

Protections for Immigrant Survivors of Domestic and Sexual Violence Under VAWA Confidentiality Laws

October 22, 2018

Webinar

Casa de Esperanza and NIWAP

REPLACE WITH CASA GRANT NUMBER

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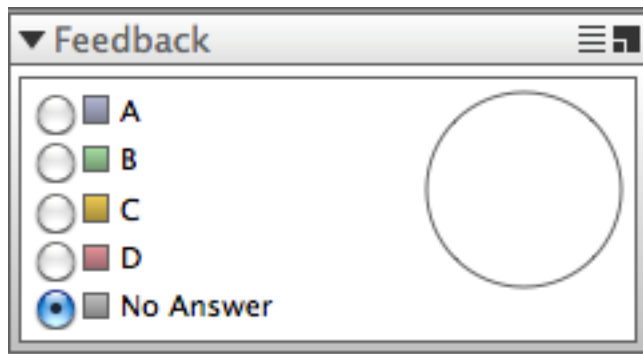
NIWAP's Technical Assistance: (202) 274-4457

Two Part Webinar Series on Protections for Immigrant Victims

- This is part II
- Part I covered
- **Judges Role in Cases Of Immigrant Domestic and Sexual Violence Survivors**
 - **Recorded October 22, 2018**
 - Is available on line

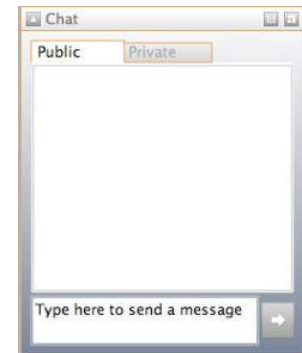
Let's see who is on the call with us. Please check the box that best describes you:

Answer
on the left



A screenshot of a web-based feedback form titled "Feedback". It features five radio buttons, each next to a colored square and a letter: A (blue), B (green), C (yellow), D (red), and "No Answer" (grey). The "No Answer" option is selected. To the right of the radio buttons is a large empty circle. The window has a standard title bar and a menu icon in the top right corner.

- A. Judge or court staff
- B. Lawyer representing victims in family court
- C. Domestic violence/sexual assault victim advocate
- D. Other



A screenshot of a web-based chat window titled "Chat". It has two tabs: "Public" (selected) and "Private". Below the tabs is a large empty text area for messages. At the bottom is a text input field with the placeholder "Type here to send a message" and a send button (arrow icon). The window has a standard title bar and window control buttons in the top right corner.

Learning Objectives

By the end of this webinar you will be better able to:

- Take steps to help immigrant domestic and sexual violence victims receive VAWA Confidentiality protection
- Rule on, file objections to, or seek pretrial rulings on discovery of VAWA confidentiality protected information
- Respond effectively should an immigrant victim become a target of immigration enforcement at a protected location

Many Immigrant Victims of Domestic Violence, Sexual Assault and Other Crimes Are Eligible for Immigration Relief

Immigration Relief Available for Immigrant Victims of ---

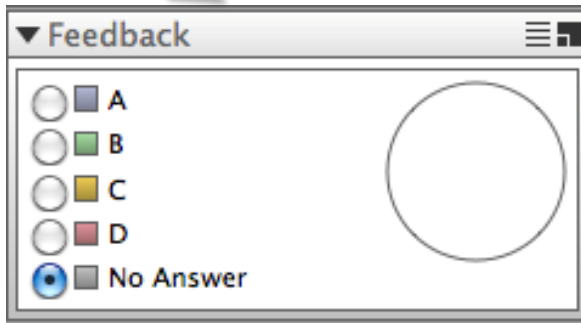
- Domestic violence
 - Child abuse
- Sexual assault
- Rape
- Incest
- Prostitution
- Torture
- Felonious assault
- Manslaughter
- Murder
- Female genital mutilation
- Kidnapping
- Abduction
- Trafficking
- Involuntary servitude
- Slave trade
- Being held hostage
- Fraud Foreign Labor Contracting
- Peonage
- False Imprisonment
- Blackmail
- Extortion
- Witness tampering
- Obstruction of justice
- Perjury
- Stalking
- **Parent perpetrated**
 - **Child abuse**
 - **Child neglect**
 - **Child abandonment**

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

In what percentage of the cases you hear/work on has a victim, a parent or a child suffered one or more of these criminal activity?

