA, HSI, USCIS, or any other part of DHS that may encounter crime victims in their work.

- j. **Reasonable suspicion.** Can be any information or evidence that indicates a noncitizen is a victim of a crime, battering or extreme cruelty, or abuse, abandonment or neglect, or similar harm under state law. Examples include but are not limited to observing injuries, bruises, or difficulties that noncitizen may have suggesting non-visible injuries, photographs of injuries or the crime scene, the noncitizen mentions abuse or crime victimization, or the victim provides copies of or describes the existence of protection orders, police reports, criminal, family, juvenile, or civil court findings, or medical records involving domestic violence, child abuse, sexual assault, human trafficking, stalking or other U visa covered criminal activity.
- k. **Victim-Based Immigration Benefit.** Includes the following forms of humanitarian immigration benefits:

**VAWA Self-Petition(er).** Under VAWA, noncitizens who have been or their children have been battered or subjected to extreme cruelty by a qualifying relative may self-petition, allowing them to remain in the United States, apply for Lawful Permanent Resident (LPR) status as an approved VAWA self-petitioner, and eventually, apply for naturalization. VAWA self-petitioners include: the spouse, child, stepchild, or parent of an abusive U.S. citizen; the spouse, child, or stepchild of an abusive LPR; the conditional resident spouse or stepchild of an

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<sup>12</sup> Victim-immigration benefits are defined below.

abusive U.S. citizen or LPR (Battered Spouse Waiver); the abused spouse or child of a noncitizen eligible for relief under the Cuban Adjustment Act, the Haitian Refugee Immigration Fairness Act, or the Nicaraguan Adjustment and Central American Relief Act; and the spouse or child eligible for suspension of deportation or cancellation of removal due to abuse by a U.S. citizen or LPR. See INA 101(a)(51) (defining "VAWA self-petitioner").

**VAWA Cancellation of Removal and VAWA Suspension of Deportation:** Under VAWA noncitizens who are in removal proceedings may be eligible to apply for relief with the immigration court in the form of VAWA cancellation of removal or VAWA suspension of deportation. See INA 240A(b)(2) and INA 244(a)(3)(as in effect prior to March 31, 1997)(prescribing eligibility requirements). VAWA cancellation of removal and VAWA suspension of deportation offer immigration relief for spouses, former spouses, children and stepchildren when they or their children were battered or subjected to extreme cruelty by their U.S. citizen or lawful permanent resident spouse, former spouse, parent, or stepparent.

**Special Immigrant Juvenile Status (SIJS).** SIJS provides humanitarian protection for immigrant children who are under age 21 and unmarried, who were abused, abandoned, neglected or were subjected to similar maltreatment by a parent either prior to the child's arrival in the U.S. or while in the United States. SIJS children will have state court orders finding that the child cannot be reunified with the parent who perpetrated the abuse, abandonment, neglect or a similar harm defined by state law that the child suffered and placing or awarding custody of the child to a family member, the state child welfare system, HHS, or other caregiver. See INA 101(a)(27)(J). Approved SIJS applicant children receive work authorization and are eligible to apply for adjustment of status to that of a lawful permanent resident (LPR).<sup>13</sup>

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<sup>13</sup> As part of this Directive DHS is extending VAWA confidentiality protections to children who have applied for or are in the process of applying for Special Immigrant Juvenile Status (SIJS). Prior to this directive SIJS was the only form of crime victim-based immigration relief that has not been afforded VAWA confidentiality protection. SIJS children have been abused, abandoned, neglected, or suffered similar harms proscribed by state law and one or both of the child's parents have perpetrated the abuse and face similar harms and risks similar to those VAWA self-petitioner, U visa, T visa, and Continued Presence applicant children experience. SIJS children were also afforded by Congress protections under the SIJS program that provides approved SIJS petitioners a path to lawful permanent residency.

Electing to provide VAWA confidentiality protection to SIJS children follows the lead of and is consistent with the approach previously taken by both ICE and USCIS. ICE has recently extended VAWA confidentiality protections and information disclosure prohibitions of 8 U.S.C. §1367 to noncitizen trafficking victims applying for and being granted continued presence. See, ICE Center for Countering Human Trafficking, Continued Presence Resource Guide 14 (July 2021) <https://niwaplibrary.wcl.american.edu/pubs/continued-presence-resource-guide-2021>. USCIS similarly elected to extend VAWA confidentiality protections to abused spouses of certain nonimmigrant visa holders. See, USCIS, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants 3 (March 8, 2016) <https://niwaplibrary.wcl.american.edu/pubs/h-visa-765-2>.

**U Nonimmigrant Status.** U nonimmigrant status for victims of criminal activity designated in INA §101(a)(15)(U) (qualifying crimes)<sup>14</sup> who have suffered substantial mental or physical abuse as a result of being a victim of criminal activity, possess relevant information concerning the crime, and have been helpful, are being helpful, or are likely to be helpful to law enforcement, prosecutors, judges, or other federal, state or local government officials in the detection investigation, prosecution, conviction or sentencing of the criminal activity. U visa status allows victims to receive work authorization, deferred action, be granted U visa status, and, if certain conditions are met, apply for adjustment of status to that of an LPR.

**T Nonimmigrant Status.** T nonimmigrant status for victims of a severe form of trafficking in persons, as defined in section 103 of the TVPA of 2000, who are physically present in the United States on account of trafficking and who have complied with any reasonable requests for assistance to law enforcement or prosecutors in the investigation or prosecution of the trafficker (with limited exceptions). See INA 101(a)(15)(T). T visa status allows victims of human trafficking to remain in the United States for up to four years (or longer if a limited exception applies), receive work authorization, and, if certain conditions are met, apply for adjustment of status to that of an LPR.

**Continued Presence.** Continued Presence (CP) is a temporary immigration designation (22 U.S.C. § 7105(C)(3)) provided to noncitizens identified as victims of a “severe form of trafficking in persons” who may be potential witnesses. CP allows noncitizen human trafficking victims to lawfully remain and work in the United States temporarily during the investigation into the human trafficking-related crimes committed against them and during any civil action under 18 U.S.C. §1595 filed by noncitizen victims against their traffickers.

**Work Authorization for Abused Spouses of Certain Nonimmigrant Visa Holders.** Under VAWA, as amended, noncitizens who have been admitted to the U.S. under INA section 101(A), (E)(iii), (G), or (H) are eligible for employment authorization under INA Section 106 when the immigrant or their child was battered or subjected to extreme cruelty by the victim’s spouse who is a visa holder under INA section 101(A), (E)(iii), (G), or (H).

### 3. Responsibilities

#### 3.1. HROs are responsible for:

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<sup>14</sup> U visa criminal activities include: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labor contracting, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint; or other related crimes including any similar activity where the elements of the crime are substantially similar. Also includes attempt, conspiracy, or solicitation to commit any of the above and other related crimes.

- 1) Ensuring overall compliance with this Standard Operating Procedure within their respective Directorate or Program Office; and
- 2) Developing and issuing any necessary implementation guidance specific to their Directorate or Program Office, in coordination with the ICE Office of Policy and Planning or the CBP Office of Policy.

### 3.2. FROs and OPLA are responsible for:

- 1) Ensuring that ICE and CBO personnel and OPLA attorneys are trained on and are routinely accessing the, Central Index System database<sup>15</sup> (or any successor information technology system), to determine whether a noncitizen's case is flagged as an applicant for or the beneficiary of a victim-based immigration benefit that receives 8 U.S.C. §1367 (1367 Confidentiality protection)<sup>16</sup> and are also actively on alert when looking at other available records and databases to determine whether the noncitizen has a pending or approved application for a any victim-based immigration benefit.<sup>17</sup>
- 2) Ensuring ICE and CBP personnel, and OPLA attorneys notify FROs and OPLA in writing with a detailed explanation, before taking or initiating any enforcement action against an individual who is known by DHS to be, or DHS has, or should have reasonable suspicion is a crime victim, including but not limited to applicants for and beneficiaries of victim-based immigration benefit, unless an exceptional circumstance exists;
- 3) Ensuring ICE and CBP personnel notify the FROs in writing as soon as practicable, but generally *within two hours* if a detainer or arrest is made or if a noncitizen is taken into custody or *within 24 hours* if a person already detained or in custody is identified as an individual who is known by DHS to be, or DHS has, or should have reasonable suspicion is a crime victim, including but not limited to applicants for and beneficiaries of victim-based immigration benefit without prior FRO approval. This notification must include a detailed explanation of why prior approval was not sought and include an explanation of any more than 2 hour or 24 hour delay which ever is applicable;

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<sup>15</sup> Considering that DHS components have access to and knowledge of the Central Index System (CIS), USCIS has added a new Class of Admission (COA) code of "384" to CIS as a means to alert components that the individual is covered by the confidentiality provisions of section 384 of IIRIRA. When an individual files a VAWA self-petition (Form I-360), T nonimmigrant application (Form I-914 or Form I-914 Supplement A), or U nonimmigrant petition (Form I-918 or Form I-918 Supplement A) with USCIS, the COA in CIS will be updated to 384. Once the pending VAWA, T, or U petition/application is adjudicated, the COA will be updated to reflect the correct classification, which is unique to each type of immigration relief. DHS, DHS Broadcast Message on New 384 Class of Admission Code (December 21, 2010) <https://niwaplibrary.wcl.american.edu/pubs/dhs-broadcast-class-admission-code>

<sup>16</sup> ICE Directive No 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims (August 10, 2021); DHS Directive No. 002-02, Implementation of Section 1367 Information Provisions (Nov. 1, 2013); DHS Instruction No. 002-02-001, Implementation of Section 1367 (Nov. 7, 2013).

<sup>17</sup> This step is important because some noncitizen crime victims pending or approved cases for victim-based immigration relief will not be red flagged in the Central Index System. Examples include Special Immigrant Juvenile Status cases filed by noncitizen children who are victims of abuse, abandonment or neglect by a parent and battered spouse waiver applicants whose cases have not yet been entered into the Central Index System.



4) Ensuring that ICE and CBP personnel and OPLA attorneys review all applicable information and proactively inquire of individuals apprehended by ICE or CBP or who are in ICE or CBP custody, and noncitizens in OPLA cases whether they are noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits;

5) Ensuring a process is in place for FROs to request concurrence with a decision to detain from the ERO Executive Associate Director for individuals known by DHS to be or that the FRO has or should have reasonable suspicion are noncitizen crime victims , including applicants for and beneficiaries of victim-based immigration benefits. This process must include a method to ensure that ICE Health Service Corps (IHSC) confirms any detention location can provide appropriate care for individuals known by DHS to be a noncitizen crime victim, including an applicant for and beneficiary of victim-based immigration benefit;

6) Approving in writing the detention of individuals known by DHS to be a noncitizen crime victim or an individual for whom ICE or CBP officers have or should have a reasonable suspicion in a crime victim, including applicants for and beneficiaries of victim-based immigration benefits and any detention of crime victims shall be in the least restrictive facility and shall be in a facility in close proximity the noncitizen crime victim's counsel and family members. Reevaluate any decision to detain at least weekly;

7) Notifying the appropriate medical staff (e.g. Field Medical Coordinators (FMC) or Health Services Administration (HAS)) as soon as practicable, but generally *within 24 hours* of learning an individual detained in ICE custody is a noncitizen crime victim, including applicant for and beneficiary of victim-based immigration benefit. This notification must include a detailed explanation of why prior approval was not sought and include an explanation of any more than 24-hour delay;

8) Ensuring local IHSC, or appropriate medical staff in non-IHSC staffed facilities, have a process in place to notify the FRO as soon as practicable, but generally *within 24 hours*, after an individual in custody is determined to be a noncitizen crime victim, including an applicant for and beneficiary of victim-based immigration benefit. This notification must include a detailed explanation of why prior approval was not sought and include an explanation of any more than 24-hour delay;

5) Tracking, monitoring, and reporting all individuals known by DHS to be, or that ICE, CBP, OPLA attorneys, IHSC, or facility staff have or should have reasonable suspicion are noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits detained in ICE custody, concerning the medical condition of such individuals and reporting that information, at least monthly, to the ERO EAD, who will report it to the Office of the Director (through the Office of the Deputy Director). Any medical or mental health records created or medical or mental health information obtained while a noncitizen is in detention or custody shall not be used for any immigration enforcement related purpose as described in Section 4.5.4 of this Directive.

