

U-Visa Certifications: Helpful Tool for Prosecuting Domestic Violence and Sexual Assault Cases

Albuquerque, NM

April 11, 2017

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Support

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Introductions

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 - Director, The National Immigrant Women's Advocacy Project (NIWAP)
- Jane Anderson
 - Attorney Advisor, AEquitas: The Prosecutors' Resource on Violence Against Women

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USB Drive Materials

- U Visa Toolkit For Law Enforcement Agencies And Prosecutors
- DHS: U and T Visa Law Enforcement Resource Guide
- Tools for officers re: language access
- Bluecard Tool Screening Victims for Immigration Protections
- DHS Infographic

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General Caveats

- Women, men and children can qualify for U Visas
- Victims of almost all violent crimes, and many other crimes are eligible to apply for U Visas

The logo for NIWAP, consisting of the letters "NIWAP" in a white, serif font, positioned on a dark red background that features a silhouette of a mountain range.

Learning Objectives

- Articulate the reasons why immigration relief exists for victims of crime
- Hold offenders accountable by using the U Visa certification process as a crime fighting tool
- Enhance victim safety and participation in the criminal justice system
- Strategize how immigration issues can be addressed at trial

The logo for NIWAP, consisting of the letters "NIWAP" in a white, serif font, positioned on a dark red background that features a silhouette of a mountain range.

New Mexico Demographics (2015)

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

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

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

- | | |
|--|--|
| <ul style="list-style-type: none"> ▶ Latin America – 76.9% <ul style="list-style-type: none"> ▶ Mexico (70.8%) ▶ Other Central America (2.6%) ▶ South America (1.5%) ▶ Caribbean - 2.1% ▶ Canada - 1.7% ▶ Africa – 1.9% ▶ Europe – 7.5% | <ul style="list-style-type: none"> ▶ Asia – 11.0% <ul style="list-style-type: none"> ▶ Eastern China (3.6%) ▶ South Central Asia (2.9%) ▶ Southeastern Asia (4.4%) ▶ Limited English Proficiency
(Speak English less than very well) <ul style="list-style-type: none"> ▶ Naturalized citizens 36.8% ▶ Non-citizens 64.3% |
|--|--|

*Source: <http://www.migrationinformation.org/datahub/state.cfm?ID=NM>
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Dynamics of Domestic Violence Experienced By Battered Immigrants

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Immigration Related Abuse

- Refusal to file immigration papers on spouse/child/parent's behalf
- Threats or taking steps to withdraw an immigration case filed on the survivor's behalf
 - Family or work based visas
- Forcing survivor to work with false documents
- Threats/attempts to have her deported
- Calls to DHS to turn her in – have her case denied

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Coercive Control

- 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.
- 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)

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Abuse and Control

- 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

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Sexual Assault Rates

- High school aged immigrant girls
 - twice as likely to have suffered sexual assault as their non-immigrant peers, including recurring sexual assault
- Latina college students
 - experience the highest incidents of attempted rape compared to White, African American, and Asian college students
- Victimization of immigrant children also high
 - child sexual abuse

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Best Practice: Screening

- Immigration Related Abuse as a Lethality Factor
 - 10x higher in relationships with physical/sexual abuse as opposed to psychological abuse*
 - Lethality factor can predict abuse escalation
 - Corroborative

*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)

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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%

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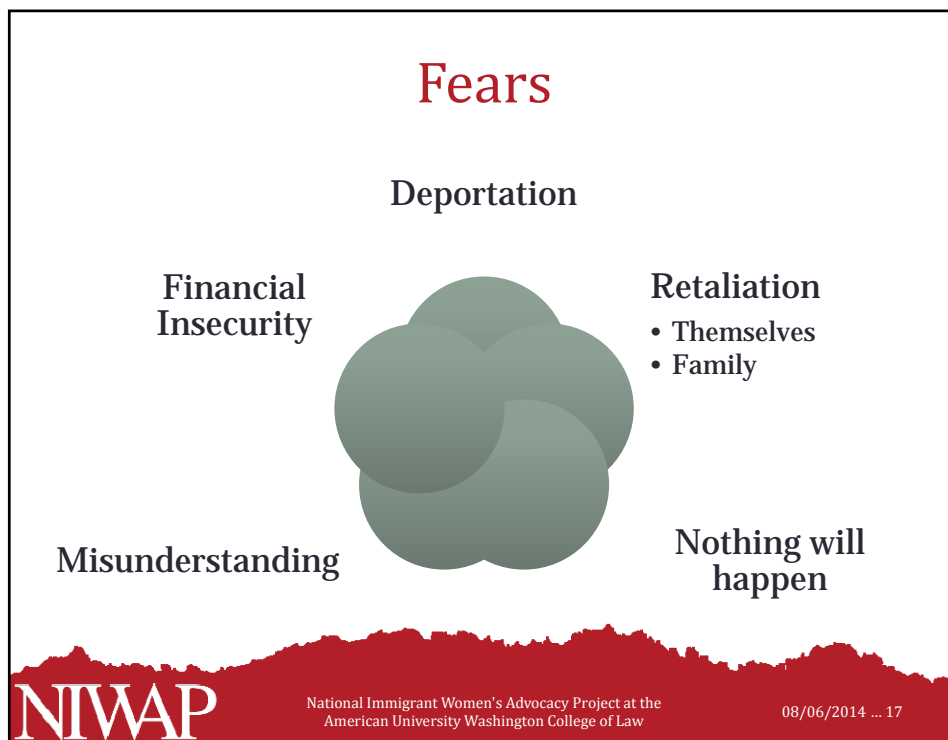
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What barriers and fears
prevent immigrant victims
from reporting crime?

