

What Family and Child Welfare Judges Need to Know: Legal Options for Immigrant Adult, Teen and Child Victims of Domestic and Sexual Violence

Judge Susan Breall, Judge Rosemary Collins (Ret.)
and Leslye E. Orloff

National Council of Juvenile and Family Court
Judges

Reno, Nevada

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Judge Susan Breall
San Francisco Superior
Court



**Judge Rosemary Collins
(Ret.)**
Circuit Court Judge of the 17th
District Circuit Court of
Winnebago County



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Thank you to OVW

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Introductions

- Judge Susan Breall
 - San Francisco Superior Court
- Judge Rosemary Collins (Ret.)
 - Presiding Judge Family Court Rockford, Illinois
- Leslye Orloff
 - NIWAP, 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 based forms of immigration relief
- Know how Violence Against Women Act (VAWA) confidentiality laws impact discovery and courthouse immigration enforcement
- Be able to seek or sign U and T visa certifications
- Seek or make the state court findings required for Special Immigrant Juvenile Status

Type in the chat box

What countries
do victims in
your courts
come from?



US Demographics (2018)*

- ❖ Total foreign born population – 44,728,721
- ❖ 13.7% of the country's ~327.2 million people are foreign born
 - 40.6% naturalized citizens
 - 28% legal permanent residents
 - 31.4% temporary visa holders or undocumented immigrants
 - 43.8% rise in immigrant population from 2000 to 2018
- ❖ 21.9% of people in the U.S. speak a language other than English at home & 46.8% of foreign born persons are limited English proficient
- ❖ Length of time immigrants have lived in the U.S.
 - 40.4% entered before 1999
 - 29.5% entered 2000 - 2009
 - 16.3% entered 2010 -2014
 - 13.7% entered 2015 or after
- ❖ 25.9% of children under age 18 have one or more immigrant parents
 - 85.8% of these children are native-born U.S. citizens

**Source: Migration Policy Institute Data Hub (July 2020) and Lawful Permanent Resident estimates MPI and DHS (2018)*

COVID-19, Immigrant Victims, and the Courts

- Promoting access to justice for immigrant crime victims, children and families
- Identifying paths victims & children have to legal immigration status promotes
 - Stability of families
 - Access to benefits and services
 - Helps reduce impact of the pandemic

Dynamics Of Domestic Violence Experienced By Battered Immigrants

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)

- Abuse rate rises to 59.5% when an immigrant's spouse/former spouse is a U.S. citizen

- Twice 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).

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)

Perpetrators Efforts to Trigger Victim's Removal

- Perpetrators actively reporting victims with pending immigration cases for removal
 - VAWA self-petitioners 38.3%; U visa 25%
- Perpetrators got the victim arrested when the victim called police for help with domestic violence
 - VAWA self-petitioners rose 2013-2017 from 15.4% -17%
 - U visa rose 2013-2017 from 7.5% -36%

Krisztina E. Szabo, David Stauffer, Benish Anver, *Work Authorization For VAWA Self-Petitioners and U Visa Applicants*, NIWAP (Feb. 12, 2014) and Rodrigues et al. Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey (May 3, 2018)

