

NIWAP



WEBINAR

VAWA CONFIDENTIALITY AND PROTECTIONS FOR IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE

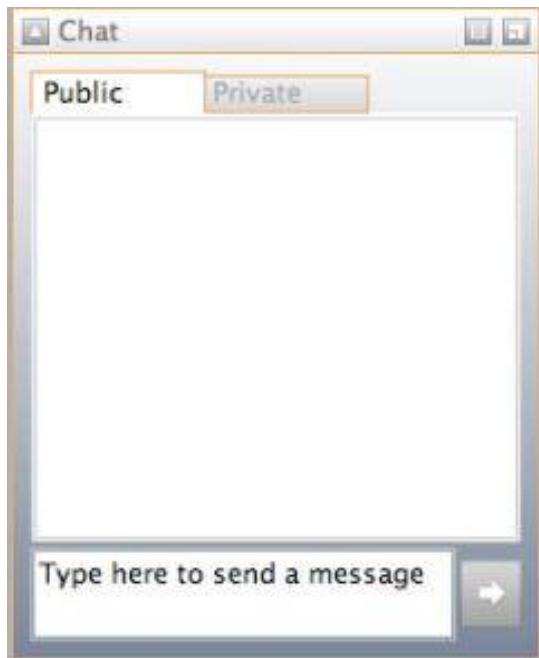
October 31, 2017

Presented by: Leslye Orloff, National Immigrant Women's Advocacy Project (NIWAP); Amy Cucinella, U.S. Department of Homeland Security

NIWAP

National Immigrant Women's Advocacy Project at the
American University Washington College of Law

Where are you located?
Please type city/state in
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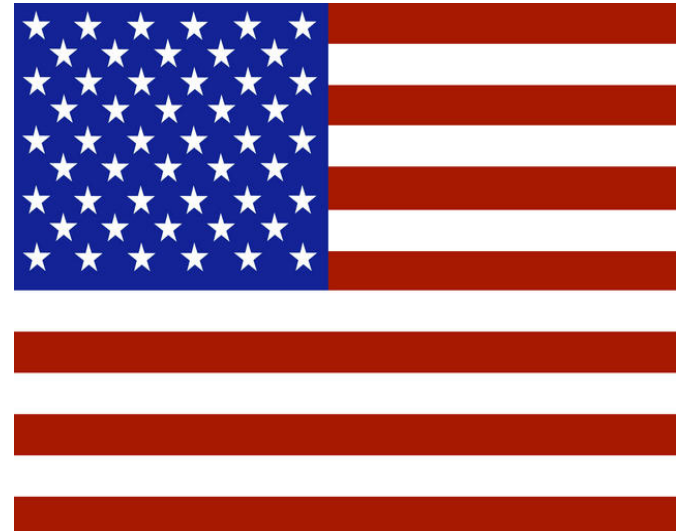




**Judge Lora
Livingston**
Presiding Judge
of the 261st Civil
District Court
Travis County,
Texas



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



**Amy Cucinella
Danielle Scott**
Civil Right and Civil
Liberties
U.S. Department of
Homeland Security

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

Answer on
the left



- A. Judicial officer
- B. Court Staff
- C. Attorneys
- D. Other

Feedback

A

B

C

D

No Answer

Other write
in chat box

Chat

Public Private

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Learning Objectives

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

- Rule on discovery motions in family, civil and criminal court cases
- Identify litigants who are crime victims eligible for VAWA confidentiality protection
- Use accurate information about federal VAWA confidentiality regulations and policies to address issues that arise at courthouses and in state family and criminal court cases

Violence Against Women Act Created Immigration Relief for Immigrant Victims



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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 sue 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*

