

INSIDE: Due Process & Non-Citizens • Special Relief for Unaccompanied Youth • Abuse Victims Scared Silent

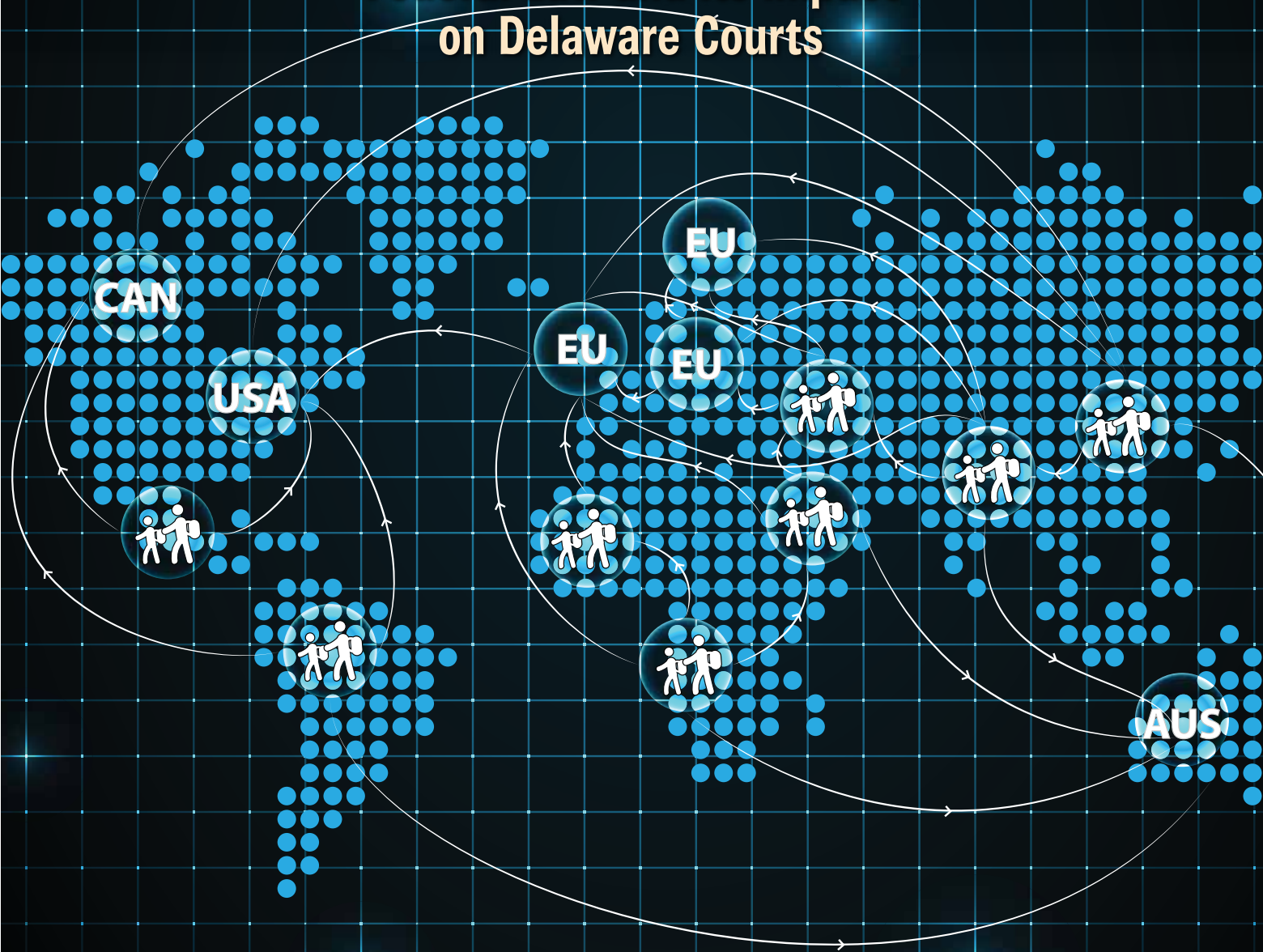
Delaware Lawyer

A PUBLICATION OF THE
DELAWARE BAR FOUNDATION



VOLUME 36 ♦ NUMBER 3
\$3.00 ♦ Fall 2018

IMMIGRATION Federal Law and Its Impact on Delaware Courts



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FEATURE

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Protecting Immigrant Victims

VAWA offers immigration protections for sexual assault victims.