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U Visas as a Crime Fighting Tool

Improving the reporting, investigation, and prosecution of violent crime & keeping everyone safer

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Benefits

- Increase reporting
- Improve investigations
- Enhance participation
- Increase safety

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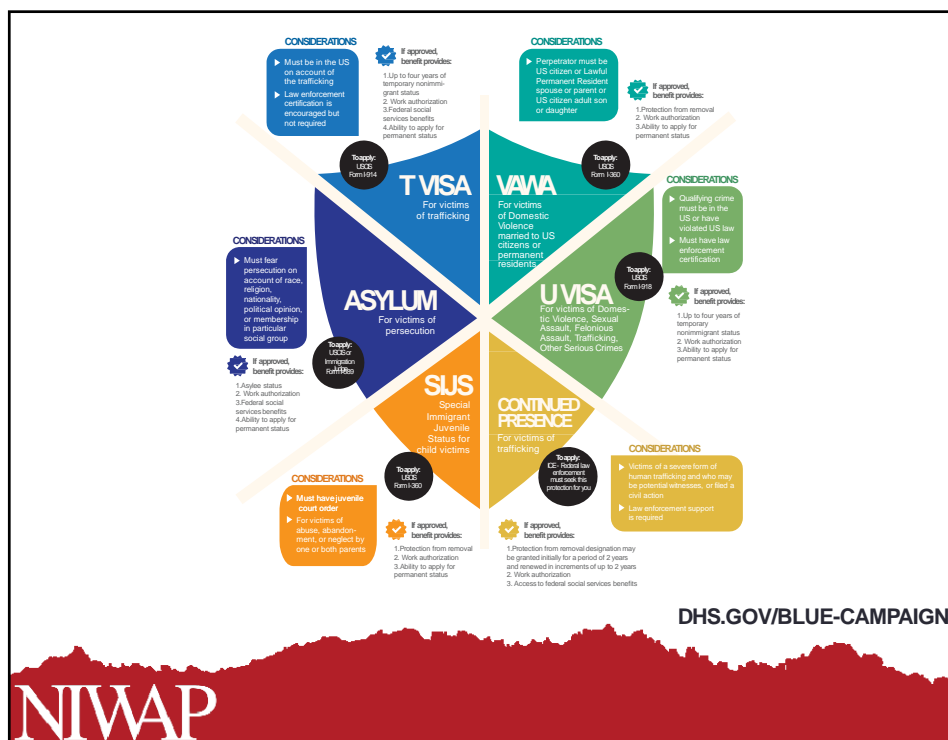
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Immigration Relief for Crime Victims

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U Visa Basics

- Law enforcement certification is just one part of the overall process it does not = Citizenship
- Meant to promote reporting of crime
- Targets offenders who prey on most vulnerable victims
- Offender may be citizen or non-citizen
- Can be “revoked”
- Increases immigrant victim participation in criminal justice system

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Purpose

- 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
 - Enhance victim safety
 - Keep communities safe

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Major Forms of Relief

- VAWA self-petition
 - Abuse by US citizen or lawful permanent resident
- U Visa
- T Visa
- Continued Presence

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U Visa Requirement

Victim

- Qualifying criminal activity
- Possesses information about the crime
- Criminal activity occurred in the U.S. or violated U.S. Law

Helpful

- Has been, is being, or is likely to be
- Detection, investigation, prosecution, conviction, or sentencing

Harm

- Substantial physical or mental abuse as a result

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Qualifying Criminal Activity

Domestic Violence	Kidnapping	False imprisonment
Sexual Assault	Abduction	Blackmail
Rape	Trafficking	Extortion
Incest	Involuntary servitude	Witness tampering
Prostitution	Slave trade	Obstruction of justice
Torture	Being held hostage	Perjury
Female genital mutilation	Peonage	Stalking
Felonious assault	Fraud in foreign labor contracting	Manslaughter

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

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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%

(11/2011 data)

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Who can apply?

- Victims of qualifying criminal activity
- Parents and guardians can apply as an “indirect victim” if:
 - the victim is a child under 21 years of age and/or
 - is incompetent, incapacitated, or deceased due to murder or manslaughter
- Bystanders victimization – very limited
- For child victims a “next friend” can provide helpfulness

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Who can certify?