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



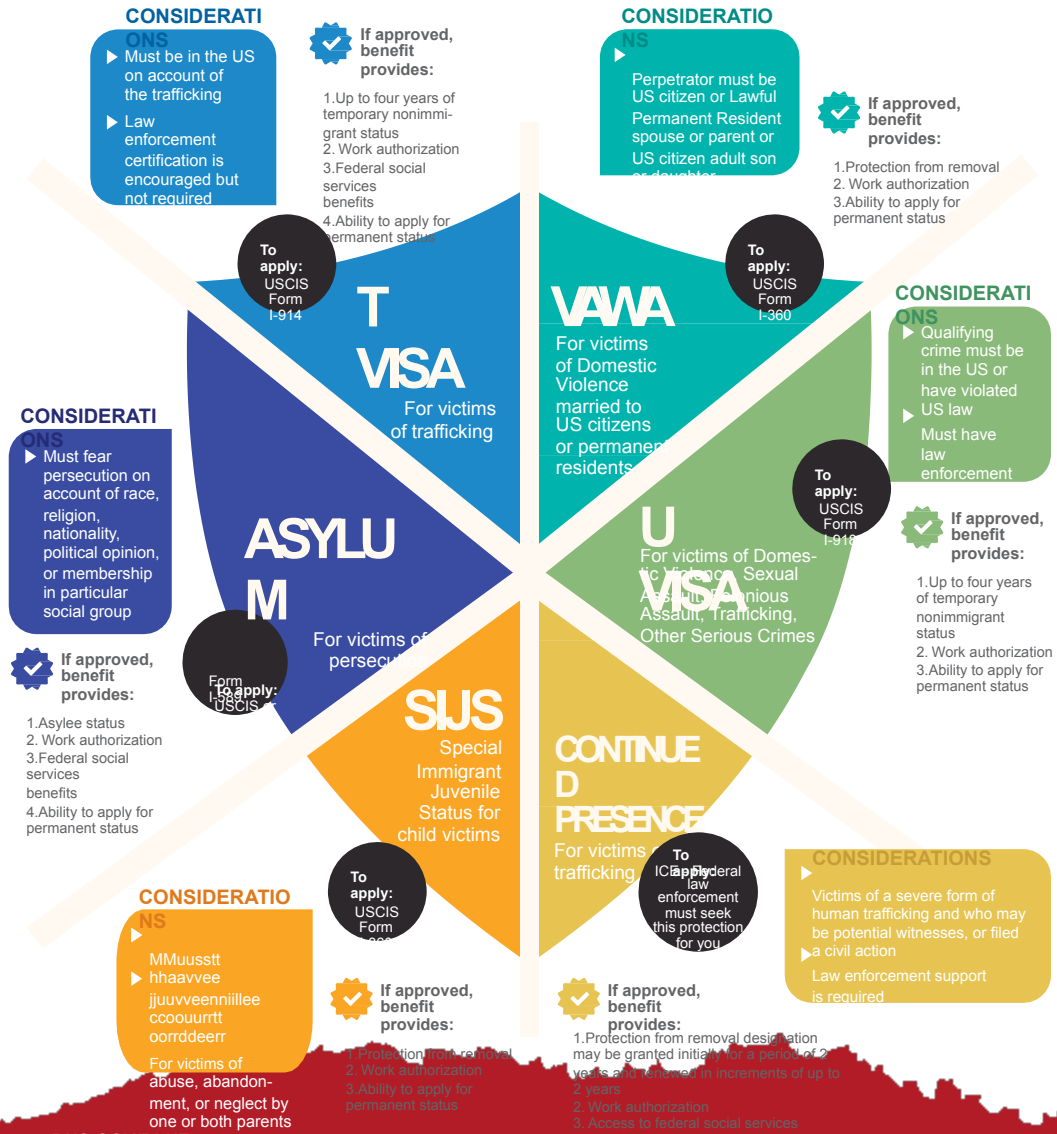
- *“The single most important provision we add to the Violence Against Women Act is the battered immigrant women provision”*
- *Abusers “are brought to justice and the battered immigrants also escape abuse without being subject to other penalties.”*

VAWA, T and U Visa and VAWA Confidentiality Legislative History:

House Congressional Record 10/6/2000

- These are *“important bipartisan pieces of legislation that together advance the cause of justice for crime victims and truly offer the prospect of improving public safety.”*
 - (Rep. Henry Hyde)
- *“[G]rant nonimmigrant visas to victims who would face a significant possibility of retribution or other harm if they were forced to leave”*
 - (Rep. Chris Smith)
- *“Allow immigrants to safely escape the violence and bring their abusers to justice”*
 - (Rep. Jackson-Lee)

PROTECTIONS FOR IMMIGRANT VICTIMS



DHS.GOV/BLUE-CAMPAIGN

For victim support call 1-888-373-7888 or text INFO or HELP to BeFree (233733)

Brief History of the Evolution of VAWA Confidentiality

Immigration Act of 1990

“The Attorney General shall, by regulation, establish measures to protect the confidentiality of information concerning any abused alien spouse or child, including information regarding the whereabouts of such spouse or child”

VAWA I (1994)

- Barred from disclosing information about victims served
- Mandated postal confidentiality of address information of domestic violence survivors and domestic violence shelter programs
- Studies on
 - Survivors address information disclosure protection
 - Confidentiality of communications between domestic violence survivors and counselors
 - Recordkeeping

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)

- VAWA confidentiality
 - Prohibited reliance on abuser/family member provided information in any case without regard to whether the victim immigration relief eligible
 - Prohibited on use and disclosure of information in VAWA immigration case
 - Disciplinary sanctions and fines
- Access to public benefits for battered immigrants
- VAWA cancellation of removal

VAWA 2000 & 2005

- Expanded VAWA confidentiality protections to U visa crime survivors
- Extended VAWA confidentiality to include full range of survivors protected
 - All VAWA self-petitioners, VAWA cancellation, T and U visa applicants
 - Created locations protected from immigration enforcement activities against victims
- Applies to DOJ, DHS, and State

VAWA 2013

- Mandated that any information released under VAWA confidentiality exceptions
 - To law enforcement, for judicial review or national security
 - Be limited
 - Must be “in a manner that protects the confidentiality” of the VAWA confidentiality protected information

VAWA 2005 VAWA Confidentiality Legislative History

- VAWA confidentiality was *“designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims’ immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims”*
 - (House Judiciary Committee – Sensenbrenner and Conyers)

VAWA Confidentiality in State Court Proceedings

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
- Prohibited immigration enforcement locations include courthouses

VAWA Confidentiality Protections

VAWA Confidentiality Prongs

- **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 (and their family members)
- **Location Prohibitions:** Enforcement locational prohibitions unless comply with specific statutory and policy safeguards
- **Non-Disclosure:** Unless one of the enumerated exceptions apply, DHS, DOJ and the State Department cannot disclose VAWA information to anyone
 - VAWA self-petitioners, VAWA cancellation/suspension, T visa, U visa, Battered Spouse Waiver, Abused Visa Holder Spouses

VAWA Confidentiality Prongs

Non- Disclosure

Protects victims who have filed a protected case with DHS

Abuser-Provided Information Prohibition

Includes family members of abusers, crime perpetrators

Protects:

- *All victims abused by as 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

DHS VAWA Confidentiality Computer System

- Directs to check for “384” computer system flag that identifies victims who have already filed for or have been granted victim-based immigration relief
- Reminds immigration officers, agents, attorneys about immigration law protections for
 - Survivors of domestic violence
 - Crime victims survivors
 - Human trafficking survivor

DHS and Victim Protection Statutes/Regulations/ Memos/Guidance

- 384 DHS computer system
 - VAWA self-petition, cancellation, suspension
 - U Visas
 - T Visas
 - Abused spouses of work visa holders work authorization
- DHS “Know Your Rights” Information
 - Infographic and VAWA/T and U Brochure
 - Excellent for courthouse distribution

Immigration Options for Immigrant Crime Victims and Children

(Red = VAWA Confidentiality Protected Case)