In 1994, Congress enacted the Violence Against Women Act¹ (VAWA), a far-reaching legislative effort to “deter and punish violent crimes against women.”² From the outset, and in subsequent broadening of VAWA protections since,³ the act has included sweeping provisions designed to protect immigrant victims and to remove critical barriers that may otherwise prevent them from seeking legal and social service protections.

The VAWA and the Trafficking Victims Protection Act (TVPA)⁴ created several forms of immigration relief designed to offer protection to immigrant victims of domestic violence, sexual assault, human trafficking and other crimes. VAWA self-petitions,⁵ VAWA cancellation of removal,⁶ battered spouse waivers,⁷ U visas⁸ and T visas⁹ offer immigrant victims access to lawful immigration status with a potential path to lawful permanent residence and eventually U.S. citizenship.

Each of these forms of immigration relief results in encouraging immigrant crime victims to come forward and avail themselves of protections in civil and criminal courts. Despite current misinformation in immigrant communities

and increased immigration enforcement,¹⁰ VAWA’s protections for immigrant victims remain intact and available for immigrant victims.

Importance of Confidentiality Protections

It is important for advocates, attorneys and victims of crime to be aware that there are critical confidentiality provisions for victims seeking immigration relief under VAWA and the TVPA. VAWA’s confidentiality provisions prohibit the Department of Homeland Security (DHS) from using information solely from an abusive spouse or parent, a trafficker, sexual assault or other crime perpetrator, as the basis for arresting or charging the victim with removal.¹¹ Further, in no case may any official or employee of the Depart-

ment of Justice (DOJ), the DHS or the Department of State (DOS) “permit use by or disclosure to anyone ... of any information which relates to an alien who is the beneficiary of an application for relief” under the VAWA provisions.¹² The distinctions between these two protections are important:

*Unlike the confidentiality provisions of 8 U.S.C. § 1367(a)(2), which expire once the benefit request has been denied and all opportunities for appeal have been exhausted, this [8 U.S.C. § 1367(a)(1)] prohibition on adverse determinations of admissibility or deportability using information furnished solely by prohibited sources does not expire upon denial of the benefit petition and applies regardless of whether any application or petition has been filed.*¹³

A policy issued by USCIS on June 28, 2018, significantly expands the potential for DHS to initiate removal proceedings against immigrants whose petitions and applications for immigration benefits are denied.¹⁴ For immigrant victims of crime applying for protection from abuse, this new policy means that if USCIS denies the request for humanitarian relief on the merits, USCIS will, with limited exceptions, issue a Notice to Appear (NTA), which is the charging document DHS serves to initiate removal proceedings.¹⁵ In light of this policy, practitioners representing immigrant victims should take care to file well documented cases and discuss with clients the risks and ramifications of the application and the strength of the defenses the client may have should the client be placed in removal proceedings (*e.g.* VAWA cancellation and 10-year cancellation of removal).¹⁶ VAWA confidentiality protections continue in full effect furthering VAWA’s victim protection, law enforcement and community safety goals.

