

# **Immigrant Survivors and Their Children: Assisting Survivors With Immigration Case Filings and Addressing Issues That Arise in Family Court Cases – Part II**

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December 8, 2021



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# Learning Objectives

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

- Implement family court litigation strategies that inform judges about the immigration related abuse and immigration remedies that protect victims;
- Counter perpetrators' attempts to use victim's immigration status to gain advantage in family court cases;
- Obtain economic relief for immigrant survivors through Affidavit of Support enforcement and spousal and child support awards
- Prevent discovery of VAWA confidentiality protected immigration case file information; and
- Obtain U and T visa certifications and SIJS findings from family court judges.

# **Poll:** Let's see who is on the webinar with us

**Please check the box that best describes you:**

- A. Family Law Attorneys
- B. Immigration Attorneys
- C. Paralegals/Legal Aid Staff
- D. Victim advocates/coalition staff
- E. Other – type in the chat





# Poll: Which types of cases do you have experience with? (check all that apply)

- A. Protection orders
- B. Divorce and Custody
- C. Immigration
- D. Public Benefits and Housing
- E. Child welfare

*Other – type in the chat*



Questions you would like answered  
by the end of this workshop?

# **Dynamics Of Domestic Violence Experienced By Battered Immigrants**

# Polling Exercise: Myths and Realities

Abusers of immigrant spouses are more likely to be lawful permanent residents and immigrants than U.S. citizens.



True



False

# Connection Between Abuse and Control Over Immigration Status

- Abuse rates among immigrant women
  - Lifetime as high as 49.8%
  - Those married to citizens and lawful permanent residents – 50.8%
  - U.S. citizen spouse/former spouse abuse rate rises to 59.5%
- Almost three times the national average

Hass, G. A., Ammar, N., Orloff, L. (2006). Battered Immigrants and U.S. Citizen Spouses

# Abused Immigrant Spouses of U.S. Citizen Husbands

- Abuse rate rises to 59.5% when an immigrant's spouse/former spouse is a U.S. citizen
  - Twice the national average

Hass, G. A., Ammar, N., Orloff, L. (2006). Battered Immigrants and U.S. Citizen Spouses

- Between 2016 and 2017 there was a 391% decline in battered immigrant spouses' willingness to file VAWA self-petitions

Rodrigues et al. Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey (May 3, 2018)

- This same research found no change in battered immigrant victim's willingness to seek protection orders

Ammar, N.H., Orloff, L.E., Couture-Carron, A., Immigrant Victims of Interpersonal Violence and Protection Orders, in Civil Court Responses to Intimate Partner Violence and Abuse (2020)

# Polling Exercise: Myths and Realities

In over 70% of abusive marriages U.S. citizen husbands refuse to file or withdraw immigration papers they filed to sponsor their abused immigrant spouse for lawful permanent residency.



True



False

# Coercive Control Over Immigration Status

- Among abusive spouses who could have filed legal immigration papers for survivors:
  - 72.3% never file immigration papers
  - The 27.7% who did file had a mean delay of **3.97 years.**

Hass, Dutton and Orloff (2000). "Lifetime prevalence of violence against Latina immigrants: Legal and Policy Implications." International Review of Victimology 7 93113

- 65% of immigrant survivors report some form of immigration related abuse (NIJ, 2003)

Edna Erez and Nawal Ammar, Violence Against Immigrant Women and Systemic Responses: An Exploratory Study (2003)





# Polling Exercise: Myths and Realities

Foreign born girls are twice as likely as U.S. born girls to have experienced sexual assault by the time they are in high school.



True



False

# Sexual Assault Rates Among Immigrant Women

- High school-aged immigrant girls
  - Twice as likely to have suffered sexual assault as their non-immigrant peers, including recurring sexual assault
  - Decker, M., Raj, A. and Silverman, J., Sexual Violence Against Adolescent Girls: Influences of Immigration and Acculturation, 13 Violence Against Women 498, 503 (2007).

# Department of Homeland Security

- DHS Dynamics Video



# Immigration Related Abuse

- 10 times higher in relationships with physical/sexual abuse as opposed to psychological abuse
- May predict abuse escalation
- Corroborates existence of physical and sexual abuse

Mary Ann Dutton, Leslye Orloff, and Giselle Hass, Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications (Summer 2000)

## Perpetrators Efforts to Trigger Victim's Removal

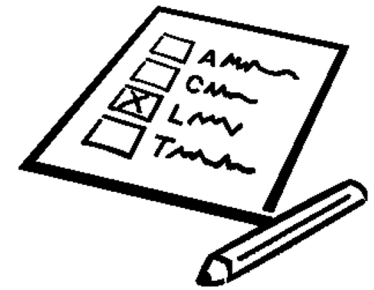
- Perpetrators actively reporting victims with pending immigration cases for removal
  - VAWA self-petitioners 38.3%; U visa 25%
- Perpetrators got the victim arrested when the victim called police for help with domestic violence
  - VAWA self-petitioners rose 2013-2017 from 15.4% -17%
  - U visa rose 2013-2017 from 7.5% -36%