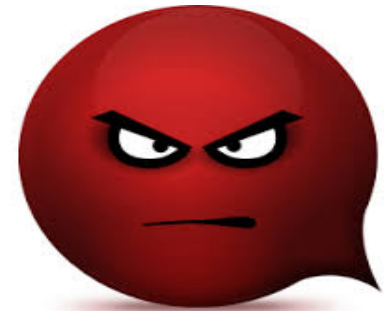
- VAWA self-petition
 - Abused spouses/children of US citizens and lawful permanent residents
 - Abused parents of U.S. citizens over 21 years of age
- VAWA cancellation of removal
- VAWA suspension of deportation
 - Abused spouses/children of US citizen and lawful permanent residents protection from deportation
- Battered spouse waiver
 - Abused spouses of US citizens with two-year conditional permanent residency
- U visa
 - Has been, is being or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing
 - Substantial harm from criminal activity
- T visa and Continued Presence
 - Victims of severe forms of human trafficking
- Abused Spouse of Visa Holders
 - Spouses battered or subjected to extreme cruelty by spouses with the following visas: A(diplomats), E(3)(Australian specialty occupation workers), G (foreign gov- Int'l orgs), H (work visas)
- Special Immigrant Juvenile (SIJS)
 - Children abused, battered, abandoned or neglected by one or both parents
- Deferred Action (DACA)
 - Deferred action for child arrivals including Dreamers
- Asylum
 - Well founded fear of persecution on account of race, religion, nationality, political opinion, social group
 - Domestic violence as gender based asylum

When Does VAWA Confidentiality Protection End?

- Protections applies from the time of filing permanently unless
 - Case denied on the merits and
 - All appeal options have been completed

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)



VAWA Confidentiality Violations Effect on Immigration Court Proceedings

- Can result in dismissal of the immigration proceeding against the non-citizen (VAWA 2005 legislative history)



DHS VAWA Regulations and Confidentiality Policies

- 8 C.F.R. 214.14(e)(2) (U visa regulations)
- U visa regulations preamble 72 Fed. Reg. 53014-53036 (September 17, 2007)
- All DHS policy (2013)
 - VAWA Confidentiality required training
- Immigration and Custom Enforcement Policy (2007)
- U.S. Citizenship and Immigration Services Policies (1997)
- Immigration Judges Policies (1997)

Bars and Limitations on Reliance on Perpetrator Provided Information

VAWA Confidentiality Legislative History

- “Federal officials may not use information furnished by, or derived from information provided solely by, an abuser, crime perpetrator or trafficker to make an adverse determination of admissibility or removal of an alien.”

Relying on Information Provided by Abuser

- 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
- The victim not required to have filed an immigration case to be protected
 - All spouse and child abuse victims protected no filing needed
 - Includes abused spouses of work visa holders
 - Victims in the process of filing T or U visa cases

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

All DHS Memo 002-02-001

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

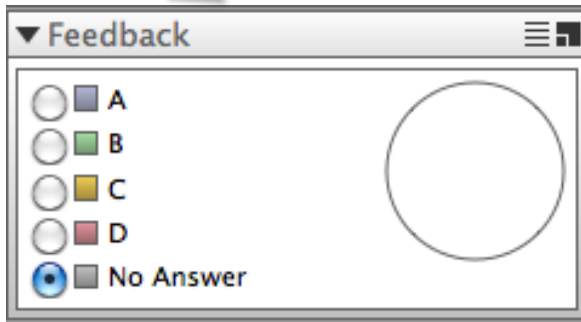
Locational Prohibitions

- Enforcement actions are not to be taken unless the action is certified in advance through a specific process aimed at protecting victims:
 - 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



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.....

Answer on
the left



Feedback

A

B

C

D

No Answer

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

Sensitive Location Certificate of Compliance

- INA§239(e)
- If any part of the enforcement action leading to the victim being brought before an immigration judge included
 - Relying upon abuser-provided information
 - Enforcement action taken at prohibited location
- DHS is required to file a certification in the immigration case that VAWA confidentiality protections were not violated

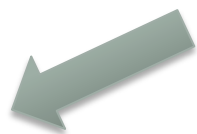
DHS must independently corroborate information provided *solely* by prohibited sources

- Adverse information corroboration examples:
 - Outstanding removal orders
 - Corroboration sources:
 - DHS databases
 - DHS or immigration court case files
 - Criminal convictions
 - Corroboration sources:
 - NCIC
 - Other criminal history databases
 - Information from local law enforcement
 - Court records of criminal convictions or pleas

VAWA Confidentiality and State Court Discovery

Have seen VAWA confidentiality discovery requests in your cases?

