

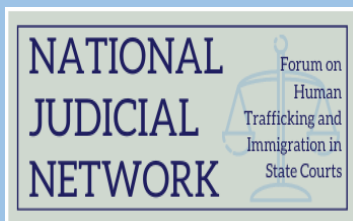
National Judicial Network Forum on Human Trafficking and Immigration in State Courts

Violence Against Women Act (VAWA) Confidentiality and Family Court Discovery

November 12, 2024

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Faculty



Ramona Gonzalez
Presiding Judge
La Crosse County Circuit
Court,
La Crosse, Wisconsin,
Court of General Jurisdiction
2019-2020 NCJFCJ President

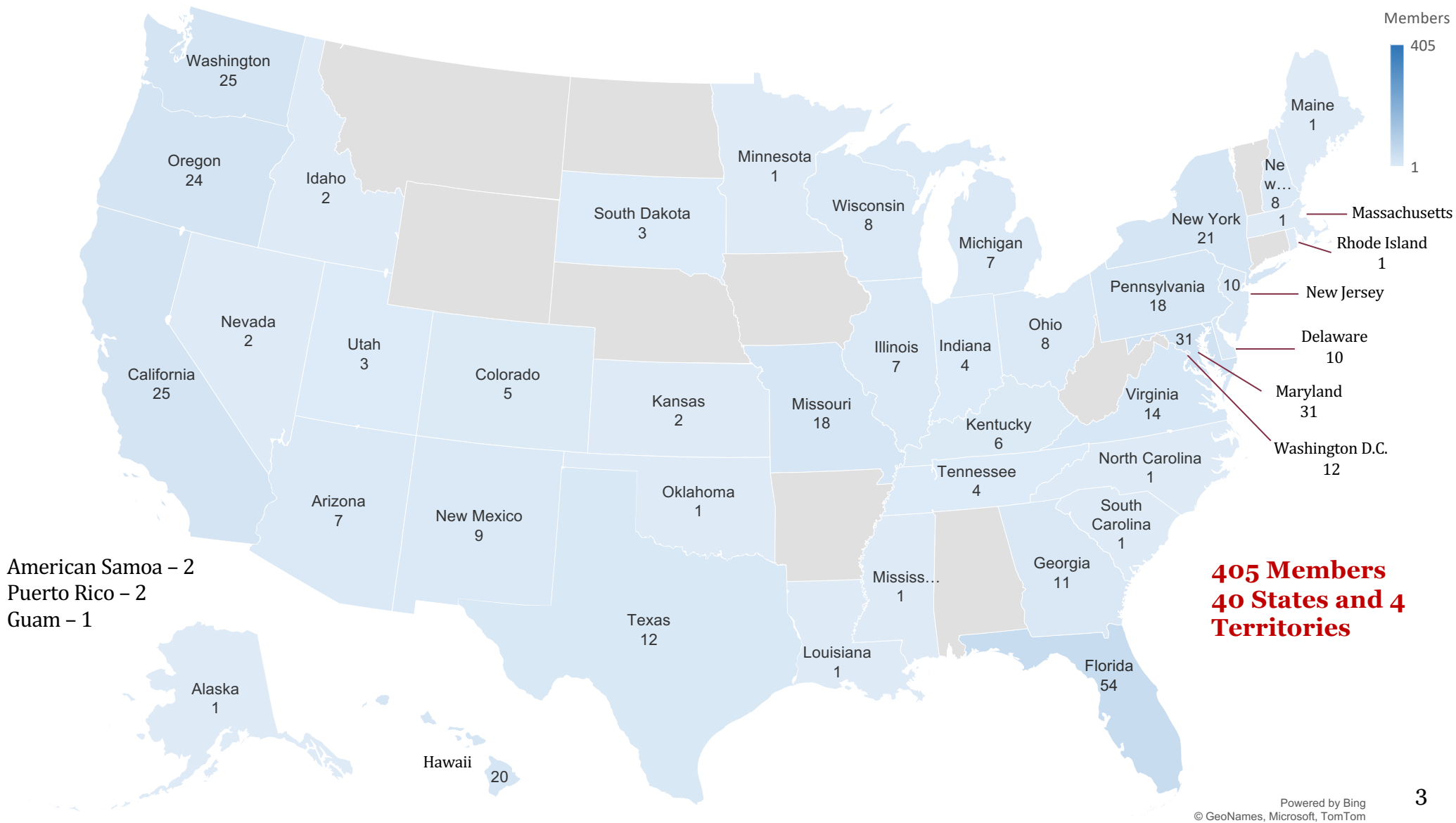


**Judge Lora
Livingston**
Senior Judge,
State of Texas
Austin, Texas

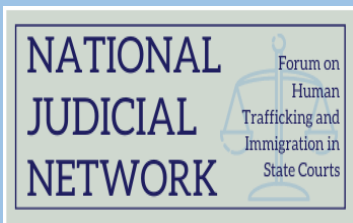


Leslye Orloff
Director
National Immigrant
Women's Advocacy Project,
American University
Washington College of Law

State Representation in The National Judicial Network as of November 12, 2024



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Upcoming Peer-to-Peer Sessions & Webinars

December 3, 2024

Culturally Appropriate Protection Orders
(Webinar)

January 2025 (TBD)

February 4, 2025

March 4, 2025

How do judges encounter VAWA confidentiality laws in state family courts?



Learning Objectives

By the end of the session judges will be better able to:

- Understand the limitations federal statutes (8 U.S.C §1367), regulations and policies place on state court discovery (VAWA Confidentiality)
- Identify litigants who are crime victims eligible for VAWA confidentiality protection
- Decide discovery motions in family court cases consistent with VAWA confidentiality requirements

Poll 1: What Types of Cases Do You Hear? (Check all that apply)

- A. Protection Orders
- B. Divorce
- C. Custody
- D. Child Welfare
- E. Criminal
- F. Other Civil

Answer on
the left



Feedback

A

B

C

D

No Answer

Other civil cases
write in chat box

Chat

Public Private

Type here to send a message

Violence Against Women Act
(VAWA) Immigration Confidentiality
Protections:
History, Purpose and Key
Protections

Excerpts of speech of Hon. John Conyers, Jr.

“Threats of deportation are the most potent tool abusers of immigrant victims use to maintain control over and silence their victims to avoid criminal prosecution.”

Re: VAWA 2005 (12/18/2005)

VAWA, T and U Visa Legislative History: Senator Biden Senate Congressional Record 10/11/2000



- *“The single most important provision we add to the Violence Against Women Act is the battered immigrant women provision”*
- *Ensuring abusers “are brought to justice and the battered immigrants also escape abuse without being subject to other penalties.”*

Historical Context of VAWA Immigration Legislation

“Eliminating domestic violence is especially challenging in immigrant communities, since victims often face additional cultural, linguistic and immigration barriers to their safety. Abusers of immigrants- spouses or children are liable to use threats of deportation to trap them in endless years of violence. Many of us have heard horrific stories of violence in cases where the threat of deportation is used against spouses and children – if you leave me, I’ll report you to immigration authorities, and you will never see your children again.” ...

*Senator Kennedy. VAWA 2005 Congressional
Testimony*



Immigration Protections for Noncitizen Victims of Crime and Abuse

NIWAP

U.S. Immigration Benefits for NONCITIZEN CRIME VICTIMS

T VISA CONSIDERATIONS

- ▶ Must be in the U.S. on account of human trafficking
- ▶ Law enforcement declaration is encouraged but not required

If approved, benefit provides:

- Up to four years of temporary nonimmigrant status
- Work authorization
- Access to federal and state benefits and services
- Ability to apply for permanent residency
- Ability for qualifying family members to receive derivative nonimmigrant status, even if not already in the U.S.

