

Promoting Just Outcomes When Immigration Issues Arise In State Court Proceedings

Give Me Your Tired and Poor: The Impact of Immigration
Laws in State Court: National Judges Conference
for the National Consortium on Racial and Ethnic Fairness
in the Courts

Miami, Florida

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Introduction

- Leslye E. Orloff
 - Materials: www.niwap.org/go/Miami2018
 - Judicial Education Materials: www.niwap.org/go/sji
 - Web Library: <http://niwaplibrary.wcl.american.edu/>

U Visa Certification by State Court Judges

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)
 - “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 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

Which Judicial Officials Can Sign Certifications

- “Any official with delegated authority from a federal, state, local, tribal or territorial court to decide cases” - DHS

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 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
- DHS treats the U visa certification as required evidence

Things to Know About Certifying

- 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?

Things to Know About Certification

- 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

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 grant 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

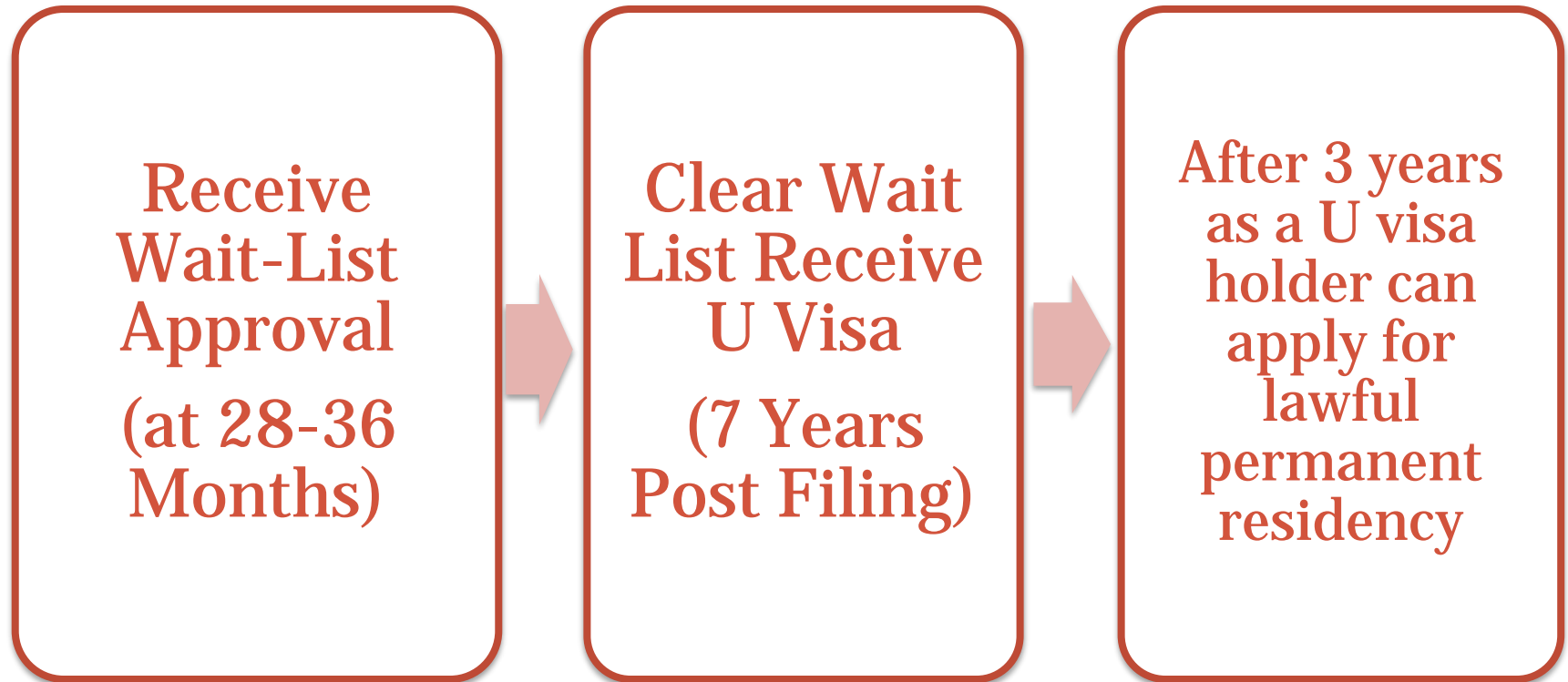
Helpfulness in the Regulations

- 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
- Chevron applies

The U-visa Application Process



The U Visa Application Process



U-visa Facts and Benefits

- Only 10,000 U-visas can be granted annually
