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AMERICAN UNIVERSITY
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When State Family Law and Federal Immigration Laws Intersect: Promoting Access to the Courts and Just Outcomes for Immigrants

**NEW MEXICO WEBINAR
SEPTEMBER 15, 2017**

NIWAP

National Immigrant Women's Advocacy Project at the
American University Washington College of Law

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Judge Lora Livingston

Presiding Judge of the 261st Civil District Court
Travis County, Texas



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Learning Objectives

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

- Know how accurate immigration law information results in just and fair outcomes in state courts
- Carry out the role Congress delegated to State Court Judges in Special Immigrant Juvenile Status (SIJS) and U Visa cases
- Identify minors before your court who are SIJS eligible and know how to issue SIJS predicate orders
- Be able to issue U visa certifications in cases of immigrant crime victims before the court

New Mexico Demographics (2015)

- Total foreign born population = 196,995 (=9.4% of the state's 2,085,109 population)
 - 36.3% naturalized citizens
 - 60.4% lawful permanent residents or temporary visa holders
 - 3.26% undocumented
- 40.9% entered the U.S. in 2000 or later
- 21.9% of children under 18 have one or more immigrant parents
 - 78.1% of these children are U.S. Citizens

<http://www.migrationpolicy.org/data/state-profiles/state/demographics/NM> (April 2017)

New Mexico – Countries/Regions of Origin (2015)*

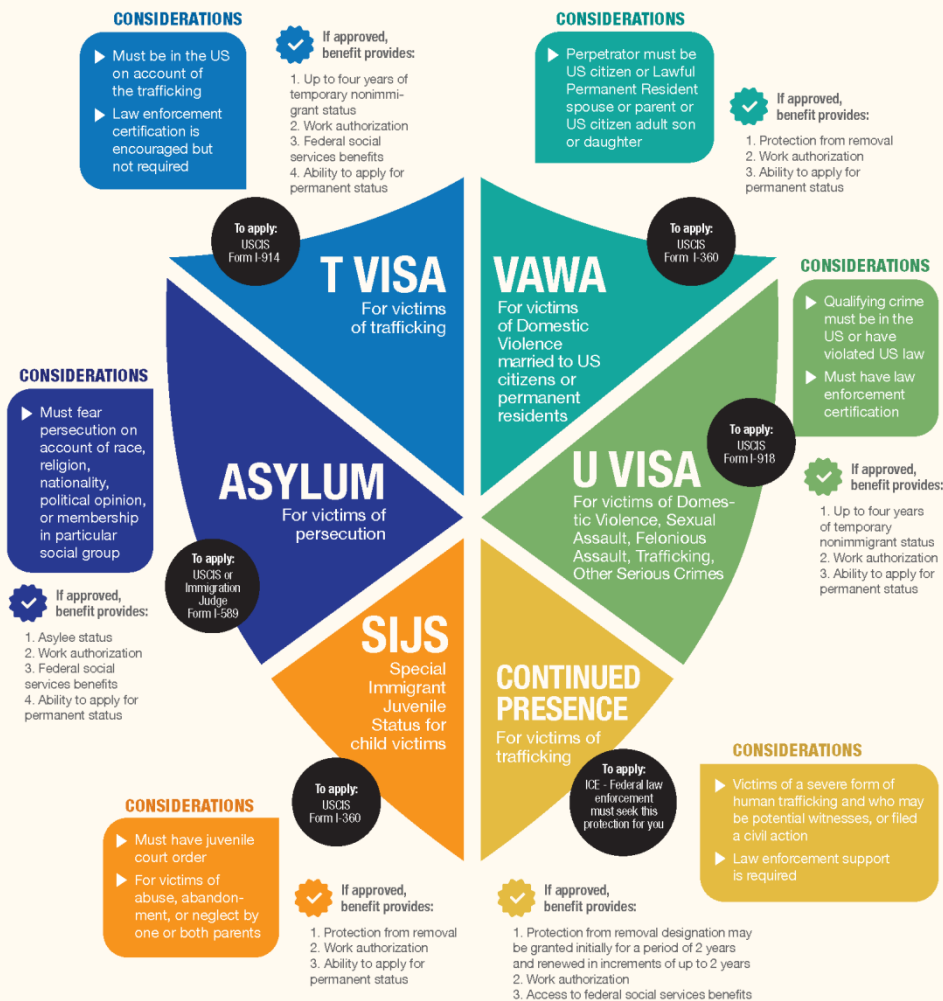
- ▶ Latin America – 76.9%
 - ▶ Mexico (70.8%)
 - ▶ Other Central America (2.6%)
 - ▶ South America (1.5%)
- ▶ Caribbean - 2.1%
- ▶ Canada - 1.7%
- ▶ Africa - 1.9%
- ▶ Europe - 7.5%
- ▶ Asia – 11.0%
 - ▶ Eastern China (3.6%)
 - ▶ South Central Asia (2.9%)
 - ▶ Southeastern Asia (4.4%)
- ▶ Limited English Proficiency
•(Speak English less than very well)
 - ▶ Naturalized citizens 36.8%
 - ▶ Non-citizens 64.3%