9) Ensuring a process is in place for the expeditious release of individuals known by DHS to be noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration

benefits, unless approval is obtained from the FRO (See # 5 above), release is prohibited by law<sup>18</sup> or exceptional circumstances exist;

10) Ensuring all facilities and all staff and contractors working in facilities in which ICE or CBP detains noncitizens or hold them in custody are trained on this Directive.

11) Ensuring individuals known by DHS to be, or that ICE or CBP have or should have reasonable suspicion are noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits receive appropriate medical and mental health care, including but not limited to arranging for care by outside providers or effectuating transfers to appropriate facilities if necessary, and if the victim in consultation with any legal representative they have retained consents to such transfer; and

15) Monitoring, in coordination with IHSC and facility medical staff, the condition of individuals known by DHS to be, or that ICE, CBP, IHSC or facility medical staff have or should have reasonable suspicion are noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits Any medical or mental health records created or medical or mental health information obtained while a noncitizen is in detention or custody shall not be used for any immigration enforcement related purpose as described in Section 4.5.4 of this Directive.

### **3.3. IHSC Personnel** are responsible for:

1) Notifying the Field Office Director (FOD), the Special Agent in Charge (SAC), IHSC Headquarters (HQ), and Headquarters Responsible Officials (HRO) as soon as practicable, but *no later than 24 hours*, after identification of individuals in ICE or CBP custody known by DHS to be, or that ICE, CBP, IHSC or facility staff have or should have reasonable suspicion are noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits. This notification must include a detailed explanation of why prior approval was not sought and include an explanation of any more than 24-hour delay;

2) Re-evaluating individuals, at least once a month, known by DHS to be, or that ICE, CBP, IHSC, or facility staff have or should have reasonable suspicion is a noncitizen crime victim, including an applicant for and beneficiary of victim-based immigration benefit to inform the FOD whether continued detention is appropriate as part of the ongoing general health and well-being and review to ensure that they receive appropriate health care and mental health treatment;

3) Overseeing and reviewing facility capabilities to meet the medical and/or mental health needs of individuals detained or held in custody who are known by DHS to be, or that ICE, CBP, IHSC, or facility staff have or should have reasonable suspicion is a noncitizen crime victim, including applicant for and beneficiary of victim-based immigration benefit. Also responsible for

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<sup>18</sup> The Immigration and Nationality Act limits the discretion of ICE to release from custody certain categories of noncitizens under certain circumstances. *See* INA § 235(b) (noncitizens in the expedited removal process); § 236(c)(certain criminal and terrorist noncitizens during pending removal proceedings); § 241(a)(2) (certain criminal and terrorist noncitizens during the 90-day removal period).

recommending to the FOD when such noncitizen crime victim's transfer to another facility is necessary for appropriate medical or mental health care including but not limited to arranging for care by outside providers or effectuating transfers to appropriate facilities if the victim in consultation with any legal representative they may have retained consents to such transfer;

4) Maintaining medical and mental health information regarding all individuals in ICE custody known by DHS to be noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits including complying with 1367 Confidentiality (8 U.S.C. §1367) and other state or federal confidentiality requirements regarding medical and mental health records; and

(5) Ensuring that any medical or mental health records created or medical or mental health information obtained while a noncitizen is in detention or custody shall not be used for any immigration enforcement related purpose as described in Section 4.5.4 of this Directive.

### **3.4. Executive Associate Director for ERO is responsible for:**

1) Reviewing and reporting information regarding individuals known by DHS to be or that ICE or CBP staff have or should have reasonable suspicion are noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits who are in ICE custody to the Office of the Director (through the Office of the Deputy Director).

### **3.5. ICE and CBP personnel and OPLA attorney, where appropriate, are responsible for:**

1) Ensuring that ICE and CBP do not detain, take custody of, or initiate or continue any part of an enforcement action against individuals known by DHS to be, or that ICE or CBP staff have or should have reasonable suspicion is a noncitizen crime victim, including applicants for and beneficiaries of victim-based immigration benefits, unless approval for detention is obtained by the FRO, release is prohibited by law or exceptional circumstances exist,

2) Requesting approval from the FOD, SAC, or OPLA through their chain of command before issuing a detainer, arresting, taking into custody, or initiating or continuing proceedings against individuals known by DHS to be, or that ICE or CBP staff have or should have reasonable suspicion is a noncitizen crime victim, including applicants for and beneficiaries of victim-based immigration benefits. The request must be in writing and contain a detailed explanation;

3) Requesting approval from the FOD or SAC through their chain of command before detaining in ICE or CBP custody individuals known by DHS to be, or that ICE or CBP staff have or should have reasonable suspicion is a noncitizen crime victim, including applicants for and beneficiaries of victim-based immigration benefits. The request must be in writing and contain a detailed explanation;

4) Notifying the FOD or SAC, or OPLA through their chain of command as soon as practicable, but generally *within 24 hours*, when individual arrested without prior approval is known by DHS to be, or that ICE or CBP personnel, or OPLA attorneys have or should have reasonable suspicion is a noncitizen crime victim, including applicants for and beneficiaries of victim-based

immigration benefits. This notification must include a detailed explanation of why prior approval was not sought and include an explanation of any more than 24-hour delay;

5) Providing appropriate case, location, and status information to assist the FRO or designee with tracking and monitoring individuals detained in ICE or CBP custody or that ICE, CBP, or IHSC staff have or should have reasonable suspicion is a noncitizen crime victim, including applicants for and beneficiaries of victim-based immigration benefits;

6) Complying with all applicable ICE and CBP policies related to the use of restraints<sup>19</sup> on individuals detained in ICE or CBP custody or that ICE, CBP, or IHSC staff have or should have reasonable suspicion is a noncitizen crime victim, including applicants for and beneficiaries of victim-based immigration benefits.

#### 4. Procedures and Requirements

##### 4.1. Prior to Taking Any Civil Immigration Enforcement Action

Generally, ICE and CBP personnel and OPLA attorneys must not detain, arrest, take into custody, execute the removal of, undertake an enforcement action, or initiate or continue to pursue removal proceedings against a noncitizen who is a crime victim, who is protected by 1367 Confidentiality laws, or who is a victim, witness, or party in legal proceedings. This includes undertaking an enforcement action against an individual known by DHS to be, or that ICE or CBP officers or OPLA attorneys have or should have reasonable suspicion is a noncitizen crime victim.

Before ICE or CBP officers or OPLA attorneys take any civil immigration enforcement action against a noncitizen, ICE and CBP personnel and OPLA attorneys shall:

- (a) Consult available records and databases, including the Central Index System database<sup>20</sup> (or any successor information technology system), to determine whether the noncitizen has been identified as an individual with 1367

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<sup>19</sup> Follow the requirements of Section 4 of this Directive.

<sup>20</sup> DHS, DHS Broadcast Message on New 384 Class of Admission Code (December 21, 2010)

<https://niwaplibrary.wcl.american.edu/pubs/dhs-broadcast-class-admission-code>. Since 2010, all DHS components have had access to, were informed about, and were supposed to be routinely checking the Central Index System (CIS) before taking an enforcement action against a noncitizen to determine whether the noncitizen has a Class of Admission (COA) code of “384”. This code alerts all DHS components that the individual is covered by the confidentiality provisions of section 384 of IIRIRA (8 U.S.C. § 1367). When an individual files for any of the following forms of victim-based immigration relief the crime victim’s case is assigned a “384” Code of Admission by USCIS in the Central Index System. Cases afforded VAWA confidentiality protection are: VAWA self-petition (Form I-360), Battered Spouse Waiver (I-751), a U visa application (Form I-918 or Form I-918 Supplement A), a T visa application (Form I-914 or Form I-914 Supplement A), VAWA cancellation of removal (EOIR Form 42b), VAWA suspension of deportation (EOIR Form 40), for continued presence or work authorization as an abused spouse of certain visa holders (INA Section 106; I-765v), or Continued Presence for victims of human trafficking. Once the pending VAWA confidentiality protected application or petition is adjudicated, the COA will be updated to reflect the correct classification, which is unique for each type of immigration relief. However, since VAWA confidentiality protections apply to the individual noncitizen in perpetuity and do not end when the case is adjudicated, DHS personnel can continue to identify the individual as covered by the confidentiality provisions of section 384 of IIRIRA via the history screen in the Central Index System. If the noncitizen’s case is denied on the merits after all rights to appeal have been exhausted, the VAWA confidentiality designation will be removed from that noncitizens’ case. *See*,

Confidentiality protection (8 U.S.C. §1367), is a beneficiary of victim-based immigration benefits, or has a pending application or petition for such benefit;<sup>21</sup>

- (b) If the Central Index System reveals an 8 U.S.C. 1367 flag, review USCIS databases including the CLAIMS database (or any successor information technology system) to determine whether the noncitizen is a crime victim and whether USCIS has made a bona fide determination, waitlist determination, a prima facie determination, or has approved or denied a victim-based immigration benefit;<sup>22</sup>
- (c) If the noncitizen has 1367 Confidentiality protection or a pending application or prima facie/bona fide determination from USCIS:
  - (1) ICE and CBP officers and OPLA attorneys shall not initiate, reinstate removal,<sup>23</sup> resume, or move forward with an immigration enforcement action against the noncitizen, until after prosecutorial discretion has been considered following the steps described in Section 3.1(h), unless exceptional circumstances exist;
  - (2) ICE officers and OPLA attorneys shall issue a request to USCIS to expedite adjudication of the pending applications or petitions;<sup>24</sup> and
  - (3) In cases where USCIS has granted deferred action to a noncitizen crime victim with pending removal proceedings, made a positive bona fide or prima facie determination on their application, ICE officers and agents must notify OPLA so that OPLA attorneys and officials may consider whether seeking dismissal of proceedings would be appropriate. When the noncitizen is subject to a final order of removal, ERO must review the

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<sup>21</sup> ICE Directive No. 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims (DHS Aug. 10, 2021); DHS Directive No. 002-02, Implementation of Section 1367 Information Provisions (Nov. 1, 2013); DHS Instruction No. 002-02-001, Implementation of Section 1367 (Nov. 7, 2013).

<sup>22</sup> DHS Directive No. 002-02, Implementation of Section 1367 Information Provisions (Nov. 1, 2013); DHS Instruction No. 002-02-001, Implementation of Section 1367 (Nov. 7, 2013).