Krisztina E. Szabo, David Stauffer, Benish Anver, *Work Authorization For VAWA Self-Petitioners and U Visa Applicants*, NIWAP (Feb. 12, 2014) and Rodrigues et al. Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey (May 3, 2018)

# Immigration Relief for Immigrant Crime Victims: Role of Legal Aid and Family Lawyers

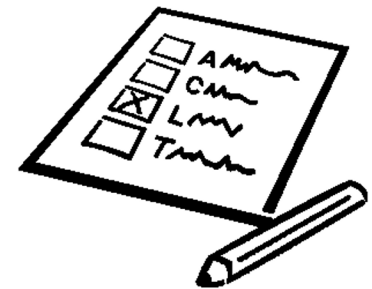
# What Forms Of Immigration Relief Have Immigrant Clients You Work With Been Eligible To Receive? (Check all that apply)

- U Visa
- T Visa
- VAWA Self-Petition
- SIJS
- Work authorization for abused spouses of work visa holders



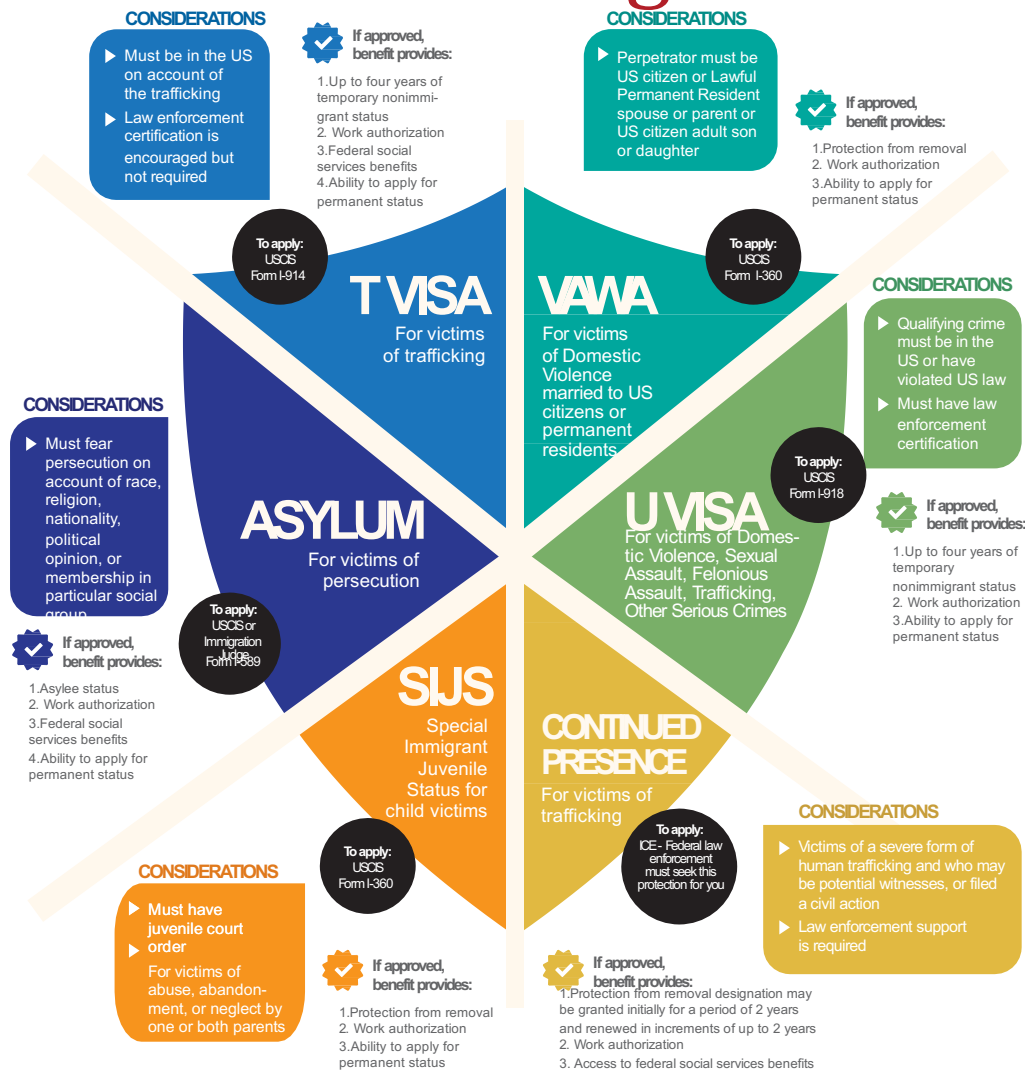
# Which of These Types of Cases Have You Assisted Them With? (Check all that apply)

- U Visa
- T Visa
- VAWA Self-Petition
- SIJS
- Work authorization for abused spouses of work visa holders





# Protections For Immigrant Victims



DHS.GOV/BLUE-CAMPAIGN

## Protections for Children and Family Members

- VAWA self petitioner = Abused Child, Parent of abused child, Abused parent
  - Family included: applicants' children and an under 21 year old child can include their parent
- U and T visa applicant = Child victim or their parent
  - Family included:
    - Under 21: spouse, children, parents, unmarried siblings under 18
    - Over 21: spouse and children
- Special Immigrant Juvenile Status = child victim
  - Family included: None

