

DHS Enforcement Priorities, Courthouse Enforcement and Sensitive Location Policies and Memoranda Information for State Court Judges¹

By: Leslye E. Orloff, Meaghan Fitzpatrick, Monica Bates, Mikaela Rodriguez and Abigail Whitmore

April 24, 2013; Updated December 27, 2021

The purpose of this bench card is to inform state court judges about which immigrant litigants, crime victims, witnesses, parents, and children appearing in court proceedings do and do not fall within current immigration enforcement priorities set by the U.S. Department of Homeland Security (DHS). This information will help courts assess the veracity of claims made in court about the effect that the immigration status of a litigant, party, child, parent, or victim may or may not have on the case before the court.

Protections for Immigrant Victims and Children

Immigrant victims of domestic violence, sexual assault, stalking, human trafficking, child abuse, child neglect, child abandonment, and other crimes covered by the U visa program are eligible for forms of immigration relief that were designed to protect victims of crime and/or abuse.² Each of these forms of immigration relief provide protection from immigration enforcement actions and deportation to immigrant victims.³ In addition to the forms of immigration relief designed to offer a path to legal immigration status for immigrant victims created by federal immigration statutes, U.S. Department of Homeland Security policies offer protections that are available to immigrant victims and witnesses without regard to whether the immigrant qualifies for or applies for victim based immigration relief.

Victims and Witnesses of Domestic Violence or Human Trafficking: Protections Afforded⁴

- VAWA Confidentiality and victim safety provisions provide three types of protection to immigrant victims of violence and/or abuse, including immigrant victims of domestic violence, sexual assault, human trafficking, and other U visa

¹ This document was developed under grant numbers SJI-12-E-169, SJI-15-T-234, SJI-20-E-005 from the State Justice Institute. The points of view expressed are those of the author(s) and do not necessarily represent the official position or policies of the State Justice Institute.

² These forms of immigration relief are described in another bench card in this series. Leslye E. Orloff & Benish Anver, *Family Court Bench Card on Immigration Rights of Battered Spouses, Children and Immigrant Crime Victims*, TRAINING MANUAL FOR CTS. (Oct. 11, 2013), <http://niwaplibrary.wcl.american.edu/pubs/judg-tkit-bchcrdvictimsimmrights10-11-13/>; See also, NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A GUIDE TO BEST PRACTICE FOR JUDGES AND COURTS (2017), <http://niwaplibrary.wcl.american.edu/2018/03/sijs-manual-table-of-content/>.

³ See <http://niwaplibrary.wcl.american.edu/vawa-confidentiality-protections-training-materials/>; See also Leslye E. Orloff & Benish Anver, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality*, TRAINING MANUAL FOR CTS. (Oct. 11, 2013), <http://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-vawa-confidentiality/>.

⁴ See U.S. Dep't of Homeland Sec., *DHS Broadcast Message On New 384 Class Of Admission Code*, CENT. INDEX SYS. (2010), <http://niwaplibrary.wcl.american.edu/pubs/dhs-broadcast-class-admission-code/>.

listed crimes.⁵ Specifically, VAWA:

- Protects the confidentiality of information provided to the Department of Homeland Security, the Department of Justice or the Department of State;
- Stops immigration enforcement agencies from using information provided by an abuser, trafficker or U visa crime perpetrator, a relative, or a member of their family against the victim in an immigration case; and
- Places limitations on DHS enforcement activities against victims at statutorily protected locations.
- “Absent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.”⁶
- Crime victims and witnesses should receive “release from detention and deferral or a stay of removal.”⁷
- Department of Homeland Security (DHS) enforcement priorities list being a victim of crime and being eligible for humanitarian immigration relief as a victim of crime of abuse as mitigating factors that militate in favor of declining immigration enforcement.”⁸

Immigration Relief for Immigrant Crime Victims and Children

*VAWA Self-Petition*⁹

To qualify for a VAWA self-petition an immigrant victim must have suffered from:

- Battery or extreme cruelty,¹⁰ which includes domestic violence, sexual assault, incest, and child abuse

⁵ See Leslye E. Orloff, *Chapter 3: VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT/LEGAL MOMENTUM EMPOWERING SURVIVORS MANUAL (2014), <https://niwaplibrary.wcl.american.edu/pubs/ch3-vawa-confidentiality-history-purpose/>; See also VAWA Confidentiality Protections for Immigrant Crime Victims (March 8, 2021), <http://niwaplibrary.wcl.american.edu/vawa-confidentiality-materials-tools/>; See also VAWA Confidentiality Statutes, Legislative History and Implementing Policy (April 4, 2018), <http://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history/>.

⁶ See Memorandum from John Morton, Dir., Immigration Customs Enforcement to All Field Office Dirs., Special Agents in Charge, and Chief Counsel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (Jun. 17, 2011), <http://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs/>.

⁷ *Id.* at 2.

⁸ See Memorandum from Alejandro N. Mayorkas, Guidelines for the Enforcement of Civil Immigration Law, at p.3-4 (Sept. 30, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/civil-immigration-enforcement-guidelines-9-2021> (Hereinafter MAYORKAS ENFORCEMENT GUIDELINES”) (Immigration enforcement will only occur against immigrants who are enforcement priorities and only after the totality of the facts and circumstances are considered including aggravating and mitigating factors).

