

# **Immigration Matters Related to Domestic Violence, Human Trafficking and Abused or Neglected Children**

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# Introductions

- Judge Ramona Gonzalez
  - La Crosse, Wisconsin
- Judge Rosemary Collins
  - Rockford, Illinois
- 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 crime victim related forms of legal immigration status
- Understand the role Congress envisioned for judges and be able to sign U and T visa certifications
- Make appropriate findings in state court cases that immigrant children filing for Special Immigrant Juvenile Status must obtain form a state court

# Missouri Demographics (2016)\*

- ❖ Total foreign born population – 249,202
  - ❖ 4.1% of the state's 6 million people are foreign born
    - 47.7% naturalized citizens
    - ≈29.4% lawful permanent residents and temporary status
    - ≈22.9% undocumented
- <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/MO>
- ❖ 64.8% rise in immigrant population from 2000 to 2016
  - ❖ 8.7% of children in the state under age 18 have 1 or more immigrant parents
    - 88.4% of children with immigrant parents in the state are U.S. native.

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

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

- ▶ Asia – 34.6%
    - ▶ China (8.4%)
    - ▶ India (8.2%)
    - ▶ Vietnam (6%)
    - ▶ Korea (2.9%)
  - ▶ Americas – 29.6%
    - ▶ Mexico (17.3%)
    - ▶ South America (3.2%)
    - ▶ Caribbean (3.2%)
    - ▶ Canada (2.4%)
  - ▶ Europe – 18.5%
    - ▶ Eastern Europe (10.6%)
    - ▶ Germany (3.2%)
    - ▶ Northern Europe (2.4%)
  - ▶ Middle East – 4.9%
    - ▶ Africa – 8.4%
      - ▶ Eastern Africa (3.2%)
- Limited English Proficiency  
(Speak English less than very well)
- ▶ Naturalized citizens 31.4%
  - ▶ Non-citizens 47%

## Languages Spoken at Home

- ❖ Spanish (147,246)
- ❖ Mandarin or Cantonese (23,382)
- ❖ Other Slavic Languages (17,905)
- ❖ German (17,660)
- ❖ Vietnamese (16,784)
- ❖ Arabic (15,711)
- ❖ Yiddish or Pennsylvania Dutch (12,791)
- ❖ Russian (7,903)

\*Source: <http://www.migrationinformation.org/datahub/state.cfm?ID=MO>  
(Feb. 2018)

**When litigants and their children learn about and pursue immigration relief legally available to them how might this improve access to justice in family courts?**



# Department of Homeland Security



# Coercive Control Over Immigration Status

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

Hass, Dutton and Orloff (2000). "Lifetime prevalence of violence against Latina immigrants: Legal and Policy Implications." International Review of Victimology 7 93113

- 65% of immigrant survivors report some form of immigration related abuse (NIJ, 2003)

\*Edna Erez and Nawal Ammar, Violence Against Immigrant Women and Systemic Responses: An Exploratory Study (2003)



# Connection Between Abuse and Control Over Immigration Status

- Abuse rates among immigrant women
  - Lifetime as high as 49.8%
  - Those married to citizens and lawful permanent residents – 50.8%
  - U.S. citizen spouse/former spouse abuse rate rises to 59.5%
- Almost three times the national average

Hass, G. A., Ammar, N., Orloff, L. (2006). Battered Immigrants and U.S. Citizen Spouses



# Sexual Assault Rates Among Immigrant Women

- High school aged immigrant girls
  - Twice as likely to have suffered sexual assault as their non-immigrant peers, including recurring sexual assault
  - Decker, M., Raj, A. and Silverman, J., Sexual Violence Against Adolescent Girls: Influences of Immigration and Acculturation, 13 Violence Against Women 498, 503 (2007).
- Latina college students
  - Experience the highest incidents of attempted rape compared to White, African American and Asian college students
  - Kalof, L., Ethnic Differences in Female Sexual Victimization, 4 Sexuality and Culture 75-97 (2000).