# VAWA SELF-PETITIONING

OMB No. 1815-0022, Expires 09-30-2018

**I-485, Application to Register  
Permanent Residence or Adjust Status**

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**For USCIS Use Only**

Full Name	Returned	Receipt
Apt. #	Resubmitted	

# Battered Spouse Waiver

- Helps immigrant spouses with 2-year conditional residency (green cards)
- Whose citizen spouse filed a family visa petition for them
- Requires proof of:
  - Battering or extreme cruelty to immigrant spouse or immigrant spouse's child or step-child
  - Good faith marriage
- Waives:
  - Joint filing requirement with abusive citizen spouse
  - Two-year wait to full lawful permanent residence
- Timeline to full lawful permanent residency = 12-24 months (2021)

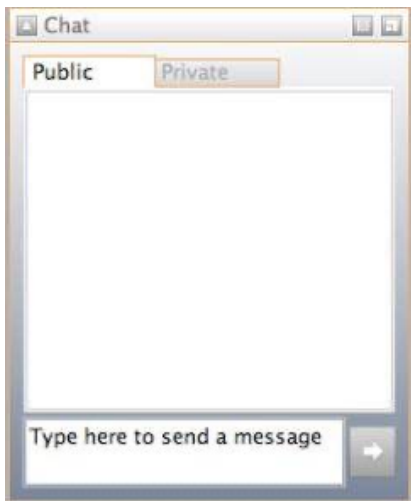
# Why Did Congress Create the Battered Spouse Waiver?

- 1986 Marriage Fraud Act amendments imposed 2-year conditional residence requirement when:
  - Citizen filed papers seeking lawful permanent residency for immigrant spouse
  - Marriage under two years duration at the time case was approved
- Created 2 year conditional green card
  - Required joint request for full lawful permanent residency at the end of two years
  - Locked battered immigrant spouses in marriage

# VAWA Self-Petitioning Requirements

- Subjected to Battery or Extreme Cruelty
- By a U.S. Citizen or Permanent Resident
  - Parent (Children abused under age 21 have up to age 25 to file)
  - Spouse or Citizen adult son/daughter (over 21)
- With Whom Self-Petitioner Resided
  - No time period required
- Good Moral Character
- Good Faith Marriage
- VAWA cancellation of removal has similar eligibility requirements
- **Timeline to work authorization = 4–24 months (2021)**
- Family Court Bench Card on Immigration Rights of Battered Spouses, Children and Crime Victims (2013) <https://niwaplibrary.wcl.american.edu/pubs/judg-tkit-bchcrdvictimsimmrights10-11-13>

# What could constitute “extreme cruelty”?



# Immigration Law's Domestic Violence Definition

## “Battering *or* Extreme Cruelty”

- Any state crime committed against a family member sufficient for issuance of a protection order including sexual abuse, stalking, threats, attempts *and/or*
  - Emotional abuse
  - Economic abuse
  - Using children
  - Deportation threats and immigration-related abuse
  - Intimidation
  - Social isolation
  - Degradation
  - Possessiveness
  - Harming pets
  - Coercive control



# Elements of Immigration Law Definition of Domestic Violence (Battering or Extreme Cruelty)

## Battering

- Physical violence against
  - Spouse/intimate partner
  - Child
- Use of a weapon
- Sexual assault
- Stalking
- Other acts defined as domestic violence under state law
- Attempts or threats to do any of these actions

## Coercive Control = Extreme Cruelty:

- Strategies designed to retain control or establish domination based on fear, dependence deprivation
- Isolation
- Deprivation of basic necessities
- Controlling regulating, monitoring victim
- Compelling through force, intimidation threats to abstain or engage in conduct against victim's will

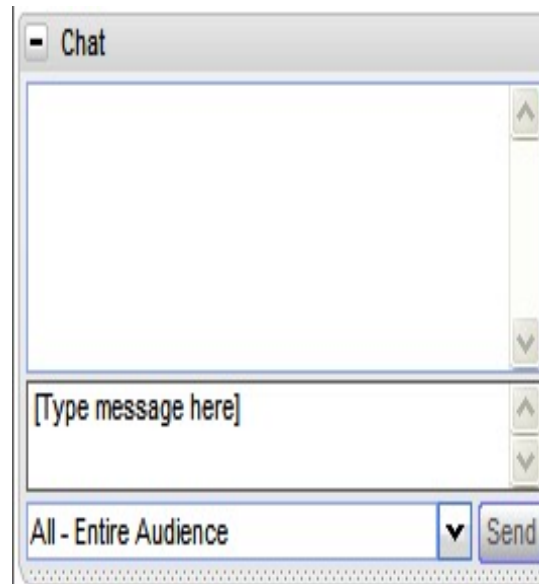
## Extreme Cruelty:

- Withholding medicine or medical care
- Adultery with a minor
- Financial abuse, seeking to destroy victim's credit
- Accusations of infidelity
- Using children as a tool
- Emotional abuse causing physical or psychological harm

# Immigration Law Definition of Battering or Extreme Cruelty

- “Being the victim of any act or a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under this rule. Acts or threatened acts that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence” 8 C.F.R. §204.2(c)(1)
- Based on what state family courts have considered to be extreme cruelty in divorce, alimony, support and custody cases