⁹ Victims who meet the qualifications for a VAWA self-petitioner if they are placed in immigration removal proceedings before an immigration judge can qualify for VAWA cancellation of removal. Also, in cases where the perpetrator filed immigration papers for the victim and the victim received conditional (2-year) permanent residency, the victim can file a battered spouse waiver that allows them to immediately obtain full permanent residency removing the 2 year wait and their need for the abuser’s cooperation in their application by providing proof of battering or extreme cruelty.

¹⁰ The definition of battering or extreme cruelty is broader than all state protection order and criminal statutes on family violence. It includes forms of emotional abuse and threats that are often not part of state law definitions of domestic violence. Sexual assault as well as threats and attempts to commit sexual assault are considered battery or attempted battering under immigration law.

- Perpetrated by an abusive U.S. citizen or lawful permanent resident spouse, parent, or step-parent or an adult son or daughter who is a U.S. citizen
- The victim must have resided with the abuser at some point in time
- The victim must have good moral character.¹¹

*U Visa for Immigrant Crime Victims*¹²

In order to be eligible for a U visa, the immigrant victim must:

- Be a victim of the one or more of the criminal activities¹³ listed in the U visa statute;¹⁴
- Possess information concerning the criminal activity;¹⁵
- Obtain a certification that the victim is being, has been, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing of the perpetrator of one or more listed criminal activities from a family, civil, juvenile, criminal or administrative law judge, law enforcement official, prosecutor, child or adult protective services, the EEOC, state labor agency, or other federal, state, or local authority;¹⁶
- Have suffered substantial physical or mental abuse as a result of having been a victim;¹⁷ and
- The criminal activity violated the laws of or occurred in the United States.¹⁸

*T Visa for Victims of Severe Forms of Human Trafficking*¹⁹

The T visa provides long-term legal immigration status and a path to lawful permanent residency for immigrant victims of severe forms of human trafficking. Immigrants will be eligible for T visas if they:

¹¹ If a victim has a criminal history they may have difficulty proving good moral character and may need to file for a U visa rather than a VAWA self-petition.

¹² U.S. Department of Homeland Security, U and T Visa Resource Guide: for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies (November 30, 2015) <http://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>; see also U Visa Certification Tool Kit for Federal, State, and Local Judges, Commissioners, Magistrates, and Other Judicial Officers (2017) <http://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-tool-kit-federal-state-local-judges-magistrates>.

¹³ The types of criminal activities include: rape, kidnapping, torture, abduction, trafficking, unlawful criminal restraint, incest, false imprisonment, domestic violence, blackmail, sexual assault, extortion, abusive sexual contact, manslaughter, prostitution, murder, sexual exploitation, felonious assault, female genital mutilation, witness tampering, being held hostage, obstruction of justice, peonage, perjury, involuntary servitude, slave trade, stalking, fraud in foreign labor contracting and attempts, conspiracy, or solicitation to commit any of these criminal activities.

¹⁴ INA § 101(a)(15)(U)(iii).

¹⁵ In the case of a victim of sexual assault or any other U visa criminal activity when the victim of the crime is a child, incapacitated or incompetent, a parent guardian or next friend of the victim can possess and provide the helpfulness to government officials required for the victim to qualify for a U visa. Indirect victims who are family members of the victim can also qualify for a U visa. The family members of an adult victim who can qualify as indirect victims are: spouses and children under the age of 21. If the victim is under age 21, their parents and unmarried siblings under age 18 can also qualify. The indirect victim protections are very important in cases of sexual assault because they expand protections to parents of sexually abused children. The undocumented parent of a sexually abused U.S. citizen or lawful permanent resident child can qualify for a U visa who possess information and provides helpfulness in the detection, investigation, or prosecution (including forensic examination) of the sexual assault perpetrated against the child.

¹⁶ INA § 101(a)(15)(U)(i)(III).

¹⁷ INA § 101(a)(15)(U)(i)(I).

¹⁸ INA § 101(a)(15)(U)(i)(IV).

¹⁹ U.S. Immigration and Customs Enforcement. 2010. *Immigration Options for Victims of Crimes Information for Law Enforcement, Healthcare Providers, and Others*. Washington, DC: U.S. Department of Homeland Security. Retrieved July 15, 2018, <https://niwaplibrary.wcl.american.edu/pubs/imm-options-victims-of-crimes>.

- Are a victim of a severe form of trafficking in persons²⁰
- Are physically present in the U.S on account of the trafficking²¹
- Assist law enforcement officials in the investigation or prosecution of their traffickers (unless they are under the age of 18, in which case they are exempted from this requirement)²²
- Can demonstrate that they will suffer extreme hardship involving unusual and severe harm upon removal.²³

Children Applying for Special Immigrant Juvenile Status

To be eligible for SIJS a child must be:

- Unmarried, in the United States and under the age of 21²⁴ at the time of filing the SIJS immigration application, and
- Submit a state court order that contains three findings:²⁵
 - The court has exercised jurisdiction as authorized by state law to issue orders regarding the custody, care or placement of an immigrant child;
 - It is not in the child’s best interest to return to the home country, or las habitual residence, of the child or the child’s abusive parent.
 - Reunification with one or both of the child’s parents is not viable due to either abuse, abandonment, neglect, **or** a similar basis under state law.