“law enforcement” & “law enforcement agencies” =

- Federal, state, and local
 - Law enforcement
 - Prosecutors
 - Judges, Magistrates, Commissioners
- Departments of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC)
- Child and Elder Abuse investigators and agencies
- Other government agencies

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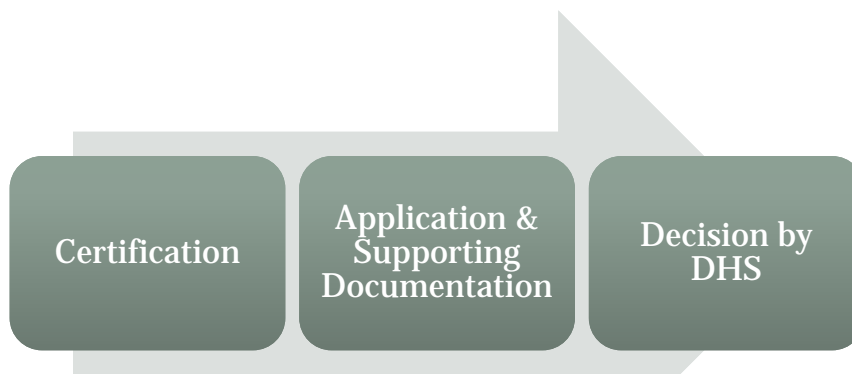
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Questions

Ask	Do not ask
<ul style="list-style-type: none"> • Do I believe this person was a victim of a qualifying crime? • Did the person assist or is willing to assist in the detection, investigation, conviction, prosecution and/or sentencing? 	<ul style="list-style-type: none"> • Can we prosecute? • Can I arrest the offender? • Do I have proof beyond a reasonable doubt? • Will the prosecutor's office file charges? • Is this within the statute of limitations? • Did we get a conviction?

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The U Visa Application Process



Typical length of process = 28 months

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DHS Adjudicates

- Were they a victim of a qualifying criminal activity?
- Did they suffer substantial harm as a result of victimization?
- Assess whether the victim unreasonably did not comply with reasonable requests from law enforcement (helpfulness)
- Is the victim admissible?
 - Review of criminal history
 - Review of immigration history

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U Visa Facts

- Only 10,000 U visas can be granted annually
- The U visa grants a temporary 4 year stay
- Only some U visa holders will qualify for lawful permanent residency- no guarantee
- U.S. citizenship can only be attained after lawful permanent residency for 5 years + proof of good moral character

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How does law enforcement and prosecution benefit from the U Visa?



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Benefits

- Encourages victims to report crimes
- Improves investigation and prosecution of violent crimes
- Increases potential to convict most dangerous criminals
- Demonstrates commitment to protecting immigrant community members

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Benefits, Cont.

- Enhanced immigrant community involvement
- Makes it easier to identify victim witnesses
- Reduces repeat calls and recanting victims
- Fosters community policing partnerships
- Enhances Officer and Community Safety

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Prosecution Strategies for Cases Involving Immigrant Victims

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Learning Objectives

- Hold offenders accountable by focusing on their predatory actions against vulnerable immigrant victims
- Enhance victim safety by ensuring provision of services and immigration relief
- Engage in pretrial litigation to maximize trial success

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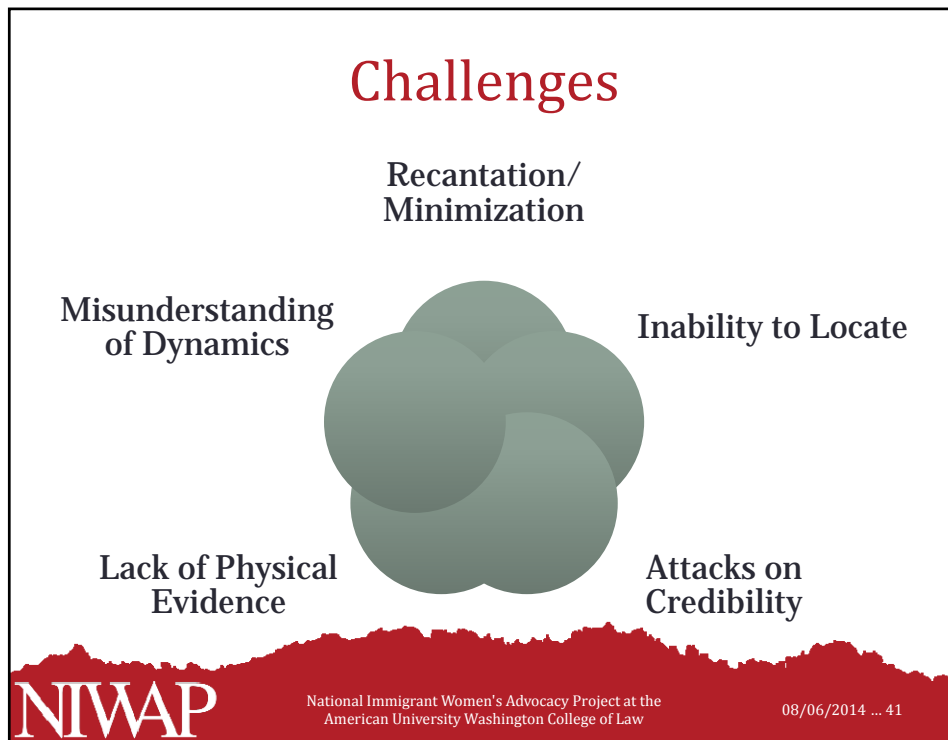
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What are your biggest
challenges to prosecuting cases
where the victim is an
immigrant?