# What kinds of evidence could you use to prove extreme cruelty?



# Proof of Extreme Cruelty or Battery

- Self-petitioner's declaration
- Others' declarations (family, neighbors, friends, faith communities, workplace, school)
- Domestic abuse service providers (shelters, crisis lines, support groups)
- Protection orders
- Criminal court records
- E-mails, notes, letters, voicemails
- Photos: injuries, broken windows, furniture
- Medical records (injuries, scars, PTSD, migraines, insomnia)
- Vet records
- Counselors (marriage, religious, mental health)
- Police reports

# VAWA self-petitioning --

- Must file within 2 years of marriage termination
- Available when perpetrator is a bigamist
- Children abused under age 21 have until they turn 25 to file
- Step children must file prior to divorce
- Credible evidence standard of proof
  - (police report, protection order, medical records NOT required)

# Comparison BSW and VAWA Self-Petition

## Battered Spouse Waiver

- Citizen/LPR spouse *filed immigration petition* for abused spouse and their children (together or within 90 days)
- Victim files the BSW
- Proof:
  - Battering or extreme cruelty
  - Spouse or their child/step-child
  - Good faith marriage

## VAWA Self Petition

- Citizen/LPR spouse *never filed or withdrew immigration petition* for abused spouse and their children
- Victims files self-petition
- Proof:
  - Battering or extreme cruelty
  - Spouse or their child/step-child
  - Good faith marriage
  - Evidence of abuser's status
  - Good moral character
  - Residence with the abuser

# Helpful Family Court Orders - VAWA

- Details about physical & emotional abuse of the victim and/or children
- Findings
  - About the marriage existing
  - Documenting the parent/child or stepparent/stepchild relationship
  - Regarding residence together
- Good Moral Character:
  - Best interest factor findings about victim's involvement with children, school, community

# VAWA Self-Petitioners Receive

- Deportation: Protection from deportation shortly after filing.
- Immigration Benefits for Children:
  - VAWA self-petitioners' children receive immigration benefits
  - VAWA cancellation parole into US visa process required
- Public Benefits: As qualified immigrants (2-3 months)
  - Housing, FAFSA, SNAP (for children) Health care exchanges
  - 5 year bar to health subsidies, TANF
- Employment authorization: (3-24 months)
- VAWA confidentiality: protections against the release of information and reliance on abuser provided information
- Lawful permanent residency
  - Citizen perpetrator apply upon approval (1 year)
  - Lawful permanent resident perpetrator ( $\approx$  3 years)



# U Visas Applications

# U Visa Requirements and Process

- Victim of a qualifying criminal activity
- Has been, is being, or is likely to be helpful in
  - Detection, investigation, prosecution, conviction, or sentencing
- Suffered substantial physical or mental abuse as a result of the victimization
- Possesses information about the crime
- Crime occurred in the U.S. or violated U.S. law
- Timeline to work authorization and deferred action =
  - 4–6 years (shortening with 2021 bona fide process)

U Visa Certification and T Visa Declaration Toolkit for Federal, State, and Local Judges (2021)  
<https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2>

# U Visa Qualifying Criminal Activity

- 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

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

# What protection is there for family of U Visa applicants?

- Adult victims:
  - Spouse
  - Children
- Victims under 21 at time of criminal activity
  - Spouse
  - Children
  - Parents
  - Unmarried siblings under 18 (at the time of filing)

# What is substantial physical or emotional abuse?

- Decided based upon each individual's experience
- Case-by-case determination using these factors:
  - nature of the injury inflicted or suffered;
  - *severity of the perpetrator's conduct*;
  - the severity of the harm suffered;
  - the duration of the infliction of harm;
  - permanent or serious harm to victim's
    - appearance,
    - health,
    - physical, and mental soundness

# Who can certify?

- Police officer
  - Local and State police
  - Federal
  - University
- Prosecutor (State and Federal)
- Judge
- Immigration Officer
- Adult and Child Protective Services
- EEOC, DOL and state labor agencies
- Other authority with responsibility for investigation or prosecution of criminal activity

# U Visa Regulations Definitions

Although terms are used interchangeably

- *Helpfulness required for certification*
  - Was helpful, is helpful, is likely to be helpful in the “investigation or prosecution” always means
    - “Detection, investigation, prosecution, conviction, or sentencing”
  - To provide early access “crime” always means
    - “criminal activity”
- *After certification & filing ongoing responsibility to provide assistance/cooperation reasonably requested by law enforcement/prosecutors*
  - Cannot unreasonably refuse to cooperate

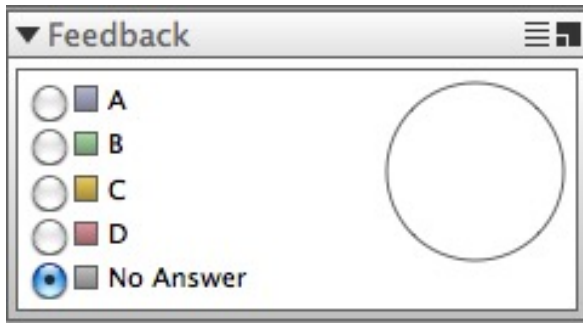
# Helpfulness Requirement Met

## *Even When:*

- Victim reports a crime and there's no further investigation or prosecution
- Perpetrator absconds or is deported
- Perpetrator is being prosecuted for a different crime
- Victim is not needed as a witness
- Victim is dead (indirect victim is applying)
- Perpetrator is dead
- The criminal case did not result in a guilty plea or conviction
- Victim is applying for a civil protection order or custody but domestic violence is not being criminally prosecuted