Protection of Victims

VAWA was created specifically for the protection of victims. The majority of VAWA confidentiality-protected cases involve abusers who have intimate, close and/or ongoing access to the victim as a family member, employer or human trafficker. Many of the crimes covered

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by U visa protections¹⁷ involve recidivist criminal activity that affects public safety. Crime victims who file police reports, obtain protection orders, cooperate in investigations and testify in criminal, civil and family court proceedings do so at increased risk to themselves, their children and their family members. Involvement in court actions increases danger to victims — both those who continue living or working in locations where the abuse occurred and those who have fled.¹⁸

In sexual assault cases, ensuring the confidentiality of the victim’s extremely sensitive and personal information in the immigration case is crucial due to the privacy concerns related to the intimate nature of the harm suffered.¹⁹ Disclosure can have consequences for the victim’s self-esteem, reputation and safety and could incite more violence, blackmail, intimidation or harassment by the abuser.²⁰ Courts often give great weight to the consequences of revealing highly personal and private information in the course of judicial proceedings.²¹

It is for this reason that VAWA confidentiality protections were designed to continue indefinitely and to help prevent the removal of victims — a goal also furthered by DHS exercising prosecutorial discretion²² to not initiate enforcement actions against victims of sexual assault, domestic violence, trafficking and other crimes.²³

Impact on Law Enforcement and the Justice System

Individuals must be able to report crimes and seek help from civil and criminal courts without fear that their reporting will give their abusers access to the sensitive information contained in their federal immigration files. Protecting the confidentiality of victims encourages their full participation in the detection, investigation, prosecution, conviction and sentencing of those crimes and increases victims’ access to justice. This was the congressional intent in creating VAWA confidentiality. Ensuring that victims can confidentially file for, and receive, immigration protection removes the threat of deportation as a tool of coercion, frees victims to come forward and helps law enforcement and courts to better serve immigrant communities.

VAWA Confidentiality in Practice

The confidentiality provisions do not permit an adverse party to have access to the victim’s immigration file through discovery or through a victim’s testimony in both civil and criminal cases involving the victim and the abuser.²⁴ Accordingly, attorneys representing immigrant victims who have filed for immigration relief must be ready to challenge an abuser’s request for information through discovery. The language in the statute and case law prohibits such disclosure by the government, including disclosure of the *existence* of an immigration petition.²⁵ Using these provisions, an attorney should be prepared to object and brief confidentiality issues to prevent the use of state court discovery to obtain such sensitive information of the victim’s protected federal immigration file. The objections could be based on relevance in a family-related proceeding and the discovery attempt itself provides evidence of a pattern of control and abuse of the victim by the abuser.²⁶

Access to specialized training and materials containing legally correct information on immigration law will help state court judges in family, civil and criminal court proceedings understand how discovery of VAWA confidentiality-protected information is part of the power and

control dynamics at play in domestic violence, child abuse and workplace sexual assault cases involving immigrant victims and their children. If courts allow abusers access to a victim's immigration file, the harm and negative implications that would follow would impact not only the particular case but all immigrant victims of domestic violence and other crimes in all VAWA confidentiality-protected cases, and in all kinds of contexts where abusers target vulnerable immigrant women and children as victims.

To fully take advantage of the confidentiality protections discussed above, advocates and attorneys must do a thorough intake when representing clients who are not U.S. citizens to screen for possible immigration relief if they are in the United States without lawful immigration status and any criminal record to minimize any risk of detention and removal. The screening should address domestic violence, sexual assault and

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trafficking in order to properly advise clients about potential immigration relief. If the attorney determines that a client

qualifies for immigration relief, the attorney should file the application as soon as possible. Early filing ensures that the client will receive VAWA confidentiality protection including some statutory protection against deportation²⁷ and discovery of the case will be restricted. In addition, the victim may be able to qualify to apply for employment authorization that will help the victim be self-supporting and less dependent on the abuser.

