

Quick Reference Guide for Judges: VAWA Confidentiality and Discovery-Related Case Law¹

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This quick reference tool has been developed to assist judges ruling on discovery requests in family, civil and criminal court cases. Congress provided protections for immigrant adult and child survivors of domestic violence, sexual assault, stalking, dating violence, child abuse, sex trafficking, labor trafficking, and commercial sexual exploitation of children. These protections include immigration relief, protection from deportation, confidentiality protections, and access to certain benefits and services. When courts encounter children, parents, and other victims of these forms of crime and abuse, the victim will be eligible for one of the following abuse-based forms of immigration relief:

- Violence Against Women Act (VAWA) self-petition;
- VAWA cancellation of removal;
- VAWA suspension of deportation;
- U visas;
- T visas;
- Continued Presence; or
- Special Immigrant Juvenile Status.

VAWA confidentiality protections were designed to allow adult and child victims of the above-listed forms of crime and abuse to safely and confidentially file their immigration cases based on crime victimization without the perpetrator's knowledge, consent, or ability to obtain any information about the case filed by the immigrant survivor of abuse or crime victimization.

The state and federal court cases listed below provide information and court's analysis describing how courts ruled when a party seeks to obtain information contained in federal immigration case filed that is covered by federal Violence Against Women Act (VAWA) confidentiality laws. The cases also describe courts' responses to attempts to discredit immigrant crime victim witnesses by raising immigration status issues in state criminal and family court cases. While the following state or federal court decisions may not be binding, the legal analysis and rulings made by the courts in the cases below may be applicable and helpful in judicial decision-making.³

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² This document has been developed for judges based upon the following publication: Jane Anderson and Benish Anver, *Quick Reference Guide for Prosecutors: U Visa and VAWA Confidentiality Related Case Law* (July 24, 2017) <https://niwaplibrary.wcl.american.edu/pubs/quick-reference-guide-for-prosecutors-u-visa-and-va-wa-confidentiality>. This publication contains updates to case law cited in that publication.

³ Please note: The case law cited in this document is current as of October 25, 2022. When you are working on a case involving the issues discussed in this document, it is important to check for additional cases that may have been decided since the publication of this document. If you need technical assistance on cases involving an immigrant crime victim, please contact NIWAP at (202) 274-4457 or info@niwap.org.

I. Federal court decisions addressing discoverability of the U Visa certification, the U Visa case file, the VAWA self-petition case file, and/or other application materials that are protected by VAWA confidentiality:

- Demaj v. Sakaj, No. 3:09 CV 255 JGM, 2012 WL 476168 (D.Conn. Feb. 14, 2012). Motion to Compel U Visa file in child custody case was denied, finding that the disclosure would undermine the purpose of the statute meant to protect the confidentiality of applications. Disclosure of documents relating to the victim's U Visa contradicts the purpose of 8 U.S.C. § 1367, which is "to protect the confidentiality of the applications by preventing disclosure of these documents to alleged criminals as disclosure would allow. . . to interfere with or undermine [victim's] immigration case." *Id.* at 19.
- 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). Finding that the defendant does not have the right to receive absolutely privileged information such as the VAWA self-petition and related records contained in Department of Homeland Security case files. The defendant's Sixth Amendment right to compulsory process does not permit access to such absolutely privileged information. VAWA Confidentiality protects all cases unless the application was denied on the merits. *Id.* at 9.
 - "[W]hen an application is denied because it is moot, the petition may contain sensitive information that the policy behind VAWA still urges remain secret."
 - "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."
 - "Primary purposes of the VAWA confidentiality provision, namely to prohibit disclosure of confidential application materials to the accused batterer."
- U.S. v. Brown, 347 F.3d 1095, 1099 (9th Cir. 2003). Finding that the defendant's right to confront witnesses was not violated when he was denied access to the witness's immigration file and was not allowed to call an expert witness regarding the unusual immigration circumstances of the witness. The court found that the cross-examination of the witness sufficiently addressed bias and motive.
 - Brown sought to subpoena the victim's complete immigration file. The district court quashed the subpoena for the victim's immigration case file (A-file) and only ordered the delivery of documents that were in possession of the prosecution.
 - "Brown's cross-examination, even without the benefit of de la Torre's complete A-File . . . enabled the jury sufficiently to assess de la Torre's credibility in order to satisfy Brown's Sixth Amendment rights."