 - Waitlist approval backlog 110,00 visas
- The U-visa grants a temporary 4 year stay
- Work authorization (≈ 28-36 months)
- Benefits for family members applicants
 - Under 21: spouse, children, parents, unmarried siblings under age 18
 - Over 21: spouse and children
- 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

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/>



Part 6. Certification

I am the head of the agency listed in **Part 2**, or I am the person in the agency who was specifically designated by the head of the agency to issue a U Nonimmigrant Status Certification on behalf of the agency. Based upon ~~investigation of the facts~~, I certify, under penalty of perjury, that the individual identified in **Part 1** is or was a victim of one or more of the crimes listed in **Part 3**. I certify that the above information is complete, true, and correct to the best of my knowledge, and that I have made and will make no promises regarding the above victim's ability to obtain a visa from U.S. Citizenship and Immigration Services (USCIS), based upon this certification. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS.

1. Signature of Certifying Official (sign in ink)



2. Date of Signature (mm/dd/yyyy)

3. Daytime Telephone Number

4. Fax Number

Judges can amend the form

Examples: Based upon ...

- My findings of fact
- Probable cause
- My issuance of a protection order
- My sentencing of the defendant
- My having presided over a criminal case

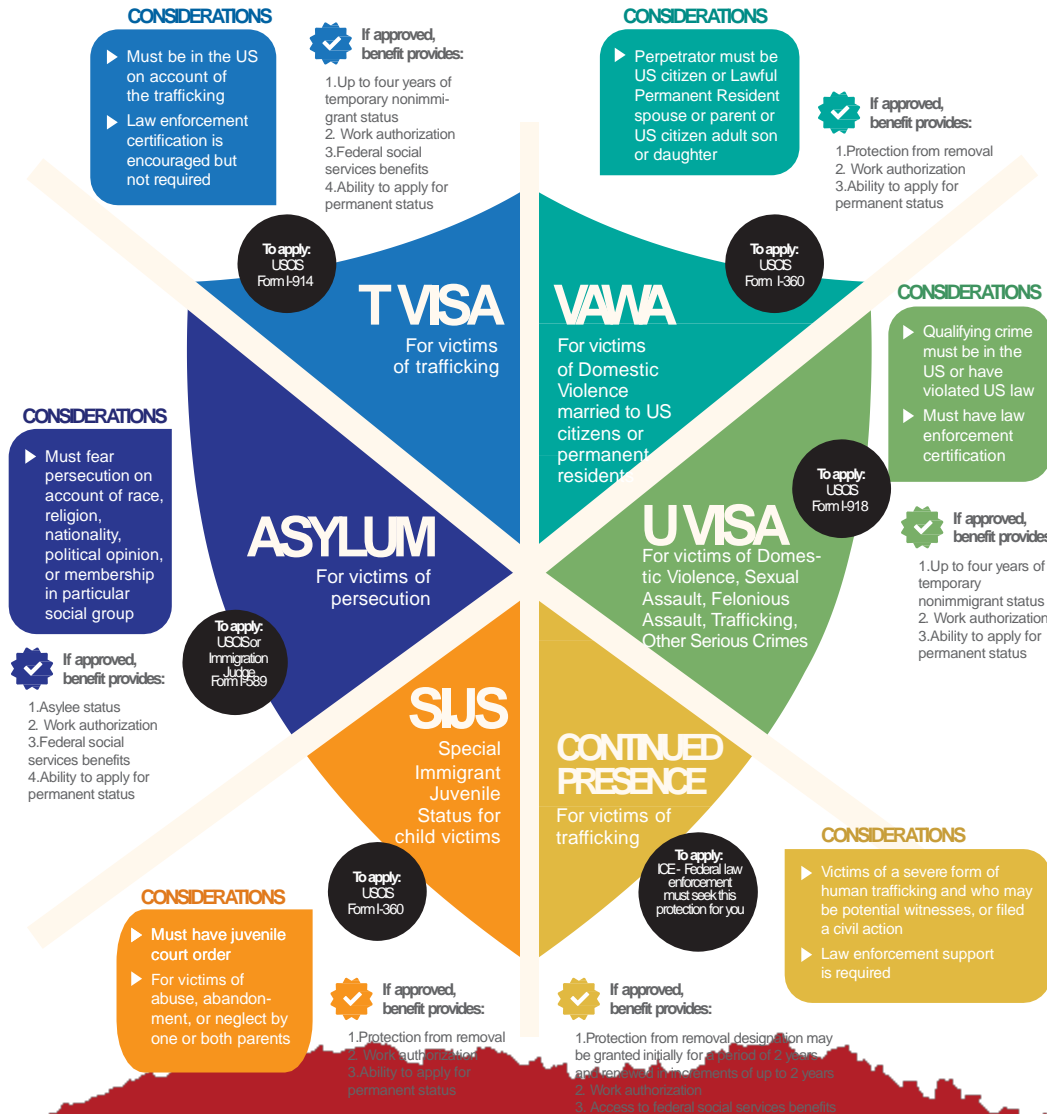
REMEMBER: This is a certification that you believe the applicant was a victim of a crime.