To apply: USCIS Form I-914

VAWA CONSIDERATIONS

- ▶ Have suffered battery or extreme cruelty perpetrated by your U.S. citizen or Lawful Permanent Resident spouse or parent or your U.S. citizen adult son or daughter
- ▶ Petitioners and perpetrators may be of any sex or gender

If approved, benefit provides:

- Lower priority for removal
- Work authorization
- Access to federal and state benefits and services (possibly sooner than approval)
- Ability to apply for permanent residency
- Ability for children of self-petitioning spouses or children to receive permanent residency, even if not already in the U.S.

To apply: USCIS Form I-360

ASYLUM CONSIDERATIONS

- ▶ Must fear persecution on account of race, religion, nationality, political opinion, or membership in a particular social group
- ▶ If in removal proceedings, may need to file Form I-589 with the immigration judge

If approved, benefit provides:

- Asylee status
- Work authorization
- Access to federal and state benefits and services
- Ability to apply for permanent residency
- Ability for spouse and children to receive asylum, even if not already in the U.S.

To apply: USCIS Form I-589

SIJ CONSIDERATIONS

- ▶ Must be a victim of abuse, abandonment, neglect, or a similar basis under state law by one or both parents
- ▶ Must have a juvenile court order with the required determinations

If approved, benefit provides:

- Ability to apply for permanent residency

To apply: USCIS Form I-360

U VISA CONSIDERATIONS

- ▶ Qualifying crime must have occurred in the U.S. or violated U.S. law
- ▶ May apply from the U.S. or while abroad
- ▶ Must have law enforcement certification

If approved, benefit provides:

- Up to four years of temporary nonimmigrant status
- Work authorization
- Ability to apply for permanent residency
- Ability for qualifying family members to receive derivative nonimmigrant status, even if not already in the U.S.

To apply: USCIS Form I-918

BLUE CAMPAIGN
One Voice. One Mission. End Human Trafficking.

Center for Countering Human Trafficking

DHS.GOV/BLUECAMPAIGN

For victim support call 1-888-373-7888 or text INFO or HELP to BeFree (233733)
All U.S. Citizenship and Immigration Services (USCIS) forms can be found at: www.uscis.gov/forms/all-forms

How do courts and communities benefit when victims are in the process of obtaining victim-based forms of immigration relief?



Research shows that U visa applicants report future crimes at higher rates

- Increases justice system involvement
 - 114% increase in willingness to trust the police
 - 36% make police reports regarding future crimes
 - 22% help other victims report abuse and seek help/justice
- Significantly reduces abusers using the victim's immigration status as a tool to perpetuate abuse
 - 74% decline in immigration related abuse
 - 78% decline in threats to snatch/cut off access to children
 - 65% decline in efforts to use immigration status of the victim to gain advantage in family court

*What were the problems that
VAWA Confidentiality laws were
designed to address?*



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.” (8 U.S.C. §1367)

VAWA Confidentiality Prongs - 8 U.S.C. §1367

- **Abuser-Provided Information:** DHS, DOJ, & the State Department are barred from taking any negative action against a victim based solely upon information provided by abusers and crime perpetrators (and their family members)
 - Applies to all victims
 - Takes effect when spousal or parent child relationship is abusive or when victim is in the process of filing 8 USC 1367 covered case
- **Location Prohibitions:** Enforcement locational prohibitions unless comply with specific statutory and policy safeguards
 - Applies to all victims
- **Non-Disclosure:** Unless an enumerated exception, Federal government cannot disclose VAWA protected information to anyone
 - Applies to VAWA self-petitioners, VAWA cancellation/suspension, Battered Spouse Waiver, Abused Visa Holder Spouses, U visas, T visas, and Continued Presence cases

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



Abuser Provided Information Bar: DHS cannot seek, gather, use, call as witness, or rely on perpetrator provided information ...