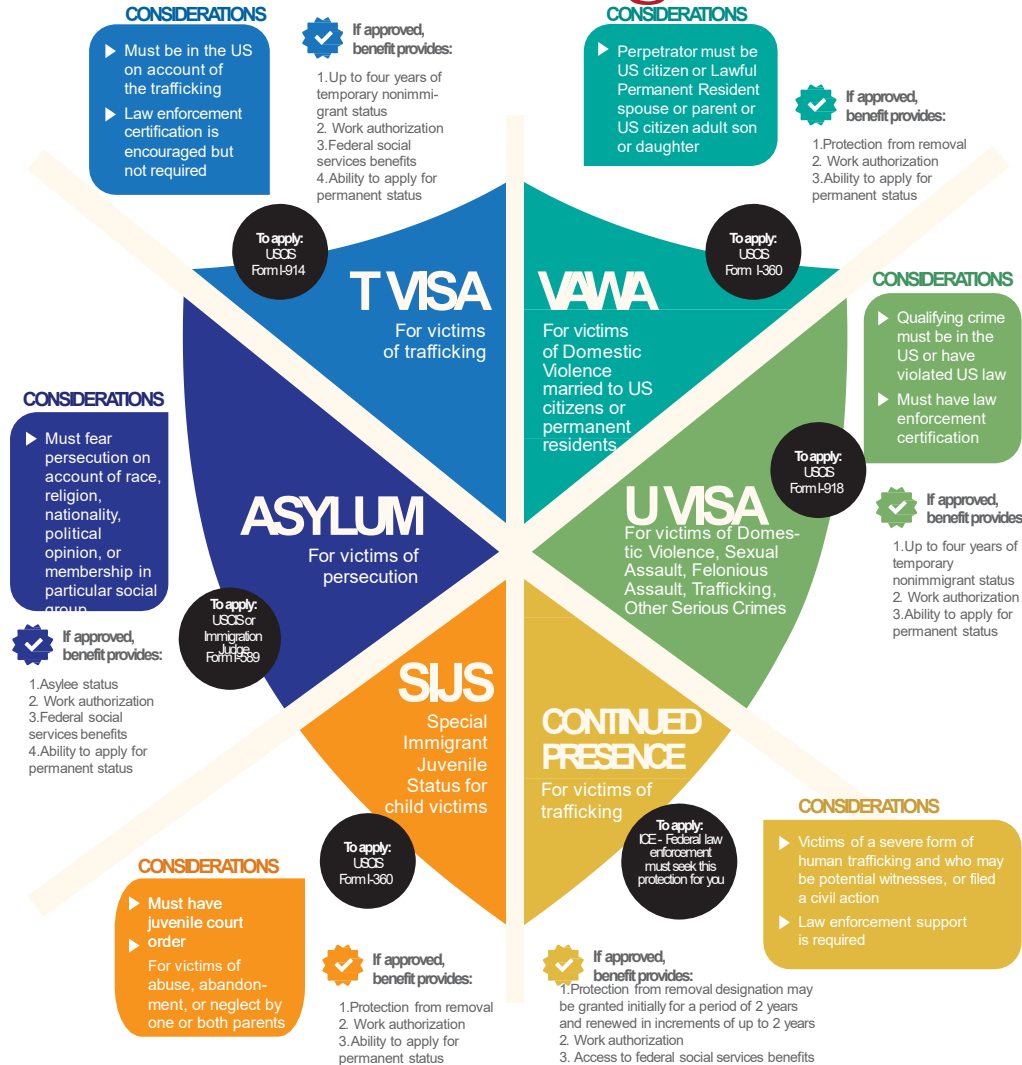
Purpose of Crime Victim Protections

Congress enacted VAWA self-petitioning (1994), the U and T visas (2000) & Special Immigrant Juvenile Status (SIJS) (1990, 2008) to:

- Improve community policing and community relationships
- Allow victims to report crimes and seek help from police, prosecutors, and courts without fear of deportation
- Improve access to justice in family/criminal/civil courts for immigrant victims of
 - Domestic & sexual violence, stalking, human trafficking, and child/elder abuse
- Enhance victim safety
- Increase prosecution and justice system accountability for perpetrators of crimes against immigrant victims
- Keep communities safe

Story: How Immigration Relief for Victims Improves Community Safety

Protections For Immigrant Victims



DHS.GOV/BLUE-CAMPAIGN

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
- VAWA cancellation of removal has similar eligibility requirements
- Battered Spouse Waiver if perpetrator files
- **Timeline to work authorization = 4–18 months (2019)**

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
- **Timeline to approval = 6 – 36 months (2019)**

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
- **Timeline to work authorization and waitlist approval =**
 - 4–6 years(2019)

T Visa for Trafficking Victims

- A victim of a severe form of trafficking in persons
 - Sex or labor trafficking involving victim under 18 or and adult subject to force, fraud or coercion
- 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
- **Timeline to work authorization = 3-12 months (2019)**

Benefits for Survivors

- Protection from deportation
- Can include family members in application
 - VAWAs, U visas and T visas
- Access to legal immigration status
- Financial independence from perpetrator
 - Legal work authorization (3-48 months from filing)
 - Issuance of federally recognized ID
 - More benefits access than undocumented victims
- VAWA confidentiality

Case Scenario (Handout)

Clara met Eduardo a lawful permanent resident 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. After Clara became pregnant and gave birth to a baby girl Lupe, Eduardo decided to bring Clara, Miguel and Lupe to the U.S. to live with him. When they arrived in the U.S. Eduardo took Clara, Miguel and Lupe's passports and became physically and sexually abusive of Clara and abusive of Miguel who tried to protect his mother from Eduardo's abuse. Eduardo also physically beat Lupe 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, Clara talked to police when they arrived. The police arrested Eduardo for attempted murder and child abuse, took Clara to the hospital and placed the children in the care of the state.