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- ## Additional Challenges
- Victims have additional fear to come forward due to immigration status
 - Offenders can threaten victims with deportation
 - Jurors may have anti-immigration feelings
 - Allegations that the victim is lying because of immigration
 - To receive an immigration benefit
 - To curry favor with the government
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Topics



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Certification

- Prosecutors can sign certification forms
 - Must be designee
- Any certifying agency can certify at any time they have probable cause
- Certification policies & practices should be discussed at collaborative partner meetings (e.g. CCR, MDT)
- Certifying prosecutor should consider not being the trial prosecutor

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Certify Early

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Establish trust

Build rapport

Protect from offender

Protect from deportation

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Accusation that victim is lying for immigration benefit

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Why not just wait to certify until the case is over?

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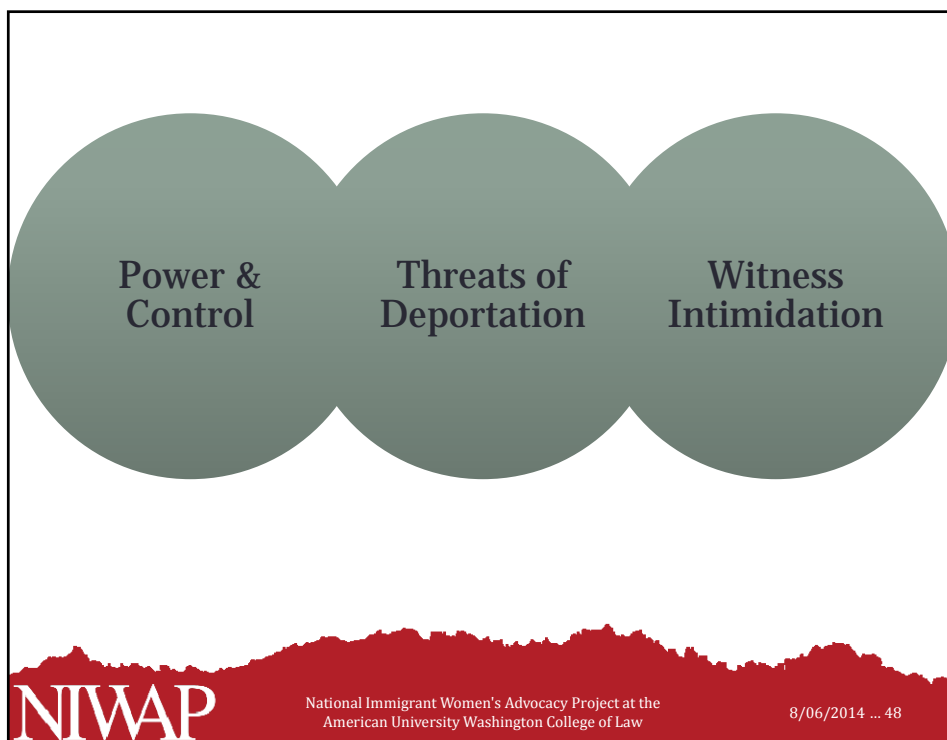
Threats of Deportation

- Signed certification must be included in the initial application for a U Visa
- Once the initial application is processed:
 - Victim is entered into a database and flagged as an applicant for a U Visa



- Immigration proceedings will not be initiated
- Offender can not succeed with deportation intimidation

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Discovery

- Must provide defense with any materials within the state's control that may effect the credibility of any witness or that goes to any witnesses motive to lie or bias
 - Is it within the State's custody or control?
 - Does it go to the witness' credibility, bias, or motive to lie?

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What is considered within your custody and/or control?

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Custody and Control

Within

- Certification form
- Accompanying documentation; e.g. police reports, photographs, medical records
- Communications from immigration attorney
- Attachments provided to you

Not Within

- Materials not provided to you
 - U visa application
 - VAWA application
 - T visa application
 - Attachments to application
 - Other materials submitted
- Immigration file
 - Includes existence of & actions taken in the case

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Strategies to Limit Risk

- Certify based on information the prosecutor/police have
 - Do not need and should not seek additional information or materials
- Work with local attorneys and advocates working with immigrant victims
 - Tell them you will not accept more information
 - Do not accept materials offered/sent

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State v. Marroquin-Aldana

2014 ME 47, ¶ 20, 89 A.3d 519, 525

- Court ruled there was “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

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Hawke v. U.S. Dep't of Homeland Sec.