# Best Practice: Screen for Immigration Related Abuse

- Immigration Related Abuse
  - 10 times higher in relationships with physical/sexual abuse as opposed to psychological abuse\*
  - May predict abuse escalation
  - Corroborates existence of physical and sexual abuse

\*Mary Ann Dutton, Leslye Orloff, and Giselle Hass, Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications (Summer 2000)

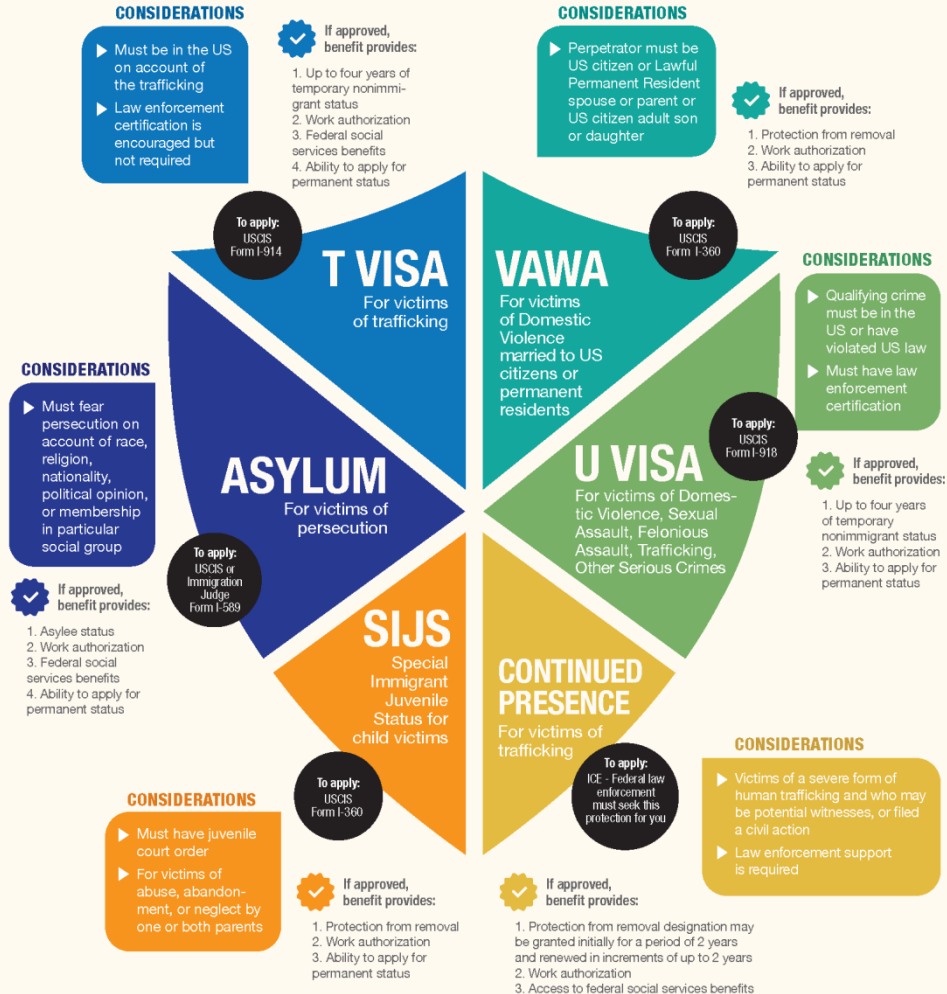


# Risks of Removal for Victims

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

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

# PROTECTIONS FOR IMMIGRANT VICTIMS



DHS.GOV/BLUE-CAMPAIGN

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

# Purpose of Crime Victim Protections

Congress enacted VAWA self-petitioning (1994) and the U and T visas (2000) to:

- Improve community policing and community relationships
- Increase prosecution of perpetrators of crimes against immigrant victims
- Allow victims to report crimes without fear of deportation
- Improve ability of victims to access justice from family, criminal and civil courts
- Enhance victim safety
- Keep communities safe

# Potential Immigration Remedies

- Applications filed with DHS
  - VAWA self petition
  - Battered spouse waivers
  - Work authorization for abused spouses of work visa holders
  - U-visa (crime victims)
  - T-visa (victims of trafficking)
  - Special Immigrant Juvenile Status
- Forms of relief from removal- granted by Immigration Judge
  - VAWA cancellation of removal
  - VAWA suspension of deportation