*Source: <http://www.migrationinformation.org/datahub/state.cfm?ID=NM> (April 2017)

DHS Victim Protection Memos/Guidance

- VAWA Confidentiality
- 384 DHS computer system (VAWA, T visas, U visas)
- DHS victim witness protection memo
 - See Web library www.niwap.org/go/sji for:
 - Bench Card: Immigration Rights of Battered Immigrant Spouses, Children and other Immigrant Crime Victims
 - DHS Victim Protection Resources on
 - U visa
 - Special Immigrant Juvenile Status

PROTECTIONS FOR IMMIGRANT VICTIMS



DHS.GOV/BLUE-CAMPAIGN

For victim support call 1-888-373-7888 or text INFO or HELP to BeFree (233733)

Legal Immigration Status Options for Non-citizen Crime Victims and Children

- VAWA self-petition
 - Abused spouses/children of US citizens and lawful permanent residents
 - Abused parents of U.S. citizens over 21 years of age
- VAWA cancellation of removal
 - Abused spouses/children of US citizen and lawful permanent residents protection from deportation
- Battered spouse waiver
 - Abused spouses of US citizens with two-year conditional permanent residency
- Asylum
 - Well founded fear of persecution on account of race, religion, nationality, political opinion, social group
 - Domestic violence as gender based asylum
- U visa
 - Has been, is being or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing
 - Substantial harm from criminal activity
- T visa and Continued Presence
 - Victims of severe forms of human trafficking
- Special Immigrant Juvenile (SIJS)
 - Children abused, battered, abandoned or neglected by one or both parents
- Deferred Action (DACA)
 - Deferred action for child arrivals including Dreamers
- DHS Prosecutorial Discretion
 - “low priority” for removal immigrants -- survivors, witnesses, parents, children, elderly, disabled
 - Humanitarian detention release

Access to Legal Immigration Status:

- Provides a path to economic security
 - Work authorization
 - Driver's licenses (including federally recognized)
 - State and federally funded benefits vary by immigration status applied for including in New Mexico:
 - TANF
 - Health Care exchange access
 - Health care subsidies
 - Child Care
 - Food Stamps for children
 - Financial aid to attend university

Access to Legal Immigration Status:

- Removes fear of deportation, promotes stability and facilitates access to:
 - VAWA confidentiality statutory limitations on removal
 - Nurturing family relationships
 - Stable school environment
 - Mentors, role models and community support

VAWA Confidentiality Prongs

Non-Disclosure

Protects victims **who have filed** a protected case with DHS

Violation = \$5,000 fine and/or disciplinary action

Abuser-Provided Information Prohibition

Includes family members of abusers, crime perpetrators and their agents

Protects:

- * **All victims abused by a spouse or parent**
- * **All victims in the process of applying for U or T visas**
- * **Abused spouses of visa holders with VAWA work authorization filed**

Location Prohibitions

Protects: **All Victims**

Requires:

No action at protected locations
OR

Notice to Appear must state how they complied with VAWA confidentiality

DHS VAWA Confidentiality Computer System

- Directs use of “red flag” “384” computer system to identify victims who have already filed for or have been granted victim-based immigration relief
- Reminds immigration officers, agents, attorneys about immigration law protections for
 - Victims of domestic violence
 - Crime victims
 - Human trafficking victims

Locational Prohibitions

- Enforcement actions are not to be taken unless the action is certified in advance through a specific process aimed at protecting victims:
 - A shelter
 - Rape crisis center
 - Supervised visitation center
 - Family justice center
 - Victim services program or provider
 - Community based organization
 - Courthouse in connection with any
 - Protection order case, child custody case, civil or criminal case involving or related to domestic violence, sexual assault, trafficking, stalking