What forms of immigration relief would Clara qualify for:

- A. U visa
- B. VAWA self-petition as the parent of Lupe
- C. T visa
- D. All of the above

Feedback

A

B

C

D

No Answer

What forms of immigration relief would Lupe and Miguel qualify for:

▼ Feedback

A

B

C

D

No Answer

- A. Both can VAWA self-petition
- B. Both qualify for a U visa
- C. Lupe qualifies for a T visa
- D. All of the above

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
 - Applying VAWA confidentiality laws in ruling on discovery
- Make rulings on discovery consistent with VAWA confidentiality
- Distribute DHS-produced “Know Your Rights” information at your courthouse

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 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

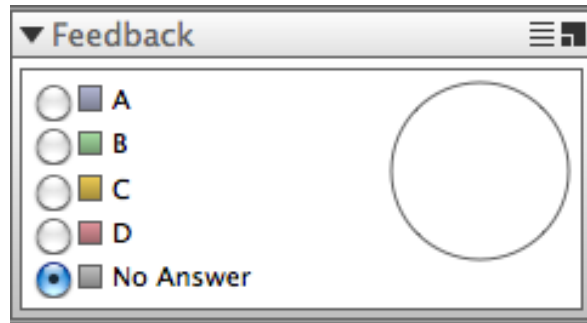
Attempt, conspiracy or solicitation to commit any of these crimes any similar activity

Which Judicial Officers Can Certify?

- Federal, state, & local
 - **Judges, Magistrates, Commissioners, Judicial Referees, Masters, Alderman, ALJs, Surrogates, Chancellors**
 - Others with delegated decision-making authority
- Judge will need to amend the form
- Certification based on helpfulness to courts
 - Detection(family/juvenile/civil/criminal)
 - Pleadings
 - Testimony
 - Attending court
 - Seeking orders
 - Working with police/prosecutors
 - Conviction/Sentencing (criminal)

Why would victims seek U visa certification from state courts?

- A. Only justice system contact a custody, protection order, civil employment or child welfare case
- B. No language access to police when victim called for help
- C. Judge observed victim's attendance and participation in criminal case
- D. All of the above