- U.S. v. Locascio, 6 F.3d 924, 949 (2d Cir. 1993). Finding that the prosecution was not in possession of information acquired by federal agencies uninvolved in the state’s investigation or trial.
- Cazorla v. Koch Foods of Miss., L.L.C., 838 F.3d 540, (5th Cir. 2016). In an employment action, the discovery of U visa case file was limited because the court was concerned that full discovery might intimidate individual claimants, compromise the U visa program, and law enforcement efforts more broadly. The Fifth Circuit directed the district court to craft an approach to discovery that ensures identifying information about individual victims was not revealed. The District court’s discovery order on remand after the 5th Circuit ruling limited discovery to U visa certification forms only and required that personal identifying information of the victims be redacted. Note: This type of anonymity may not be possible in a criminal prosecution or family court matter.
 - “In addition, 8 C.F.R. § 214.14, which implements the U visa program, provides that ‘[a]gencies receiving information under this section. . .are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367.’ “
 - “Allowing U visa discovery from the claimants themselves in this high-profile case will undermine the spirit, if not the letter, of those Congressionally sanctioned assurances and may sow confusion over when and how U visa information may be disclosed, deterring immigrant victims of abuse—many of whom already mistrust the government—from stepping forward and thereby frustrating Congress’s intent in enacting the U visa program.”
 - “In sum, allowing discovery of U visa information may have a chilling effect extending well beyond this case, imperiling important public purposes.”⁴
- Washington v. Horning Brothers, LLC, No. 2:17-CV-0149-TOR, 2018 U.S. Dist. LEXIS 81151, at *8 (E.D. Wash. May 14, 2018). The Court granted the Plaintiffs-Intervenors' request for a protective order prohibiting the discovery of their U visa immigration status. The Court weighed the Plaintiffs-Intervenor’s fears for themselves and others of possible detention, removal, criminal prosecution, and job loss if forced to disclose U visa information. The Court held that the “[...] chilling effect, public policy concerns, and Plaintiffs-Intervenors' fears outweigh any alleged probative value of possible exaggeration.” The District Court considered the Ninth Circuit's preference for the impermissibility of immigration status information. See Rivera, 364 F.3d at 1065.
- Rivera v. NIBCO, Inc., 364 F.3d 1057, 1061 (9th Cir. 2004). Defendant filed an interlocutory appeal of the court’s protective order, prohibiting NIBCO from using the discovery process to inquire into the plaintiffs' immigration status and eligibility

⁴ Cases prior to the *Cazorla v. Koch Foods of Miss., L.L.C* such as *Camayo v. John Peroulis & Sons Sheep, Inc.*, Civil Action No. 10-cv-00772-MSK-MJW, 2012 U.S. Dist. LEXIS 168078, at *5-6 (D. Colo. Nov. 27, 2012) that allowed discovery of all documents related to the plaintiff's efforts to obtain T visas did not directly discuss the VAWA confidentiality provisions in 8 U.S.C.S. § 1367(a)(2) and 8 C.F.R. § 214.14.

for employment. The court reaffirmed the district court's decision that inquiring into plaintiff's immigration status would cause a substantial burden to the plaintiffs. The Court held that "[t]he chilling effect such discovery could have on the bringing of civil rights actions unacceptably burdens the public interest."

- "Even documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation." *Id.* 17.

II. Federal court decisions addressing the scope of discovery regarding immigration status or immigration benefit applications during cross-examination