Immigrant Children in Family Court

- May have options for legal immigration status
 - Child's own application
 - Child included in parent's application
- Immigrant children's best interests are promoted when state courts:
 - Sign U visa certifications
 - Award custody to non-abusive parents, family members, guardians
 - Issue detailed findings required for children to apply for Special Immigrant Juvenile Status
 - Distribute U.S. DHS legal rights for victims/children brochures
- **Update: unaccompanied minors HHS/ORR placements with sponsors**

U Visas and U Visa Certification

U Visa for Immigrant Victims

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

U Visa Qualifying Criminal Activity

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

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

U Visa Criminal Activities

- Domestic violence (including child abuse) 45.9%
- Rape, sexual assault, incest, trafficking 30.4%
- Felonious assault, murder, manslaughter 9.9%
- Kidnapping, being held hostage, unlawful criminal restraint, torture 8.47%
- Blackmail, extortion, perjury, obstruction of justice, attempts, conspiracy, solicitation 5.3%

U Visa Certification: Who Can Certify?

- Federal, state, and local
 - Police, sheriffs, FBI, HSI, ATF...
 - Prosecutors
 - **Judges, Magistrates, Commissioners, Judicial Referees, Masters, Alderman, ALJs, Surrogates, Chancellors**
- Departments of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC)
- Child and Elder Abuse investigators and agencies
- Other government agencies

Helpfulness in the Regulations

- DHS determines whether a victim:
 - has been helpful, is being helpful or is likely to be helpful in the
 - *Detection, or Investigation, or Prosecution, or Conviction or Sentencing*
- Certification provides required evidence

Examples of Helpfulness

- Calling 911 to report a crime
- Filing a police report
- Providing a statement to police, prosecutor, court
- Seeking a protection order
- Litigating the abuse as part of a custody case
- Appearing at court in a criminal case
- Serving as a witness in a prior prosecution
- Testimony in a sentencing hearing
- EEOC witness in an employment case