<sup>23</sup> Section 813(b) of the Violence Against Women Act of 2005 Pub. L. No. 109-162(Jan. 5, 2006) directed DHS to exercise its discretion not to reinstate removal against crime victims eligible for victim-based immigration benefits as VAWA self-petitioners, VAWA cancellation of removal or VAWA suspension of deportation applicants, or a U or T visa applicants. These provisions of VAWA 2005 have never been fully implemented and should be implemented as part of this Directive. The text of Section 813 of VAWA 2005 is:

**DISCRETION TO CONSENT TO AN ALIEN'S REAPPLICATION FOR ADMISSION.—**

(1) **IN GENERAL.**—The Secretary of Homeland Security, the Attorney General, and the Secretary of State shall continue to have discretion to consent to an alien's reapplication for admission after a previous order of removal, deportation, or exclusion.

(2) **SENSE OF CONGRESS.**—It is the sense of Congress that the officials described in paragraph (1) should particularly consider exercising this authority in cases under the Violence Against Women Act of 1994, cases involving nonimmigrants described in subparagraph (T) or (U) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 25 1101(a)(15)), and relief under section 240A(b)(2) or 244(a)(3) of such Act (as in effect on March 31, 1997) pursuant to regulations under section 212.2 of title 8, Code of Federal Regulations.

<sup>24</sup> Including, but not limited to, VAWA self-petitions, SIJS applications, U visas, and T visa cases.

case for a discretionary stay of removal and document in writing with a detailed explanation the reasons for any denial;<sup>25</sup>

- (d)** When exceptional circumstances exist that made consultation of the Central Index System impracticable prior to taking a civil immigration enforcement action, ICE and CBP personnel and OPLA attorneys must review the Central Index System and consult available records and databases within 24 hours to determine whether the noncitizen is protected by 1367 Confidentiality (8 U.S.C. §1367) or is a beneficiary of victim-based immigration benefits or has a pending application or petition for such benefit and must notify the FOD or SAC through the chain of command. This notification must be in writing and contain a detailed explanation of both the failure to consult and any delay of more than 24 hours;
- (e)** Repeat steps (a)-(d) each time an ICE and CBP officer or OPLA attorney reviews a noncitizen's case and before taking addition steps related to any part of an enforcement action. A noncitizen may become a victim of crime at any point in the immigration enforcement lifecycle. Accordingly, whenever reviewing cases in the course of their duties, ICE and CBP personnel and agents and OPLA attorneys must routinely check the Central Index System for a 1367 Confidentiality flag suggesting that a noncitizen has become a victim of crime that could allow the noncitizen to apply for an immigration benefit; in such cases, ICE and CBP personnel and agents and OPLA attorneys must take actions appropriate and consistent with this Directive;
- (f)** When ICE or CBP officers or OPLA attorney encounter a noncitizen who is a crime victim, or who ICE or CBP officers or OPLA attorneys have or should have a reasonable suspicion is a crime victim who does not have a case in the Central Index System or who does not have a pending application for immigration relief ICE and CBP personnel and OPLA attorneys must:
  - (1)** Proactively inquire about crime victimization. This requires:
    - i. Inquiring about crime victimization each time an ICE or CBP officer or OPLA attorney considers undertaking any part of an enforcement action against an individual;
    - ii. Not taking a noncitizen's current or prior denial as conclusive evidence that the individual is not a crime victim (e.g., the denial could have been on other grounds not related to victimization); and
    - iii. When a noncitizen is represented by counsel making inquiries through counsel or with counsel present;
  - (2)** Use the screening tools that are required to be developed under Section 3.5.1. of this Directive to help ICE and CBP personnel and OPLA attorneys identify and screen noncitizens to identify crime victims;

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<sup>25</sup> ICE Directive No. 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims (DHS Aug. 10, 2021); DHS Directive No. 002-02, Implementation of Section 1367 Information Provisions (Nov. 1, 2013).

- (3) Look for indicia or evidence that suggests a noncitizen is a crime victim including considering victim's statements, protection orders and other court orders the victim may have, photographs, police reports, observations about injuries both visible and those that may limit the victim's movement; or an eligibility letter issued from the Department of Health and Human Services Office of Trafficking in Persons;
  - (4) Identify crime victims who may be eligible for victim-based immigration benefits; and
  - (5) Fully consider identified crime victims and all crime victims who have applied or who may be eligible for victim-based immigration benefits for prosecutorial discretion following the steps outlined in Section 3.1(h) of this Directive;
- (g) When ICE, CBP, or OPLA encounters a noncitizen who is a witness or party in civil or criminal proceedings including family and juvenile court cases, criminal prosecutions and civil court cases and administrative law proceedings enforcing federal and state labor, civil rights, civil liberties, housing, anti-trafficking, and other federal and state laws, ICE and CBP shall exercise its prosecutorial discretion not to initiate or continue an enforcement action against the noncitizen witness or party, unless an exceptional circumstance exists;
- (h) Each time an ICE or CBP officer or OPLA attorney considers undertaking any part of an enforcement action against a noncitizen, the officer must first conduct a prosecutorial discretion determination which must include the following steps:
- (1) Determine whether the individual crime victim is an enforcement priority as defined in Alejandro N. Mayorkas "Guidelines for the Enforcement of Civil Immigration Law" (September 30, 2021) which requires an assessment of the individual and the totality of the facts and circumstances;<sup>26</sup>
  - (2) If the noncitizen is not an enforcement priority, ICE and CBP shall exercise prosecutorial discretion and not initiate or continue a civil immigration enforcement action against the noncitizen and shall release detained noncitizens from detention or custody, unless an exceptional circumstance exists or approval is obtained;
  - (3) For noncitizens who could be considered enforcement priorities, ICE and CBP personnel and OPLA attorneys are required to consider both aggravating factors that militate in favor of an enforcement and consideration of mitigating or extenuating factors that militate in favor of

declining an enforcement action.<sup>27</sup> 1367 Confidentiality protections (8 U.S.C., §1367) must be considered as mitigating factors;<sup>28</sup>

- (4) When a noncitizen crime victim has been the victim of 1367 Confidentiality violations prosecutorial discretion shall be granted to the victim as one of the remedies for victims of 1367 Confidentiality violations; unless an exceptional circumstance exists. If a victim of a 1367 Confidentiality violation is an enforcement priority, the 1367 Confidentiality violation must be considered as one of the mitigating factors in the prosecutorial discretion determination;
  - (5) Consider the broader public interest implications of the decision regarding whether to take an enforcement action against the individual;<sup>29</sup> and
  - (6) Conduct the investigative work needed to learn the totality of the facts and circumstances of the conduct that is the basis for the enforcement action being considered. All investigative work undertaken must comply with the requirements of 1367 Confidentiality (8 U.S.C. §1367) and DHS implementing policies, this includes but is not limited to not seeking, obtaining, or using information provided by the perpetrator (or their family member, agent or person acting on the their behalf);
- (i) All crime victims, witnesses and parties identified by ICE, CBP, and OPLA attorneys and all noncitizens in detention must be:
- (1) Provided information about all forms of victim-based immigration benefits;<sup>30</sup>
  - (2) Provided with information about the protections afforded by 1367 Confidentiality (8 U.S.C. §1367);

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DHS Directive No. 002-02, Implementation of Section 1367 Information Provisions (Nov. 1, 2013). Violations of Section 1367 could give rise to serious, even life-threatening, dangers to victims and their family members. Violations compromise the trust victims have in the efficacy of services that exist to help them and, importantly, may unwittingly aid perpetrators retaliate against, harm or manipulate victims and their family members, and elude or undermine criminal prosecutions. DHS Directive No. 002-02, Implementation of Section 1367 Information Provisions (Nov. 1, 2013); DHS Instruction No. 002-02-001, Implementation of Section 1367 (Nov. 7, 2013).

<sup>29</sup> *Id.* at 4.

<sup>30</sup> The following brochures (or more updated versions produced by DHS or DOJ) must be provided to noncitizen crime victims: DHS Blue Campaign, *Protections for Immigrant Victims* (2017); USCIS, *Immigration Options for Crime Victims* (2011); USCIS, *Immigration Relief for Abused Children, Special Immigrant Juvenile Status* (2016); Blue Campaign and ICE, *Continued Presence Temporary Immigration Designation for Human Trafficking Victims* (2019); DOJ, *Domestic Violence and the International Marriage Broker Regulation Act What Every Law Enforcement Officer and Domestic Violence Victim Advocates Should Know* (2014). Note these should be translated into the most common languages spoken by immigrant crime victims applying filing VAWA self-petitions, U visas and T visas. In a detention or custody setting, this information can also be prominently posted in all detention facilities and hold rooms to be considered sufficient to meet this requirement. The *Protections for Immigrant Victims* (2017) was developed by the Blue Campaign in part with this particular use as a poster in detention facilities in mind.



- (3) Referred to attorneys and victim service providers<sup>31</sup> with expertise serving noncitizen victims;<sup>32</sup>
  - (4) As appropriate, referred to appropriate law enforcement authorities, protection order courts, or appropriate federal or state enforcement agencies (e.g. EEOC, DOL, DOJ, or state labor, housing or civil rights enforcement agencies); and
  - (5) Considered for prosecutorial discretion; and
- (j) Notify in writing and with a detailed explanation and obtain approval from their Enforcement and Removal Operations (ERO) Field Office Directors (FODs), Homeland Security Investigations (HSI), or Special Agents in Charge (SACs) before the ICE or CBP officers issues a detainer, arrests, detains, takes into custody, or conducts any part of an enforcement action against a noncitizen is who known by DHS to be, or that ICE or CBP staff have or should have reasonable suspicion is a noncitizen crime victim, party, or witness, including crime victims with pending applications for or who are beneficiaries of victim-based immigration benefits.

**4.2. Noncitizen does not have pending application. Reasonable suspicion.** When ICE or CBP officers or OPLA attorneys have or should have any reasonable suspicion that indicates a noncitizen is or maybe a crime victim or a witness or party in legal proceedings, the officer shall consider and evaluate whether prosecutorial discretion is appropriate regardless of whether the noncitizen has any pending application for immigration relief.

ICE and CBP personnel and OPLA attorneys must investigate and screen the noncitizen and collect information and evidence to evaluate the individual and the totality of the facts and circumstances prior to initiating any civil immigration enforcement action against the noncitizen. Any and all available, credible evidence must be consulted to determine if an individual is a crime victim or a witness or party to litigation. ICE and CBP personnel and OPLA attorneys must exercise prosecutorial discretion according to Alejandro N. Mayorkas “Guidelines for the Enforcement of Civil Immigration Law”

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<sup>31</sup> The term “victim service providers” is defined in the Violence Against Women Act 32 U.S.C. § 12291(a)(43) (“VICTIM SERVICE PROVIDER- The term ‘victim service provider’ means a nonprofit, nongovernmental or tribal organization or rape crisis center, including a State or tribal coalition, that assists or advocates for domestic violence, dating violence, sexual assault, or stalking victims, including domestic violence shelters, faith-based organizations, and other organizations, with a documented history of effective work concerning domestic violence, dating violence, sexual assault, or stalking.) As used there the definition includes nongovernmental organizations “with expertise in the protection of victims of severe forms of trafficking in persons.” 22 U.S.C. § 7105(b)(1)(G)(iv)(II).