*Individuals Who Came to the United States as Children*²⁶

Children who receive Deferred Action for Child Arrivals (DACA) also receive protection from deportations and access to work authorization.²⁷ DACA helps immigrant children and youth who:

- Came to the United States under the age of sixteen;
- Have continuously resided in the United States for at least five years;
- Is currently in school, has graduated from high school, has obtained a GED or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;

²⁰ INA § 101(a)(15)(T)(i)(I).

²¹ INA § 101(a)(15)(T)(i)(II).

²² INA § 101(a)(15)(T)(i)(III).

²³ INA § 101(a)(15)(T)(i)(IV).

²⁴ Children must obtain findings from a state court that has jurisdiction to enter orders regarding their care and custody. Orders containing SIJS findings must be issued while the child is under the age of majority set by state law, which is often age 18. Some state laws may confer jurisdiction over a person who is older than 18.

²⁵ See INA § 101(a)(27)(J) (defining Special Immigrant Juveniles); See also SIJS Bench Book (March 30, 2018)

<https://niwaplibrary.wcl.american.edu/pubs/sijs-bench-book-complete>.

²⁶ Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec. to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Services, & John Morton, Dir., U.S. Immigration and Customs Enf’t, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <http://niwaplibrary.wcl.american.edu/pubs/discretion-individuals-came-as-children/>.

²⁷ U.S Department of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012); see also *Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)* (January 20, 2021), <https://niwaplibrary.wcl.american.edu/pubs/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca-the-white-house>.

- Has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- Is not above the age of thirty.

Immigration Enforcement Priorities 2021

Immigrants who fall within DHS immigration enforcement priorities are the immigrants who are most likely to become subject to immigration enforcement actions. Parents, children, and other parties appearing in a state court proceedings would only be a likely target for immigration enforcement if they were an enforcement priority. The September 2021 Department of Homeland Security’s agency-wide immigration enforcement policy memorandum which takes effect on November 29, 2021 make it clear that:²⁸

“The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way. Justice and our country’s well-being require it.”

Civil Immigration Enforcement Priorities:²⁹

In September 2021 Immigration and Customs Enforcement listed the following immigrants as priorities for immigration enforcement. Immigrants who are a threat to:³⁰

- **National Security** –
 - A noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities; or
 - Who otherwise poses a danger to national security, is a priority for apprehension and removal.
- **Border Security** –
 - A noncitizen apprehended at the border or port of entry while attempting to unlawfully enter the United States; or
 - A noncitizen apprehended in the United States after unlawfully entering after November 1, 2020.
 - In cases concerning border security, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action.
- **Public Safety** – a noncitizen poses a current threat to public safety, typically because of serious criminal conduct.
 - Whether a noncitizen poses a current threat to public safety requires an assessment of the individual and the totality of the facts and circumstances.

²⁸ See MAYORKAS ENFORCEMENT GUIDELINES, at p. 2 ; *see also* DHS Press Release: Secretary Mayorkas Announces New Immigration Enforcement Priorities (September 30, 2021) <https://niwaplibrary.wcl.american.edu/pubs/mayorkas-enforcement-priorities-press-release-9-30-21> (Hereinafter PROTECTED AREAS PRESS RELEASE).

²⁹ See MAYORKAS ENFORCEMENT GUIDELINES at p.3.

³⁰ See MAYORKAS ENFORCEMENT GUIDELINES, AT P. 3; *see also* United States Immigration and Customs Enforcement, Civil Immigration Enforcement Actions in or near Courthouses (Apr. 27,2021), <https://niwaplibrary.wcl.american.edu/pubs/2021-dhs-enforcement-at-courthouse-press-release> (Hereinafter COURTHOUSE ENFORCEMENT POLICY).

- In reevaluating whether a noncitizen currently “poses a threat to public safety” requires an assessment of the individual and the totality of the facts and circumstances and consideration of both aggravating and mitigating factors.
- DHS personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue.

DHS policies include non-exclusive lists of factors and facts that could serve as mitigating, extenuating, or aggravating factors and DHS enforcement officials will use in exercising prosecutorial discretion and making immigration enforcement decisions. These lists of factors also provide legally correct information about immigration law that will be helpful to state court judges’ decision-making responding to allegations by parties about whether, if, and/or how immigration status should play any role in state court cases. Further, when state courts familiar with the fact of the cases before them make findings of fact about the existence of any of these factors and include such findings in state court orders, this can provide useful evidence about the factors that pertain in a particular case to both the immigrant before the court and DHS investigators, adjudicators, and enforcement agents. The following examples of relevant mitigating factors,³¹ absent serious aggravating factors:³²

Mitigating and Extenuating Facts and Circumstances³³

- Compelling humanitarian factors
 - Persons with poor health or a serious health conditions³⁴
 - Persons who are minors, pregnant, or elderly³⁵
 - The person is the primary caregiver to a seriously ill relative in the United States,³⁶ including an immediate family or household member who is, known to be suffering from serious physical or mental illness³⁷
 - Victims of domestic violence, trafficking, or other serious crimes³⁸
 - Status as a victim, witness, or plaintiff in civil or criminal proceedings³⁹
 - Persons who came to the U.S. as young children and have since lived in the U.S. continuously⁴⁰

³¹ See MAYORKAS ENFORCEMENT GUIDELINES at p. 3-4 (noting mitigating factors that mitigate in favor of declining enforcement action in determining whether a noncitizen poses a current threat to public safety); see also TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.9.