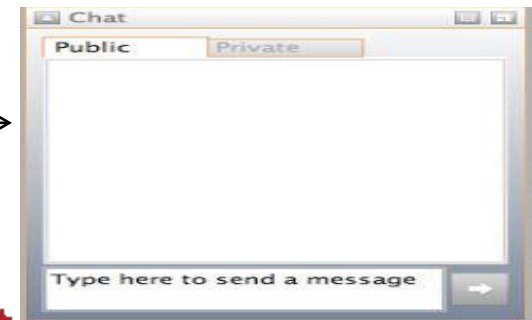
Answer on
the left

- A. Under 10%
- B. 11- 25%
- C. 26- 50%
- D. Over 50%
- E. Other



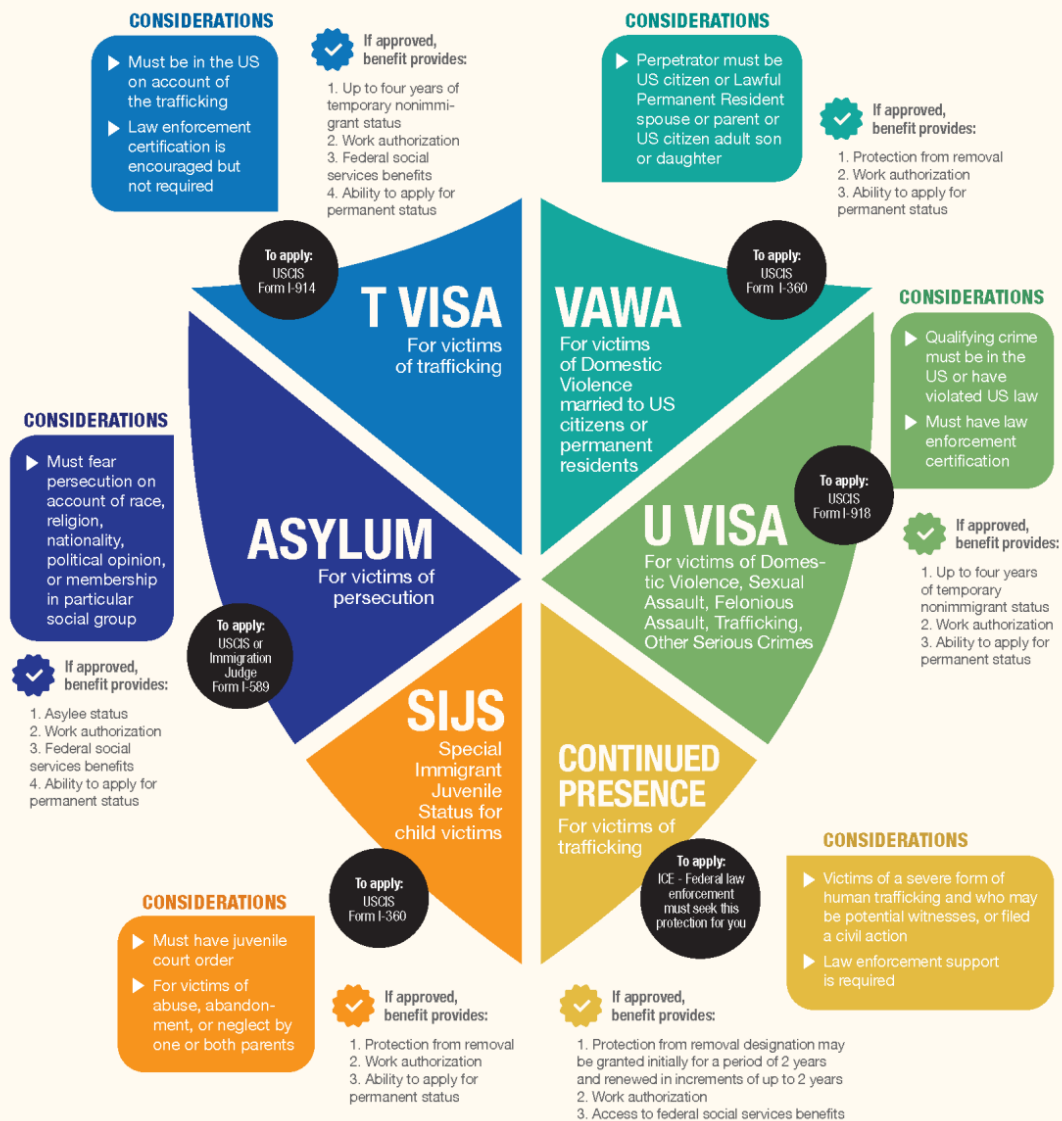
A screenshot of a 'Feedback' window. It features a title bar with a dropdown arrow and the word 'Feedback'. Below the title bar, there are five radio buttons, each followed by a letter: A (blue square), B (green square), C (yellow square), D (red square), and 'No Answer' (blue circle). To the right of these options is a large empty circle. A green arrow points from the text 'Answer on the left' to the radio button for option A.