# General VAWA Self-Petitioning Requirements

- Subjected to Battery or Extreme Cruelty
- By a U.S. Citizen or Permanent Resident
  - spouse;
  - parent; or
  - Citizen adult son/daughter (over 21)
- With Whom Self-Petitioner Resided
  - No time period required
- Good Moral Character
- Good Faith Marriage



# U Visa Requirements

- Victim of a qualifying criminal activity
- Has been, is being, or is likely to be helpful in
  - Detection, investigation, prosecution, conviction or sentencing
- Suffered substantial physical or mental abuse as a result of the victimization
- Possesses information about the crime
- Crime occurred in the U.S. or violated U.S. law

# Special Immigrant Juvenile Status (SIJS)

- Immigration relief for unmarried children
- Under the age of majority under state law
- Victims of abuse, abandonment, neglect, or dependency
  - By at least **one parent**
- To apply must submit required findings from a state court with jurisdiction over
  - the care, custody, or dependency of the child

# 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 and state
- VAWA confidentiality protection upon filing VAWA, T or U visa case

# VAWA Confidentiality Protections

- **Abuser-Provided Information:** DHS, DOJ and the State Department are barred from taking action against a victim based *solely* upon information provided by abusers and crime perpetrators (their family members or associates)
- **Non-Disclosure:** Unless one of the enumerated exceptions apply, DHS, DOJ and the State Department cannot disclose VAWA information to anyone
  - VAWA self-petitioners, VAWA cancellation/suspension, T visa, U visa, Battered Spouse Waiver, Abused Visa Holder Spouses
- **Location Prohibitions:** Enforcement locational prohibitions unless comply with specific statutory and policy safeguards – includes courthouses in cases involving immigrant crime victims

# Why is VAWA Confidentiality Important for State Courts?

- Perpetrators are using state court discovery to obtain federal VAWA confidentiality protected information that
  - DHS will not release
  - Cannot be released under federal law
- Confidentiality protections apply to family, civil and criminal court discovery
- VAWA confidentiality's limitations on courthouse immigration enforcement in cases involving immigrant crime victims

# Small Group Activity - Case

Clara met Eduardo a naturalized U.S. citizen when he came back to his hometown to visit his family in El Salvador. Eduardo started dating Clara who was raising her 9 year old son Miguel. Eduardo began regularly coming to visit Clara who became pregnant and gave birth to a baby girl Lupe. When Lupe turned 1 year old Eduardo decided to bring Clara, Miguel and Lupe to the U.S. to live with him. Upon their arrival in the U.S. Eduardo took Clara, Miguel and Lupe's passports and became physically and sexually abusive of Clara. Eduardo's abuse turned toward Miguel when he tried to protect his mother from Eduardo and Lupe was also physically beaten by Eduardo when he said she "misbehaved". Within a year following their arrival in the U.S. Eduardo forced both Clara and Miguel to work for his family's business and never paid them for their labor. One night when Miguel was 13 and Lupe was 5, Eduardo's rage led to severe beatings with a belt of Miguel and of Lupe. When Clara intervened to protect the children, Eduardo strangled her until she passed out. The neighbors call the police for help who arrested Eduardo for attempted murder and child abuse. The police came took Clara to the hospital and took both children into care of the state.

- What forms of immigration relief do the abused family members qualify for?



# Judicial Role

- Make detailed findings
  - Family relationships: Marriage and Parent child relationship
  - Battering, extreme cruelty, child abuse, elder abuse, child abandonment, neglect, sexual assault, stalking
  - Apply and cite state law
- Role Congress created for state court judges in
  - U/T visa certification
  - Special Immigrant Juvenile Status findings
- Distribute DHS produced know your rights information available at your courthouse

# Access to Public Benefits in Missouri

- TANF & TANF funded childcare
  - T visas, VAWA self-petitioners (& their children)
  - SIJS children, U visas 5 years after lawful permanent residency
- Food Stamps
  - T visas (& their children)
  - Under 18 children of VAWA self-petitioners
- Health Insurance Exchange
  - T visas (& their children) - subsidies
  - VAWA self-petitioner (& children) - no subsidies
  - SIJS applicant children – no subsidies