- To take any adverse action against a victim
 - 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 examples:
 - Detain, deport, seek out, question, any immigration enforcement action, deny victim’s immigration case

Non-Disclosure Protections: Overview

Laws, Regulations and Policies –

- Protects all information about the victim's VAWA confidentiality protected immigration case
 - Extends to all immigration cases filed by the victim
- Prohibits disclosure of any information about
 - The existence of a VAWA, T or U visa application
 - Decisions made in the case
 - Information contained in the #A file
- Disclosure is prohibited to all persons, not just the perpetrator
- 8 U.S.C §1367

VAWA Confidentiality Violations

- Each violation
 - Disciplinary action and/or
 - \$5,000 fine for the individual
- VAWA Confidentiality Enforcement Guidance (1997, 2005, 2007, 2008, 2013, 2021, 2023, 2024)
- ICE required to:
 - Check for “384” victim flag before enforcement actions
 - Certify compliance to immigration judge = violations can be basis for dismissal



Federal VAWA Confidentiality Law's Impact on Family Court Discovery in State Courts

Victims Protected by VAWA Confidentiality

- Victims who have suffered
 - Battering or extreme cruelty
 - Domestic violence, spouse abuse, elder abuse, child abuse – includes step-children
 - Human trafficking
 - Sexual assault, stalking and other U visa listed criminal activities
- Protections apply to all pending and approved immigration cases filed by a victim permanently from the time of filing unless
 - The VAWA confidentiality protected case is denied on its merits, and
 - All appeal options have been completed

Immigration Relief Available for Immigrant Victims of

- Domestic violence
 - Sexual assault
 - Rape
 - Incest
 - Prostitution
 - Torture
 - Felonious assault
 - Manslaughter
 - Murder
 - Female genital mutilation
 - Kidnapping
 - Abduction
 - Trafficking
 - Involuntary servitude
 - Slave trade
 - Being held hostage
 - Fraud Foreign Labor Contracting
 - Peonage
 - False Imprisonment
 - Blackmail
 - Extortion
 - Witness tampering
 - Obstruction of justice
 - Perjury
 - Stalking
 - Similar activities
 - Hate crimes
 - Video voyeurism
 - Child/elder abuse
 - Abuse of adults with disabilities
- Attempt, conspiracy or solicitation to commit any of these crimes or any similar activity**

VAWA Confidentiality's Limited Exceptions

- Law enforcement, Judicial, National security officials
 - In a manner that protects the confidentiality of the information
 - Solely for legitimate law enforcement, national security purpose
- For verification of victim's eligibility for *state or federal public benefits*
- Disclosure in the same manner as census data and Congressional oversight
 - Without identifying information
- All adults waive confidentiality protections
 - Must be voluntary, specific, time limited

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”

Poll 2: True or False?

- VAWA confidentiality's judicial exception applies to State Court judges hearing criminal, family and/or civil court matters.

A. True

B. False

A screenshot of a poll interface. It features a "Feedback" window with a dropdown arrow and a hamburger menu icon. Below the title bar, there are five radio button options: A (blue square), B (green square), C (yellow square), D (red square), and No Answer (blue circle). A large empty circle is positioned to the right of the options.

Limited Disclosure in Narrow Circumstances – Judicial

- A judicial exception applies only to appeals of the victim's immigration case
- Exception does not extend to state or federal judges hearing other civil, family, or criminal court matters

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, family, 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”

Applying VAWA Confidentiality Laws to Family Court Discovery

Poll 3: Have you had a family court case where a party sought discovery of ... (Check all that apply)

Feedback

A

B

C

D

No Answer

- A. A U visa certification
- B. A T visa declaration
- C. Information about the existence of a victim-based immigration case
- D. The victim's immigration case file or information in the file
- E. The outcome of a victim's immigration case