Other write
in chat box



A screenshot of a 'Chat' window. It has a title bar with the word 'Chat'. Below the title bar, there are two tabs: 'Public' and 'Private'. The 'Public' tab is selected. The main area of the window is a large empty text box. At the bottom, there is a text input field with the placeholder text 'Type here to send a message' and a send button with a right-pointing arrow.

PROTECTIONS FOR IMMIGRANT VICTIMS



VAWA Confidentiality in State Court Proceedings

Bipartisan VAWA Confidentiality Legislative History in VAWA 2005

- “In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings...”
- These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims

Bipartisan VAWA Confidentiality Legislative History in VAWA 2005

- “This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not ... rely on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual assault and trafficking, as prohibited by section 384 of IIRIRA.”

Poll



- You have worked with domestic violence or sexual assault victim clients who have
 - Received threats of deportation from perpetrators
 - Yes/No
 - Been contacted by immigration enforcement officials
 - Yes/No

VAWA Confidentiality Prongs

Non- Disclosure

Protects victims **who have filed** a protected case with DHS

Violation = \$5,000 fine and/or disciplinary action

Abuser-Provided Information Prohibition

Includes family members of abusers, crime perpetrators and their agents

Protects:

- * **All victims abused by a spouse or parent**
- * All victims in the process of applying for U or T visas
- * Abused spouses of visa holders with VAWA work authorization filed

Location Prohibitions

Protects:

All Victims

Requires:

No action at protected locations
OR

Notice to Appear must state how they complied with VAWA confidentiality

VAWA Confidentiality Protections

- **Abuser-Provided Information:** DHS, DOJ and the State Department are barred from taking action against a victim based *solely* upon information provided by abusers and crime perpetrators (their family members or associates)
- **Location Prohibitions** to enforcement unless DHS complies with specific statutory and policy safeguards – includes no courthouse immigration enforcement against immigrant crime victims
- **Non-Disclosure:** DHS, DOJ and the State Department cannot disclose VAWA confidentiality protected information to anyone including through civil, family and criminal court discovery of information about or contained in the file of any protected case:
 - VAWA self-petitioners, VAWA cancellation/suspension, T visa, U visa, Battered Spouse Waiver, Abused Visa Holder Spouses

DHS Victim Protections For Whom?

Statutes/Regulations/Policies

- VAWA confidentiality
 - VAWA self-petition, cancellation, suspension
 - Battered Spouse Waiver
 - U Visas
 - T Visas
 - Abused spouses of work visa holders who file for VAWA employment authorization
 - *All victims abused by a spouse or parent*

DHS VAWA Confidentiality Computer System

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

VAWA Confidentiality 384 Red Flag System and Prohibitions on Release of Information Apply to Following Cases

- VAWA self-petition
 - VAWA self-petitioner
 - Battered spouse waivers
 - VAWA Cuban Adjustment Act
 - VAWA Haitian Refugee Immigration Fairness Act
 - VAWA Nicaraguan Adjustment & Central American Relief Act
- VAWA cancellation of removal
- VAWA suspension of deportation
- U visa applicants
- T visa applicants
- VAWA work authorization abused spouses of visa holder applicants

Can Victims Be Protected Prior to Filing a VAWA Confidentiality Protected Immigration Case?

- If victim shows evidence that they are in the process of filing a
 - U visa, T visa or VAWA case VAWA confidentiality is triggered and applies
- Evidence might include
 - A letter from an attorney/advocate stating that they are in the process of applying for a VAWA, T or U visa case
 - A copy of a certification
 - A protection order

Statute Does Not Require Filing For VAWA Confidentiality Protections To Apply To:

- Domestic violence victims
- Child abuse victims
- Immigrant parents of child abuse victims
- Victims of family violence perpetrated by another family member residing in the same household
- Best practice to file as soon as possible
 - A well documented case

VAWA Confidentiality Violations

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



Victim Witness DHS Memo 2011

Continuing Effect Confirmed 6/18

- Goal: “Minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice.”
- “Absent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.”
- Crime victims and witnesses should receive “release from detention and deferral or a stay of removal.”

How might these
policies be important
for state courts?