Conclusion

Congress enacted VAWA and the TVPA with the objective of eliminating obstacles for victims of domestic violence, sexual assault, human trafficking and other crimes. Knowledge about crime victim related immigration options for victims and understanding of the VAWA confidentiality provisions helps attorneys provide competent legal services while preventing disclosure of sensitive information related to the client's immigration file. Family law practitioners and



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the judiciary should be skeptical of abusers' attempts to seek copies of immigration petitions through discovery, which seek to accomplish little more than intimidation.²⁸ ♦

NOTES

1. See 42 U.S.C. § 13925, *et seq.*
2. H.R. Rep. No. 103-395, at 26 (1994). See Pub. L. 103-322 (Sept. 13, 1994).
3. The protections of VAWA 1994 were expanded in 1996, 2000, 2005, and 2013. VAWA reauthorization of VAWA's funding programs is required again in 2018, however, VAWA's immigration protections do not sunset and will continue even if Congress fails to reauthorize VAWA.
4. See Pub. L. 106-386 (Oct. 28, 2000) and 22 U.S.C. § 7101, *et seq.*
5. 8 U.S.C. § 1154(a)(1)(A)(iii).
6. 8 U.S.C. § 1229b(b)(2).
7. 8 U.S.C. § 1186a(c)(4).
8. 8 U.S.C. § 1101(a)(15)(U).
9. 8 U.S.C. § 1101(a)(15)(T).
10. Many immigrant victims of domestic and



sexual violence are reticent to come forward to report their abusers fearing that contacting and cooperating with police and prosecutors or going to court will lead to the victim's detention

or deportation. See, Rodrigues, *et al Promoting Access to Justice for Immigrant and LEP Crime Victims in an Age of Increased Immigration Enforcement - National Report* (2018) <http://niwaplibrary.wcl.american.edu/pubs/immigrant-access-to-justice-national-report>.

11. See 8 U.S.C. § 1367(a)(1).
12. 8 U.S.C. § 1367(a)(2).
13. USCIS, Policy Memoranda: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0050.1, June 28, 2018, <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>. See also, *Hawke v. U.S. Dep't of Homeland Sec.* 2008 WL 4460241 (N.D. Cal. Sept. 29, 2008) (When a victim attains lawful permanent residence through a spouse's petition any VAWA confidentiality immigration case the victim may have filed is denied as moot and the confidentiality protections continue because the case was not denied on its merits.). For all of DHS's directives on implementation, see <http://niwaplibrary.wcl.american.edu/pubs/implementation-section-1367>.
14. For example, "USCIS will issue NTAs where, upon issuance of an unfavorable decision

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on an application, petition, or benefit request, the alien is not lawfully present in the United States.” USCIS, Policy Memoranda: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, PM-602-0050.1, June 28, 2018, <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> (“8 U.S.C. § 1367 does not preclude USCIS from serving an NTA upon the attorney of record or safe mailing address. However, USCIS cannot serve the NTA on the physical address of the applicant or petitioner unless Section 1367 protections have been terminated.”).

15. INA § 239(a)(1). The Notice to Appear must contain information regarding the nature and legal authority of the proceedings, including the charges against the immigrant.

16. The National Immigrant Women’s Advocacy Project, at American University provides technical assistance to individuals working with immigrant victims at info@niwap.org or at (202)274-4457.

17. 8 U.S.C. § 1101(a)(15)(U) (The criminal activity involves one or more of the following or any similar activity in violation of Federal, State, or local criminal laws: rape; torture; trafficking;

incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; stalking; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; fraud in foreign labor contracting, manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt; conspiracy; or solicitation to commit any of these crimes).

18. For a discussion of immigrants’ interaction with DHS and prohibition against enforcement in certain sensitive locations, *see generally*, Veronica T. Thronson, *Executive Orders and Immigrant Victims of Domestic Violence*, 47 MICH. FAM. L. J. 7 (2017).