<sup>32</sup> An Office on Violence Against Women (DOJ) funded directory of programs with expertise serving immigrant crime victims and immigrant victims of abuse developed and run by NIWAP, American University, Washington College of Law with organizations in every state is available at <https://niwaplibrary.wcl.american.edu/home/directory-programs-serving-immigrant-victims>. The link to this directory as a resource must be providing to all crime victims and 1367 confidentiality protected noncitizens detained or in custody.

(September 30, 2021),<sup>33</sup> which requires an assessment of the individual and the totality of the facts and circumstances.

#### **4.3. Assisting Law Enforcement and Federal or State Agency Partners.**

Absent exceptional circumstances, during the pendency of any criminal or civil investigation or prosecution being undertaken by a federal or state law enforcement agencies, prosecutors, or other state or federal government agencies ICE and CBP personnel and OPLA attorneys will not undertake civil immigration enforcement actions against victims, witnesses, or parties, without express written approval from Headquarters Responsible Officials (HRO). State or federal government agencies that may be conducting investigations, prosecutions, or bringing civil enforcement actions in state or federal courts or before state or federal administrative agencies include but are not limited to the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor, the U.S. Department of Justice, and state departments of labor, housing, civil rights, and adult or child protective services.

Federal and state law enforcement officials, prosecutors and federal and state government agencies involved in civil, criminal or administrative investigations, prosecutions, civil or criminal court cases, or administrative proceedings and the courts that adjudicate these matters may notify<sup>34</sup> DHS, ICE and CBP about noncitizens who are crime victims, witness, and/or parties in such cases. Such notification informs DHS about the noncitizen's status as crime victims, witnesses, and/or parties. This helps prevent ICE and CBP personnel from responding to "tips" from crime perpetrators, abusers and the unscrupulous employers, landlords, human traffickers, and others that federal and state government agencies are investigating, prosecuting, or against whom federal and state government agencies are bringing actions in civil or administrative court proceedings.

#### **4.4. Traffic Stops and Tips from Perpetrators.** Research has found that VAWA self-petitioner and U visa applicants, while their cases are pending, often become the subjects of civil immigration enforcement.<sup>35</sup> Civil immigration enforcement actions against victims occur mostly as a result of the perpetrator or the perpetrator's family contacting ICE or CBP to report the victim, or are as a result of state law enforcement officials calling ICE to report noncitizens encountered during traffic stops.<sup>36</sup>

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<sup>33</sup> Alejandro N. Mayorkas *Guidelines for the Enforcement of Civil Immigration Law 3* (Sept. 30, 2021).

<sup>34</sup> Notification from Federal and state law enforcement officials, prosecutors and federal and state government agencies involved in civil, criminal or administrative investigations, prosecutions, civil or criminal court cases, or administrative proceedings and the courts that adjudicate these matters should be directed to: (Insert contact email to which this notification should be sent) .

<sup>35</sup> See KRISZTINA E. SZABO, ET. AL., EARLY ACCESS TO AUTHORIZATION FOR VAWA SELF-PETITIONERS AND U-VISA APPLICANTS, 25-26 (Feb. 12, 2014) (28% of VAWA self-petitioners and 30% of U visa victims become the subject of an immigration enforcement action while their immigration case is pending adjudication).

[https://niwaplibrary.wcl.american.edu/pubs/final\\_report-on-early-access-to-ead\\_02-12](https://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12)

<sup>36</sup> *Id.* at 25-26 (Traffic stops accounted for 29% and reports from abusers and their family members accounted for 27% of enforcement actions brought against self-petitioners. For victims with pending U visa cases traffic stops accounted for 30% and reports from perpetrators and their family members accounted for 27% of enforcement actions initiated against victims with pending U visa applications).

- (a) Traffic stops: When ICE or CBP officers receive a call from state or local law enforcement officials to report a noncitizen who may be an undocumented noncitizen in determining how to respond ICE and CBP personnel must:
- (1) Determine whether the noncitizen is or may be an immigration enforcement priority;
  - (2) If the noncitizen is not an enforcement priority, exercise prosecutorial discretion to not initiate immigration enforcement against the noncitizen. Inform the state, local or federal government official who contacted ICE or CBP about the noncitizen that DHS will not be pursuing an enforcement action against the noncitizen and no **det**ainer will be issued;
  - (3) If the noncitizen may be an enforcement priority, ICE and CBP personnel and OPLA attorneys must follow the 1367 Confidentiality check required by Section 3.1 (a)-(d) and the prosecutorial discretion steps required by Section 3.1(h) of this Directive. If after completing the required 1367 Confidentiality checks and determining that the noncitizen will be granted prosecutorial discretion, the ICE or CBP officer will inform the state, local or federal government official who contacted ICE or CBP about the noncitizen that DHS will not be pursuing an enforcement action against the noncitizen and no detainer will be issued.<sup>37</sup>
- (b) Information or Tips From Perpetrators and Their Family Members; Agents, or Persons Acting On the Abuser's Behalf:<sup>38</sup> In order to prioritize the use of DHS immigration enforcement resources consistent with DHS enforcement priorities<sup>39</sup> and prevent ICE and CBP personnel and OPLA attorneys unknowingly or knowingly assisting abusive spouses, child abusers, human traffickers, crime perpetrators and unscrupulous landlords, employers and others from triggering enforcement actions against their victims that

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<sup>37</sup> It is important to note that this approach complies with VAWA confidentiality requirements because the ICE or CBP officer is not communicating to local law enforcement any information about the existence of, decisions made in, or any other information about any VAWA confidentiality protected case that may or may not have been filed by the VAWA confidentiality protected noncitizen. *See* DHS Directive No. 002-02, Implementation of Section 1367 Information Provisions (Nov. 1, 2013); *see also* DHS Instruction No. 002-02-001, Implementation of Section 1367 (Nov. 7, 2013). The ICE or CBP officer is only informing law enforcement that DHS will not be pursuing an enforcement action or issuing a detainer against the noncitizen. By responding in this way, state and local law enforcement officials will only be able to hold noncitizens in custody for violations of state criminal laws.

<sup>38</sup> *See* John P. Torres and Marcy Forman, *Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005*, 25 (Jan. 22, 2007) (VAWA confidentiality prohibitions are “important to note because ICE officers sometimes receive information from upset or disgruntled spouses, abusers, traffickers, or family members”); DOJ APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009, H.R. REP. NO. 109-233, at 122 (2005) (“threats of deportation are the most potent tool abusers of immigrant victims use to maintain control over and silence their victims and to avoid criminal prosecution....Examples include abusers using DHS...encouraging immigration enforcement officers to pursue removal actions against their victims.”); DHS Instruction No. 002-02-001, Implementation of Section 1367 (Nov. 7, 2013); DHS Instruction No. 002-02-001, Implementation of Section 1367 (Nov. 7, 2013) (“there are a number of ways DHS employees might receive ‘tips’ from an abuser or an abuser’s family, such as: calling ICE to report the victim as illegal, a ‘landlord’ (who may actually be a human trafficker) calling ICE to report that his ‘tenants’ are undocumented, or providing information to USCIS rebutting the basis for the victim’s application. When a DHS employee receives adverse information about a victim of domestic violence, sexual assault, human trafficking or an enumerated crime from a prohibited source, DHS employees treat the information as inherently suspect.”)

<sup>39</sup> Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021).

undermine criminal investigations and prosecutions,<sup>40</sup> when ICE or CBP officers or OPLA attorneys receive “tips” or information reporting a noncitizen for immigration enforcement, before initiating any enforcement action based on the “tip” or information received ICE and CBP personnel and OPLA attorneys must:

- (1) Review the Central Index System to determine if the individual has been identified as an individual with 1367 Confidentiality protection (8 U.S.C. §1367);
- (2) If there is a “384” flag in the Central Index System, review USCIS databases including the CLAIMS database (or any successor information technology system) to determine whether the noncitizen is a crime victim and whether USCIS has made a bona fide determination, waitlist determination, a prima facie determination, or has approved or denied a victim-based immigration benefit.
- (3) If the noncitizen has 1367 Confidentiality protection or a pending application or prima facie/bona fide determination from USCIS, ICE and CBP officers, and OPLA attorneys shall not initiate or resume any immigration enforcement action against the noncitizen, until after a favorable grant of prosecutorial discretion has been considered unless exceptional circumstances exist.
- (4) Determine whether the noncitizen is or may be an immigration enforcement priority;
- (5) If the noncitizen is not an enforcement priority exercise prosecutorial discretion;
- (6) If the noncitizen may be an enforcement priority, ICE and CBP personnel and OPLA attorneys must follow the prosecutorial discretion steps required by Section 3.1(h) of this Directive.
- (7) If after following the prosecutorial discretion procedures required by Section 3.1(h) of this Directive, ICE, CBP, or OPLA decide not to grant prosecutorial discretion to a crime victim, ICE and CBP officers and OPLA attorneys must notify in writing and with a detailed explanation and obtain approval from their Enforcement and Removal Operations (ERO) Field Office Directors (FODs), Homeland Security Investigations (HSI), Special Agents in Charge (SACs) or the Office of the Principle Legal Advisor (OPLA) before the ICE or CBP officer or OPLA attorney issues a detainer, arrests, detains, takes into custody, or conducts any part of an enforcement action against a noncitizen is who known by DHS to be, or that ICE, CBP, or OPLA staff have or should have reasonable suspicion is a noncitizen crime victim, party,

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<sup>40</sup> ICE and CBP personnel and OPLA attorneys need to be “sensitive to the fact that the [noncitizen] at issue may be a victim and that a victim-abuser dynamic may be at play.” DHS Instruction No. 002-02-001, Implementation of Section 1367 (Nov. 7, 2013)

or witness, including crime victims with pending applications for or who are beneficiaries of victim-based immigration benefits.

(8) If prosecutorial discretion is not provided to a 1367 Confidentiality protected crime victim before issuing a Notice to Appear, ICE officers shall complete the INA Section 239(a) required certification. OPLA attorneys shall review the certification form and independently determine whether the procedures set out in this Directive were followed before submitting moving forward with a Notice to Appear. Prior to completing the certification the ICE officer shall:

- (A) Screen to determine whether the noncitizen is a crime victim entitled to protection under 8 USC §1367(a)(1). Section 1367(a)(1) precludes DHS officials from using information provided by a prohibited source prohibited source (e.g. an abuser, a trafficker, a crime perpetrator, their family member, agent or person acting on their behalf). The 1367 Confidentiality prohibited source protections §1367(a)(1) apply to all victims of spouse abuse and child abuse and crime victims in the process of applying for status through a VAWA, U or T visa case without regard to whether the victim has filed an immigration case seeking a victim-based immigration benefit. It is important to note that this group of 1367 Confidentiality protected crime victims will not have cases that will be flagged in the Central Index System and will need to be screened and identified under these provisions;
- (B) Complete a certification required by INA Section 239(e) without regard to whether the crime victim has filed or intends to file for a victim-based immigration benefit.<sup>41</sup>
- (C) Include in the certification facts addressing whether the immigration enforcement action took place at a sensitive location listed in Section 239(e);<sup>42</sup> and demonstrate that the information upon which the enforcement action was based did not come from a prohibited source (e.g. an abuser, a trafficker, a crime perpetrator, their family member, agent or person acting on the their behalf);<sup>43</sup>

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<sup>41</sup> DHS Directive No. 002-02, Implementation of Section 1367 Information Provisions (Nov. 1, 2013); DHS Instruction No. 002-02-001, Implementation of Section 1367, 12 (Nov. 7, 2013) (“DHS officers and employees comply with the section 239(e) certification requirement even if the alien has not applied for or does not intend to apply for a victim-based application or petition”).