# Access to Public Benefits in Missouri

- Educational Grants/Loans (FAFSA)
  - T visas, VAWA self-petitioners (& their children)
  - SIJS children, U visas after lawful permanent residency
- SSI
  - T visas (& their children)
- Public and Assisted Housing & Vouchers
  - T visas (& their children)
  - VAWA self-petitioner (& children)

# T Visa for Trafficking Victims

- A victim of a severe form of trafficking in persons
- Victim is physically present in the U.S. on account of trafficking
- Victim must comply with reasonable requests for helpfulness in investigating or prosecuting trafficking. Exceptions
  - Under age 18
  - Physical or psychological trauma impede helpfulness/cooperation
- Removal from the U.S. would cause extreme hardship

# What are Severe Forms of Human Trafficking?

- **Sex Trafficking:** in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- **Labor:** The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery

(Federal Law—"Victims of Trafficking and Violence Prevention Act of 2000 can be found at [www.ojp.usdoj.gov/vawo/laws/vawo2000/](http://www.ojp.usdoj.gov/vawo/laws/vawo2000/))

# 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 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

# U Visa Regulations Definitions

Although terms are used interchangeably

- As a matter of law (U visa regulations)
  - Helpfulness in the “investigation or prosecution” always means
    - “Detection, investigation, prosecution, conviction, or sentencing”
  - “Crime” always means
    - “criminal activity”
- “Criminal activity” chosen to offer early access to justice system protection
  - Improving stability for crime victims