No. C-07-03456 RMW, 2008 WL 4460241, at *7 (N.D. Cal. Sept. 29, 2008)

“[T]he strict confidentiality of the Violence Against Women Act still applies to any petitions filed by Mrs. Hawke. While Mr. Hawke's Sixth Amendment right to Compulsory Process permits him access to some information held by the government, it does not permit him to receive absolutely privileged information like any records held by DHS here.”

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Response to Motions to Compel

- Concede existence of certification
- Provide copy of certification and only accompanying documents that are in your custody and control
- Move to quash subpoena for immigration file
 - Confidentiality protections
 - Impermissible “fishing expedition”
 - Case law

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Is the victim's immigration
status ever relevant to the
prosecution's case?

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Analyze Case

Victim Selection

- Did the offender chose the victim because of a real or perceived vulnerability?

Criminal Act

- Did the offender use the victim's immigration status to commit a criminal act?

Escape Detection

- Was the victim prevented from reporting the crime to police because of their immigration status?

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Victim Selection

- Chose a particular area of town to commit crime
- Target victims working in specific venues; e.g. agriculture, hospitality, or construction
- Victimize known immigrant
- Instill vulnerability by jeopardizing victim's immigration status

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Criminal Act

- Human trafficking
- Rape by threats
- Power and control within domestic violence relationship
 - Intimate partner, spouse, child, elder abuse
- Threats as part of stalking or harassment
- Witness intimidation or tampering
- Robbery by threat (Extortion, threat of felonious assault, false imprisonment)

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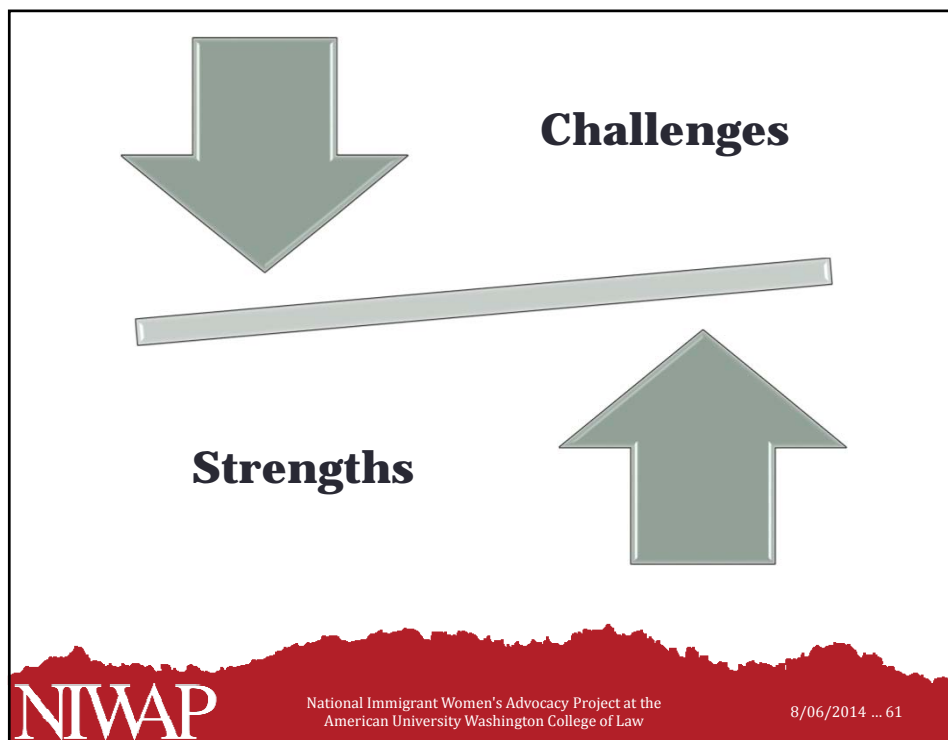
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Escape Detention

- Threats
 - Deportation
 - "No one will believe you"
 - "You will never see your children again"
 - Financial
 - Family cohesiveness

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Pretrial Strategies

- Preview evidence for judge
- Brief complex legal issues
- Establish evidence that will and will not be admitted at trial
- Requires thoughtful consideration of case well in advance of trial date



Motions in Limine

Immigration Status

- Exclusion
- Limitation

Other Bad Acts

- Prior threats
- Subsequent threats or intimidation

Experts

- Victim Dynamics
- Immigration Relief

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Immigration Status

- Exclude if irrelevant
 - No immigration benefit provided
 - Not relevant to offender's crime
- Cross-examination will be allowed as to U-Visa application and VAWA self-petition
 - Limit scope
 - Opens the door to rebuttal evidence

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People v. AlvarezAlvarez

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 of both Teresa and, potentially, defendant, which was completely irrelevant to this case. The trial court was well within its discretion in excluding reference to the visa.”