<sup>42</sup> John P. Torres and Marcy Forman, *Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005*, 27 (Jan. 22, 2007) (“ICE officers are discouraged from making arrests at these sensitive locations absent clear evidence that the alien is not entitled to victim-based benefits”).

<sup>43</sup> John P. Torres and Marcy Forman, *Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005*, 25 (January 22, 2007) (including persons acting in the abuser’s capacity in the prohibition); 151 Cong. Rec. 2606-07 (Dec. 18, 2005) (speech of Hon. John Conyers Jr.) (VAWA 2005 legislative history: “This section is enhances VAWA’s confidentiality

(D) If the information came from a prohibited source, Section 239(e) requires that ICE shall demonstrate in the certification requires by Section 239(e) that ICE did not rely solely on information furnished by or derived from that prohibited source<sup>44</sup> and provide details about whether, to what extent, and how the information was independently corroborated.<sup>45</sup> When some of the information being relied upon for issuing the NTA came from a prohibited source the ICE officer notify and seek approval in writing from the FOD or SAC through their chain of command before issuing any NTA.

(9) OPLA attorneys are responsible for ensuring that the steps set out in this Directive have been taken in all cases they are considering taking before an and that are in proceedings before an immigration judge or the Board of Immigration Appeals. When OPLA attorneys learn or have reason to believe these steps have not been followed they shall actively become involved in ensuring compliance before moving forward with any part of an enforcement OPLA may be pursuing.

#### 4.5. Detention Protocol

**4.5.1. Proactive Identification and Routine Screening.**<sup>46</sup> ICE, CBP, and all detention facility contractors shall conduct screenings of noncitizens in the noncitizen's native language<sup>47</sup> using qualified interpreters within the first 48 hours of detention and weekly while the noncitizen remains in detention for each of the following:

(a) Individuals with 1367 Confidentiality (8 U.S.C. §1367) protection with cases in the Central Index System<sup>48</sup>

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protections for immigrant victims and directs immigration enforcement officials not to rely on information provided by an abuser, his family members or agents to arrest or remove an immigrant victim from the United States”).

<sup>44</sup> DOJ APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009, H.R. REP. NO. 109-233, at 122 (2005) (“the Secretary of Homeland Security and the Attorney General and other Federal officials may not use information furnished by, or derived from information provided solely by, an abuser, crime perpetrator or trafficker to make an adverse determination of admissibility or removal of an alien... This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual as- assault and trafficking, as prohibited by section 384 of IIRIRA”).

<sup>45</sup> John P. Torres and Marcy Forman, *Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005*, 23 (Jan. 22, 2007).

<sup>46</sup> Timely screening is important to prevent crime victims from not being informed about or screened for victim-based immigration benefits. It is important to identify victims eligible for U visas, T visas, VAWA, or Special Immigrant Juvenile Status so that eligible crime victims are not among those detained for longer periods. *See*, Report of the ICE Advisory Committee on Family Residential Centers 17 (October 7, 2016) <https://niwaplibrary.wcl.american.edu/pubs/acfrc-report-final-102016>.

<sup>47</sup> ICE is required under federal law to provide qualified interpreters in the noncitizen's native language. Services that provide qualified interpreters also assist in identifying the limited English proficient individual's native language. Under federal language access laws, qualified interpreters must be provided to persons who are not able to read, write, speak and understand English fluently. *See*, LEP.gov, Commonly Asked Questions Regarding Limited English Proficient (LEP) Individuals, 1Q. Who is Limited English Proficient, and 5Q What is a federally conducted activity? <https://www.lep.gov/commonly-asked-questions> (last visited Feb. 27, 2022)

<sup>48</sup> It is important to note that 1367 Confidentiality protected victims with cases flagged in the Central Index System receive protection under 8 U.S.C. Section 1367(a)(1) see list in Policy Manual Chapter 4.5.1(b) and once the noncitizen's victim-based

- (b) Victims statutorily protected by 1367 Confidentiality under:**
- (1) 8 U.S.C. Section §1367(a)(1)(A)(noncitizen battered or subjected to extreme cruelty by a spouse, parent or stepparent);<sup>49</sup>
  - (2) 8 U.S.C. §1367(a)(1)(B)(noncitizen battered or subjected to extreme cruelty by their spouse's, parent's, or stepparent's family member residing in household of the noncitizen crime victim);
  - (3) 8 U.S.C. §1367(a)(1)(C) and (D)(noncitizen whose child or stepchild has been battered or subjected to extreme cruelty by the noncitizen's spouse or the noncitizen's child's other parent or a member of the spouse or other parent's family residing in the household with the noncitizen);
  - (4) 8 U.S.C. §1367(a)(1)(E) and (F)(noncitizen crime victims who have filed or who are in the process of filing U visa and/or T visa applications including victims of intimate partner violence who are not married to their abusers, sexual assault, stalking, human trafficking, and all other crime victims who have suffered U visa criminal activities);
- (c) Victims of domestic violence;**<sup>50</sup>
- (d) Victims of sexual assault or child abuse that occurred in detention, outside of detention, and/or prior to detention;**<sup>51</sup>
- (e) Child victims who suffered abuse, abandonment, or neglect perpetrated by one or both of their parents;**
- (f) Victims of human trafficking; and**
- (g) Witnesses and parties in civil, family or criminal court cases and administrative law proceedings and civil or criminal investigations being undertaken by federal or state government agencies.**<sup>52</sup>

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immigration case has been filed or is in the process of being filed, the noncitizen crime victim also receives the special confidentiality protections that apply to their 1367 Confidentiality protected case under 8 U.S.C. Section 1367(a)(2).

<sup>49</sup> It is important to note that 8 U.S.C. Section 1367(a)(1)(A)-(D) provide protection to victims of spouse abuse and child abuse without regard to whether the noncitizen victim or their noncitizen parent has filed, is in the process of filing or plans to file a VAWA self-petition or for another form of VAWA confidentiality protected immigration relief. The protections also extend to victims of spouse and child abuse who do not qualify to self-petition.

<sup>50</sup> This covers victims of domestic violence and child abuse and other victims of domestic violence who are covered by state protection order laws and state criminal domestic violence laws. It particularly includes victims abused by intimate partners who may be citizens or noncitizens and children abused by family members not living in their households.

<sup>51</sup> This screening identifies noncitizen crime victims before and whether or not they are in the process of filing for U or T visa immigration relief.

<sup>52</sup> This screening is important to identify crime victims and witnesses in civil, family, criminal and administrative law cases. It is also important to identify noncitizens in detention who are defendants, respondents or parents with active, open, or pending state court proceedings whose participation in court proceedings ICE would be responsible for facilitating. See, ICE ERO, Policies and Procedures Involving Detained Parents and Legal Guardians (March 2018).) (This policy should be expanded to cover the full range of family and criminal court actions a detained noncitizen may be required to participate in including cases that may not involve children. Examples include divorce, protection order, spousal support, child welfare cases involving children the noncitizen may have abused, adult protective services proceedings, and criminal cases where the noncitizen may be the defendant or a witness.)

The completion of these screenings must be documented by ICE, CBP, and detention facility contractors.

Additionally, such screenings are required to be part of any medical and mental health examinations conducted while the noncitizen is in detention.<sup>53</sup>

If the initial medical/mental health intake indicates that a detainee or noncitizen in custody has suffered sexual assault, domestic violence, child abuse, human trafficking, stalking, or other gender-based violence, an initial health/mental health appraisal should be completed within 48 hours regardless of when or where the victimization occurred.

The questions to be used by ICE, CBP and OPLA personnel for screening for noncitizen crime victims will be developed by DHS Subject Matter Experts selected from validated evidence based screening tools including those listed in Appendix A.

#### **4.5.2. Provide All Detainees and Noncitizens in Custody Access to Information on All Form of Victim-Based Immigration Benefits**

Many noncitizens detained or taken into custody may qualify for the crime victim-based immigration benefits addressed in this Directive. ICE and CBP staff involved detention or custody of noncitizens must distribute to each detainee information about victim based immigration benefits. This can be accomplished by providing each detainee with a copy of the **DHS Blue Campaign, *Protections for Immigrant Victims (2017)*** that was developed in part for this purpose and is available in multiple languages.<sup>54</sup> This information should also be prominently posted in detention centers and hold rooms.

Access to information about victim-based immigration benefits will help detainees and noncitizens taken into custody learn whether they or their children qualify for one of these victim-based immigration benefits. ICE must ensure that the detention centers post information about VAWA, T, U, SIJS and Continued Presence publically and prominently in detention centers and hold room. Organizations running the legal orientation programs at each detention center should be encouraged and provided copies of the **DHS Blue Campaign, *Protections for Immigrant Victims (2017)*** to assist them in providing information to noncitizens detained or in custody on VAWA, T and U visa, Special Immigrant Juvenile Status, and Continued Presence in addition to information about asylum, withholding, and CAT protections.

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<sup>53</sup> HHS and the CDC include screening for domestic and sexual violence among the standard recommended best practices and services offered to all women in health care settings. See Centers for Disease Control and Prevention, *Intimate Partner Violence and Sexual Violence Victimization Assessment Instruments For Use in Healthcare Settings* (Kathleen C. Basile, Marci F. Hertz, & Sudie E. Back, eds., 2007), <http://www.cdc.gov/violenceprevention/pdf/ipv/ipvandsvscreening.pdf>; see also *Preventative Care Benefits for Women*, HEALTHCARE.GOV, <https://www.healthcare.gov/preventive-care-women>.

<sup>54</sup> See NIWAP, *Multilingual Materials by Title, DHS Infographic; Protections for Immigrant Victims* (Jan. 12, 2017) <https://niwaplibrary.wcl.american.edu/multilingual-materials-by-title>.



#### **4.5.3. Treatment of Crime Victims Protected by 1367 Confidentiality and/or Who Have Pending Applications for Victim-Based Immigration Benefits Who Have Been Detained or Taken Into Custody**

Noncitizen crime victims including those eligible for victim-based immigration benefits and victims eligible for protections under 1367 Confidentiality statutes may be in detention or custody at the time that this memo goes into effect or may become subject to immigration detention or custody subsequent to the issuance of this memo. There will also be immigrant crime victims who will only learn about their eligibility for victim-based immigration relief after the victim has been detained or taken into custody. Others may become eligible for victim-based immigration relief based on victimization they suffered in detention or custody or just before they were detained or in custody.

ICE, CBP, and OPLA policies require that ICE and CBP personnel and OPLA attorneys exercise prosecutorial discretion in appropriate circumstances to facilitate access to justice and victim-based immigration benefits by noncitizen crime victims.<sup>55</sup> To fully implement this policy and statutes Congress enacted to offer the humanitarian relief for crime victims needed so that immigrant crime victims can gain access to justice and law enforcement and government agencies are better able to hold offenders accountable, requires that noncitizens in detention and custody are proactively identified and assisted.

