

State Courts and the Protection of Immigrant Crime Victims and Children

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Introductions

- Commissioner Loretta Young
 - Family Court of the State of Delaware, New Castle County
- Leslye Orloff
 - National Immigrant Women's Advocacy Project, American University, Washington College of Law

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
- Recognize facts that indicate a party qualifies for:
 - Legal immigration status
 - Protection from deportation/low priority for removal
- Understand the role Congress envisioned for judges signing U visa certifications
- Make appropriate findings in state court cases needed for or helpful to an immigrant crime victim's immigration case

Idaho Demographics (2014)*

- ❖ Total foreign born population – 97,353
- ❖ 6% of the state's ~1.6 million people is foreign born
 - 36.2% naturalized citizens
 - ~60.7% legal permanent residents or temporary visa holders
 - ~3.1% undocumented (American Immigration Council)
- ❖ 51.9% rise in immigrant population from 2000 to 2014
- ❖ High proportion of new immigrants
 - 25.9% entered in the 1990s
 - 40.9% entered 2000 or later
- ❖ 12.9% of children in the state under age 18 have 1 or more immigrant parents
 - 87.1% of children with immigrant parents in the state are U.S. citizens

*Source: <http://www.migrationinformation.org/datahub/state.cfm?ID=ID>
(June 2016)

Idaho – Countries/Regions of Origin (2014)*

- ▶ **Latin America – 60.8%**
 - ▶ Mexico (55.6%)
- ▶ **Europe – 9.8%**
 - ▶ Eastern Europe (2.6%)
 - ▶ United Kingdom (1.8%)
 - ▶ Germany (2.4%)
- ▶ **Canada – 6%**
- ▶ **Asia – 20.3%**
 - ▶ Eastern Asia - including China/Taiwan, Korea (6%)
 - ▶ South Central Asia - including India, Iran (3.2%)
 - ▶ Southeastern Asia – including Philippines, Vietnam (9.5%)
- ▶ **Africa – 2.6%**

*Source: <http://www.migrationinformation.org/datahub/state.cfm?ID=ID>
(June 2016)

DHS' Roles

- Protecting vulnerable persons - USCIS
 - Non-citizen crime victims
 - Children
 - Special Immigrant Juvenile Status
 - Deferred Action for Childhood Arrivals
 - Children included in victim's applications
- Adjudicating legal immigration status -USCIS
 - Visas, lawful permanent residency, citizenship
- Admitting persons into the U.S. - CBP
- Removing undocumented immigrants who are high priorities for removal – ICE, CBP



DHS Priorities for Enforcement and Victim Protection: DHS Memos/Guidance

- DHS victim witness protection memo
- Prosecutorial discretion re: caregiving parents
- Humanitarian release
- 384 DHS computer system (VAWA, T visas, U visas)
- Memorandum on DHS detention priorities
 - *See Web library for:*
 - Bench Card: DHS Enforcement Priorities Information for State Court Judges
 - DHS Victim Protection Resources and Guidance

Department of Homeland Security



Coercive Control Over Immigration Status

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



Immigration-Related Abuse

- Refusal to file immigration papers on spouse/child/parent's behalf
- Threats or withdrawal of victim's immigration case
- Forcing a victim to work with false documents
- Calls to DHS to:
 - Have the victim deported
 - Deny victim's immigration case



Immigration-Related Abuse as a Lethality Factor

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



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

Materials overview of remedies - <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts/benefits>

Immigration Law's Domestic Violence Definition “Battering or Extreme Cruelty”

Any state crime committed against a family member sufficient for issuance of a protection order including sexual abuse, stalking, threats, attempts AND/OR:

- Emotional abuse;
- Economic abuse;
- Using children;
- *Deportation threats and immigration related abuse;*
- Intimidation;
- Social isolation;
- Degradation;
- Possessiveness;
- Coercive control;
- Harming pets

Immigrant Victims and Children Receive

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

Courts Can Play a Role



- Distribute information
 - DHS brochures
 - Non-profit Legal Services Agencies
- Provide language Access
- Recognize potentially eligible immigrants
- Know how to obtain accurate information about current immigration laws, policies and practices
 - Technical assistance through NIWAP's SJI grant

State Courts' Role:

- Make detailed findings
- Federal immigration law role
 - U visa certification
 - Special Immigrant Juvenile Status findings
- Increases courts options for orders re: children and custodial parents, guardians and kinship care:
 - Greater access to state and federal public benefits
 - Can obtain drivers licenses
 - Legal work authorization
 - Protection from deportation

U Visa for Immigrant Victims

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

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

U Visa Criminal Activities

- Domestic violence 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 Facts and Benefits

- Only 10,000 U-visas can be granted annually
- The U visa grants a temporary 4 year stay
- Work Authorization (4 year)
- Lawful permanent residency after 3 years if
 - Cooperation or not unreasonably refuse to cooperate
 - + humanitarian need, family unity or public interest
- U.S. citizenship after 5 years of lawful permanent residency+ proof of good moral character

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?