³² See MAYORKAS ENFORCEMENT GUIDELINES at 3 (listing factors that can militate in favor of enforcement action when considering whether a noncitizen poses a current threat to public safety); see also TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.6. (Relevant aggravating factors include: criminal history, participation in persecution or other human rights violations, extensiveness and seriousness of prior immigration violations (e.g. prior removals by ICE, prior illegal entries, noncompliance with conditions of release), fraud or material misrepresentation).

³³ See MAYORKAS ENFORCEMENT GUIDELINES at p.2-4.

³⁴ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.5, 6, and 9.

³⁵ See MAYORKAS ENFORCEMENT GUIDELINES at 3; see also TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6 and 9.

³⁶ See MAYORKAS ENFORCEMENT GUIDELINES at 3 (listing as a mitigating factor how removal would impact family in the United States, such as loss of a caregiver); TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 6.

³⁷ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.9-10.

³⁸ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.10 (This includes all criminal activities that would qualify for protections under the T and U visa certification programs).

³⁹ See MAYORKAS ENFORCEMENT GUIDELINES AT 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.6.

⁴⁰ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.10.

- The person is a party to significant collateral civil litigation (e.g., family court proceedings, non-frivolous civil rights or labor claims)⁴¹
- The person is otherwise eligible for humanitarian protection⁴²
- Veterans (military service members or immediate relatives thereof)⁴³
- Persons likely to be granted temporary or permanent immigration relief⁴⁴
- Whether the person has potential immigration relief available⁴⁵
- Significant law enforcement or other governmental interest⁴⁶
 - This includes cooperating witnesses, confidential informant and immigrants otherwise assisting state or federal law enforcement officials, prosecutors, and agencies involved in enforcing labor and civil rights laws
- Long term Lawful Permanent Residents⁴⁷
- Length of residence in the United States⁴⁸
- Work history in the United States⁴⁹
- Pursuit or completion of education in the United States⁵⁰
- Contributions to the community⁵¹
- Family or community ties to the United States⁵²
- The impact of removal on family in the United States, such as loss of a provider or caretaker⁵³
- Where an individual has a criminal history, mitigating factors include:
 - Length of time since a crime or offense was committed and evidence of rehabilitation⁵⁴
 - Convictions that were vacated or expunged⁵⁵
 - A mental condition that may have contributed to criminal conduct, or a physical or mental condition requiring care or treatment⁵⁶

In addition to mitigating factors, the September 2021 DHS guidance on prosecutorial discretion⁵⁷ provides aggravating factors that militate in favor of enforcement action, particularly in considering whether an individual poses a threat to public safety. Addressing these aggravating factors in state court findings and orders can be useful for both immigrant crime victims and DHS

⁴¹ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.10.

⁴² See MAYORKAS ENFORCEMENT GUIDELINES at p.3.

⁴³ See MAYORKAS ENFORCEMENT GUIDELINES at p. 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.9.

⁴⁴ See MAYORKAS ENFORCEMENT GUIDELINES at p.3 (listing as a mitigating factor whether the individual is eligible for humanitarian protection or other immigration relief); TRASVINA ENFORCEMENT AND REMOVAL POLICIES at 9.

⁴⁵ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.6.

⁴⁶ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.10.

⁴⁷ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.10.

⁴⁸ See MAYORKAS ENFORCEMENT GUIDELINES at 3; TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.5-6.

⁴⁹ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.6.

⁵⁰ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.6.

⁵¹ See TRASVINA ENFORCEMENT AND REMOVAL POLICIES at p.6.

⁵² See TRASVINA ENFORCEMENT AND REMOVAL POLICIES.

⁵³ See MAYORKAS ENFORCEMENT GUIDELINES at p.3.

⁵⁴ See MAYORKAS ENFORCEMENT GUIDELINES at p.4.

⁵⁵ See MAYORKAS ENFORCEMENT GUIDELINES at p.4.

⁵⁶ See MAYORKAS ENFORCEMENT GUIDELINES at p.3.

⁵⁷ See MAYORKAS ENFORCEMENT GUIDELINES.

officials responsible for making immigration enforcement and prosecutorial discretion determinations. Aggravating factors include:

- The gravity of the offense of conviction and the sentence imposed⁵⁸
- The nature and degree of harm caused by the criminal offense⁵⁹
- The sophistication of the criminal offense⁶⁰
- Use or threatened use of a firearm or dangerous weapon⁶¹
- A serious prior criminal record⁶²

As the following data from Immigration and Customs Enforcement illustrates, immigrants who do not fit one of these listed categories of immigrants are statistically less likely to become subjects of immigration enforcement actions.

- In 2013, DHS removals fell within these categories:⁶³
 - 82% convicted criminals,
 - 7.8% repeat immigration violators;
 - 1.6% immigrants who had been ordered removed and failed to depart
 - 7.7% other immigrants.
- In 2017,⁶⁴ U.S. Immigration and Customs Enforcement conducted 143,470 immigration enforcement actions against immigrants:
 - 73.7% with criminal convictions;
 - 15.5% with pending criminal charges;
 - 5.3% with outstanding notices to appear in immigration court;
 - 2.8% who had been ordered removed and failed to depart from the U.S. (fugitives) or were subject to reinstatement of removal because they had been previously removed from the U.S.; and
 - 2.6% were other immigrants.⁶⁵
- In 2020,⁶⁶ the removal numbers continued to indicate that deportation action focused primarily on those with criminal convictions.
 - 92% individuals previously convicted of a crime (including those with pending charges)

As this ICE data and ICE enforcement priorities demonstrate, immigrants appearing in state court cases who do not fall within these enforcement priorities are significantly less likely to become subject to immigration enforcement actions. In contested cases it is

⁵⁸ See MAYORKAS ENFORCEMENT GUIDELINES at p.3.