# Why would victims seek U visa certification from state courts?



- A. Only justice system contact a custody, protection order, civil employment or child welfare case
- B. No language access to police when victim called for help
- C. Judge observed victim's attendance and participation in criminal case
- D. All of the above

# According to DHS, a U Visa Certification Tells USCIS Only 3 Things:

- Certifier believes the applicant is a victim of a qualifying criminal activity
- Victim had knowledge of the criminal activity
- U visa: Victim was, is, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing

## Part 6. Certification

I am the head of the agency listed in **Part 2**, or I am the person in the agency who was specifically designated by the head of the agency to issue a U Nonimmigrant Status Certification on behalf of the agency. Based upon investigation of the facts, I certify, under penalty of perjury, that the individual identified in **Part 1**, is or was a victim of one or more of the crimes listed in **Part 3**. I certify that the above information is complete, true, and correct to the best of my knowledge, and that I have made and will make no promises regarding the above victim's ability to obtain a visa from U.S. Citizenship and Immigration Services (USCIS), based upon this certification. ~~I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS.~~

1. Signature of Certifying Official (sign in ink)



2. Date of Signature (mm/dd/yyyy)

3. Daytime Telephone Number

4. Fax Number

Judges can amend the form

Examples: Based upon ...

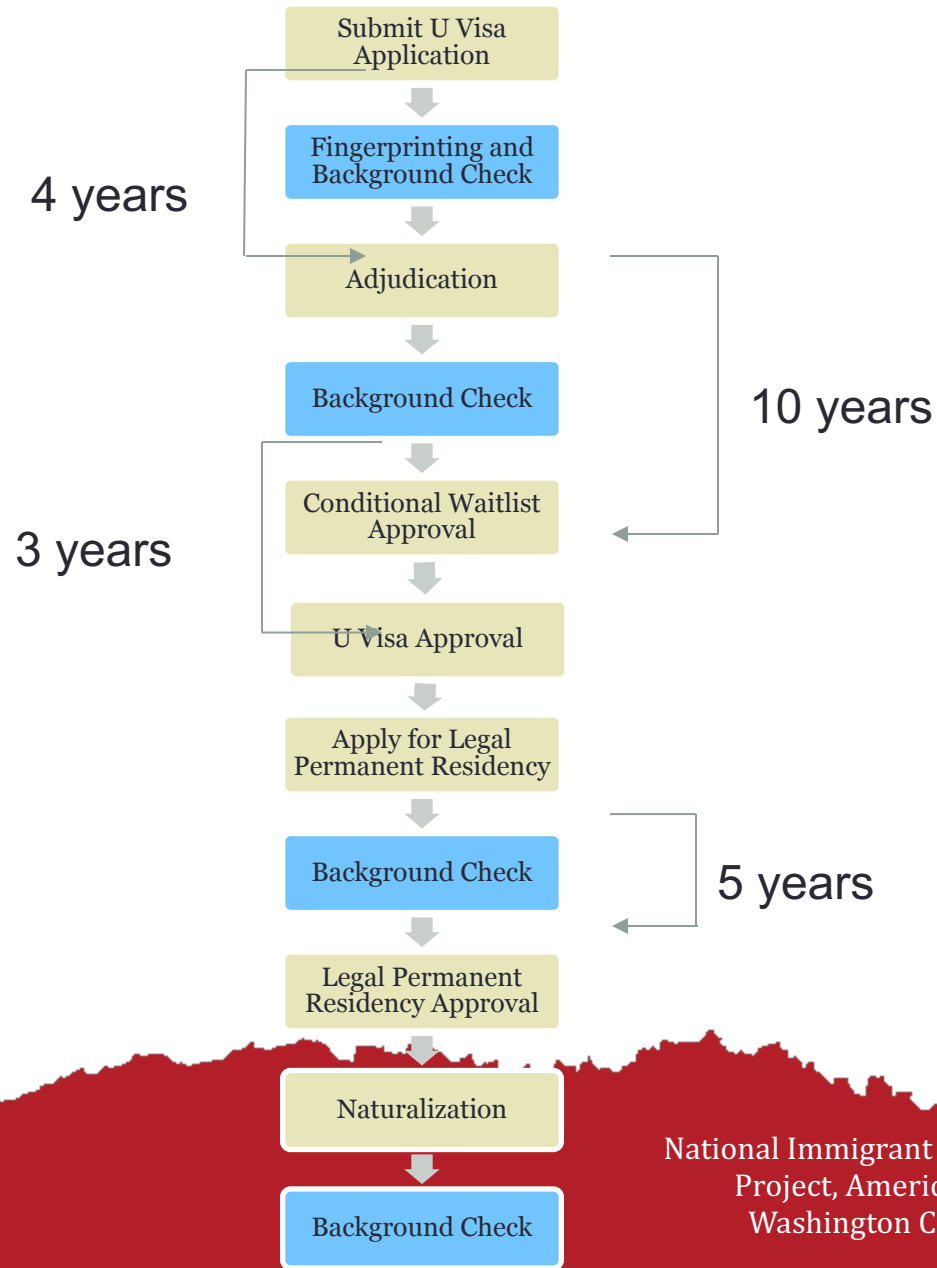
- My findings of fact or ruling in [name type of proceeding]
- Probable cause
- My issuance of a protection order
- My sentencing of the defendant
- My having presided over a criminal case