Certification provides evidence to DHS.

DHS adjudicates and decides whether to grant the victim immigration relief.

VAWA Confidentialty

PROTECTIONS FOR IMMIGRANT VICTIMS



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
- VAWA Visa Holder Spouse Work Authorization
 - For abused spouses of A, E iii, G or H work visa holders
- 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
 - Respond to reasonable requests for assistance unless under 18
 - Extreme and unusual hardship
- 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

Immigrant Victims and Children Receive

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

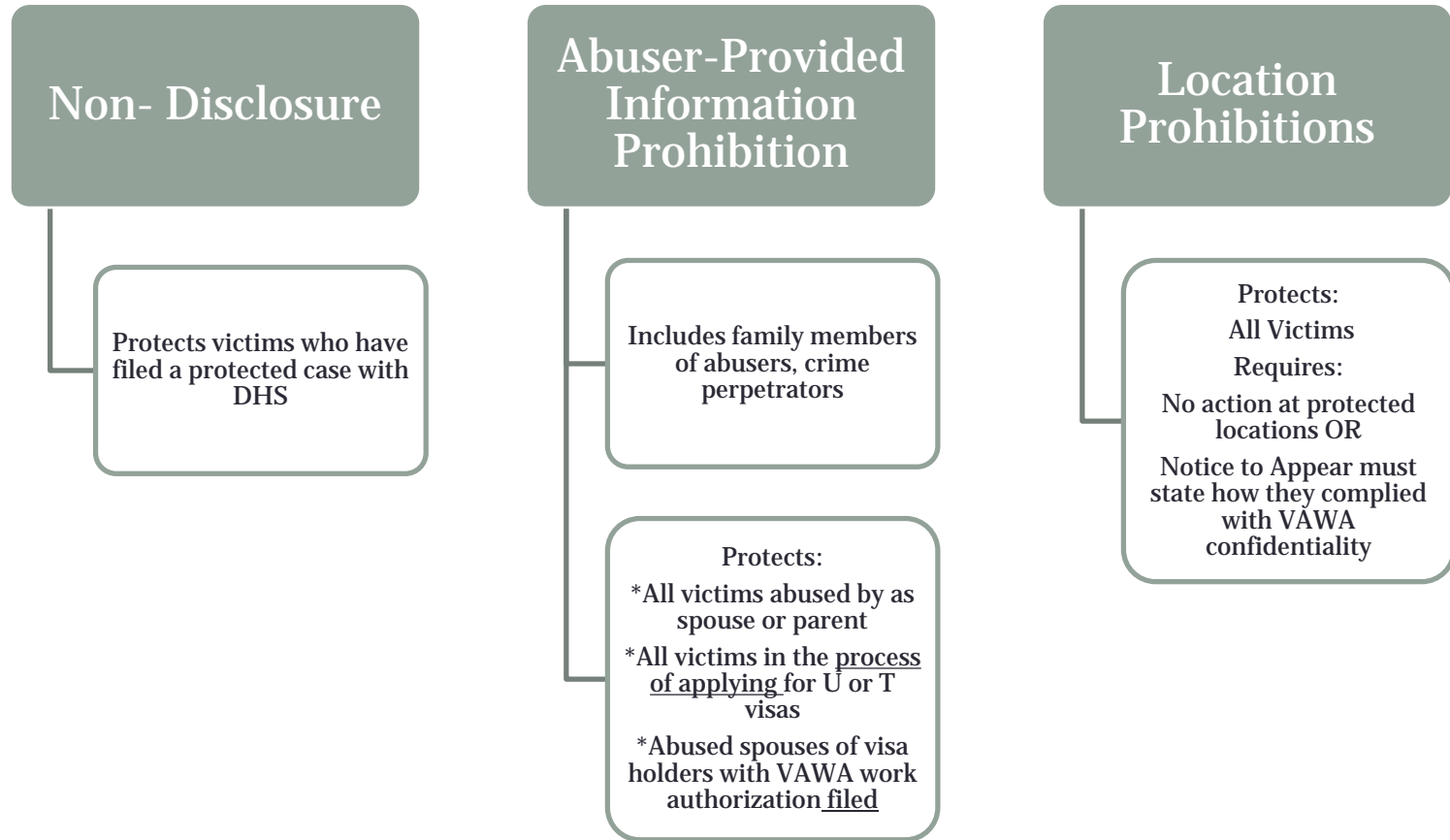
Risks of Removal for Victims

- Perpetrators actively reporting for removal victims with pending immigration cases
 - VAWA self-petitioners 38.3%; U visa 26.7%
- Perpetrators got the victim arrested for domestic violence
 - VAWA self-petitioners 15.4%; U visa 7.5%
- Traffic stops
 - VAWA self-petitioners 28.6%; U visa 26.7%

VAWA Confidentiality Prongs

- **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 (and their family members)
- **Location Prohibitions:** Enforcement locational prohibitions unless comply with specific statutory and policy safeguards
- **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

VAWA Confidentiality Prongs



DHS VAWA Confidentiality Computer System

- Directs use of “red flag” “384” computer system to identify victim 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



Prohibition on disclosure:

- Information about the existence of the case
- Any information contained in the case
- Action taken on the case by DHS



VAWA Confidentiality Violations

- Each violation
 - Disciplinary action and/or
 - \$5,000 fine for the individual
- Violations also include making a false certifications in a Notice to Appear
- VAWA Confidentiality Enforcement Guidance CRCL (2008)