⁵⁹ See MAYORKAS ENFORCEMENT GUIDELINES at p.3.

⁶⁰ See MAYORKAS ENFORCEMENT GUIDELINES at p.3.

⁶¹ See MAYORKAS ENFORCEMENT GUIDELINES at p.3.

⁶² See MAYORKAS ENFORCEMENT GUIDELINES at p.3.

⁶³ IMMIGRATION AND CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., *FY 2013 ICE Removals*, available at <https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>

⁶⁴ IMMIGRATION AND CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., *FY 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT*, available at <https://www.ice.gov/removal-statistics/2017>

⁶⁵ Id.

⁶⁶ See U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT P.4 (2020), <https://niwaplibrary.wcl.american.edu/pubs/ice-ero-report-2020>.

important for courts to be aware that power and control tactics used by perpetrators of crimes against immigrant victims include the perpetrator making calls to report immigrant victims to ICE in an effort to gain an advantage in state court proceedings by triggering ICE enforcement actions against victims.⁶⁷ The legislative history of VAWA demonstrates Congress' intention to reduce the ability of abusers to gain advantages as shown in the quotes below:⁶⁸

- “Consequently, a battered spouse may be deterred from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges or calling the police, because of the threat or fear of deportation.”⁶⁹
- “Relief from deportation is also critical for victims who could face retribution or other hardship if removed from the United States.”⁷⁰
- “No longer will battered immigrant women and children be faced with deportation for reporting an abuser on whom they may be dependent on for an immigration benefit.”⁷¹

“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.”⁷²

Immigration and Customs Enforcement Courthouse Enforcement Policy

The Department of Homeland Security's Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CPB) have jointly issued policies that limit immigration enforcement at or near courthouses.⁷³ These courthouse enforcement limitations apply to all immigrants and are in addition to the protections provided immigrant crime victims by VAWA Confidentiality's limitations on immigration enforcement against crime victims at courthouse.⁷⁴ On April 27, 2021 ICE and CBP jointly issued updated policies detailing how and under what limited circumstances ICE or CPB would be authorized to carry out immigration enforcement activities in

⁶⁷ See Krisztina E. Szabo & Leslye E. Orloff, *The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending* (June 18, 2014) <http://niwaplibrary.wcl.american.edu/pubs/imm-qref-safetyplanning/>; See also *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*, at p. 1 (June 8, 2021), <https://niwaplibrary.wcl.american.edu/pubs/executive-summary-final> (Finding that when immigrant victims apply for and receive work authorization and protection from deportation through the VAWA and U visa programs there is a 65% reduction in abusers using immigration status against victims in custody cases).

⁶⁸ See generally Alina Husain & Leslye Orloff, *VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy* (Apr. 4, 2018) <http://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history>.

⁶⁹Id. (Quoting the House Judiciary Committee on VAWA 1994).

⁷⁰ Id. (Quoting Sen. Kennedy on VAWA 2000).

⁷¹ Id. (Quoting Sen. Bingaman on VAWA 2000).

⁷² Id. (Quoting Rep. Conyers on VAWA 2005 Final Bill - Legislative History Immigration Protections: Conyer's Extension of Remarks).

⁷³ See COURTHOUSE ENFORCEMENT POLICY (superseding and revoking United States Immigration and Customs Enforcement, *Civil Immigration Enforcement Actions Inside Courthouses* (Jan. 10, 2018) <http://niwaplibrary.wcl.american.edu/pubs/ice-courthouse-directive-2018/>).

⁷⁴ COURTHOUSE ENFORCEMENT POLICY at p.2 (Footnote 3). This policy continues the bars that VAWA confidentiality created to halt immigration enforcement actions against victims appearing in court proceedings. United States Immigration and Customs Enforcement, *Civil Immigration Enforcement Actions Inside Courthouses*, at p. 3(Jan. 10, 2018), <http://niwaplibrary.wcl.american.edu/pubs/ice-courthouse-directive-2018/>; See also Leslye E. Orloff & Benish Anver, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality*, TRAINING MANUAL FOR CTS. (Oct. 11, 2013), <http://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-vawa-confidentiality/>.

or near courthouses.⁷⁵ This policy affirmed and expanded upon ICE’s prior limits on circumstances in which courthouse enforcement measures were authorized.