# 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 any similar activity*

# U-Visa Criminal Activities (11/2011 data)

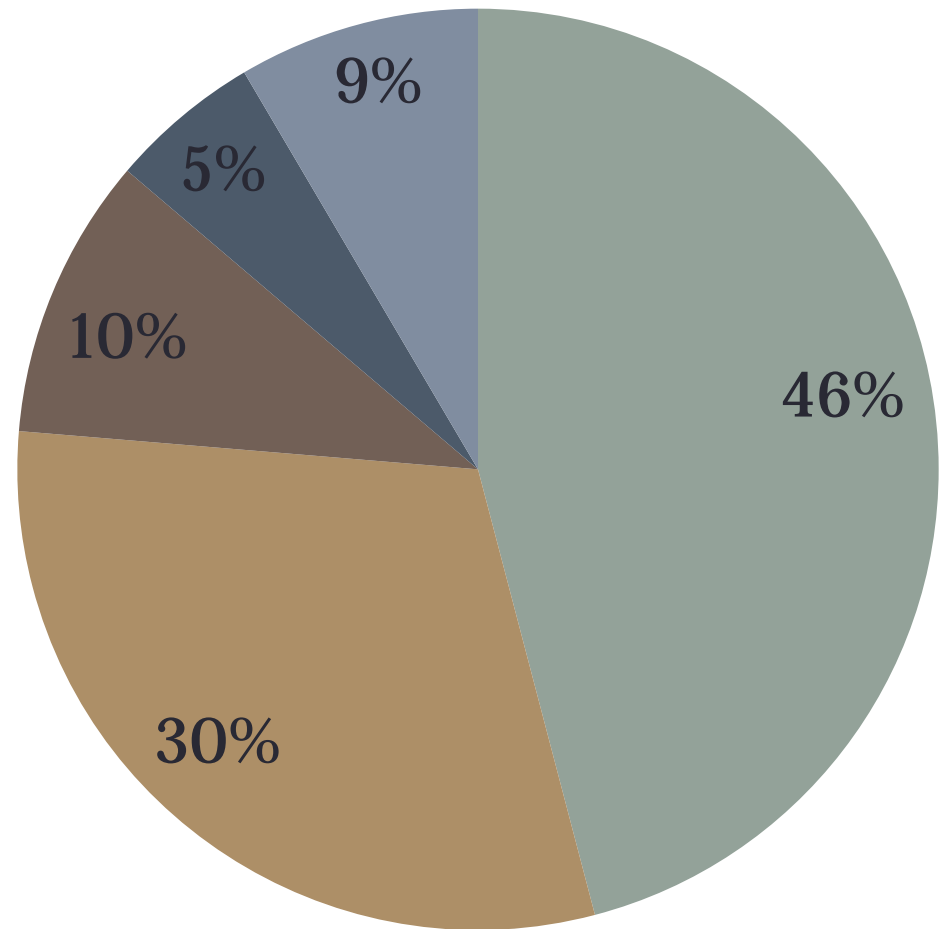
■ Domestic violence- 45.9%

■ Rape, Sexual Assault, Incest, Trafficking- 30.4%

■ Felonious Assault, Murder, Manslaughter- 9.9%

■ Blackmail, extortion, perjury, obstruction of justice, attempts, conspiracy, solicitation- 8.47%

■ Kidnapping, being held hostage, unlawful criminal restraint, torture- 5.3%



# U/T 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



# Types of Court Proceedings: Courts Receive Evidence of “Criminal Activities”

- Family
  - ✓ Civil Protection
  - ✓ Custody
  - ✓ Divorce
  - ✓ Paternity
  - ✓ Adoption
- Juvenile
  - ✓ Child Abuse, Neglect, or Termination of Parental Rights
  - ✓ Delinquency
- Criminal
- Probate
  - ✓ Elder / Dependent Adult Abuse
  - ✓ Guardianship
  - ✓ Conservatorship
- Civil
  - ✓ Employment
  - ✓ Tort damages against a perpetrator

# Why victims seek certification from courts

- Only justice system contact was a protection order, custody, or civil case
- No language access when called police for help
- Police did not investigate and case never sent to the prosecutor

# According to DHS, a U/T Visa Certification Tells USCIS Only 3 Things:

- Certifier believes the applicant is a victim of a qualifying criminal activity
- Victim had knowledge of the criminal activity
- Victim was, is, or is likely to be helpful

# Detecting Helpfulness

# Helpfulness in the Regulations

- Statute and DHS Regulations: has been helpful, is being helpful or is likely to be helpful in the
  - Detection, or Investigation, or
  - Prosecution, or Conviction or
  - Sentencing
- There is no degree of helpfulness required
- The certification may be completed once the certifier can access or has evidence of the victim's helpfulness
- The investigation or prosecution can still be ongoing

# Helpfulness Requirement Met *Even When:*

- Victim reports a crime and there's no further investigation
- Report is of past crime that the victim did not report at the time
- Perpetrator absconds or is deported
- Perpetrator is being prosecuted for a different crime
- Victim is not needed as a witness
- Victim is dead (indirect victim is applying)
- Perpetrator is dead
- The criminal case did not result in a guilty plea or conviction
- Victim is applying for a civil protection order, but domestic violence is not being criminally prosecuted

# Evidence of Helpfulness:

## Some Examples in Criminal Case

- Evidence in case that the victim:
  - Called 911
  - Participated in a criminal investigation
  - Identified perpetrator at line up
  - Testified before a grand jury or at trial
  - Appearance in a case
  - Attended criminal court hearings in the case
  - Victim witness statement
  - Testimony at sentencing

# Evidence of Helpfulness:

## Some Examples in Family/ Civil Case

- Filed and/ or appeared at hearing for full protection order
- Plead and or testified about abuse or sexual assault in a court case (e.g. protection order, divorce, custody, small claims, housing, employment)
- Evidence in case that victim called the police, made a police report, cooperated in a criminal investigation
- Serving the perpetrator with notice of case with underlying abuse facts



# Small Group Activity - Case

- Using the Eduardo and Clara case scenario -Handout
- While Clara was in the hospital she received help from a victim advocate who told her about civil protection orders and became a client of the local legal services agency who helped her get her children back once she was released from the hospital.
- You heard Clara's case and issued Clara a protection order against Eduardo
- A week after the protection order was issued Clara's legal aid attorney sends you a letter requesting that you sign a U visa certification
  - What evidence of helpfulness might you include on the U visa certification form?
  - In what other types of state court proceedings might a judge receive similar forms of evidence that could support U visa certification?