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

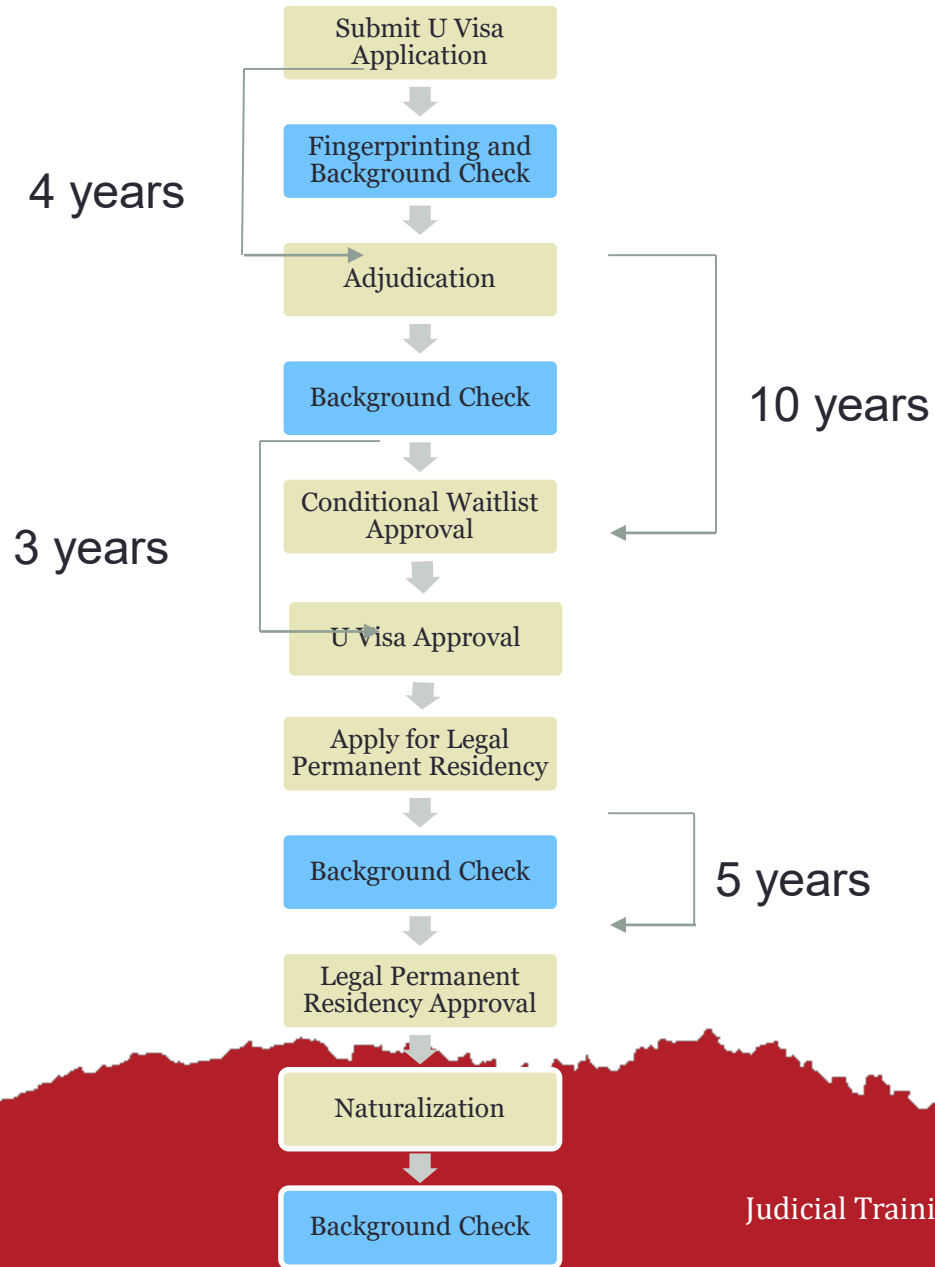
- Certifier believes the applicant is a victim of a qualifying criminal activity
- Victim had knowledge of the criminal activity
- U visa: Victim was, is, **or** is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing
- T visa: Victim complied with reasonable requests for assistance from law enforcement or prosecutors unless exempt
 - Under 18 or physical or psychological trauma

Helpfulness Requirement Met

Even When:

- Victim reports a crime and there's no further investigation or prosecution
- 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 or custody but domestic violence is not being criminally prosecuted

U Visa Process Timeline



After Immigration Case is Filed Immigrant Victim's Justice System Use

- Protection orders – VAWA 47.6%, U visa 43.7%
- Filed a police report - VAWA 36.2%, U visa 50.3%
- Helped in a criminal case - VAWA 33.4%, U visa 73.1%
- Divorce – VAWA 32.1%, U visa 19.5%
- Child custody – VAWA 20.1%, U visa 17.9%
- Child support – VAWA 26.1%, U visa 10.7%

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

Special Immigrant Juvenile Status (SIJS)

- Humanitarian immigration relief for unmarried children who cannot be reunified with one or both parents who...
 - Abused, abandoned or neglected the child
- State court findings are required as evidence
 - The court using state best interests laws makes a child custody or placement decision and includes SIJS findings
 - The state court order reflects judge's expertise and does **not** provide immigration status
 - The order is one required piece of evidence in a federal adjudication process

State Court Findings Needed for SIJS

State Law Applies To Each

- The court has jurisdiction to issue orders regarding the care, custody, or placement of an immigrant child (under age of majority and unmarried) with
 - An individual (e.g. non-abusive parent, grandparent, kinship care, guardian, next friend, adopting parent) 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 at least **one parent's** abuse, abandonment, or neglect

Decisions about care and custody of children arise in family court proceedings

- Dependency/Delinquency
- Civil protection order cases
- Custody cases
- Divorce cases
- Paternity and child support cases
- Adoption cases
- DHS states: All are of the above = *Juvenile courts*
 - Juveniles = all children
- Bench Book chapters on each case type

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

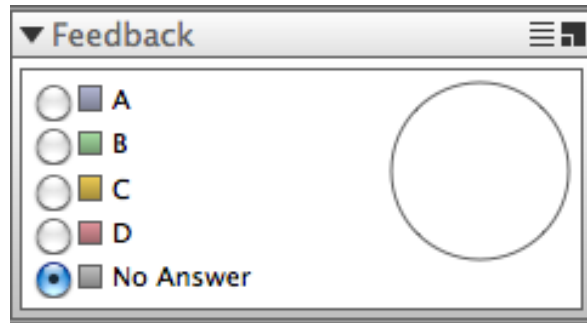
Finding: Reunification Not Viable

- Does not require termination of parental rights
- Viability of reunification does not necessitate no contact with parent – Visitation can occur
- Order must include the finding that reunification with the parent is not viable
 - Explain reasons in court order
- Using state best interests law

Apply Same Jurisdiction and Procedural Rules as All Other Cases

- Include a statement of the court's jurisdiction citing the state statute, court rule, or other authority under which the court is exercising jurisdiction.
- Follow your state court procedures and note that you do so to demonstrate that the court made an informed decision.