Certifying Judges Will Need to Amend Form

- Judges may amend the language of the form to accurately reflect the basis upon which the judge is signing the certification.
 - Probable cause, findings, rulings
 - Include the type of proceeding and
 - If orders were issued attach a copy of the order
- Judges can should amend current form --examples:
 - Based upon my having probable cause I certify”
 - Based upon my issuance of a civil protection order ...I certify”
 - Based on my having presided over the criminal case ... I certify”
 - “Based upon my findings in a [custody/divorce] case of [domestic violence/child abuse] ... I certify”

Special Immigrant Juvenile Status (SIJS)

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

State Court Findings Needed for SIJS

State Law Applies To Each

1. The court issued 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

SIJS Findings Possible In ...

- Divorce
- Custody
- Legal separation
- Child support
- Child abuse
- Termination of parental rights
- Paternity
- Adoption
- Protection order
- Guardianship
- Motions for Declaratory Judgments
- Dependency
- Delinquency

Procedural Issues: May require consolidation of cases to attain ability to make needed findings

Order must be issued before the age of majority in the state

IMMIGRANT LITIGANTS IN FAMILY COURTS

Impact of State Court Orders on 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 Mothers, Protects Children

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

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

How Immigrant Parents End Up In Department of Homeland Security Custody

- Abusers/crime perpetrators/employers report them
 - VAWA self-petitions 38.3%; U visas 26.7%
- Traffic stops
 - VAWA self-petitions 28.6%; U visas 30.1%
- Immigration enforcement at the worksite
- CPS, welfare workers, health care providers, others
- Victims call the police for help and police
 - Make a dual arrest;
 - Fail to obtain qualified interpreter and arrest the victim
 - Under Secure Communities program all arrested persons reported to DHS

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

Custody Involving Immigrant Parents and/or Immigrant Children

- Accurate information about immigration status helps judges issue fair rulings in custody cases where immigration status of a parent or child may be raised
- Tools for Judges
 - Help avoid reliance on incorrect information provided by parties about immigration status & likelihood of detention or deportation
 - Provide accurate information when needed
 - www.Niwap.org/go/sji
 - Direct technical assistance to state court judges, commissioners, magistrates, court staff
 - Bench cards, charts, training materials and webinars
 - In person SJI funded trainings in states/local jurisdictions



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

VAWA Confidentiality

- Enforcement locational prohibitions
- DHS cannot disclose information about an immigrant victim's case
- DHS barred from relying on information provided by perpetrators (or their family members) to initiate an enforcement action against or deny a victims case
- **Violation can result in dismissal of immigration case against victim**

Why is VAWA Confidentiality important for state courts?

- Prohibited enforcement locations include courthouses
- Perpetrators are using state court discovery to obtain federal VAWA confidentiality protected information that
 - DHS will not release
 - Cannot be released under federal law

VAWA Confidentiality Upheld By Federal Courts

- *Hawke v. DHS* (N.D. CA, 2008) – VAWA Self-Petition Case
- *Demaj v. Sakaj* (D. Conn, 2012) – U Visa Case
- VAWA confidentiality information is privileged:
 - Applies unless immigration case dismissed on its merits
 - Perpetrators: domestic and sexual abuse, Trafficking, felonious assault, kidnapping and other listed crimes
 - Despite relevance barred as contrary to federal intent –
 - Prohibit disclosure of confidential application materials to the perpetrator
 - Stop perpetrator from interfering with and undermining victim's immigration case and causing her deportation
 - Protects information in federal immigration case file including when victim discloses existence of the case

Federal Criminal Court VAWA Confidentiality Ruling

- Reached same conclusion federal immigration case file is not discoverable
- Reasoning similar to why FBI files not discoverable in state criminal court cases
- Not in state's control

Issues That Arise in State Criminal Court Proceedings Involving Immigrants

Responsibilities in Plea Bargaining Under *Padilla v. Kentucky* 130 S. Ct. 1473 (2010)

- Plea bargains and admissions of guilt may have serious consequences for immigrant defendants
- *Padilla* held that all immigrant defendants must receive legal advice about the potential consequences plea deals may have on their immigration status.