REMEMBER: This is a certification that you believe the applicant was a victim of a crime.

Certification provides evidence to DHS.

DHS adjudicates and decides whether to grant the victim immigration relief.

# U Visa Process Timeline



# Which U-Visa Recipients Can Obtain Lawful Permanent Residence?

- Did not **unreasonably refuse** to cooperate in the detection, investigation or prosecution of criminal activity; AND
  - Humanitarian need, OR
  - Family unity, OR
  - Public interest
- Homeland Security review of cooperation and the reasonableness of non-cooperation is required for lawful permanent residency

# Helpful Family Court Orders – U Visa

- Details about physical & emotional abuse of the victim and/or children
- Findings
  - About physical or mental abuse suffered and it's impact on the victim and/or their children
  - Documenting the parent/child or stepparent/stepchild relationship
- For potential inadmissibility waivers:
  - Best interest factor findings about victim's involvement with children, school, community

# U Visa Applicants Recieve

- Deportation: Protection from deportation shortly after filing.
- Immigration Benefits for Children:
  - U visa victim's children receive immigration benefits
- Public Benefits:
  - Government funded help open to undocumented immigrants
  - West Virginia provides health care for lawfully present children and pregnant women when bona fide or wait list approved (up to 5 years)
  - For details see November 10, 2021 webinar
- Employment authorization:
  - At bona fide determination or waitlist approval (up to 5 years);
- VAWA confidentiality: protections against the release of information and reliance on abuser provided information
- Lawful permanent residency
  - Can apply 3 years after receiving U visa

# Comparison: VAWA vs. U-visa

## VAWA Self-Petition

- Abuser: spouse, former spouse, parent, 21+ USC child
- Abuser USC or LPR
- Children included
- No cooperation with law enforcement required
- No proof of harm
- Criminal involvement can cut off access to relief
- Qualified immigrant = public benefits
- One year wait for work authorization
- Protection from deportation for 1 year
- Green card after approval if abuser is a citizen, or 3+ years wait if abuser is LPR

## U-visa

- Abuser: anyone
- Any status
- Children included
- Cooperation in detection, investigation or prosecution required
- Substantial physical or emotional abuse
- Crimes can be waived
- PRUCOL less benefits access
- One year wait for work authorization
- If in immigration proceedings, case expedited
- Green card after 3 years if can show cooperation + either humanitarian need, public interest or family unity



# Immigrant Victims of Human Trafficking and the T Visa

# T Visa for Trafficking Victims

- A victim of a severe form of trafficking in persons
  - Sex or labor trafficking involving victim under 18 or and adult subject to force, fraud or coercion
- Victim is physically present in the U.S. on account of trafficking
- Victim must comply with reasonable requests for helpfulness in investigating or prosecuting trafficking. Exceptions
  - Under age 18
  - Physical or psychological trauma impede helpfulness/cooperation
- Removal from the U.S. would cause extreme hardship
- **Timeline to work authorization = 12-18 months (2021)**
- DHS, Recognizing Human Trafficking in the Courts Room (2015)  
<https://niwaplibrary.wcl.american.edu/pubs/dhs-recognizing-human-trafficking-victims-in-the-courtroom>

# Familial Trafficking

- Over 62.7% of sex trafficked children their trafficker is a family member
  - Parent, grandparent, aunt, uncle, cousin, sibling
  - With 45.8% parent or guardian
- Up to 34% of sex trafficked children are trafficked by an intimate partner

- Cole, J., & Sprang, G. Sex trafficking of minors in metropolitan, micropolitan, and rural communities. *Child Abuse & Neglect* (2014), <http://dx.doi.org/10.1016/j.chiabu.2014.07.015>

# Who is Reporting Human Trafficking to the U.S. Human Trafficking Hotline (2019)?

- Female 82%, Male 12%, Gender Minorities 6%
- Adults 73%; Minors 27%
- Citizens/lawful permanent residents 43%
- Immigrants 57%
- Type of trafficking
  - Sex trafficking only 71.7%
  - Labor trafficking only or a combination of labor and sex trafficking 16%

# Sex Trafficking

22 U.S.C. § 7102; 18 U.S.C. § 1591

## Process -Act

- Recruits
- Entices
- Harbors
- Transports
- Provides
- Obtains
- Advertises
- Maintains
- Patronizes
- Solicits
- Benefits, financially or by receiving anything of value

## Means

- Force
- Fraud
- Coercion
- **Proof of force, fraud, or coercion not required for sex trafficked children under 18.**