In the Clara and Eduardo scenario in which of the following cases could the court NOT issue SIJS findings for Lupe as part of the court's order?



A screenshot of a feedback form window titled "Feedback". The window contains a list of radio buttons with corresponding colored squares: A (blue), B (green), C (yellow), D (red), and No Answer (grey). The "No Answer" option is selected. To the right of the list is a large empty circle.

- A. A protection order case in which the order grants Clara custody
- B. A custody case brought by Clara
- C. The criminal prosecution of Eduardo
- D. A child welfare case in which the court made findings of Eduardo's abuse and placed the children with Clara

VAWA Confidentiality in State Court Proceedings

Why is VAWA Confidentiality Important for State Courts?

- Promotes access to justice and just and fair outcomes in state courts
- Perpetrators may attempt to use state court discovery to obtain federal VAWA confidentiality protected information
- Prohibited immigration enforcement locations include courthouses

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
- *DHS notifies staff through “384” computer system*

State and Federal VAWA Confidentiality and Discovery Case Law

- Family law - VAWA and U visa case information not discoverable
- Criminal law – only U visa case certification discoverable
 - File not in prosecutors’ custody or control
- Civil cases not discoverable except potentially as needed to prove damages to a specific individual
 - In chambers review judge can redact

Sensitive Locations Protected From Immigration Enforcement

VAWA Confidentiality

- Victims protected at courthouses in connection with civil/family/criminal cases related to
 - Domestic violence, sexual assault, trafficking, stalking
- Shelters, rape crisis centers
- Supervised visitation centers
- Family Justice Centers
- Programs serving victims

DHS Policies (ICE & CBP)

- Schools
- Medical treatment & health care facilities
- Places of worship
- Religious or civil ceremonies e.g. weddings and funerals
- Public demonstrations e.g. march, rally, parade

January 2018 ICE Courthouse Enforcement Policy: Targeted Immigrant Limitation

- Civil immigration enforcement at courthouses will only occur when
 - ICE officers have information that leads them to believe that a *targeted immigrant* will be present at a courthouse
- No immigration enforcement against other persons including
 - Victims
 - Witnesses
 - Family members
 - People accompanying others to court

Steps Courts Are Taking

- Restrict activities that interfere with courtroom operations
- Enforcement restricted to non-public areas of the courthouse*
- Courts ask ICE to coordinate with court security staff and use of non-public entrances & exits*
- Some courts do not allow ICE into courtrooms
- No enforcement in civil and family proceedings absent written authorization from ICE Field Office Director or Special Agent in Charge*
- No interruptions during court proceedings or until case is completed
- No enforcement against victims, witnesses, family members, people accompanying others to court*
- Call courthouse security if ICE fails to comply with court orders

When judges know which immigrant victims, children, or family members can access certain benefits, how might this impact state court orders?

Both documented and undocumented immigrants can access:

- Family Court – e.g. divorce, custody, child support, protection orders, child welfare
- Language Access
- Police Assistance
- Have perpetrators prosecuted
- Obtain public benefits for their children
- Elementary & Secondary education
- School lunch/breakfast
- Soup kitchens, food banks, nutrition assistance
- Communicable disease immunizations, testing, treatment, treatment from public health centers
- Services necessary to protect life and safety
- Most COVID-19 Cares Act rental assistance
- Legal Services
- Assistance for Crime Victims
- Emergency Medicaid
 - COVID-19 treatment
- Emergency Shelter
- Transitional Housing
- Child and Adult protective services
- Crisis counseling and intervention
- Violence/abuse prevention services