Consequences include:

- Makes the defendant removable;
 - Makes the defendant inadmissible;
 - Makes defendant ineligible for cancellation of a removal order;
 - Prevents defendant from attaining citizenship
- *Failing to disclose these risks amounts to ineffective assistance of counsel.*

Finality of Convictions Under Federal Immigration Law

- May constitute a conviction under immigration law even when no conviction under state law
 - Deferred adjudication, diversion , and drug court programs
- An expungement is still a conviction under immigration law
- Any formal judgment of guilt entered by the court, OR If no adjudication of guilt but:
 - The immigrant entered a plea or nolo contendere
 - Immigrant admitted sufficient facts to warrant finding of guilt AND judge has ordered some form of punishment, penalty or restraint on liberty

Non-Waivable Offenses Can Result in Denial of Lawful Permanent Residency to SIJS Children

- Moral turpitude crimes
 - Theft and shoplifting convictions
 - Domestic violence
 - Child abuse or exploitation
 - Espionage, terrorist activities, genocide, torture, or extrajudicial killing
- Drug crimes
 - Findings and admissions regarding drugs (except less than 30 grams of marijuana)
 - Controlled substance traffickers
- Multiple criminal convictions
 - Juvenile adjudications are not convictions

Deportation Grounds = Conviction For:

- Crimes of moral turpitude
 - One crime that carries maximum possible sentence of 365 days or more or two crimes unless part of a single scheme
 - Crimes involving conduct that is inherently “base, vile, depraved and contrary to moral standards” or “malice”
 - Theft, fraud, sex offenses, violence
 - Intentional bodily or property harm or serious harm caused by reckless act
- Drug/firearm offenses
 - any offense “relating to” controlled substances
 - Exception under 30 grams of marijuana for personal use ;
 - Many types of firearms offenses
 - Drug Offenses: “reason to believe” enough no conviction required

Aggravated Felony Can be Felonies or Misdemeanors

- Theft, burglary if sentence is 365 days or more
 - Including petty theft
- Crimes of violence and 365 days or more sentence
- Murder, rape, child molestation
- Drug offenses
- Obstruction of Justice
- Perjury
- Trafficking in firearms
- Ransom
- Child pornography
- Treason



Key Deportable Convictions

- Domestic violence offenses
 - Domestic violence (VAWA definition)
 - Stalking
 - Child Abuse, Neglect, Abandonment
 - Violation of protective provisions of protection order (finding enough)
- Crimes of Moral Turpitude
- Aggravated Felonies
- Managing a prostitution business
- Effect on VAWA self-petitioners and U visa cases

DOJ Language Access: Courts Responsibilities

Laws Governing Language Assistance to Limited English Proficient (LEP) Persons

- Civil Rights Act of 1964 Title VI: prohibits national origin discrimination by programs receiving federal funding or assistance.
- Lau v. Nichols (1973): U.S. Supreme Court held
 - “failing to take reasonable steps to ensure MEANINGFUL access for LEP persons is national origin discrimination under Title VI”
- Presidential Executive Order 13166 (2000): Title VI language access requirements apply to courts & all federally *conducted and funded* activities
- U.S. Department of Justice Clarifying Memorandum Regarding Limited English Proficiency and Executive Order 13166 (2001):
 - Delivery of LEP services is at its zenith when denial or delay could have life or death or other serious implications
- U.S. Department of Justice Memo on Language Access Requirements for State Courts (2010):
 - Ensuring language access is fundamental courts and the cornerstone of the judiciary’s ability to dispense justice fairly, efficiently and accurately

DOJ LEP Directive to State Courts on Federal Civil Rights Requirements (8/20/2010)

- Translation Requirements for Documents
 - Translated petitions, court orders, and materials explaining rights and obligations.
 - Post signs and public service announcements in foreign languages advertising free qualified interpreters.
 - Language cards to accurately identify individual language needs
 - All languages spoken by the lesser of 5% of population or 1000 individuals
 - When fewer than 50 persons = 5% written notice in that language of right to receive oral interpretation

DOJ LEP Directive to State Courts on Federal Civil Rights Requirements (8/20/2010) - Interpreters

- LEP individuals are to be provided qualified interpreters
 - For all parties, defendants and witnesses and all persons whose presence is necessary or appropriate
 - E.g. parents of minors and crime victims
 - In ALL court room proceedings whether civil, criminal, administrative or other.
 - LEP individuals should not incur any fees for these services.
 - Not restricted to court rooms, also other court functions including:
 - Clerks offices, Records room
 - Alternative dispute resolution
 - All interactions with court appointed personnel such as guardians ad litem or court psychologists
 - *Pro se* clinics

How Does the Court Know When An Interpreter is Needed

- When an attorney litigant advises the court that:
 - A party, witness or person necessary/appropriate for case is LEP
 - A person involved in the case does not appear to fully understand the court proceedings in English
- When the court determines that a qualified interpreter would enhance due process and/or the court's record

Technical Assistance and Materials

- Power Point presentations and materials for this conference at www.niwap.org/go/idaho
- 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

Questions



Evaluations



Thank you!