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Other Bad Acts

- Includes prior and subsequent “bad acts”
- Does not need to rise to the level of criminal activity
- May go to prove motive, knowledge, intent, opportunity, or lack of mistake, self-defense, or accident
- Can be relevant to establish the “nature of the relationship”

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Expert Witness

- Victim responses to trauma
- Dynamics of domestic violence experienced by immigrant victims
- Relationships between offenders and victims in human trafficking cases
- Victim protections under immigration law
- Other subjects that may be outside the common jurors understanding

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Fed. R. Evid. 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data...

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Where can I find an expert?

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Possible Experts

Dynamics

- Experience working with immigrant victims
 - DV Shelter
 - Advocates
 - Rape Crisis Center
 - Investigators
- Scholars

Immigration

- Immigration attorney
- Law Professors
- Other attorneys that have experience with immigration issues; e.g. family law, legal aid

Best Practice: Do not use any expert that is involved with the case or has worked with the victim

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State v. Olvera-Guillen

2008-Ohio-5416

- Court allowed defense to call an expert witness to explain the U Visa process
- Prosecutor's comments permissible:

"You know there is a very good reason why that U-visa program is in place because without it, people like him, can have free rein. They rape, pillage and plunder a whole underclass of people in this country simply because they are illegal aliens, knowing full well that they in their perpetual fear factor and their state of paranoia are not going to go running to the police."

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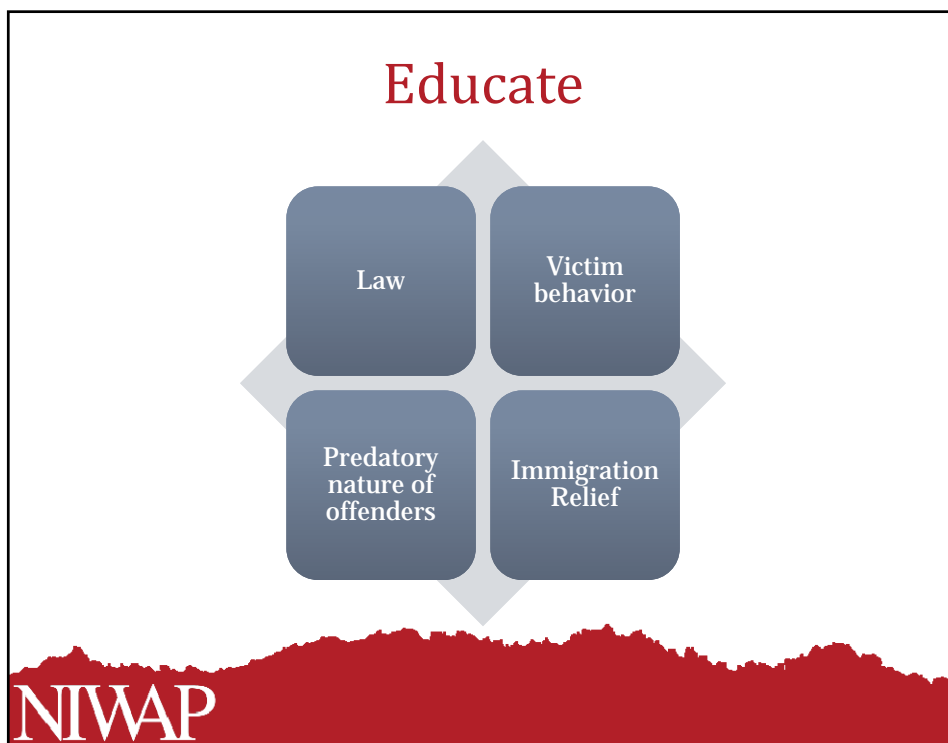
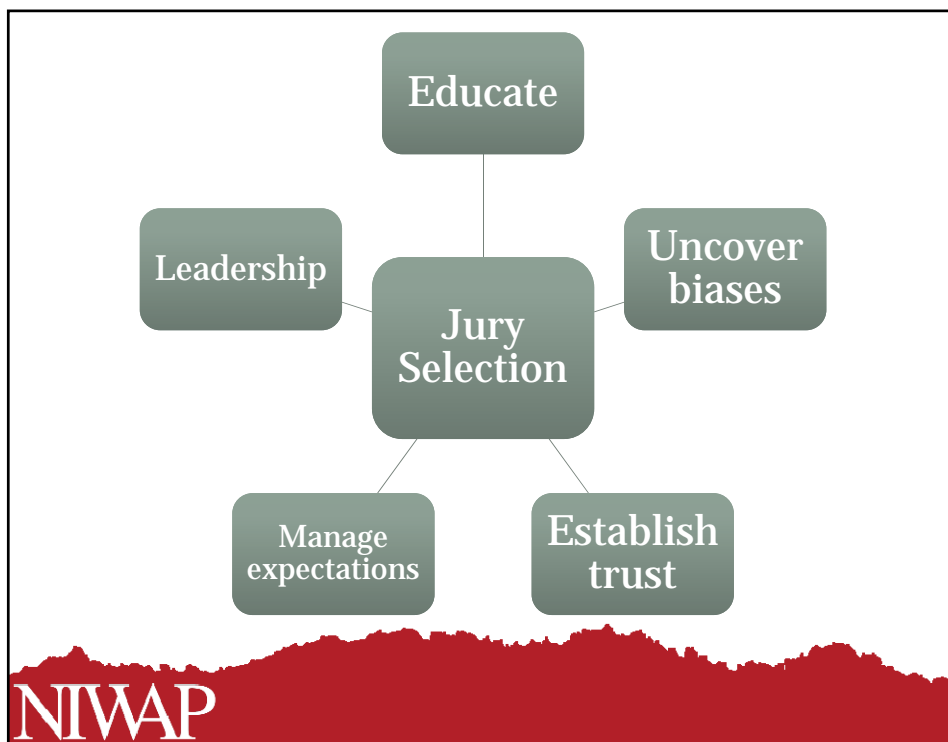
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When do you start talking about immigration status?