- Walsh v. Unforgettable Coatings, Inc., No. 2:20-cv-00510-KJD-DJA, 2022 U.S. Dist. LEXIS 151938, at *18 (D. Nev. Aug. 23, 2022). Fair Labor Standards Act (FLSA) action where the Court found that although Plaintiff has demonstrated good cause to limit the deposition of the Department of Labor's Regional Coordinator for Workplace Crimes, defendants have the right to explore inconsistencies with plaintiff's statements regarding immigration applications on a limited basis. The Court found that the deposition alone would not cause intimidation.⁵
 - "[...] Defendants may not ask [...] about [*19] the immigration status or U visa applications of any specific individual or the identity of any individual to whom she may have helped provide an immigration benefit. Defendants may, however, ask her generally whether she helped provide immigration benefits to individuals involved in the Department of Labor's investigation into Defendants."
- Avila-Blum v. Casa de Cambio Delgado, Inc., 236 F.R.D. 190, 191-92 (S.D.N.Y. 2006). The appellate court approved the magistrate judge's protective order prohibiting questions on immigration status during the plaintiff's deposition and explaining that such questions could chill employment discrimination cases.
- EEOC v. Bice of Chicago, 229 F.R.D. 581, 583 (N.D. Ill. July 18, 2005) The court upheld the court's protective order prohibiting discovery into immigration status because "questions about immigration status are oppressive, they constitute a substantial burden on the parties and on the public interest, and they would have a chilling effect on victims of employment discrimination from coming forward to assert discrimination claims."
- EEOC v. First Wireless Grp., Inc., 225 F.R.D. 404, 405-407 (E.D.N.Y. 2004) The court upheld the protective order issued by the court prohibiting discovery into immigration status because such inquiries "would significantly discourage employees

⁵ The District Court decision is consistent with Cazorla v. Koch Foods of Miss., L.L.C., 5th Circuit decision because the district court crafted an approach to discovery that does not directly provide personally identifying information about individual victims.

from bringing actions against their employers who engage in discriminatory employment practices.”

- EEOC v. DiMare Ruskin, Inc., No. 2:11-cv-158, 2012 U.S. Dist. LEXIS 24951, at *13 (M.D. Fla. Feb. 15, 2012) The court entered a protective order prohibiting discovery into the claimants' immigration status because "[t]he EEOC's mission of protecting victims of employment discrimination would be hampered if potential victims are unwilling to come forward and cooperate because of fear of removal or other immigration consequences."

III. State court decisions addressing the discoverability of the U visa certification and/or other immigration application materials that are protected by VAWA confidentiality

- State v. Marroquin-Aldana, 2014 ME 47, 89 A.3d 519, 531 (Me. 2014). The Supreme Judicial Court of Maine found that the lower court did not err in denying the defendant access to the victim's entire immigration case file. This Court found it sufficient that U visa certification was provided in discovery and that the defendant had the opportunity to cross-examine the victim and call credibility into question. It also noted the heightened protections under VAWA confidentiality laws given to "documents filed with immigration authorities pursuant to federal law." *Id.* at 525.
 - "[T]he court concluded that there was insufficient justification for disclosure of the documents because the State had already produced a copy of the District Attorney's certification in support of Lissette's U visa application, and Marroquin-Aldana could therefore call Lissette's credibility into question based on her assistance with Marroquin-Aldana's prosecution."
- People v. AlvarezAlvarez, No. G047701, 2014 WL 1813302, at 5 (Cal. Ct. App. May 7, 2014), review denied (July 16, 2014). Finding that the trial court was well within its discretion to exclude reference to the U visa and that the defendant had other opportunities to question the witness's credibility.
 - "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."
- State v. Buccheri-Bianca, 312 P.3d 123, 127-128 (Ariz. Ct. App. 2013), review denied (Feb. 11, 2014). Holding that the trial court did not err in excluding the immigration status of the victims because it found that the possible grant of a U visa was not the motivation for the disclosure of the crime and, therefore, was irrelevant.
 - "As discussed above, the trial court properly excluded evidence of Maya's U-Visa application after finding that the possibility of immigration relief did not motivate the accusations in this case."
- EEOC v. Sol Mexican Grill LLC, Civil Action No. 18-2227 (CKK), 2019 U.S. Dist. LEXIS 112745, at *6-7 (D.D.C. June 11, 2019). In a motion for a protective order barring Defendants from pursuing discovery related to the immigration and/or work authorization statuses of the charging parties, the Court concluded that defendant

employers failed to provide any specific arguments as to why such information would be relevant.