When Does VAWA Confidentiality Protection End?

- Protections apply from the time of filing permanently unless
 - Case denied on the merits and
 - All appeal options have been completed

Why is VAWA Confidentiality important for state courts?

- Promotes access to justice and just and fair outcomes in state courts
- Prohibited enforcement locations include courthouses in connecting with a case involving a crime victim
- Perpetrators are using state court discovery to obtain federal VAWA confidentiality protected information that
 - DHS will not release
 - Cannot be released under federal law

FAMILY COURT CASES INVOLVING IMMIGRANT VICTIMS AND CHILDREN: DIVORCE, CUSTODY AND PROTECTION ORDERS

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

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

PROTECTION ORDERS



Protection Orders

- All are eligible for civil protection orders without regard to the immigration status of any party or child
- Protection order issuance = will not trigger deportation
- A conviction *or finding* of violation of the “*protection against abuse provisions*” of a protection order is a deportable offense
- Protection order issued against a victim can be harmful
 - To good moral character & violation leads to deportation
- 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
- Make finding about age, existence of a marriage, parent child relationship
- Deter parental kidnapping
- Child/Spousal support
 - Affidavit of support
- Health insurance

Criminal Law and Immigration Overview of Key Issues Affecting Cases Involving Immigrant Families

Criminal Issues & SIJ Eligibility

- Juvenile delinquency finding \neq conviction for immigration purposes
- Juvenile dispositions can have immigration consequences
 - Negative factors in discretionary determinations
 - Some grounds of inadmissibility or deportability do not require a criminal conviction