- (a) **Noncitizens entering detention facilities or CBP custody:** ICE and CBP personnel shall for each noncitizen detained or in custody:
- (1) Within 24 hours of the noncitizen being detained or placed in custody consult available records and databases, including the Central Index System database (or any successor information technology system), to determine whether the noncitizen has been identified as an individual with 1367 Confidentiality protection (8 U.S.C. §1367), is a beneficiary of victim-based immigration benefits, or has a pending application or petition for such benefit and document in writing that this records check was completed.
  - (2) If the Central Index System contains a “384” flag, within 24 hours of a noncitizen being detained or placed in custody, review USCIS databases including the CLAIMS database (or any successor information technology system) to determine whether the noncitizen is a crime victim and whether USCIS has made a bona fide determination, waitlist determination, a prima facie determination, or has approved or denied a victim-based immigration benefit and document in writing that this records check was completed.
  - (3) If the noncitizen has 1367 Confidentiality protection or a pending application or prima facie/bona fide determination from USCIS, ICE and CBP officers and OPLA attorney shall immediately consider exercising prosecutorial discretion including, but not limited to, release from detention or custody, following the steps described in Section 3.1(h). ICE shall complete and report

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<sup>55</sup> See ICE Directive No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011); ICE Directive No 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021).

the results of the prosecutorial discretion determination to the FRO within 24 hours of the noncitizen crime victim detained or in custody being identified.

- (4) When noncitizen crime victims are released from detention or custody as part of the exercise of prosecutorial discretion, any of their under 21 year old children who are also detained or in custody shall be released along with their parents (or if the children are over 18 may have been detained or in custody separately, released on the same day their parent is released) without regard to whether the children are included in the victims' applications for victim-based immigration benefits, absent exceptional circumstances.
- (5) The denial of prosecutorial discretion and the denial of release from detention or custody of a detained noncitizen with 1367 Confidentiality protection or a pending application for victim-based immigration benefits must be reported through the chain of command to and approved in writing with a detailed explanation by the FRO who will be responsible for reporting in writing to the HRO and the Secretary details about the reasons for denying the crime victim detained or in custody prosecutorial discretion.
- (6) OPLA attorneys are responsible for ensuring these steps have been taken in all cases they are considering taking to and that are in proceedings before an immigration judge or the Board of Immigration Appeals. When OPLA attorneys learn or have reason to believe these steps have not been followed they shall actively become involved in ensuring compliance before moving forward with any part of an enforcement OPLA may be pursuing.

**(b) Noncitizens with prima facie or bona fide determinations in victim-based immigration benefits cases:** If the noncitizen detained by ICE has a pending application for victim-based immigration benefit and prima facie or bona fide determination:

- (1) ICE shall release the noncitizen from detention immediately so long as their release is not prohibited by law and no exceptional circumstances exist;
- (2) Any expedited removal or reinstatement processes against them must be halted or rescinded pursuant to DHS's prosecutorial discretion or other authority to evaluate eligibility for crime-based relief;
- (3) When noncitizen crime victims are released from detention or custody as part of the exercise of prosecutorial discretion, any of their under 21 year old children who are also detained or in custody shall be released along with their parents (or if the children are over 18 may have been detained or in custody separately, released on the same day their parent is released) without regard to whether the children are included in the victims' applications for victim-based immigration benefits, absent exceptional circumstances;
- (4) The denial of prosecutorial discretion and the denial of release from detention to a detained noncitizen with 1367 Confidentiality protection or a pending application for victim-based immigration benefits must be reported in writing

with a detailed explanation *within 24 hours* through the chain of command to and be approved by the FRO who will be responsible for reporting in writing to the HRO and the Secretary details about the reasons for denying the detained crime victim prosecutorial discretion.

(c) **Noncitizens with pending application and no prima facie or bona fide**

**determination.** If the noncitizen detained in ICE custody has a pending application for victim-based immigration benefit, but has no prima facie or bona fide decision, ICE personnel and OPLA attorneys shall:

- (1) Issue a request to USCIS to expedite adjudication of the pending applications or petitions within 48 hours of the noncitizen crime victim's detention and shall provide the A file to USCIS to facilitate that adjudication;<sup>56</sup>
- (2) Conduct a full prosecutorial discretion determination following the steps required by Section 3.1(h) of this Directive;
- (3) When noncitizen crime victims are released from detention or custody as part of the exercise of prosecutorial discretion, any of their under 21 year old children who are also detained shall be released along with their parents (or if detained separately released on the same day their parent is released) without regard to whether the children are included in the victims' applications for victim-based immigration benefits, absent exceptional circumstances; and
- (4) The denial of prosecutorial discretion and the denial of release from detention or custody to a detained noncitizen with 1367 Confidentiality protection or a pending application for victim-based immigration benefits must be reported through the chain of command to and approved in writing with a detailed explanation by the FRO who will be responsible for reporting in writing to the HRO and the Secretary details about the reasons for denying the detained crime victim prosecutorial discretion.

**4.5.4. Medical and Mental Health Records: Compliance with 1367 Confidentiality and HIPPA Protections**

ICE and CPB personnel, including ICE trial attorneys are prohibited from obtaining or using in any part of an enforcement action (medical or mental health records of or created by medical or mental health professionals working in any ICE, CBP, or contracted detention facility or a facility for noncitizens in CBP custody or working in any Health and Human Services (HHS) run facility that houses noncitizen minors in HHS custody. The seeking, obtaining, reviewing, or use in or as part of any enforcement action of any medical or mental health records created while a noncitizen was detained or in custody is barred by this policy. This approach is needed to ensure that such medical or mental health records receive all of the protections afforded medical and mental health records

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<sup>56</sup> Including, but not limited to, VAWA self-petitions, SIJS applications, U visas, and T visa cases.

under the Health Insurance Portability and Accountability Act of 1996 (HIPPA)<sup>57</sup> and state patient information privacy laws.<sup>58</sup> Additionally, this Directive promotes compliance with federal 1367 confidentiality laws which guarantee that any medical and mental health records of noncitizen crime-victims entitled to protection under 1367 Confidentiality Sections 8.U.S.C. §1367(a)(1) and §1367(a)(2) cannot be sought, obtained, reviewed or used in any part of an enforcement action.

5. **Use of Restraints.** ICE personnel and contractors shall adhere to the following restrictions regarding the use of restraints for individuals who are noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits. This general prohibition on restraints applies to all noncitizen crime victims in the custody of ICE, whether during transport, in a detention facility, in CBP custody or at an outside medical facility.

Restraints shall not be considered as an option for applicant for and beneficiary of victim-based immigration benefit, except under the following extraordinary circumstances:

- a) Credible, reasonable grounds exist to believe the individual presents an immediate and serious threat of hurting themselves, staff, or others; or
- b) Reasonable grounds exist to believe the individual presents an immediate and credible risk of escape that cannot be reasonably minimized through any other method.

6. **Training.** ICE and CBP personnel, OPLA attorneys and all supervisors in the chain of command discussed in this Directive must complete required training related to this SOP, including annual refresher training. Such training must include an overview of crime victims and immigration enforcement, the victim-centered approach, including a description of victim-based immigration benefits, and an overview of what discretion might be appropriate in various circumstances.

## 7. Reporting.

Civil immigration enforcement actions that are planned or have been taken against crime victims will be documented in the relevant ICE, CBP, and OPLA electronic systems of record, which can be searched and validated.

ICE, CBP, and OPLA will each provide a monthly written report to the Secretary and to the Office of Civil Rights and Civil Liberties, detailing all planned and executed civil immigration enforcement actions taken against 1367 Confidentiality protected crime victims and SJIS applicant children, including the basis under this policy for each enforcement action.

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<sup>57</sup> For an overview of the health care professionals and medical and mental health records covered by HIPPA *see*, Rayhan A. Tariq and Pamela B. Hackert, Patient Confidentiality (October 7, 2021) <https://www.ncbi.nlm.nih.gov/books/NBK519540/>

<sup>58</sup> Seyfarth, 50-State Survey of Health Care Information Privacy Laws, (2021) <https://www.seyfarth.com/images/content/7/7/v2/77459/50-State-Survey-of-Health-Care-Information-Privacy-Laws.pdf>

## 8. Authorities/References.

### Statutes

- Title 8, U.S.C., Section §1367, “Penalties for disclosure of information” (originally enacted as Section 384 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA))
- INA §239(e); 8 U.S.C. §1229(e)
- VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, Pub. L. No. 103-322, 108 Stat. 17 (1994) (VAWA 1994)
- VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (VAWA 2000 and TVPA 2000)
- Section 813(b) of the Violence Against Women Act of 2005 Pub. L. No. 109-162 (Jan. 5, 2006) (VAWA 2005)
- Special Immigrant Juvenile Status was first created in the Immigration and Nationality Act of 1990. IMMIGRATION AND NATIONALITY ACT OF 1965, Pub. L. No. 101-649, § 153(a)(3), 104 Stat. 4978, 5005-06 (1990)

### Legislative History

- Legislative History VAWA 2005 DOJ APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009, H.R. REP. NO. 109-233, at 122 (2005)
- 151 Cong. Rec. 2606-07 (Dec. 18, 2005) (speech of Hon. John Conyers Jr.)

### Governing Policies

- Alejandro N. Mayorkas, Guidelines for Enforcement of Civil Immigration Law (Sept. 30, 2021)
- John D. Trasvina, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities 6 (May 27, 2021)
- ICE Directive 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims 6, 9 (DHS Aug. 10, 2021)
- Tae Johnson (ICE), and Troy Miller (CBP), Civil Immigration Enforcement In or Near Courthouses 2 (Apr. 27, 2021)
- ICE, What is an enforcement action? FAQs: Protected Areas and Courthouse Arrests 2 (Oct. 28, 2021);
- ICE Directive 11032.4: Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals (July 1, 2021)
- DHS Directive No. 002-02, Implementation of Section §1367 Information Provisions (Nov. 1, 2013)
- DHS Instruction No. 002-02-001, Implementation of Section §1367 (Nov. 7, 2013).
- ICE Directive No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (DHS Jun. 17, 2011)
- John P. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005, 25 (Jan. 22, 2007)
- DHS, DHS Broadcast Message on New 384 Class of Admission Code (December 21, 2010)

- USCIS, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants 3 (March 8, 2016)

Resources

- ICE Center for Countering Human Trafficking, Continued Presence Resource Guide 14 (July 2021)
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**9. No Private Right of Action**

The guidance set forth in this memorandum is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

This memorandum provides management guidance to ICE and CBP personnel exercising discretionary law enforcement functions and does not affect the statutory authority of ICE, CBP or OPLA employees.

## Appendix A

### Government Sponsored and Government Funded Resources to Guide the Development of a Screening Tool for Use by DHS Officials

Government agencies involved in providing health care and other forms of assistance to survivors of domestic violence, sexual assault, stalking, and human trafficking have developed screening tools to help professionals identify victims. The effectiveness of these tools has been validated by evidence based research. The following tools and the questions they ask can serve as a resource from which DHS officials should develop the screening tool that will be used to screen detainees and other noncitizens ICE and CBP personnel and OPLA attorneys encounter in their work. The format of the questions asked is important and has been tested and validated by research. Subject matter experts at DHS on VAWA, T and U visas, SIJS and VAWA confidentiality should select from these screening tools to develop the tool that DHS personnel will use under this Directive. NIWAP would welcome the opportunity to assist DHS Subject Matter Experts in developing the screening tool.