## Purpose-End

- **Commercial Sexual Activity**
- **A commercial sex act is any sexual act for which something of value is given or received**
  - Money
  - Drugs
  - Food
  - Shelter
  - Clothing
  - Transportation

# Labor Trafficking

22 U.S.C. § 7102; 18 U.S.C. § 1590

## Process-Act

- Recruits
- Harbors
- Transports
- Provides
- Obtains
- Benefits, financially or by receiving anything of value

## Means

- Force
- Restraint
- Threats of harm
- Abuse or threatened abuse of the legal system
- Any scheme, plan, or pattern intended to cause the person to believe that if they did not perform labor, they would suffer serious harm or restraint
- **No federal exception for minors**

## Purpose-End

- Involuntary servitude
- Peonage
- Debt Bondage
- Slavery

When can being forced to work  
by a spouse, intimate partner,  
parent to step-parent constitute  
labor trafficking?

# Coexisting Involuntary Servitude & Domestic Violence

- Condition of involuntary servitude induced by
  - Means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not do or continue the work, that person or another person would suffer serious harm or physical restraint, or abuse of legal process (& threats)
    - Can occur in intimate partner, spousal, parent child and roommate relationships
    - Can include domestic servitude and sexual exploitation
- Threats of abuse
  - Physical, mental, emotional, sexual, intimidation, coercive control
- Lead to compelled or coerced labor or services or force, fraud or coercion
- Domestic labor can constitute forced labor amounting to involuntary servitude
  - Involving force, fraud or coercion
  - Goal of securing forced labor = condition of servitude



# T Visa Declaration

- Identify type of trafficking (sex, child sex, labor)
- Describe the victimization
- Identify relationship with the crime detected, under investigation, being prosecuted, conviction or sentencing and dates
- Comments on potential for retaliation or revenge from trafficker if victim is removed from U.S.
- Dates of trafficking
- Statutory citations to crimes
- Information about victims involvement in case(s) against trafficker
- Names and relationship of any family members involved in the human trafficking

# Helpful Family Court Orders – T Visa

- Findings about:
  - The type of human trafficking suffered
  - A description of the trafficking suffered
  - The potential for retaliation or revenge from the trafficker
  - Victim's fear of the trafficker
  - Names and relationships of family members involved in the human trafficking

# T Visa Applicants Receive

- Deportation: Protection from deportation shortly after filing.
- Immigration Benefits for Children:
  - T visa victim's children receive immigration benefits
- Public Benefits:
  - Government funded help open to undocumented immigrants
  - Upon receipt of HHS certification (bona fide or continued presence) same benefits as refugees
  - For details see November 10, 2021 webinar
- Employment authorization:
  - At bona fide determination or continued presence (1 year);
- VAWA confidentiality: protections against the release of information and reliance on abuser provided information
- Lawful permanent residency
  - After 3 years in T visa status or when case is concluded

# Special Immigrant Juvenile Status (SIJS)

- Immigration relief for unmarried children
- Under state law age of majority at SIJS finding
- Under the age of 21 when child files SIJS case
- Victims of abuse, abandonment, neglect, or dependency
  - By at least **one parent**
- To apply must submit required findings from a state court with jurisdiction over
  - the care, custody, or dependency of the child
- **Timeline to approval = 6 – 36 months (2021)**
- Special Immigrant Juvenile Status Bench Book (2018)  
<https://niwaplibrary.wcl.american.edu/sijs-manual-table-of-contents>

# Special Immigrant Juvenile Status (SIJS)

- Humanitarian immigration relief for unmarried children who cannot be reunified with one or both parents who...
  - Abused, abandoned or neglected the child
- State court order is a required filing prerequisite
- The state court order reflects judge's expertise on children's best interests
- State court findings do **not** grant immigration status

# State Court SIJS Findings Applying State Law

- The court has jurisdictions to issue orders regarding care, custody, or placement of an immigrant child (under age of majority and unmarried) with
  - An individual (e.g. non-abusive parent, grandparent, guardian, adopting parent) OR
  - State agency, private agency, including foster care system
- It is not in the child's best interest to return to their home country
- Reunification of the child is not viable with a parent due to at least ONE PARENT'S abuse, abandonment, or neglect

## Home country not in child's best interests

- Identify each potential custodian state law requires the court to consider in U.S. and home country
- Apply state best interests factors to each placement
- Court order states the factual findings that support chosen placement
- Make findings that illustrate why under state best interest factors court is not choosing placements in child's home country
- Compare the supports, help, services child needs U.S vs. home country
- Then, if needed, address other country conditions
  - Gangs, other harmful factors

# Finding: Reunification Not Viable

- Reunification with a parent is not viable due to abuse, neglect, abandonment, or similar state law basis
- Does not require termination of parental rights
- Viability of reunification does not necessitate no contact with parent – Visitation can occur
- Means granting the abusive parent custody is not envisioned by the court as a viable option
- Changes in circumstances can occur
  - But not granting full legal/physical custody to abusive parent



# Family Court Cases That Include Decisions About Care & Custody of Children

- Dependency/Delinquency
- Civil protection order cases
- Custody cases
- Divorce cases
- Paternity and child support cases
- Adoption cases
- DHS states: All are of the above = *Juvenile courts*
  - Juveniles = all children
- SIJS Bench Book has chapters on each case type  
<https://niwaplibrary.wcl.american.edu/sijs-manual-table-of-contents>

## Large Group Multiple Choice:

In the Clara and Eduardo Scenario in which of the following cases could the court NOT issue SIJS findings for Lupe as part of the court's order?