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
- Knowledge of protected locations improves court orders
- Prohibited immigration enforcement locations include courthouses

Attorney/Advocate Tips and Tools

- Identify VAWA, T and U visa eligible victims
- File victim's immigration case ASAP
 - Must be a well documented case
 - That will meet prima facie test
 - Gets victim's case into the DHS 384 computer system
- Ideally want immigration case filed before
 - perpetrator served in a family court case
 - Victim is appearing in the perpetrator's criminal case

What to Take to Court When Accompanying an Immigrant DV/SA Victim

- A# or Letter from advocate/attorney stating that victim is filing a VAWA, T or U visa case
- Police Reports
- Copy of the U/T certification
- VAWA confidentiality policies
 - ICE, DHS
- Evidence of abuse include copies of protection orders, photos, criminal court subpoenas

Victims for Which VAWA Confidentiality Will Offer Less Protection

- Victims with criminal histories
 - Including arrests
- Victims with outstanding deportation orders
- Victims eligible for VAWA, T or U who have not filed their immigration case

VAWA Confidentiality and Discovery

Protecting Information About a Survivor's Immigration Case

- Prohibits disclosure of any information about
 - The existence of a VAWA, T or U visa application
 - Information contained in the A file
- Helps survivors who have suffered
 - Battering or extreme cruelty
 - Human trafficking
 - Sexual assault, stalking and other U visa listed crimes
- Disclosure prohibited to all persons, not just the perpetrator

Protecting Information About a Survivor's Immigration Case

- Disclosure prohibited to all persons, not just the perpetrator
- Protections apply from the time of filing permanently unless
 - Case denied on the merits
 - All appeal options have been completed

Disclosure Exceptions

- Limited disclosure in narrow circumstances
 - Disclosure to law enforcement or national security officials
 - Solely for a legitimate law enforcement or national security purpose; and
 - In a manner that “protects the confidentiality of such information”

Hawke v. Dep't of Homeland Security

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

(Judicial review exception)

- 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”

Exceptions to Disclosure

- All DHS instruction 002-02-001
 - Only “in a manner that protects the confidentiality of such information”
 - “Please note, defense counsel in state cases may sometimes attempt to make the entire A-file discoverable; however the entire file is not discoverable in its entirety under this exception”

Federal VAWA Confidentiality Implementing Regulations

- 8 C.F.R. 214.14 (3)(2)
 - “Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367”
- Chevron v NRDC (S. Ct. 1984)
 - Considerable weight and deference required of federal regulations

Demaj v Sakaj (D. Conn, 2012) –U Visa/Custody 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
 - That is not possible in a family or criminal court case

State v. Marroquin-Aldana – Criminal Case

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 Alvarez- Criminal Case

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

Discoverable or Not Polls?

- The U/T visa certification in a
 - Criminal case? Yes/No
 - Family court case? – Yes/No
- Beyond the certification
 - Is information contained in the victim's VAWA, U or T visa case discoverable in a state court case?
Yes/No
 - Is information about the existence a VAWA/T or U visa case discoverable in a state court case? Yes/No

Bars and Limitations on Reliance on Perpetrator Provided Information

Bars Limiting Reliance Upon Information Provided by a Perpetrator

- The government cannot gather and/or use information provided solely by:
 - A domestic violence or child abuser
 - A sexual assault or stalking perpetrator
 - A trafficker
 - The perpetrator of any U visa listed crime
 - The perpetrator's family member
 - Other persons associated with the perpetrator
- To take an adverse action against a victim
- 8 U.S.C. 1367(a)(1)

DHS cannot rely on information *solely* provided by the perpetrator

- Information provided ***solely*** by prohibited sources **must** be independently corroborated by DHS
 - Adverse information about the victim from a prohibited source should be treated as “**inherently suspect**” (DHS Directive 11/1/2013)
 - “If the officer believes there is any credible evidence that the alien may be eligible for VAWA benefits or T or U” VAWA confidentiality applies (ICE 2007)

Adverse Actions Include Using Perpetrator Provided Information To...

- Deny a victims immigration case
- Detain a victim
- Deport a victim
- Initiate an immigration enforcement action against a victim
- Seek out, question or detain a victim at a prohibited location, including courthouse

All DHS Memo 002-02-001

- Adverse information about the victim from a prohibited source should be treated as “inherently suspect”

All DHS Memo 002-02-001

- “Whenever a DHS officer or employee receives *adverse information* from a spouse, family member of a spouse, or unknown private individual, the employee will check the Central Index System (CIS) for the COA ‘384’ flag. Employees will be sensitive to the fact that the alien at issue may be a victim and that a victim-abuser dynamic may be at play.”

The perpetrator provided information bar

- Is enforced in a variety of ways
 - Complaints filed with the office of civil rights at the Department of Homeland Security
 - The prohibited sensitive locations bar

VAWA Confidentiality's Location Protections That Apply to Crime Victims

Prohibiting immigration enforcement at sensitive locations was designed to...