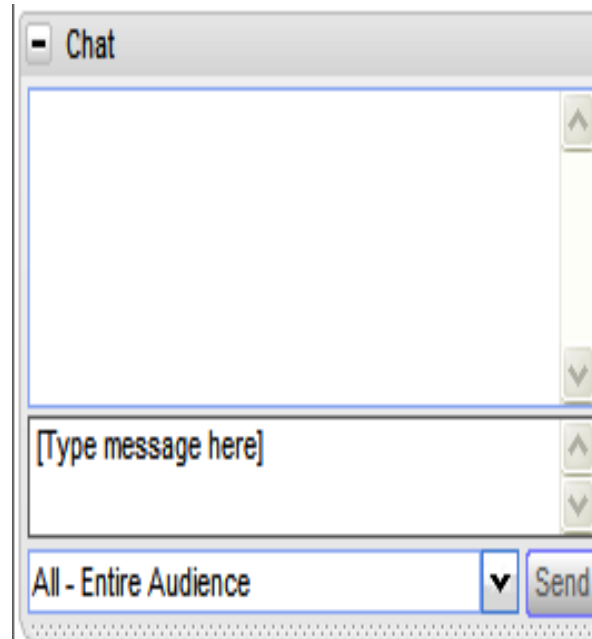
Raise Your Hand Exercise: Have these discovery requests come up in your...



- Custody cases
- Divorce cases
- Child abuse or neglect cases
- Protection order cases
- Civil employment actions
- Criminal cases
- Other cases

What were the parties trying to obtain and why?

- Unmute or type in the chat



Family and Civil Court Discovery Universal Considerations and Core Values

- Relevance to an issue or remedy in the case
 - Why is it wanted or needed
 - What will the party do with it
- Reasonableness of the discovery request
- Is this a fishing expedition
- Is it harassment
- Litigation abuse

Judicial Analysis

Is the matter sought material and necessary to the prosecution or defense of an action?



Did the party apprise the non-party of the circumstances or reasons for the disclosure?



Is the evidence sought protected by VAWA Confidentiality laws?



Did the party demonstrate that the relevancy or materiality of the evidence outweighs VAWA Confidentiality Protections?

What would be in the victim's immigration file that would be relevant to the family court decisions regarding...

- Breakup of the family
- Who is taking care of the children
- Best interests of the child
- Unmute or type in the chat



What is Contained In a Victim's Immigration Case File

Affidavits of the
Victim and
Witnesses

Proof of
Substantial
Harm Caused to
Victim

Health and
Mental Health
Records

Attorney-Client
Privileged
Information

Victim's & their
child's
immigration
history & all
cases filed

Information
About the
Victim's Location

Passports, SSNs,
birth certificates,
identity
documents

Taxpayer
Identification
Numbers

Forensic
Examinations of
a victim and/or
their child

*Is family court discovery the
least restrictive way to obtain
the information?
Could it be obtained somewhere
else or another way?*



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

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

**Ramirez v. Marsh, and
New Mexico Immigrant Law Center v. Leos
(May 7, 2024) New Mexico Supreme Court**

- Criminal court judge cannot order disclosure of U or T visa applications or related materials from
 - The victim
 - The victim’s parents
 - The victim’s counsel
- New Mexico Supreme Court invalidated subpoenas issues by state criminal court judges requiring disclosure
- *Ramirez v. Marsh*, S-1-SC-39966, and *New Mexico Immigrant Law Center v. Leos*, S-1-SC-40114.

Would in camera review be an option?



People v. Jun Du – Criminal Case

“Sanctuary For Families”

[NY Sup Ct Kings County 2024](Sept. 27, 2024)

- Based on VAWA confidentiality laws, the Judge reversed their previous decision granting an *in camera review* and denied the request for *in camera review* of the T-visa application (Form I-914).
- VAWA Confidentiality protects the disclosure of the T-visa application (Form I-914).
- Party seeking disclosure must show that the application is so relevant or material that it outweighs VAWA confidentiality.
- The Court decided the materials (T-visa application) are protected and confidential. No exceptions are permitted.

Questions and Answers



- VAWA confidentiality bench Card
- VAWA confidentiality legislative history, regulations and policies
- DHS quotes on VAWA confidentiality
- VAWA confidentiality case law
- VAWA confidentiality web page

Session Evaluation

- Please don't forget to complete the evaluation at the end of the session!
- Link to the poll
 - <https://www.surveymonkey.com/r/FV7W9XK>
- We will also send the link in a separate email after the session.

Thank You!