Is There a Waiver for SIJS Cases

- Waivable Offenses
 - Prostitution
 - Drug abuse or addition,
 - Smuggling
- Non-Waivable Offenses
 - Moral turpitude crimes (theft and shoplifting, murder, spousal or child abuse, fraud, espionage, terrorist activities, genocide, torture)
 - Drug crimes (findings and admissions regarding drugs except simple possession of 30 grams or less of marijuana; controlled substances traffickers)
 - Multiple criminal convictions (does not include juvenile adjudications)

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 defendant admits facts through a plea or the judge orders some form of punishment, penalty or restraint on liberty
- Key deportable convictions
 - Domestic violence, stalking, child abuse, CPO violations, crimes of moral turpitude with 365 or more days sentence, drugs, firearms, terrorism, aggravated felonies

Technical Assistance and Materials

- Power Point presentations and materials for this conference at www.niwap.org/go/Miami2018
- 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

Courts may be asked to rule on

- Motions *in limine*
- Protective orders
 - Objections to discovery
 - Regarding questioning victims about VAWA confidentiality protected case filings in court
- Rule 11 sanctions
- Case law supporting non-disclosure

Civil Case Law Supports Non-Disclosure

- 6th Amendment right to compulsory process does not permit access to VAWA confidentiality protected information (Hawke)
- Although relevance to credibility or impeachment, barred as contrary to VAWA confidentiality's purpose (Demaj)
- VAWA confidentiality protects contents, for federal immigration file even when the victim admits existence of the case (Demaj)
- Limited discovery only allowed where can protect anonymity must be crafted to not intimidate victims and without compromising VAWA confidentiality's purpose (Koch)

Criminal Case Law Supports Non-Disclosure

- In light of the high level of protection given by federal law to VAWA confidentiality nothing beyond the certification form is discoverable. (Morroquin-Alanda)
- U visa is a tangential, collateral issue and allowing evidence about it invites speculation about victim's immigration status which is irrelevant to the criminal case (Alvarez)

Hawke v. Dep't of Homeland Security

(N.D. CA, 2008) – VAWA Self-Petition Case

- VAWA Confidentiality Protects cases:
 - All cases unless denied on the merits
- Judicial exception applies to appeals of victim's immigration case
 - Does not apply to civil or criminal court proceedings
- 6th Amendment right to compulsory process does not permit access to absolutely privileged information
- “primary purposes of the VAWA confidentiality provision, namely to prohibit disclosure of confidential application materials to the accused batterer”

Demaj v Sakaj (D. Conn, 2012) – U Visa Case

- Although relevant to credibility and impeachment
- Family court discovery barred as contrary VAWA confidentiality purpose --
 - Prevent disclosure of documents & information in a protected case file to alleged criminals
 - Stop perpetrator's actions to interfere with & undermine a victim's immigration case
- Seeking to obtain protected information through discovery in a custody case = interference with the victim's immigration case barred by the federal statute
- VAWA confidentiality applies to protect the case file contents, including in cases when
 - the victim discloses in state court that DHS has approved her protected immigration case

EEOC v Koch (5th Circuit)

- In civil discovery court must consider
 - How discovery of U visas might intimidate victims outside of the case before the court
 - Compromising the U visa program and law enforcement investigations and prosecutions more broadly
 - Koch: limited discovery crafted to maintain anonymity may be allowable
- Anonymity is not possible in a family or criminal court case

State v. Marroquin-Aldana

2014 ME 47, ¶ 20, 89 A.3d 519, 525

- “insufficient justification” to disclose additional documentation when the defense had the certification form
- Provided defense opportunity to cross-examine victim and call credibility into question
- Court noted the “high level of protection” given to documents filed with immigration

People v. Alvarez

No. G047701, 2014 WL 1813302, at *5 (Cal. Ct. App. May 7, 2014),
review denied (July 16, 2014)

- “The visa was a tangential, collateral issue, and allowing evidence about it invited speculation about the legal status ... which was completely irrelevant to this case.”
- The trial court was well within its discretion in excluding reference to the U visa