# New DHS Forms Published Make Judicial Certification Easier

- Judges' certification can occur when the judge signing the certification has
  - Probable cause
  - Made findings
  - Observed or detected evidence of helpfulness
  - 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/>



# U-visa Facts and Benefits

- Only 10,000 U-visas can be granted annually
  - Waitlist approval backlog 110,000 visas
- The U-visa grants a temporary 4 year stay
- Work authorization ( ≈ 28-48 months)
- Limited state benefits
- 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

# 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

# SIJS: Congressional Goals

- Included a role for state court judges as experts in child best interests, custody, child welfare matters.
- State court expertise that are an inherent part of court's decision-making when courts:
  - Adjudicate facts of child abuse, neglect and abandonment
  - Issue 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

# 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\*

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



# SIJS Definition

- A “juvenile court” according to federal statutes and regulations is
  - Any “court located in the United States having jurisdiction under State law to make judicial determinations about custody and care of juveniles.”
  - 8 C.F.R. § 204.11

# Department of Homeland Security Confirms

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

# Types of Proceedings With Jurisdiction To Make SIJS Findings:

- Dependency
- Delinquency
- Termination of parental rights
- Guardianship
- Protection orders
- Paternity
- Custody and child support
- Divorce
- Legal Separation
- Adoption

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

# Apply State Law

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

# Make Findings of Neglect or Abuse Rather Than Similar Basis for:

- Child Endangerment
  - All state statutes more than neglect and may also fall within definition of abuse
- Domestic violence
  - When child abuse falls within state domestic violence statute definitions

# Apply State Law

- Best Interests
  - Placement
  - Not returning child to their home country
  - Non-viability
- Where are best interest factors in state law?
  - Child welfare statutes
  - Custody statutes
  - Case law

# 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

# Approach:

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



# Court Order: Custody, Dependency, Placement

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

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

# “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.

# State Courts Regularly Make Custody & Placement Determinations

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

# 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)

## Home country not in child's best interests

- Identify each potential custodian in U.S. and home country
- Apply state best interests factors to each placement
- States in court order the factual findings that support chosen placement
- Make findings that illustrate why under state best interest factors court is not choosing placements in child's home country
- Compare the supports, help, services child needs U.S vs. home country
  - Example of factors VAWA Extreme hardship

## Factors to consider...

- Risk of danger to the child
- Family violence, abuse, neglect, abandonment
- Trauma the child has suffered
- State laws that preclude or discourage placement with abusive parent
- The child's physical, emotional, safety and mental health, and educational needs
- Help the child is receiving
- Family support system

# Reunification Not Viable and Best Interests

- Order must include the finding that reunification with the parent is not viable
- Using state best interests law
  - Identify factual reasons why reunification is not viable
  - Will include explaining why the abusive parent is not being granted physical custody of the child