Children and Crime Victims Qualified to Receive Public Benefits— Common Examples

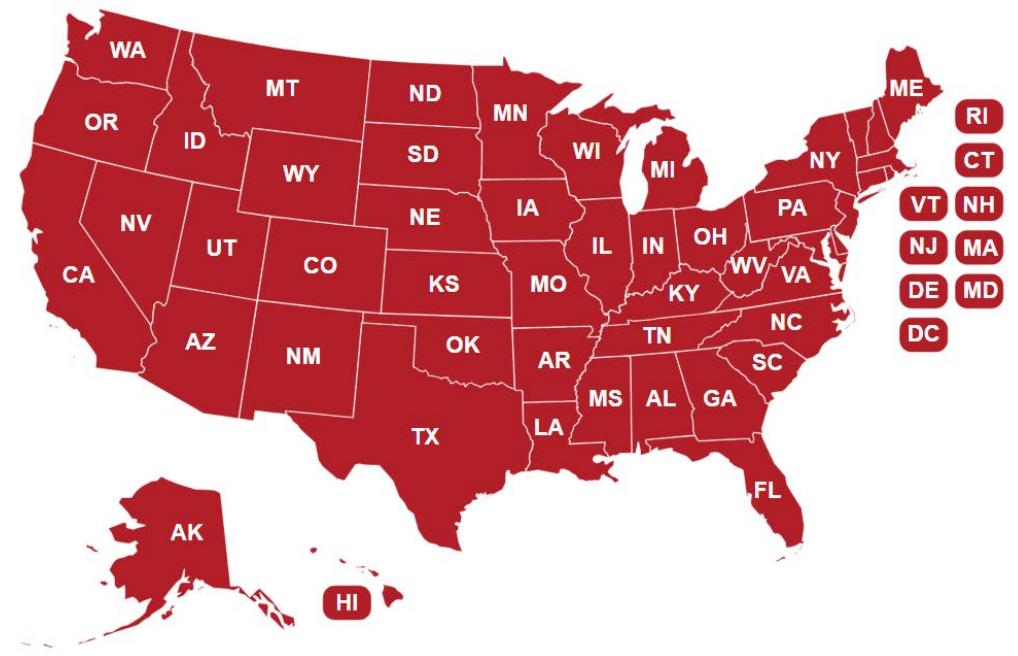
- Qualified Immigrants benefits eligible
 - Lawful permanent residents
 - Includes U visas and SIJS
 - Refugees/Asylees
 - VAWA self-petitioners
 - Trafficking victim with
 - Continued presence or
 - Bona fide determination in T visa case
- Not generally benefits eligible some variation by state
 - Asylum applicants
 - DACA recipients
 - U visa applicants & recipients
 - Work/Student visa holders
 - Undocumented

Many immigrants with work authorization qualify for CAREs Act Rebates and unemployment insurance both state and CAREs Act

Partial List of Federal Public Benefits/Community Programs Open to All “Qualified Immigrants”

- Public and assisted housing
- Post-secondary educational grants & loans
- Driver’s Licenses
- Access to most subsidized child care (Not TANF)
- Adoption assistance
- Foster care
- Low income and residential energy assistance programs
- Disability benefits
- Assistance to developmentally disabled
- Job opportunities for low income individuals

<http://map.niwap.org/>



Immigrant Victims and Family Court Cases

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



Myth vs. Fact: Parents without Legal Immigration Status

Myth	Fact
Deportation is imminent	DHS policies prevent detention/removal of immigrant parents who are crime victims
Parent is likely to flee U.S. with child	US citizens and lawful permanent residents are more likely to flee with children, especially when <ul style="list-style-type: none">- There have been threats of kidnapping children- They are dual nationals- They travel freely to and from U.S.
The parent has no livelihood	Abused immigrant parents in family court have a path to immigration relief, work authorization & some benefits
Legally present parent must have custody in order to file for benefits for child	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

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

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

Impact of Divorce

- VAWA self-petitioners:
 - Spouse 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, Work Visa Holders, Diplomats
- Divorce cuts off access to lawful permanent residency for spouses and children of people seeking lawful permanent residency based on:
 - Employment
 - Asylum
 - Family relationships
 - Cancellation of removal
- Annulment instead of divorce can lead to federal marriage fraud charges

Technical Assistance and Materials

- Power Point presentations and materials for this conference at <http://niwaplibrary.wcl.american.edu/NCJFCJ2020/>
- Judicial Training Manual at <http://niwaplibrary.wcl.american.edu/sji-jtn-materials/>
 - **NIWAP Technical Assistance**
 - Call (202) 274-4457
 - E-mail info@niwap.org
- Web Library: www.niwaplibrary.wcl.american.edu