- Ensure that abusers and criminals cannot use the immigration system against their victims stopping victims from:
 - Accessing civil and criminal justice system help
 - Protection courthouses, family justice centers, and supervised visitation centers
 - Obtaining help from shelters, rape crisis centers, victim services, and community-based organizations

Locational Prohibitions

- *Enforcement actions at VAWA Confidentiality protected sensitive locations actions are not to be taken:*
 - “[A]bsent clear evidence that the alien is not entitled to victim-based benefits”
 - Actions taken must “be handled properly given that they may ultimately benefit from VAWA’s provisions”
 - Officers are to follow a specific process aimed at protecting victims that includes obtaining advance permission from a supervisor or ICE general counsel for enforcement actions at statutorily protected sensitive locations
- John P. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007)

VAWA Sensitive Location Prohibitions

- Enforcement actions are not to be taken unless the action specific procedures designed to protect victims are followed:
 - 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



Are Courthouses Sensitive Locations?

- Courthouses are *not considered* sensitive locations by DHS
- *Exception:* VAWA confidentiality statutes and DHS policies treat courthouses as sensitive locations with regard to victims of
 - Domestic violence, sexual assault, stalking, trafficking
- DHS required to certify to the immigration judge that VAWA confidentiality not violated
 - Immigration case can be dismissed

VAWA confidentiality is likely violated when a DHS official comes to the courthouse in response to a “tip” from the perpetrator and arrests a victim who has come to court.....

- A. Seeking a protection order
- B. For a child custody case
- C. For an eviction case when the perpetrator stopped paying rent required in a protection order
- D. As a State’s witness in a criminal case
- E. All of the above

Sensitive Location Protections That Apply to All Immigrants Including Victims

Additional Protections for All Immigrants

- Sensitive Location Protections
- Immigration and Customs Enforcement (ICE) Limitations on Courthouse Enforcement
- Victims receive
 - These protections + VAWA confidentiality

Sensitive Locations

- Enforcement actions by ICE and CBP are not to occur or be focused at sensitive locations:
 - Schools
 - Medical treatment and health care facilities
 - Places of worship
 - Religious or civil ceremonies: e.g. weddings, funerals
 - During a public demonstration: e.g., march, rally, parade
- Very limited exceptions:
 - Exigent circumstances
 - Prior approval by a designated supervisor
 - Other law enforcement action led ICE/CBP there

Sensitive Location Exceptions

- Exigent circumstances
- Other law enforcement action led the officer to a sensitive location
- Prior approval by a designated supervisor

How might information about sensitive locations be helpful to courts?

Courthouse Protections That Apply to All Immigrants Including Victims

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
- To be targeted an immigrant must
 - Have criminal conviction(s)
 - Be gang members
 - Be a threat to national security or public safety
 - Have been ordered removed and failed to depart, or
 - Have re-entered the country illegally after being removed

January 2018 Policy: Persons Who are Not Targets

- Will not subject to immigration enforcement persons who are not targets including
 - Witnesses
 - Family members
 - People accompanying others to to court
 - Victims

Civil Immigration Enforcement Action Defined

- Action by immigration enforcement action regarding an individual to:
 - Apprehend
 - Arrest
 - Interview
 - Stop
 - Search

January 2018 Policy:

Avoid Non-Criminal Proceedings

- Avoid enforcement in courthouses or areas within a courthouse that are dedicated to non-criminal proceedings
 - Applies to courts and cases
 - Family cases
 - Civil cases
- Requires Field Office Director/Special Agent in Charge Approval
 - Will involve screening for VAWA confidentiality protected victim's cases

Policy Directives: Immigration Enforcement at Courthouses

- Civil enforcement actions at courthouses will be planned
- Minimize impact on court proceedings
- Take place in non-public areas
- Be conducted in collaboration with court staff and security
- Use non-public entrances and exits
- Substantial efforts will be made to not alarm the public

**What policies or procedures
might courts implement with
regard to VAWA confidentiality
and courthouse enforcement?**

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

DHS Victim Protection Statutes/Regulations/Policies

- VAWA Confidentiality
- 384 DHS computer system (VAWA, T visas, U visas)
- DHS victim witness protection memo
- DHS Courthouse Enforcement Policy
- DHS Sensitive Locations Policy
 - *All available in NIWAP Web library*
www.niwap.org/go/sji

Technical Assistance and Materials

- Power Point presentations and materials for this webinar at <http://niwap.org/go/jffnm2018>
- Judicial Training Manual at <http://niwap.org/go/sji>
 - **NIWAP Technical Assistance:**
 - Call (202) 274-4457
 - E-mail info@niwap.org
- Web Library:
<http://niwaplibrary.wcl.american.edu>

Evaluations



Thank you!