# Viability Factors and Best Interests

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



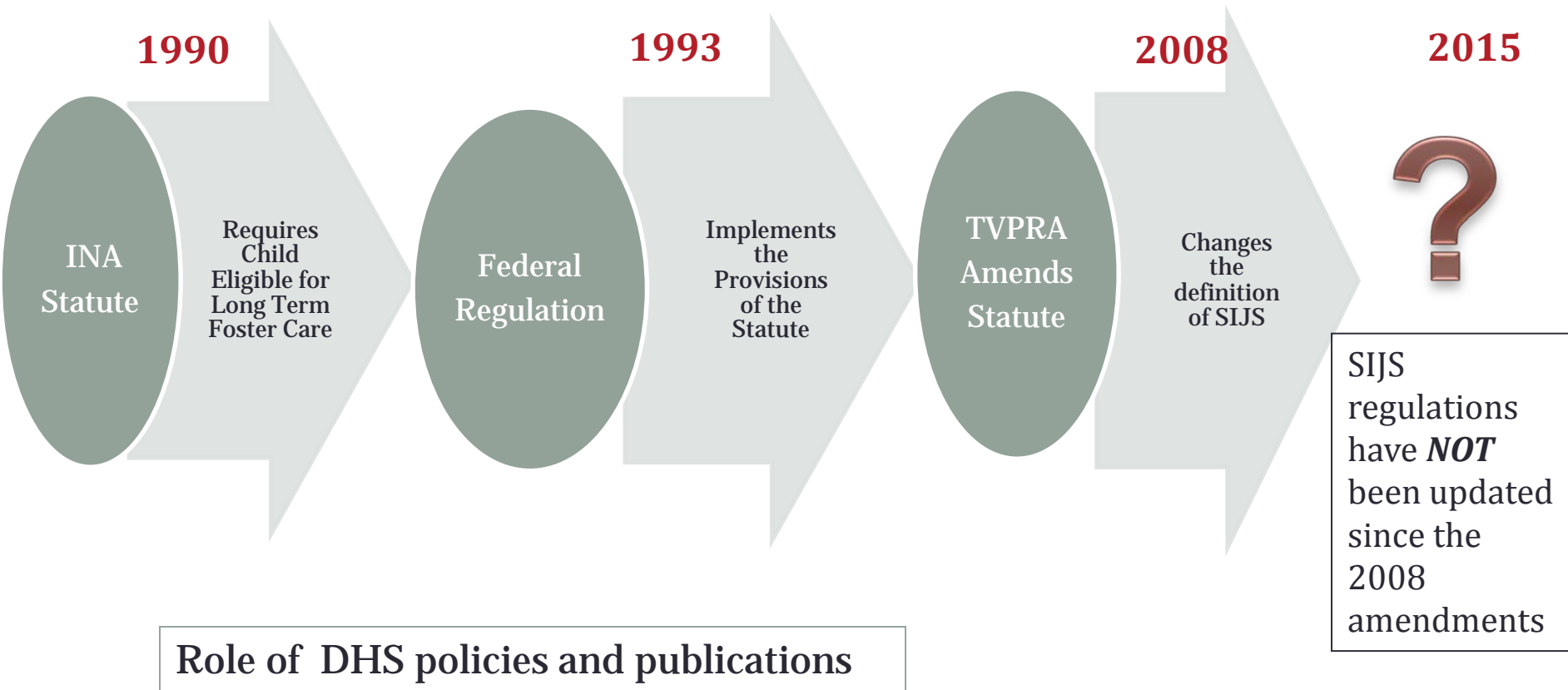
# Finding: Reunification Not Viable

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

# 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

# Important Note: Statute Controls over Regulations



# Small Group Activity - Case

- Using the Eduardo and Clara case scenario -Handout
- Do Lupe and Miguel qualify for Special Immigrant Juvenile Status?
  - Why does Lupe qualify?
  - Why would Miguel qualify?
- In what types of court proceedings could the court issue SIJS findings for
  - Lupe?
  - Miguel?

# Best Practice for Court Order

- Make factual findings regarding
  - Facts of abuse, abandonment and/or neglect
  - Separately regarding each parent
  - Articulating trauma impact on child helpful
  - Connect the dots
    - Explain why the orders and findings the court is issuing
    - Are needed for child protection, healing, stability
    - Because of the abuse/abandonment/neglect the child suffered
  - Why court orders in the child's best interest

# Best Practice for Court Order

- Cite the state statute(s) on
  - Abuse, abandonment and/or neglect
  - Jurisdiction over the minor
- If “similar basis” explain how it is similar to
  - Abuse, abandonment and/or neglect

# Discussion: De Rubio v. Herrera

- Issuance of SIJS orders discretionary not mandatory in custody cases
- In child welfare cases findings should be made based on the court's obligation to act in the child's best interests.