A recommended list of screening tools from which DHS Subject Matter Experts can identify questions that have been validated by evidence-based research include the following:

- (a) For domestic violence and sexual assault use:
  - (1) One of the assessment instruments listed by the CDC in *Intimate Partner Violence and Sexual Violence Victimization Assessment Instruments for Use in Healthcare Settings*;<sup>59</sup>
  - (2) Validated Screening Tests available from the Kaiser Family Foundation.<sup>60</sup>
  - (3) Danger Assessment Tool<sup>61</sup>
  - (4) Screening tools recommended by the National Health Resource Center on Domestic Violence;<sup>62</sup>
- (b) For child abuse, neglect, abandonment and maltreatment ICE and CBP should use:
  - (1) Resources for identification, screening and assessment of Child Abuse and Neglect recommended by HHS;<sup>63</sup>

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<sup>59</sup> <https://www.cdc.gov/violenceprevention/pdf/ipv/ipvandsvscreening.pdf>

<sup>60</sup> *Appendix Table 2: Screening Tests in Kaiser Family Foundation, Amrutha Ramaswamy, Usha Ranji and Alini Salganicoff, INTIMATE PARTNER VIOLENCE (IPV) SCREENING AND COUNSELING SERVICES IN CLINICAL SETTINGS (Dec. 2, 2019)* <https://www.kff.org/report-section/intimate-partner-violence-ipv-screening-and-counseling-services-in-clinical-settings-appendices/>.

<sup>61</sup> *Id.* at *Appendix Table 3: Danger Assessment Tool, Jacqueline C. Campbell, Danger Assessment Tool* <https://www.dangerassessment.org/>.

<sup>62</sup> *Futures Without Violence, IPV SCREENING AND COUNSELING TOOLKIT* <https://www.futureswithoutviolence.org/ipv-screening-and-counseling-toolkit/>.

<sup>63</sup> Administration for Children and Families, *Identification, Screening, and Assessment of Child Abuse and Neglect*, HHS (<https://www.childwelfare.gov/topics/systemwide/assessment/family-assess/id-can/>) (last visited Feb. 16, 2022).

- (2) Resources for identification, screening and assessment of Child Abuse and Neglect recommended by HHS;<sup>64</sup>
- (c) For stalking ICE and CBP should use:
  - (1) Stalking and Harassment Assessment and Risk Profile (SHARP);<sup>65</sup>
- (d) For human trafficking ICE and CBP should use:
  - (1) Adult Human Trafficking Screening Tool and Guide;<sup>66</sup>
  - (2) For human trafficking, ICE should use the *HHS Screening Tool for Victims of Human Trafficking*.<sup>67</sup>
  - (3) D.C. Superior Court’s Sex-trafficking Assessment Review (STAR) is a screening tool for identification of Commercial Sexual Exploitation of Children Victims<sup>68</sup>

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<sup>64</sup> Administration for Children and Families, *Assessing Sexual Abuse*, HHS (<https://www.childwelfare.gov/topics/systemwide/assessment/family-assess/id-can/sexual-abuse/>) (last visited Feb. 16, 2022).

<sup>65</sup> *Stalking Harassment and Risk Profile (SHARP) Risk Assessment*, AEQUITAS <https://www.stalkingawareness.org/sharp/>.

<sup>66</sup> Administration for Children and Families, *Adult Human Trafficking Screening Tool and Guide*, HHS (Jan. 2018) [https://www.acf.hhs.gov/sites/default/files/documents/otip/adult\\_human\\_trafficking\\_screening\\_tool\\_and\\_guide.pdf](https://www.acf.hhs.gov/sites/default/files/documents/otip/adult_human_trafficking_screening_tool_and_guide.pdf).

<sup>67</sup> *Resources: Screening Tool For Victims of Human Trafficking*, HHS, [https://www.acf.hhs.gov/sites/default/files/documents/ort/screening\\_questions\\_to\\_assess\\_whether\\_a\\_person\\_is\\_a\\_trafficking\\_victim.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ort/screening_questions_to_assess_whether_a_person_is_a_trafficking_victim.pdf).

<sup>68</sup> Information on the STAR assessment can be accessed at: <https://niwaplibrary.wcl.american.edu/njn-forum-dec-7-2021-dc-courts-star-assessment-tool-training>



## Appendix A

### Government Sponsored and Government Funded Resources to Guide the Development of a Screening Tool for Use by DHS Officials

Government agencies involved in providing health care and other forms of assistance to survivors of domestic violence, sexual assault, stalking, and human trafficking have developed screening tools to help professionals identify victims. The effectiveness of these tools has been validated by evidence based research. The following tools and the questions they ask can serve as a resource from which DHS officials should develop the screening tool that will be used to screen detainees and other noncitizens ICE and CBP personnel and OPLA attorneys encounter in their work. The format of the questions asked is important and has been tested and validated by research. Subject matter experts at DHS on VAWA, T and U visas, SIJS and VAWA confidentiality should select from these screening tools to develop the tool that DHS personnel will use under this Directive. NIWAP would welcome the opportunity to assist DHS Subject Matter Experts in developing the screening tool.

A recommended list of screening tools from which DHS Subject Matter Experts can identify questions that have been validated by evidence-based research include the following:

- (a) For domestic violence and sexual assault use:
  - (1) One of the assessment instruments listed by the CDC in *Intimate Partner Violence and Sexual Violence Victimization Assessment Instruments for Use in Healthcare Settings*;<sup>59</sup>
  - (2) Validated Screening Tests available from the Kaiser Family Foundation.<sup>60</sup>
  - (3) Danger Assessment Tool<sup>61</sup>
  - (4) Screening tools recommended by the National Health Resource Center on Domestic Violence;<sup>62</sup>
- (b) For child abuse, neglect, abandonment and maltreatment ICE and CBP should use:
  - (1) Resources for identification, screening and assessment of Child Abuse and Neglect recommended by HHS;<sup>63</sup>

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<sup>59</sup> <https://www.cdc.gov/violenceprevention/pdf/ipv/ipvandsvscreening.pdf>

<sup>60</sup> *Appendix Table 2: Screening Tests in Kaiser Family Foundation, Amrutha Ramaswamy, Usha Ranji and Alini Salganicoff, INTIMATE PARTNER VIOLENCE (IPV) SCREENING AND COUNSELING SERVICES IN CLINICAL SETTINGS (Dec. 2, 2019)* <https://www.kff.org/report-section/intimate-partner-violence-ipv-screening-and-counseling-services-in-clinical-settings-appendices/>.

<sup>61</sup> *Id.* at *Appendix Table 3: Danger Assessment Tool, Jacqueline C. Campbell, Danger Assessment Tool* <https://www.dangerassessment.org/>.

<sup>62</sup> *Futures Without Violence, IPV SCREENING AND COUNSELING TOOLKIT* <https://www.futureswithoutviolence.org/ipv-screening-and-counseling-toolkit/>.

<sup>63</sup> Administration for Children and Families, *Identification, Screening, and Assessment of Child Abuse and Neglect*, HHS (<https://www.childwelfare.gov/topics/systemwide/assessment/family-assess/id-can/>) (last visited Feb. 16, 2022).

- (2) Resources for identification, screening and assessment of Child Abuse and Neglect recommended by HHS;<sup>64</sup>
- (c) For stalking ICE and CBP should use:
  - (1) Stalking and Harassment Assessment and Risk Profile (SHARP);<sup>65</sup>
- (d) For human trafficking ICE and CBP should use:
  - (1) Adult Human Trafficking Screening Tool and Guide;<sup>66</sup>
  - (2) For human trafficking, ICE should use the *HHS Screening Tool for Victims of Human Trafficking*.<sup>67</sup>
  - (3) D.C. Superior Court’s Sex-trafficking Assessment Review (STAR) is a screening tool for identification of Commercial Sexual Exploitation of Children Victims<sup>68</sup>

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<sup>64</sup> Administration for Children and Families, *Assessing Sexual Abuse*, HHS (<https://www.childwelfare.gov/topics/systemwide/assessment/family-assess/id-can/sexual-abuse/>) (last visited Feb. 16, 2022).

<sup>65</sup> *Stalking Harassment and Risk Profile (SHARP) Risk Assessment*, AEQUITAS <https://www.stalkingawareness.org/sharp/>.

<sup>66</sup> Administration for Children and Families, *Adult Human Trafficking Screening Tool and Guide*, HHS (Jan. 2018) [https://www.acf.hhs.gov/sites/default/files/documents/otip/adult\\_human\\_trafficking\\_screening\\_tool\\_and\\_guide.pdf](https://www.acf.hhs.gov/sites/default/files/documents/otip/adult_human_trafficking_screening_tool_and_guide.pdf).

<sup>67</sup> *Resources: Screening Tool For Victims of Human Trafficking*, HHS, [https://www.acf.hhs.gov/sites/default/files/documents/ort/screening\\_questions\\_to\\_assess\\_whether\\_a\\_person\\_is\\_a\\_trafficking\\_victim.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ort/screening_questions_to_assess_whether_a_person_is_a_trafficking_victim.pdf).

<sup>68</sup> Information on the STAR assessment can be accessed at: <https://niwaplibrary.wcl.american.edu/njn-forum-dec-7-2021-dc-courts-star-assessment-tool-training>

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MEMORANDUM

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**TO:** ANDREW LORENZEN- STRAIT, ICE OFFICE OF POLICY & PHYLLIS COVEN, ICE OFFICE OF DETENTION POLICY AND PLANNING

**FROM:** SAMEERA HAFIZ, LEGAL MOMENTUM

**SUBJECT:** USING THE RISK ASSESSMENT TOOL TO SCREEN FOR GENDER-BASED VIOLENCE AND CRIME

**DATE:** 2/22/2010

**CC:** LESLYE ORLOFF, LEGAL MOMENTUM

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Thank you for this opportunity to provide input on the Office of Detention Policy and Planning's (ODPP) proposed risk assessment tool. I look forward to discussing this further with you at our DHS-NGO Working Group meeting on March 1<sup>st</sup>. This memo highlights the need to include screening for victimization and gender-based violence as part of the risk assessment tool.

### **Background**

According to the report issued by your office in October, titled *Immigration Detention Overview and Recommendations*, the purpose of immigration detention is to hold, process, and prepare individuals for removal; this purpose is administrative rather than punitive.<sup>1</sup> The report also recommends that immigration detainees should be placed in custody in accordance with their assessed risk and programs should be provided to detainees based on assessed need. The report recommends the development of unique provisions for special populations such as women.<sup>2</sup>

It is estimated that a high number of detained immigrant women are victims of sexual or gender-based violence.<sup>3</sup> A health services worker at one immigration detention center in the United States has estimated that "almost all women in her care were touched by domestic violence."<sup>4</sup>

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<sup>1</sup> Dora Schriro, Department of Homeland Security Immigration and Customs Enforcement, *Immigration Detention Overview and Recommendations*, (Oct. 6, 2009) at 2 [hereinafter *Overview and Recommendations*].

<sup>2</sup> See *id.* at 3.

<sup>3</sup> See Human Rights Watch, *Detained and Dismissed Women's Struggles to Obtain Health Care in United States Immigration Detention*, (March 2009) at 57 [hereinafter *Detained and Dismissed*]. See also National Immigrant Justice Center, *The Situation of Immigrant Women Detained in the United States*, in *Briefing Materials Submitted to the United Nations Special Rapporteur on the Human Rights of Migrants* (Apr. 1, 2007) available at <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/35.%20Briefing%20Materials%20for%20UN%20Special%20Rapporteur.pdf> at 99; Nina Rabin, *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona*, (The University of Arizona, January 2009) at 23.