- Requesting information on U visas to determine whether or not the EEOC is assisting in an effort to achieve more favorable immigration statuses for employees is not relevant and is good cause to prohibit the discovery of such information due to its potential to chill the resolve of those who seek to take advantage of the protections offered by Title VII.
- “In addition, discovery into the U Visa application process is prohibited by statute regardless of the Court's protective order.” [11]
- “[D]efendants are prohibited from the discovery of, or inquiry into the following categories of information as relating to the charging parties, the claimant, their family members, and any other claimants or witnesses in this lawsuit:

1. Information Related to Immigration and Residency Status, including but not limited to: past or current immigration or residency status, citizenship, and naturalization, involvement in any immigration-related proceedings, travel to and from the United States, and sensitive personal identifiers that can relate to immigration and residency status, including but not limited to passports, social security numbers, social security cards, and taxpayer identification numbers; and

2. Work histories relating to any employer other than Defendants.”

- Briggs v. Hedgpeth, No. C 11-3237 PJH, 2013 WCL 245190, at *15 (N.D. Cal. Jan. 22, 2013) aff'd, 585 F.App'x 454 (9th Cir. 2014). Finding that it was erroneous to preclude the defense from asking about U visa benefits that were offered to the victim, but also found that it was a harmless error because there was substantial evidence of the crime.

IV. State court does not have authority to order USCIS to turn over VAWA confidentiality-protected information

- Guillen v. B.J.C.R., LLC, 341 F.R.D. 61, 70 (D. Nev. 2022). In a motion to compel production of the plaintiff's employee's immigration records, in a case where the plaintiff disclosed the existence of a U visa case,⁶ the defendant employer's motion to compel was denied because the court did not have authority under 5 U.S.C.S. § 552(a)(4)(B), and defendants did not cite to any, to order USCIS to appear and provide the U visa documents in a civil sexual harassment and discrimination action to which USCIS was not a party. Plaintiff's motion for a protective order was denied as moot because plaintiff was not in possession of the U Visa documents, and so there was nothing to compel. The documents requested from USCIS about U-visa were withheld under VAWA Confidentiality protections:

⁶ In this case although not required to do so under the law, the plaintiff's lawyer incorrectly advised the victim to try to obtain the U visa case file from USCIS and turn it over to the court under a tailored protective order. USCIS complied with VAWA confidentiality and did not release the file.

- “[...] The amended supplemental responses state that the U Visa application documents were withheld by USCIS under a claimed statutory exemption to disclosure and, therefore, could not be produced.” *Id.* at 11.

V. State court decisions addressing defense counsel’s use of lack of immigration status and/or pursuing immigration relief during cross-examination:

- Guardado v. State, No. 2397, 2015 WL 5968756 (Md. App. Oct. 14, 2015). Holding that the trial judge correctly limited the scope of the cross-examination of the victim about her immigration status where the “defense offered no evidence that [the victim] lacked stable immigration status, that she could be eligible for some sort of favorable immigration treatment as a crime victim, or, if it exists, that she was aware of the program at the time she identified [the defendant] as her assailant.”

VI. State court decision addressing *in terrorem* effect due to the discoverability of U-visa file after the victims receive the U-visa and permanent-resident status.

- Molnar v. Margaret W. Wong & Associates Co., L.P.A., 2021-Ohio-1402, ¶ 1 (Ct. App.) The Court of Appeals found that in cases in which a crime victim is seeking civil damages and where the victim obtained the U visa due to the underlying criminal activities committed by victims’ former attorneys against the victims as part of defendant lawyers’ egregious legal malpractice, defendant attorneys were entitled to obtain that information in order to prepare a defense. The Court observed that at the time the trial court ruled on plaintiffs’ motion for a protective order, plaintiffs had been granted both the U-visa and permanent-resident status based on the victims being U-visa holders, and any possible *in terrorem* effect due to the release of the U visa applications would be muted.⁷

⁷ The argument used by the Court of Appeals that any chilling effect would be muted because immigrant has received permanent-resident status is contrary to the VAWA Confidentiality Statute 8 U.S.C. Section 1367(a)(2), which prohibits disclosure of any information related to an immigrant who is the beneficiary of an application entitled to VAWA confidentiality protection. These protections continue permanently and end only in cases in which the victim’s VAWA confidentiality-protected application is denied on its merits and all opportunities for appeal have been exhausted. See DEP’T OF HOMELAND SECURITY, INSTRUCTION NUMBER: 002-02-001, IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS, 6 (Nov. 7, 2013) <https://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001>; Memorandum from Virtue, Paul W., Acting Executive Associate Commissioner, Office of Programs, to all INS Employees, Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384 (May 5, 1997), (on file with author) available at: <https://niwaplibrary.wcl.american.edu/pubs/conf-vawa-gov-insconfvawamemo-05-05-1997>.