# DHS Defines Juvenile Court to Includes Both:

- Child welfare proceedings
  - Dependency, Delinquency
  - Guardianship, Foster care
  - Placement with 3<sup>rd</sup> party custodians
- Custody decisions made in other family court cases
  - Divorce, Custody
  - Protection Order
  - Adoption



# DHS defines a child to be “dependent” on a state court

- When courts issue placement/custody orders in a child welfare case (e.g. dependency, delinquency, guardianship) OR
- When courts award physical custody of a child to a party as part of a divorce, custody, civil protection order or other family court case
  - That custody order governs the child’s physical custody

# When State Courts Apply Child's Best Interests Standards Under State Law

- Child welfare, delinquency, guardianship
- Contested custody in the context of any family court case
- Approving proposed custody orders
  - By consent or in uncontested cases

# IMMIGRANT LITIGANTS IN FAMILY COURTS

# Divorce

# Impact of Divorce

- VAWA self-petitioners
  - Must file within two years of final divorce
  - Step-children must file before divorce
- Ends legal immigration status for spouses and children of visa holders:
  - Students, Persons with legal work visas, Diplomats
- Divorce cuts off access to lawful permanent residency for spouses and children of people seeking lawful permanent residency based on:
  - Asylees
  - Employment visa holders
  - Family based visas
  - Cancellation of removal

# Annulment Instead of Divorce

- Annulment can lead to a marriage fraud finding that:
  - Permanently bars approval of any visa petition
  - Is a ground for deportation
  - Can lead to an unfavorable exercise of discretion by an immigration judge not to grant immigration relief
- Impact on
  - Spousal support
  - Property division

# Custody

# 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

Ammar, Orloff, Hass and Dutton, "Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status." (September 2004)

<http://niwaplibrary.wcl.american.edu/pubs/co-occurencedvchildabuse/>





# 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



# ABA Center on Children & The Law

- “Parties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce or child support proceedings.”
- “Batterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution for battering and to shift the focus of family court proceedings away from their violent acts...When the judicial system condones these tactics, children suffer.”
- “This ... will ensure that children of immigrant domestic violence victims will benefit from ...laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all other children.”

# 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 crime victims
2. US citizens and lawful permanent residents 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 his 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

# Detained Parent Directive Aug 2017

- If parents are detained:
  - Placement near family court when ongoing family court/child welfare cases
  - Bring parents to family court to participate in cases involving children
    - Alternate: video or teleconference participation
  - Facilitate visitation when required by family/child welfare court order
  - Help children travel with deported parent – obtain passports for children

# 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



# AFFIDAVITS OF SUPPORT

# Affidavits of Support

- Under provisions introduced in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, each person who petitions for a family member to immigrate to the United States must execute a legally enforceable affidavit of support.
- 8 U.S.C. § 1182(a)(4)(C)(ii)

# Affidavits of Support

- Enforced as contract or used as evidence of ability to pay support
- These affidavits are of increasing importance in resolving support issues in immigrant families, sometimes decades after the act of immigration is complete.

# Evidence in Affidavit of Support

- 3 years of tax returns
- Evidence of employment including self-employment
- Proof of income sufficient to sustain the immigrant at 125% of poverty

# Affidavit of Support

- Almost all immigrants who are applying to obtain lawful permanent residence through a family member must submit an Affidavit of Support.
- Citizen and Lawful permanent resident spouses affirms to DHS in the Affidavit of Support that they will
  - Financially supporting the non-citizen relative for up to 10 years or until relative naturalizes
  - Congressional goal preventing the immigrant family member from being a “public charge” =
    - someone who needs government assistance to survive

# Enforceability of the Affidavit Support

- Courts have found the Affidavit of Support enforceable and have ordered support payments to a former spouse.
  - *See, Shumye v. Felleke*, 555 F.Supp.2d 1020(N.D. Cal.2008); *Stump v. Stump*, 2005 WL 2757329 (N.D. Ind. Oct. 25, 2005)
  - *Kumar v. Kumar* A145181 (Cal. App. Div. II, July 28, 2017)(enforceable and no duty to mitigate)
- As part of a family law property settlement, the sponsored immigrant may surrender his or her right to sue to enforce the Affidavit of Support.
  - 71 F.R. 35732, 35740 (June 21, 2006).

# Technical Assistance and Materials

- Power Point presentations and materials for this conference at <http://niwap.org/go/OzarksJudges>
- Judicial Training Manual at <http://niwap.org/go/sji>
  - **NIWAP Technical Assistance:**
  - Call (202) 274-4457
  - E-mail [info@niwap.org](mailto:info@niwap.org)
- Web Library:  
<http://niwaplibrary.wcl.american.edu>