Courthouse Enforcement Policy Goals

“The courthouse is a place where the law is interpreted, applied, and justice is to be done. As law enforcement officers and public servants, we have a special responsibility to ensure that access to the courthouse - and therefore access to justice, safety for crime victims, and equal protection under the law - is preserved.”⁷⁶

“Executing civil immigration enforcement actions in or near a courthouse may chill individuals’ access to courthouses and, as a result, impair the fair administration of justice. At the same time, there may be legitimate need to execute a civil immigration enforcement action in or near a courthouse. This memorandum is designed to address these interests, which can sometimes be in tension with one another. It provides guidance as to when and how civil immigration enforcement actions can be executed in or near a courthouse so as not to unnecessarily impinge upon the core principle of preserving access to justice.”⁷⁷

“Ensuring that individuals have access to the courts advances the fair administration of justice, promotes safety for crime victims, and helps to guarantee equal protection under the law...The expansion of civil immigration arrests at courthouses during the prior administration had a chilling effect on individuals’ willingness to come to court or work cooperatively with law enforcement.” (DHS Secretary Alejandro Mayorkas)⁷⁸

Application of Policy to Enforcement Actions Both “In” and “Near” Courthouses

““Near” the courthouse means in the close vicinity of the courthouse, including the entrance and exit of a courthouse, and in adjoining or related areas such as an adjacent parking lot or transportation point (such as a bus stop right outside a courthouse). It does not include adjacent buildings or houses that are not part of the courthouse or otherwise are not used for court-related business.”⁷⁹

What is the April 2021 Courthouse Enforcement Policy Does

- Bars Most Enforcement Actions⁸⁰
 - Inside courthouses
 - Inside court rooms
 - In court parking lots
 - At courthouse entrances and exits
 - At bus-stops outside courthouses
 - At areas adjoining the courthouse used for court-related business

⁷⁵ See COURTHOUSE ENFORCEMENT POLICY at p.2-3; *See generally* United States Immigration and Customs Enforcement, *FAQs: Protected Areas and Courthouse Arrests* (Oct. 28, 2021), <https://niwaplibrary.wcl.american.edu/pubs/faqs-protected-areas-and-courthouse-arrests>. (Hereinafter FAQs: PROTECTED AREAS AND COURTHOUSE ARRESTS).

⁷⁶ COURTHOUSE ENFORCEMENT POLICY at p.1.

⁷⁷ COURTHOUSE ENFORCEMENT POLICY at p.1.

⁷⁸ PROTECTED AREAS PRESS RELEASE at p. 1-2.

⁷⁹ COURTHOUSE ENFORCEMENT POLICY at p.2.

⁸⁰ COURTHOUSE ENFORCEMENT POLICY at p. 2.

- Enforcement action may only be taken in or a near a courthouse if —
 - It involves a national security threat; or⁸¹
 - There is an imminent risk of death, violence, or physical harm to any person; or⁸²
 - There is an imminent risk of destruction of evidence material to a criminal case; or⁸³
 - It involves hot pursuit of an individual who poses a threat to public safety.⁸⁴
 - In the absence of hot pursuit a civil immigration enforcement action may only be taken against an individual who poses a threat to public safety if:⁸⁵
 - It is necessary to take the action in or near the courthouse because a safe alternative location for such action does not exist or would be too difficult to achieve the enforcement action at such a location; *and* The action has been approved in advance by a Field Office Director, Special Agent in Charge, Chief Patrol Agent, or Port Director.

- Limits Courthouse Enforcement to an Identified Individual Immigrant and Will Not Target Other Immigrants Present at the Courthouse

“Enforcement actions at courthouses will only be executed in limited circumstances against individuals falling within the public safety priorities of DH S's civil immigration enforcement priorities. Such enforcement actions will, absent exigent circumstances, not lead to arrest of non-targeted individuals.”⁸⁶

The impact of this policy will be that the following individuals can safely access courthouses and court services without risk of immigration enforcement:

- Crime victims
 - Witnesses
 - Children
 - Litigants
 - Family members accompanying litigants to court
- Informs immigration enforcement officers that if civil enforcement must take place at a courthouse officers should:⁸⁷
 - Conduct enforcement in non-public areas of the courthouse
 - Collaborate with courthouse security staff
 - Use the courthouse’s non-public entrances and exits
 - Conduct enforcement actions outside of public view
 - Conduct enforcement after the judicial proceeding that brought the individual into the courthouse has concluded

⁸¹ COURTHOUSE ENFORCEMENT POLICY at p.2.

⁸² COURTHOUSE ENFORCEMENT POLICY at p.2.

⁸³ COURTHOUSE ENFORCEMENT POLICY at p.2.

⁸⁴ COURTHOUSE ENFORCEMENT POLICY at p.2.

⁸⁵ COURTHOUSE ENFORCEMENT POLICY at p.2.

⁸⁶ FAQ ON PROTECTED AREAS AND COURTHOUSE ARRESTS, at p. 3.

⁸⁷FAQ ON PROTECTED AREAS AND COURTHOUSE ARRESTS, at p. 3.

VAWA Confidentiality Federal Statutes Provide Additional Protection from Courthouse Enforcement for Immigrant Victims⁸⁸

- For victims of domestic violence, sexual assault, human trafficking, stalking, and other U visa listed criminal activities⁸⁹ once the victim has filed their immigration case, the case will appear in a DHS database of VAWA confidentiality protected cases. DHS supervisors and enforcement officers are required to check this database as part of the process of approving civil enforcement at a courthouse and any enforcement action involving an immigrant crime victim.⁹⁰ VAWA confidentiality protected victims additionally receive protection from limitations on immigration enforcement in all court cases involving domestic violence, sexual assault, stalking, or human trafficking.⁹¹ The VAWA confidentiality protected immigration case types that will be flagged for additional protection are:⁹²
 - VAWA self-petitions, VAWA cancellation of removal and VAWA suspension of deportation
 - U visas for crime victims
 - T visas for human trafficking victims
 - Battered spouse waivers
 - Work authorization applications filed by abused spouses of A , E(iii), G and H visas.⁹³

VAWA imposed statutory prohibitions on enforcement actions at any of the following locations:⁹⁴

- Domestic violence shelter
- Victim services program
- Family justice center
- Supervised visitation center

⁸⁸ Immigration and Nationality Act (“INA”) § 239(e); codified at 8 U.S.C. §1229(e) “Initiation of Removal Proceedings: Certification of compliance with restrictions on disclosure.” *See generally*, : Leslye E. Orloff, Benish Anver, and Rafaela Rodrigues, Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality 4 (December 3, 2021) <https://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-va-wa-confidentiality>.