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Uncover Biases

- Will the juror be able to “get” ...
 - Victim is not on trial
 - Predatory nature of offenders
 - Equal protection of the law for immigrant victims
 - Intent of immigration relief for victims of crime

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Establish Trust

- Be accurate about the law
- Do not hide “bad facts”
- Be respectful to Judge, defense attorney, defendant, court staff, and jurors

Jurors watch everything you do!

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Leadership

- Inspire jurors
- Be authentic and genuine
- Do not be repetitive
- Use appropriate humor

#1 BE YOU

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Manage Expectations

- Victim may not have immediately reported the assault
- Victim may be undocumented
 - A civil violation of immigration law
- Victim may have engaged in criminal behavior
- Offender may not have used violence, but merely threats of violence or deportation

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Offender-Focused Theme

PREYING ON THE MOST VULNERABLE	AMERICAN DREAM BECAME A NIGHTMARE	BETRAYAL OF TRUST, FAMILY, AND THE LAW
POWER OVER THE POWERLESS	PICKED THE PERFECT VICTIM	KNEW THERE WAS NO WHERE TO TURN

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Victim Testimony

- Introduce the victim to your jury
- Recreate the reality of the crime
- Illustrate fear
- Address immigration status and U Visa, T Visa, or VAWA self-petition application
- Emphasize threats of
 - Deportation
 - Separation from family
 - Loss of employment

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Cross-Examination

- Prepare victim for anticipated lines of questioning
- Listen for the defendant to explicitly or implicitly accuse the victim of lying for an immigration benefit

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Rebuttal Testimony

- Once the defendant has alleged that the victim has a motive to lie, the prosecution can introduce the victim's prior consistent statements about the charged crime
- Door to this testimony can be opened at any time, but is likely done during cross-examination
- Be prepared with case law and a legal brief, if appropriate

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Prior Consistent Statements

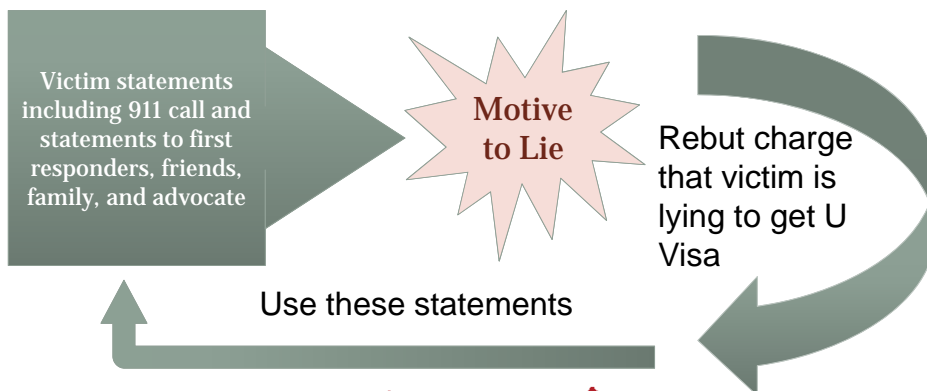
- Non-Hearsay
- Not subject to Crawford
- Any consistent statement
 - offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying
 - to rehabilitate the declarant's credibility as a witness when attacked on another ground

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Introducing Statements

- Establish timeline of when victim was told about U Visa/VAWA and statement made prior to that



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What statements do you usually have from a victim of a crime?

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Victim Statements

- 911 call
- Statements to first responders
- Interview by detective
- Comments made to family, friends, or coworkers
- Conversation with service providers
 - Community-based v. Systems-based

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Which of these statements
would normally be admissible?

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When is a victim typically
advised of immigration relief
benefits?