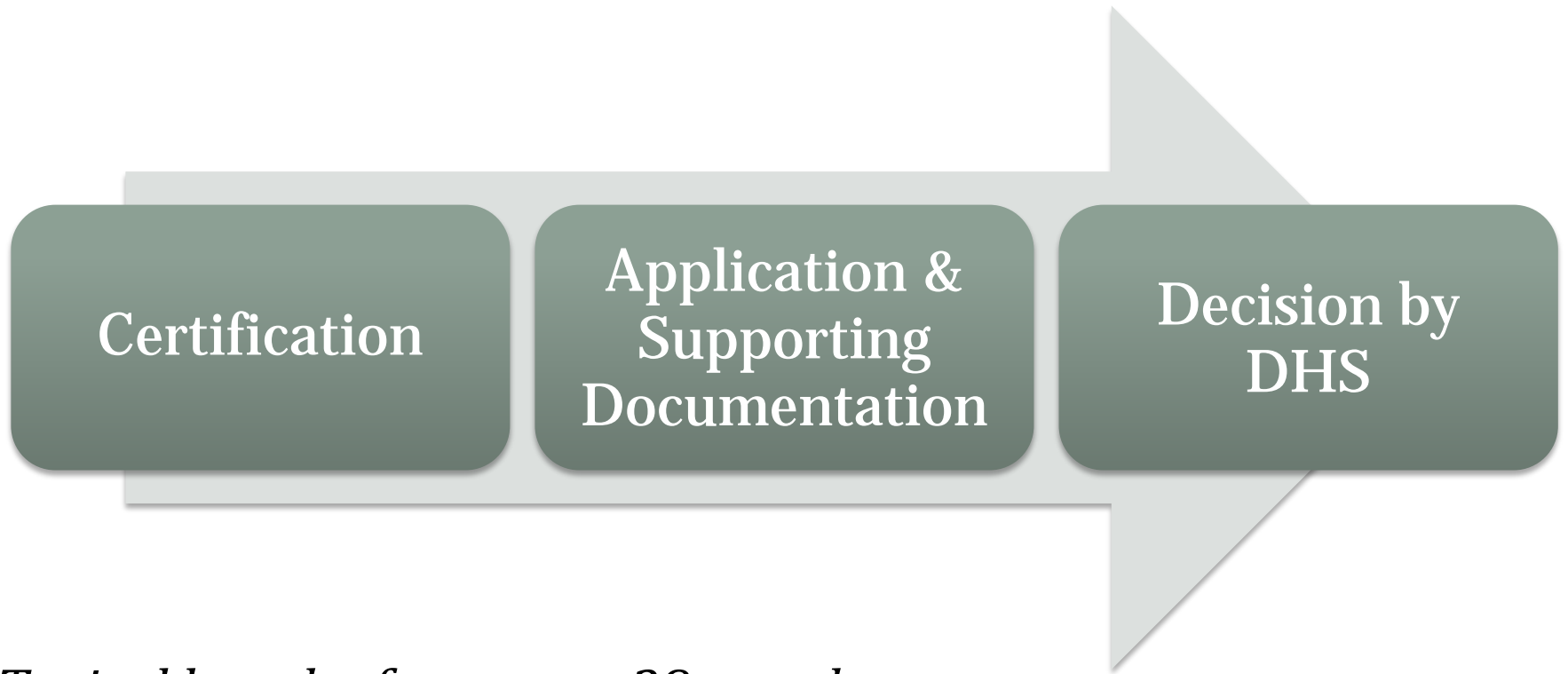
Helpfulness in the Regulations

- Judges, law enforcement and other certifiers
 - May complete U visa certification if they observe or detect a victim's helpfulness
 - Can be a civil, family or criminal case
- The investigation, prosecution or case
 - Can still be ongoing
 - Can be closed
 - May have settled
 - Occurred a long time ago
 - May never have been criminally prosecuted

U Visa Certification in Proceedings Involving Children in Immigrant Families

- Child or non-abusive parent seeking U visa
- Proceedings
 - Protection order
 - Custody
 - Criminal case
 - Child abuse case
 - Other civil case where the court is provided evidence and making findings of abuse

The U-visa Application Process



Typical length of process = 28 months

Things to Know About Certifying

- “Do I believe this person was a victim of a qualifying crime?”
- “Did the person assist or willing to assist in detection, investigation, conviction, prosecution and/or sentencing?”
- Question is **NOT**:
 - Is/was there a prosecution?
 - Was there an arrest of the offender?
 - Do I have proof beyond a reasonable doubt?
 - Is this within the statute of limitations?
 - Was there a conviction?

New DHS Forms Published Make Judicial Certification Easier

- Judges' certification can occur when the judge signing the certification
 - Has probable cause
 - Made findings
 - Issued a ruling
 - Include the type of proceeding and
 - If orders were issued attach a copy of the order

Minnesota Judicial Ethics Opinion U Visa Certification (June 26, 2015)

- Judge may sign certifications when
 - “adequate basis for the averments made in the certification”
- Certification after the criminal or civil case is completed does not raise impartiality issues
 - In open cases should disclose certification to the parties
- Certification describes immigrant victim’s past/present helpfulness -- Does not vouch for character
- In civil and criminal cases whether to sign a U visa certification is a an issue of law that does not implicate judicial ethics codes

Full Opinion Available at: <http://www.bjs.state.mn.us/file/advisory-opinions/opinion-2015-2-final.pdf>
Hon. Pendleton also published a training update based on the opinion at: <http://pendletonupdates.com/>

Problems With Reported Decisions

- No Chevron deference to DHS regulations
- Result in legally incorrect opinions: E.g.,
 - Judges cannot certify
 - In an open case/closed case
 - Judges do not investigate or prosecute
 - Regulations say judges certify based on detection, conviction, sentencing
 - In case heard by another judge
 - Requires a criminal case or helpfulness to the judge
 - Not recognizing that past/present helpfulness
Congressionally deemed sufficient

U Visa Facts and Benefits

- Only 10,000 U-visas can be granted annually
 - 70,000+ backlog
 - The U visa grants a temporary 4 year stay
- Wait list approval
 - Work authorization (28 months) and driver's licenses
- Limited state funded public benefits (NIWAP benefits map)
- Lawful permanent residency after 3 years if
 - Cooperation or not unreasonably refuse to cooperate AND humanitarian need, family unity or public interest
- U.S. citizenship after 5 years of lawful permanent residency+ proof of good moral character

Overview Special Immigrant Juvenile Status (SIJS)

- Humanitarian protection that provides a path to lawful permanent residency
- Created by Congress in 1990 to help and protect foreign born children living in the United States
 - who have been abused, or abandoned, or neglected by at least one parent.