⁸⁹ INA § 101(a)(22)(U)(iii) domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, stalking, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, fraud in foreign labor contracting, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, solicitation to commit any of the above-mentioned crimes, or *any similar activity* in violation of federal, state, or local criminal law.

⁹⁰ VAWA Confidentiality Statutes, Legislative History and Implementing Policy, at p. 11-19 (Updated April 4, 2018) <https://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history>.

⁹¹ John p. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, at p.27 (January 22, 2007), <https://niwaplibrary.wcl.american.edu/pubs/iceopla-va-wa-confidentiality-2007-foia/>

⁹² DEP’T OF HOMELAND SECURITY, INSTRUCTION NUMBER: 002-02-001, IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, 4 (Nov. 7, 2013), <https://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/> (VAWA self-petitioner, which incorporates the following applications or petitions: I-360 Self-petition - self-petitioners under INA sec. 204; I-751 Hardship waiver - battered spouse or child hardship waiver; VAWA CAA - abused Cuban Adjustment Act applicants; VAWA HRIFA - abused Haitian Refugee Immigration Fairness Act applicants; VAWA NACARA - abused Nicaraguan Adjustment and Central American Relief Act applicants; VAWA Suspension of Deportation; VAWA Cancellation of Removal applicants under INA 240A(b)(2); I-914 T Visa Status - victim of a severe form of trafficking in persons under INA 101(a)(15)(T); I-918 U Visa Status - victim of qualifying criminal activity under INA 101(a)(15)(U)).

⁹³ Instructions for Application for Employment Authorization for Abused Nonimmigrant (Visa Holder) Spouses I-765V 10 (February 14, 2017) <https://niwaplibrary.wcl.american.edu/pubs/i-765vinstr> (“The information you provide in the application is confidential and protected from disclosure under 8 USC 1367”)

⁹⁴ INA § 239(e)

- A courthouse if the victim is appearing in connection with a protection order case, a child custody case or other civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking

Protected Areas Limitations on Immigration Enforcement

It is important to note that the DHS, ICE and CBP policies and VAWA confidentiality statute’s limitations on immigration enforcement at courthouses apply despite the fact that these policies do not technically consider courthouses protected areas.⁹⁵ Having information about which locations are considered “protected areas” where, except in limited circumstances immigration enforcement actions will not be conducted against immigrants generally and against immigrant crime victims who are offered additional statutory protection under VAWA confidentiality laws will help courts promote access to justice for immigrants in the community the court serves. Information about locations that are generally protected from immigration enforcement activities will help courts crafting orders identify safe locations for visitation exchange and programs that children and parents can safely access for services and assistance.

On October 27, 2021, DHS, ICE and CBP jointly issued updated policies governing all DHS enforcement actions in or near protected areas.⁹⁶ The 2021 policy supersedes and rescinds all prior sensitive location policies⁹⁷ and expands areas in which enforcement actions should be avoided. The policy was developed and grounded in the following foundational principle:⁹⁸

“In our pursuit of justice, including in the execution of our enforcement responsibilities, we impact people’s lives and advance our country’s well-being in the most fundamental ways. It is because of the profound impact of our work that we must consider so many different factors before we decide to act. This can make our work very difficult. It is also one of the reasons why our work is noble.”

“When we conduct an enforcement action – whether it is an arrest, search, service of a subpoena, or other action – we need to consider many factors, including the location in which we are conducting the action and its impact on other people and broader societal interests. For example, if we take an action at an emergency shelter, it is possible that noncitizens, including children, will be hesitant to visit the shelter and receive needed food and water, urgent medical attention, or other humanitarian care.”

“To the fullest extent possible, we should not take an enforcement action in or near a location that would restrain people’s access to essential services or engagement in essential activities. Such a location is referred to as a “protected area.””

⁹⁵ FAQ ON PROTECTED AREAS AND COURTHOUSE ARRESTS, at p.4.

⁹⁶Department of Homeland Security, , Guidelines for Enforcement Actions in or Near Protected Areas, at p.2 (Oct. 27, 2021), <https://niwaplibrary.wcl.american.edu/pubs/dhs-enforcement-in-or-near-protected-areas> (Hereinafter Protected Areas Policy).

⁹⁷The rescinded policies are: Customs and Border Protection, *U.S. Customs and Border Protection, Sensitive Locations FAQs* (August 22, 2016) <http://niwaplibrary.wcl.american.edu/pubs/cbp-sensitive-location-faq/>; U.S. Customs and Border Protection, *Sensitive Location FAQs* (Aug. 22, 2016) <https://www.cbp.gov/border-security/sensitive-locations-faqs>.

⁹⁸ See PROTECTED AREAS POLICY, at p.2

“This principle is fundamental. We can accomplish our enforcement mission without denying or limiting individuals’ access to needed medical care, children access to their schools, the displaced access to food and shelter, people of faith access to their places of worship, and more. Adherence to this principle is one bedrock of our stature as public servants.”