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Example Questions on Rebuttal

- “Defense counsel asked you about your application for a U Visa, when did you first hear about the U Visa?”
 - “After speaking with detective, I spoke with an advocate at the police station”
- “Prior to speaking with the advocate, did you provide the detective with an recorded statement?”

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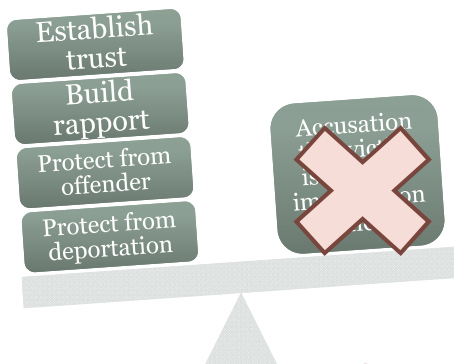
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Certify Early

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Going Forward

- When probable cause exists, certify early to ensure victim safety and enhance victim participation
- Focus on the offender's actions throughout the investigation and prosecution
- Litigate discovery and pretrial motions to ensure just results
- Turn challenges into strengths

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Helpfulness



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Regulations

- There is no degree of helpfulness required
- Law enforcement may complete U visa certification once they assess victim's helpfulness
- The investigation or prosecution can still be ongoing
- Certification can be revoked at any time



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Helpfulness Satisfied

- Victim reports a crime where there's no further investigation
- Report is of past crime that the victim did not report at the time
- Perpetrator absconds or is subject to immigration removal
- The perpetrator is being prosecuted for a different crime



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Helpfulness Satisfied, Cont.

- Victim is not needed as a witness
- Victim is dead (indirect victim qualifies)
- Perpetrator is dead
- Victim has a criminal history or is subject to immigration enforcement
- Victim fully discloses story after better understanding rights, the U-visa and meaningful language access

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What does it mean for a victim to “unreasonably refuse” to provide assistance?

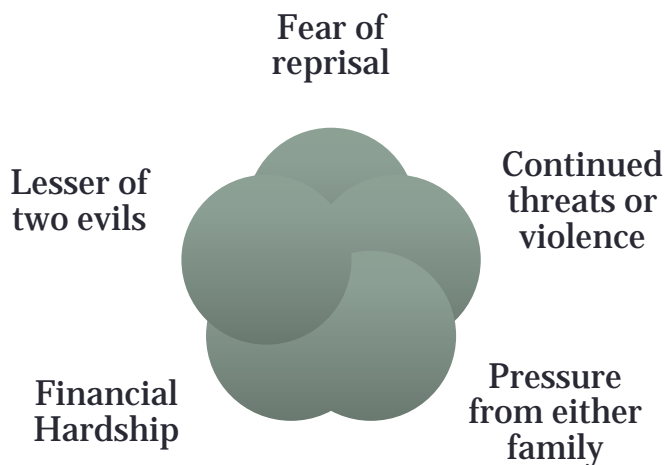
4. Has unreasonably refused to provide assistance in a criminal investigation and/or prosecution of the crime detailed above. *(Attach an explanation.)* Yes No

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Why would a victim report a crime and then refuse to participate in the ensuing investigation and trial?

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Reasons



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Evaluating “Reasonableness”

- Considerations:
 - totality of the circumstances, including the nature of the victimization
 - victim’s fear or the abuser
 - trauma suffered
 - force, fraud or coercion

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If you still believe the victim is unreasonably refusing...

- Note on the certification, sign, and return to victim or victim’s attorney
- Burden shifts to victim to prove the refusal is not unreasonable
- DHS makes the ultimate decision

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Working With Local DHS Resources

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Prosecutor's Important Role

- Countering perpetrator's efforts to have victims deported
- Police/Prosecutors play key role
- Particularly in areas/times of enhanced immigration enforcement
 - Inform victims about VAWA, T and U visas
 - Collaborate with victim advocates/attorneys
 - Know who to call at DHS

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ICE Victim Assistance Specialist
SAC Albuquerque
Denise Gutierrez
Phone: (505)452-4904
Denise.Gutierrez@ice.dhs.gov



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ICE ERO Community Field
Liaison
Brian Van Dyke
El Paso Field Office
(915) 856-5595

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Law Enforcement Support Center Field
Offices

LESC Communications Section

188 Harvest Lane

Williston, VT, 05495

(802) 872-6050 or via NLETS

Administrative Message (AM) to
VTINS07S0

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NIWAP Resources

- Technical Assistance
 - Call: 202.274.4457
 - Email: niwap@wcl.american.edu

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Written Resources

- Materials on U visa and Immigrant Victims Legal Rights
 - Visit <http://niwaplibrary.wcl.american.edu>
 - U Visa Certification Toolkit
 - DHS Answers to Law Enforcement Reasons for Not Certifying
 - USCIS Q & A on U Visa Certification
 - Roll call training videos
 - All available at:
[www.http://niwap.org/lawenforcement](http://www.niwap.org/lawenforcement)

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Thank You!

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