19. *See, e.g., Doe v. El Paso Cnty. Hosp. Dist.*, 2015 WL 1507840, at *4 (W.D. Tex. Apr. 1, 2015); *see also, e.g., Plaintiff v. Francis B.*, 631 F.3d 1310, 1315-19 (11th Cir. 2011); *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir.1997) (“[F]ictitious names are allowed when necessary to protect the privacy of ... rape victims, and other particularly vulnerable parties or witnesses.”); *Doe v. Cabrera*, Civ. A. No. CV 14-1005(RBW), 2014 WL 4656610, at *4 (D.D.C. Sept. 10, 2014); *EEOC v. Spoa, LLC*, No. CIV. CCB-13-1615, 2013 WL 5634337, at *3 (D.Md. Oct.15, 2013); *Roe v. St. Louis Univ.*, No. 4:08CV1474 JCH, 2009 WL 910738, at *3-5 (E.D. Mo. Apr.2, 2009); *Doe No. 2 v. Kolko*, 242 F.R.D. 193, 196 (E.D.N.Y.2006).

20. *See Cazorla v. Koch Foods of Mississippi*, 838 F.3d 540 (5th Cir. 2016) (while the District Court permitted the use of a protective order to redact information related to the immigration status and history of Appellants, recognizing its irrelevance to the claims at hand, the information related to the very intimate nature of the crimes alleged, including those of a sexual nature, were permitted to be discoverable). Taking a harder line, another district court recently prohibited discovery of immigration status in a workplace case, finding “the chilling effect, public policy concerns, and Plaintiffs-Intervenors’ fears outweigh any alleged probative value of possible exaggeration.” *Washington v. Horning Bros., LLC.*, No. 2:17-CV-0149-TOR, 2018 WL 2208215 (E.D. Wash. May 14, 2018).

21. *See, e.g., Doe v. El Paso Cnty. Hosp. Dist.*, 2015 WL 1507840, *4 (W.D. Tex. Apr. 1, 2015) (where the issues involved are matters of a sensitive and highly personal nature ...

the normal practice of disclosing the parties’ identities yields to a policy of protecting privacy in a very private matter,” quoting *S. Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712 - 13 (5th Cir. 1979)).

22. Under U.S. immigration law, prosecutorial discretion is the power that DHS has to initiate or discontinue removal proceedings against a person. The USCIS Policy Memorandum issued on June 28, 2018, provides for a Prosecutorial Review Panel that “must be maintained in each office authorized to issue NTAs.” *See* <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

23. *See* John Morton, *U.S. Customs and Immigration Enforcement, Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs*, (June 17, 2011), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

24. *See Demaj v. Sakaj*, No. 3:09 CV 255 JGM, 2012 WL 476168, at *5 (D.Conn. Feb. 14, 2012); *State v. Marroquin-Aldana*, 2014 ME 47, 39, 89 A.3d 519, 531 (Me. 2014); *People v. AlvarezAlvarez*, No. G047701, 2014 WL 1813302, at *5 (Cal. Ct. App. May 7, 2014), *Cazorla v. Koch Foods of Mississippi*, 838 F.3d 540 (5th Cir. 2016). The statute lists limited exceptions (*e.g.* national security, statistical data collection and Congressional oversight). *See* 8 U.S.C. § 1367(b)).

25. All DHS Directives on Implementation of Section 1367 Information Provisions can be found at <http://niwaplibrary.wcl.american.edu/pubs/implementation-section-1367>.

26. For detailed strategies on utilizing the VAWA confidentiality provisions *see* *Veronica Thronson, et al., Winning Custody Cases for Immigrant Survivors: The Clash of Laws, Cultures, Custody and Parental Rights*, FAM. & INTIMATE PARTNER VIOLENCE Q., Fall 2016 & Winter 2017, at 85.

27. *See* Alina Husain, *et. al.*, VAWA Confidentiality Statutes, Legislative History and Implementing Policy (4.4.18) <http://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history/>.

28. *See* Guillermo M. Hernandez, *Closing the Courthouse Doors: The Implications of the Discovery of Immigration Related Facts and the Effects of § 30.014 of the Texas Civil Practice & Remedies Code*, 13 Scholer 673, 701-704 (2011).



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