<sup>4</sup> See *Detained and Dismissed* at 57.

Including screening for victimization as part of ODPP’s risk assessment tool will, in part, accomplish the goals set forth in the ODPP report of assessing detainees’ risks and needs by identifying victims. Many victims of gender-based violence and crime are eligible for immigration relief such as asylum, Violence against Women Act (VAWA) relief, T-visas for victims of human trafficking, and U-visas for victims of crime. Screening eligible victims is essential because non-citizens who are eligible for immigration relief pose less of a flight risk – these non-citizens have viable defenses to removal. Screening victims, not only promotes the goal of risk assessment, it also has the benefit of saving ODPP the costs associated with unnecessarily detaining non-citizens eligible for immigration relief.

The ODPP report also notes that DHS encounters a majority of detainees while they are in criminal custody.<sup>5</sup> In our experience training and providing technical assistance to advocates and attorneys working with immigrant victims in the field, we have found an overwhelming number of crime victims become entangled with the immigration enforcement and criminal justice systems. As national technical assistance providers and co-chairs of the National Network to End Violence Against Immigrant Women, which has over 3000 member organizations, we have found that crime perpetrators use the immigration system to abuse victims in various ways. Batterers, traffickers, abusive employers and crime perpetrators often both threaten to and actually report victims to the police and provide “tips” to DHS enforcement officials designed to trigger DHS immigration enforcement actions against victims.<sup>6</sup> In some cases employers who subject their immigrant employees to sexual assault or labor exploitation report their victims to cut off their ability to cooperate with law enforcement.

Due to these forms of immigration related abuse, it is not uncommon for victims of crime, eligible for immigration relief, to find themselves in immigration detention. These victims will not pose a flight risk as they are eligible for relief and their detention is therefore unnecessary. Many of these victims, when released from detention are able to cooperate with law enforcement investigations and prosecutions against their crime perpetrators, thereby making our communities safer. In fact, T-visa and U-visa relief require eligible applicants to cooperate with law enforcement in investigating and prosecuting crime perpetrators. This cooperation can be

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<sup>5</sup> *Overview and Recommendations* at 11.

<sup>6</sup> Immigration related abuse is a powerful form of coercive control used by crime perpetrators on immigrant victims. See, Mary Ann Dutton and Lisa A Gordon, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, *Sex Roles*, Vol. 52, Nos. 11/12, June 2005. See also Mary Ann Dutton and Giselle Hass, “Use of Expert Testimony Concerning Battering and Its Effects on Immigrant Women” in Bette Garlow, Leslye Orloff, Janice Kaguyutan, Heather Maher, and Susan Shriner, Eds. “Domestic Violence & Immigration: Applying the Immigration Provisions of the Violence Against Women Act: A Training Manual for Attorneys & Advocates” (The ABA Commission on Domestic Violence and Ayuda, Washington, D.C.: 2000). Immigration related abuse correlates strongly with physical and sexual abuse of victims. Immigration related abuse is 10 times higher in intimate partner relationships that are physically and sexually abusive; 51% of immigrant women interviewed by advocates report that abusers sometimes, often, or very often threaten or actually report victims to immigration authorities. See Mary Ann Dutton, Nawal Ammar, Leslye Orloff, and Darci Terrell, “Use and Outcomes of Protection Orders by Battered Immigrant Women: REVISED FINAL TECHNICAL REPORT” p. 41 submitted to the National Institutes of Justice, November 10, 2006, <http://www.ncjrs.gov/pdffiles1/nij/grants/218255.pdf>. Seeking and obtaining protection orders by immigrant victims leads to the reduction in physical violence, but not immigration abuse – when protection orders are violated, 68.3% of violations are due to ongoing immigration related abuse. See *id.* Immigration related abuse is the second highest form of protection order violation reported. See *id.*

facilitated by releasing crime victims from detention, and thereby helping law enforcement achieve its core objective of protecting our communities.

In addition, many victims of gender-based violence and crime continue to experience trauma as a result of their victimization. This trauma is exacerbated by detention.<sup>7</sup> Victims need to be connected to legal and social services support. Often it is difficult for victims to access such services in detention. Victims should therefore be released or released into alternatives to detention upon screening during the risk assessment phase.

### **How to Screen for Victimization**

Screening for crime victimization and domestic violence has been the model practice in health care settings for years.<sup>8</sup> Screening for victimization poses many real challenges for ODPP, such as difficulties establishing trust between non-citizens and DHS, language and cultural barriers, and lack of training of DHS enforcement officers in identifying and responding to victimization. Given these challenges, the following is suggested in screening for victimization in the risk assessment tool:

- 1) The screening should be conducted in a linguistically and culturally appropriate way, including for those that are deaf or otherwise disabled.
- 2) Personnel conducting risk assessment should be specially trained in the following prior to conducting assessments:
  - cultural sensitivity toward diverse understandings of acceptable and unacceptable sexual behavior;
  - appropriate terms and concepts to use when discussing sex, sexual abuse, and violence with culturally diverse populations;
  - sensitivity and awareness regarding past trauma that detainees may have experienced;
  - knowledge of immigration relief available to immigrant victims, DHS humanitarian release policies, and VAWA confidentiality laws; and
  - knowledge of existing resources that provide treatment and counseling for trauma and legal advocacy for victims.

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<sup>7</sup> See Lutheran Immigration and Refugee Services, *Alternatives to Detention in the U.S. Immigration System: Recommendations of reforms necessary to improve U.S. compliance with constitutional and international standards of procedural and substantive due process*, Briefing Materials Submitted to the Inter-American Human Rights Commission, (Jul. 7, 2008) at <http://idc.rfbf.com.au/lirs-briefing-paper-on-alternatives-to-detention>. See also Mary Ann Dutton and Giselle Hass, "Use of Expert Testimony Concerning Battering and Its Effects on Immigrant Women" in Bette Garlow, Leslye Orloff, Janice Kaguyutan, Heather Maher, and Susan Shriner, Eds. "Domestic Violence & Immigration: Applying the Immigration Provisions of the Violence Against Women Act: A Training Manual for Attorneys & Advocates" (The ABA Commission on Domestic Violence and Ayuda, Washington, D.C.: 2000).

<sup>8</sup> See, Anne L. Ganley, *Improving The Health Care Response to Domestic Violence; A Training Manual for Health Care Providers*, (Family Violence Prevention Fund, San Francisco, California: 1998) (See Domestic Violence Screening Tips pp. 157-158) and Family Violence Prevention Fund "Preventing Domestic Violence: Clinical Guidelines on Routine Screening" October, 1999 (Appendix B Suggested Screening Questions pp 18-20). The list of suggested screening questions for DHS herein are based on this research, proven by practice to be successful.

- 3) Screening should occur in private settings.
- 4) During screenings, non-citizens should be informed that questions related to victimization are routine and asked to determine potential eligibility for immigration relief, to provide information about immigration relief, and to connect non-citizens to appropriate services.<sup>9</sup>
- 5) Officials conducting screenings should be calm, matter of fact and non-judgmental.
- 6) Screenings should begin with open-ended questions. Follow up questions should use behavioral examples (e.g., slapped, pushed, hit, grabbed, threatened).
- 7) Begin screening for victimization by asking questions such as:
  - Are you currently married or have you been married to a U.S. citizen or lawful permanent resident?
  - Do you have a parent who is a U.S. citizen or lawful permanent resident?
  - Do you have an over 21 year old son or daughter who is a U.S. citizen?
  - Has anyone, including a friend, family member, or employer physically hurt, threatened, or injured you?
  - Do you ever feel afraid of or in danger from anyone, including a friend, family member, or employer?
  - Has anyone, including a friend, family member, or employer threatened to hurt you, someone close to you, or members of your family?
  - Do you feel controlled or isolated by a family member, an employer, or anyone else?
  - Has anyone, including a friend, family member, or employer forced or pressured you to have sex when you did not want to?
  - Has anyone, including a friend, family member, or employer kept you from maintaining friendships or family relationships?
  - Have you ever reported to the police that someone has hurt you or that you were a victim of a crime?
  - Have you ever thought about calling the police for help but were too scared that someone would threaten or hurt you?
  - Have you ever sought counseling or social services as a result of someone hurting you?
  - Has anyone ever forced you to work against your will?
  - Have you ever wanted to leave your employment but chose not to because you were scared of what would happen?
  - Has anyone, including a friend, family member, or employer kept your travel or identity documents in his or her possession?
  - Have you ever been mistreated by someone you worked for?

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<sup>9</sup> The officer could state, “Because violence is an issue in many peoples’ lives, we ask everyone we interview some basic questions. Often people are afraid or embarrassed to bring these things up, so we ask everyone the following questions.”

- Has anyone, including a friend or family member, or employer withheld any of your earnings to pay off a debt?
  - Has anyone, including a friend, family member, or employer ever prevented you from seeking medical care?
- 8) If a non-citizen is determined to be a victim of gender-based violence or crime, she should be released or released into the least restrictive alternatives to detention. In addition, she should be connected to service providers for social services support and legal advocacy.

### **Conclusion**

As discussed above, it is essential that a risk assessment tool that truly assesses risk screen for victimization resulting from gender-based violence and crime. Legal Momentum can collaborate with ODPP to further develop victimization screening questions, language access protocols, training protocols related to culturally competent screening, and referrals to victim services.

Thank you so much for your consideration and engaging in this important dialogue. Please let me know how I can assist you further and if you have any questions. I can be reached at 202-326-0046 or shafiz@legalmomentum.org.

## Risk Assessment Questions To Ask of Immigrants Detained or Arrested<sup>1</sup>

- Are you currently married or have you been married to a U.S. citizen or lawful permanent resident?
- Do you have a parent who is a U.S. citizen or lawful permanent resident?
- Do you have an over 21 year old son or daughter who is a U.S. citizen?
- Has anyone, including a friend, family member, or employer physically hurt, threatened, or injured you?
- Do you ever feel afraid of or in danger from anyone, including a friend, family member, or employer?
- Has anyone, including a friend, family member, or employer threatened to hurt you, someone close to you, or members of your family?
- Do you feel controlled or isolated by a family member, an employer, or anyone else?
- Has anyone, including a friend, family member, or employer forced or pressured you to have sex when you did not want to?
- Has anyone, including a friend, family member, or employer kept you from maintaining friendships or family relationships?
- Have you ever reported to the police that someone has hurt you or that you were a victim of a crime?
- Have you ever thought about calling the police for help but were too scared that someone would threaten or hurt you?
- Have you ever sought counseling or social services as a result of someone hurting you?
- Has anyone ever forced you to work against your will?
- Have you ever wanted to leave your employment but chose not to because you were scared of what would happen?

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<sup>1</sup> Adapted from USING THE RISK ASSESSMENT TOOL TO SCREEN FOR GENDER-BASED VIOLENCE AND CRIME, Legal Momentum memo to Immigration and Customs Enforcement February 22, 2010



# NIWAP

- Has anyone, including a friend, family member, or employer kept your travel or identity documents in his or her possession?
- Have you ever been mistreated by someone you worked for?
- Has anyone, including a friend or family member, or employer withheld any of your earnings to pay off a debt?
- Has anyone, including a friend, family member, or employer ever prevented you from seeking medical care?