Special Immigrant Juvenile Status (SIJS)

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

State Court Findings Needed for SIJS

State Law Applies To Each

1. The court order regarding the child care, custody, dependency or placement of an immigrant child with
 - An individual (e.g. non-abusive parent, grandparent, kinship care, guardian, next friend) OR
 - State agency, private agency, including foster care system
2. Reunification of the child is not viable with a parent due to the parent's abuse, abandonment, or neglect
3. It is not in the child's best interest to return to their home country
 - Best caregiver identification/often not necessary to compare countries

Apply State Law

- Best Interests
- UCCJEA – Temporary Emergency Jurisdiction

SIJS: Congressional Goals

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

SIJS: State and Federal Roles

State Courts With Jurisdiction Over Children

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

DHS Adjudicators

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

State Courts Regularly Make Custody & Care Determinations

- Who will be the custodian/guardian of the minor
- Who the minor will live with
- Who will receive child support for the child living with them
- Whether the minor will be committed to the custody of the state or private agency for care, treatment, or rehabilitation
- Issue orders directing the child's care
 - Child support, health care, applying for benefits or services for the child

All of the Following are Potentially Eligible for SIJS

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

What Kinds of Proceedings Might You See SIJS Eligible Children In?

Types of Proceedings With Jurisdiction To Make SIJS Findings:

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

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

SIJS in State Courts

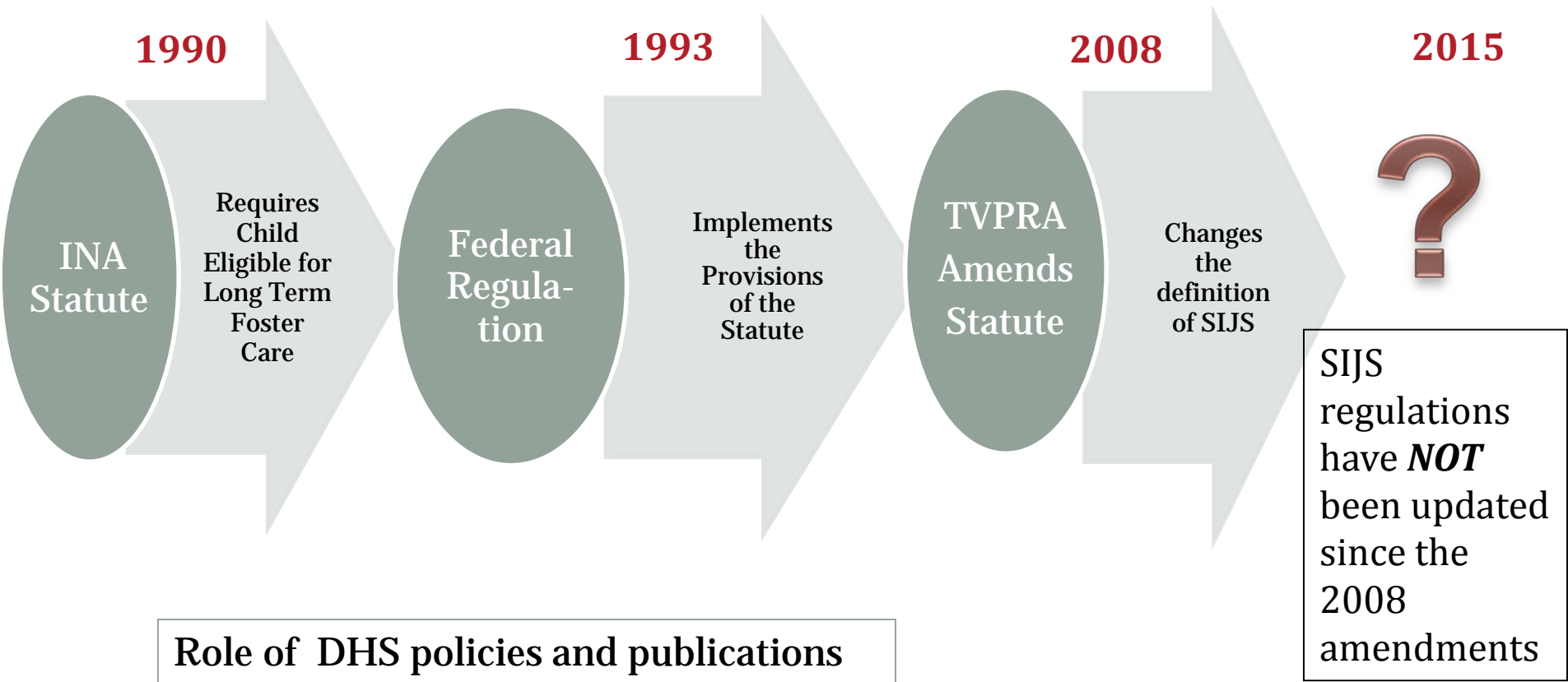
- Many SIJS cases are for 15-17 year old minors
 - State court order + filing before the child ages out
 - Up to age of majority set by state law
- SIJS is an option any time an abused, abandoned or neglected child is not a
 - Citizen or lawful permanent resident