Answer on
the left

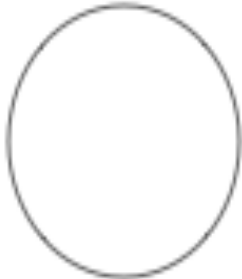


Feedback

Yes

No

No Answer



Raise your hand the requests were in any of the following types of cases---

- Criminal
- Custody
- Protection order
- Divorce



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

Prohibition on disclosure:

- **Information about the existence of the case**
- **Any information contained in the case**
- **Action taken on the case by DHS**



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

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”

Disclosure Exceptions

- Benefit granting or public benefits purposes
- Congressional oversight and data collection
 - Omitting personally identifying information
- All adult victims have waived confidentiality protections

Exceptions to Disclosure

- Judicial review exception
 - Applies to judicial review of a victim's VAWA confidentiality protected immigration case (Hawke)
- 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

Federal Court Case Law on VAWA Confidentiality

Hawke v. Dep't of Homeland Security

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

- Protects cases:
 - Denials not based on the merits; and
 - Procedural denials or withdrawals of applications continue to receive full scope of VAWA confidentiality protections
- The exception to VAWA confidentiality for a “judicial review of a determination” applies only to judicial review of the victim’s immigration case
 - Does not apply to civil or criminal court proceedings

VAWA Confidentiality Upheld By Federal Courts

- *Hawke v. United States Department of Homeland Security* (N.D. CA, 2008) – VAWA Self-Petition Case
- VAWA confidentiality information is privileged:
 - Applies unless immigration case dismissed on its merits
 - 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”

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.”

VAWA Confidentiality Upheld By Federal Courts

- *Demaj v. Sakaj* (D. Conn, 2012) – U Visa Case
- *Although relevant to credibility and impeachment*
- *Family court discovery barred as contrary to the purpose of VAWA confidentiality to --*
 - 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
 - Including claims that victim's application was fraudulent and
 - That DHS wrongly approved the victim's U visa case

Demaj v. Sakaj (D. Conn, 2012) – U Visa Case

- Efforts to obtain information through the custody case constituted the kind of interference with the victim's immigration case that was 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 remand because District Court failed to consider
 - How discovery of U visas might intimidate victims outside of the case before the court
 - Compromising the U visa programs and law enforcement investigations and prosecutions more broadly
 - Koch was an employment case where victims could maintain anonymity
 - Until liability phase of the case
 - That is not possible in a family court case

Discovery in Criminal Case

- Only in U visa cases any discovery =
 - U visa certification document only
 - Nothing else in or about the immigration case is discoverable
- VAWA self-petition, T visa, Work authorization application by spouse of visa holder not discoverable

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

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.”

Courts may be asked to rule on

- Motions *in limine*
- Protective orders
- Rule 11 sanctions

Resources and Webinar Materials

- www.niwap.org/go/NCJFCJ-VAWA-Victims
- PowerPoint
- Recording of Webinar
- VAWA confidentiality
 - Legislative and Regulatory History
 - DHS regulations and policies
 - Newsletter
 - Benchcard for Family Court Judges
 - Brochure
- Web library materials
 - www.niwaplibrary.wcl.american.edu

Technical Assistance and Materials

- PowerPoint presentations and materials for this webinar at www.niwap.org/go/NCJFCJ-VAWA-Victims
- **NIWAP Technical Assistance:**
 - Call (202) 274-4457
 - E-mail niwap@wcl.american.edu
- Web Library: www.niwaplibrary.wcl.american.edu

Questions



Evaluations