The policy includes a non-exhaustive list of designated protected areas that builds on the previous sensitive locations policy. Some examples of protected areas include but are not limited to:⁹⁹

- Schools, such as known and licensed daycares, pre-schools and other early learning programs; primary schools; secondary schools; post-secondary schools up to and including colleges and universities; as well as scholastic or education-related activities or events, and school bus stops that are marked and/or known to the officer, during periods when school children are present at the stop;¹⁰⁰
- Other places where children gather, such as a playground, recreational center, or foster care facility;¹⁰¹
- Medical treatment and health care facilities, such as hospitals, doctors’ offices, accredited health clinics, and emergent or urgent care facilities;¹⁰²
- Places of worship, such as churches, synagogues, mosques, and temples;¹⁰³
- Religious or civil ceremonies or observances, such as funerals and weddings;¹⁰⁴ and
- During a public demonstration, such as a march, rally, or parade;¹⁰⁵
- Social services establishment, such as a crisis center, domestic violence shelter, victims service center, homeless shelter, or food bank or other establishment distributing essential goods;¹⁰⁶
- Disaster or emergency response designations, such as evacuation routes, where shelter or emergency supplies are being distributed.¹⁰⁷

Generally, Immigration Enforcement Actions At Courthouses, Protected Locations and Against Victims Only With Prior Approval

Both VAWA Confidentiality federal laws and Department of Homeland Security (DHS) policies require supervisory approval from DHS Headquarters or leadership at ICE or CBP to

⁹⁹See PROTECTED AREAS POLICY, at p.2; *see also* FAQ ON PROTECTED AREAS AND COURTHOUSE ARRESTS; *see also* United States Immigration and Customs Enforcement, Enforcement and Removal Operations, *FAQ on Sensitive Locations and Courthouse Arrests* (Jan. 31, 2018) <https://www.ice.gov/ero/enforcement/sensitive-loc>.

¹⁰⁰PROTECTED AREAS PRESS RELEASE at p. 2; *See* PROTECTED AREAS POLICY, at p.2.

¹⁰¹ PROTECTED AREAS PRESS RELEASE at p.2; *See* PROTECTED AREAS POLICY, at p.3.

¹⁰² PROTECTED AREAS PRESS RELEASE at p.2; *See* PROTECTED AREAS POLICY, at p.2.

¹⁰³PROTECTED AREAS PRESS RELEASE at p.2; *See* PROTECTED AREAS POLICY, at p.2.

¹⁰⁴PROTECTED AREAS PRESS RELEASE at p.2; *See* PROTECTED AREAS POLICY, at p.3.

¹⁰⁵ PROTECTED AREAS PRESS RELEASE at p.2 *See* PROTECTED AREAS POLICY, at p.3.

¹⁰⁶ PROTECTED AREAS PRESS RELEASE at p.2; *See* PROTECTED AREAS POLICY, at p.3.

¹⁰⁷ PROTECTED AREAS PRESS RELEASE at p.2; *See* PROTECTED AREAS POLICY, at p.3.

initiate and immigration enforcement action at a courthouse or against a person whom enforcement officials have reason to believe is a crime victim.

- “The interim guidance also makes clear that civil immigration enforcement is permitted against public safety threats in the absence of hot pursuit where necessary *and with prior approval*. The memorandum directs supervisors to ensure that all employees are trained annually on this policy and that such training is documented and reviewed by agency counsel. ICE and CBP will each provide a monthly report to Secretary Mayorkas... detailing all planned or executed civil immigration enforcement actions in or near courthouses, including the basis under this policy for each enforcement action.”¹⁰⁸ (Emphasis added).

Enforcement actions in or near protected areas may occur under a very narrow set of circumstances. Absent exigent circumstances an agent or officer must seek approval from their agency’s headquarters before taking action in or near a protected area. The following are circumstances in which enforcement action may be taken:¹⁰⁹

- Action involves a national security threat
- There is imminent risk of death
- Action involves the hot pursuit of an individual who is a threat to public safety
- There is an imminent risk that evidence to a criminal case will be destroyed
- A safe alternative location does not exist

DHS directs it immigration enforcement officials to seek prior approval from they Agency Headquarters before they proceed with an enforcement action at any protected location and requires reporting to Headquarters and the DHS Secretary’s office of all enforcement actions taken at courthouses or protected locations.¹¹⁰

“Absent exigent circumstances, an Agent or Officer must seek prior approval from their Agency’s headquarters, or as you otherwise delegate, before taking an enforcement action in or near a protected area. If the enforcement action is taken due to exigent circumstances and prior approval was therefore not obtained, Agency headquarters (or your delegate) should be consulted post-action. To the fullest extent possible, any enforcement action in or near a protected area should be taken in a non-public area, outside of public view, and be otherwise conducted to eliminate or at least minimize the chance that the enforcement action will restrain people from accessing the protected area.”¹¹¹

¹⁰⁸ PROTECTED AREAS PRESS RELEASE at p.2.

¹⁰⁹ PROTECTED AREAS POLICY at p. 3-4; *see also* FAQ: PROTECTED AREAS AND COURTHOUSE ARRESTS.

¹¹⁰ PROTECTED AREAS POLICY at p. 4-5.

¹¹¹ PROTECTED AREAS POLICY at p. 4.