“One *or* Both Parent” Requirement



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

Statute vs. Regulation



Best Practice for Findings

- Issue orders that demonstrate to DHS that the court made an informed decision
 - Make factual findings regarding abuse, abandonment and/or neglect
 - Separately for each abusive parent
 - Finding that the child is in need of protection as a result of having been abused, abandoned or neglected
 - Trauma research
 - <http://niwaplibrary.wcl.american.edu/pubs/effects-of-trauma-on-minors-fact-sheet/>

What Children with SIJ Status Receive

- While case is pending:
 - Protection from deportation and removal
 - As lawfully present children – health care exchanges (no subsidies)
 - Programs and services necessary to protect life and safety

What Children with SIJ Status Receive

- At approval:
 - Lawful Permanent Residency (separate but usually concurrent filing)
 - Legal work authorization
 - Brings access to state issued driver's licenses and identification cards
 - Eligible for citizenship after 5 years
 - Post secondary educational grants and loans, public and assisted housing
 - Food stamps (only until the immigrant child turns age 19)

SIJS' may NEVER file family petition for either of the child's natural parents

IMMIGRANT LITIGANTS IN FAMILY COURTS

Impact of State Court Orders in the Immigration Case

- Court orders contain evidence of
 - Abuse, abandonment, neglect
 - Family relationships including marriage
- Divorce can result in an immigrant family member being denied immigration relief
 - Tactic used by perpetrators of spouse, child, elder abuse
- Annulment instead of divorce can set up a spouse for a federal marriage fraud prosecution

Protecting Immigrant Victims, Protects Children

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

Materials Immigrant Victims and Custody Bench Card - <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts/family-law>

Is Immigration Status Relevant to Custody?

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



Myth vs. Fact:

Parents Without Legal Immigration Status

Myth

1. Deportation is imminent
2. Parent is likely to flee U.S. with child
3. The parent has no livelihood
4. Legally present parent must have custody in order to file for benefits for child

Fact

1. DHS policies prevent detention/removal of immigrant parents who are:
 - Parents of U.S. citizen/Lawful permanent resident children
 - Primary caretaker parents of minor children without regard to the child's immigration status
2. Legal immigrants/naturalized citizens are more likely to flee with children, especially when
 - There have been threats of kidnapping children
 - They are dual nationals
 - They travel freely to and from U.S.
3. Abused immigrant parents in family court have a path to immigration relief, work authorization & some benefits
4. Custody does not affect parent's ability to file for or gain immigration benefits for their children.

Immigrant Parents and Child Custody

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

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

Parental Interest Directive Aug 2013

- If parents are detained:
 - Placement near children and family court
 - Bring parents to family court to participate in cases involving children
 - Facilitate visitation
 - Help children travel with deported parent – obtain passports for children
 - Bring deported parents back to the US for custody and parental rights cases

PROTECTION ORDERS



Protection Orders

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

Use Creative Remedies to...

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

Technical Assistance and Materials

- Power Point presentations and materials for this webinar at www.niwap.org/go/jffnm
- Judicial Training Manual at www.niwap.org/go/sji
 - **NIWAP Technical Assistance:**
 - Call (202) 274-4457
 - E-mail info@niwap.org
- Web Library: www.niwaplibrary.wcl.american.edu

Evaluations



Thank you!

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