- A. A protection order case in which the order grants Clara custody
- B. A custody case brought by Clara
- C. The criminal prosecution of Eduardo
- D. A child welfare case in which the court made findings of Eduardo's abuse and placed the children with Clara

# SIJS Timing

- Court has jurisdiction to issues orders until the child reaches age of majority
- Must obtain SIJS findings from state court while still a “child” the court has jurisdiction over
  - Defined by state law
- Then child has until they turn age 21 to filed SIJS case with DHS minors
- SIJS is an option any time an abused, abandoned or neglected and child is not a
  - Citizen or lawful permanent resident

# Apply Same Jurisdiction and Procedural Rules as All Other Cases

- Include a statement of the court's jurisdiction citing the state law under which the court is exercising jurisdiction.
- Follow your state court procedures and note that you do so to demonstrate that the court made an informed decision.

# Family Law Services of Process and Jurisdiction Requirements Charts

- By proceeding for all states:
  - Adoption
  - Child abuse and neglect
  - Custody
  - Divorce
  - Paternity and Child Support
  - <https://niwaplibrary.wcl.american.edu/family-law-service-jurisdiction-charts>
- Comparisons among case types by state  
<https://niwaplibrary.wcl.american.edu/all-state-family-law-jurisdiction-and-service-of-process-charts>
- SIJS Bench Book Chapter on Service of Process  
<https://niwaplibrary.wcl.american.edu/pubs/chapter-vii-service-of-process-in-sijs>

# Best Practice for Court Order

- Make factual findings regarding
  - Facts of abuse, abandonment and/or neglect
  - Separately regarding each parent
  - Articulating trauma impact on child helpful
  - Connect the dots
    - Explain why the orders and findings the court is issuing
    - Are needed for child protection, healing, stability
    - Because of the abuse/abandonment/neglect the child suffered
  - Why court orders in the child's best interest
- Cite West Virginia statutes or case law

# DHS Adjudications in SIJS Cases

- Adjudicates application filed by child
- Reviews evidence, including the state court's order, to determine if the child applicant is eligible for SIJS
- Determine if state court order was sought primarily
  - To provide the child relief from harm caused by abuse, abandonment or neglect; *OR*
  - Only for immigration purposes

# What Children with SIJ Status Receive

- While case is pending
  - Protection from deportation and removal
  - As lawfully present children – health care exchanges (no subsidies)
  - Programs and services necessary to protect life and safety
- At approval
  - Legal work authorization
  - Lawful permanent residency
  - Eligible for citizenship after 5 years
  - Food stamps, Post secondary educational grants and loans, public and assisted housing

SIJ's may NEVER file family petition their natural parents





# U Visa vs. SIJS

## U Visa

- Cannot file for immigration relief for abusive parent
- Suffered substantial physical or mental abuse as a result of the victimization (Child abuse)
- No findings regarding viability of reunification
- Less family law implications
- Benefits: Limited includes Health Care

## SIJS

- Cannot file for immigration relief for abusive parent
- Abuse, abandonment, neglect by family court
  - Can include extreme cruelty
- Requires finding that reunification not viable
- Greater family law implications
- Benefits: Same as lawful permanent resident

# Issues That Arise for Immigrant Victims in Family Law Cases

# Family Court Jurisdiction: Immigrant Victims

- **Protection orders**
  - Domestic violence crime committed in state or
  - Victim needs protection in state
- **Divorce**
  - Residency of party in state
  - Legal immigration status not required to establish residency under state family laws
- **Custody-Guardianship**
  - UCCJEA, Federal PKPA, Hague Convention) - home state of children
- **Child abuse, neglect, termination of parental rights**
  - Where an abused or neglected child is located.
- **Child support**
  - Where child or non-custodial parent lives

# Senjab v. Alhulaibi Nevada Supreme Court (October 21, 2021)

- Unanimous ruling
- Residence for divorce jurisdiction is established by meeting physical presence requirements (of more than 6 weeks in the state)
- Immigration status of the either party not relevant
- Visa holders and others with temporary legal immigration status need only meet residence (not domicile requirements) to file for divorce.

# Impact of Divorce

- VAWA self-petitioners
  - Must file within two years of final divorce
- Spouses and children of visa holders ends legal immigration status in the United States:
  - Students, Persons with legal work visas, Diplomats
- Divorce cuts off access to lawful permanent residency for spouses and children of people seeking lawful permanent residency based on:
  - Employment based
  - Asylees
  - Family based
  - Cancellation of removal applicants

# Annulment Instead of Divorce

- Annulment can lead to a marriage fraud finding that:
  - Permanently bars approval of any visa petition
  - Is a ground for deportation
  - Can lead to an unfavorable exercise of discretion by an immigration judge not to grant immigration relief
- Impact on
  - Spousal support
  - Property division

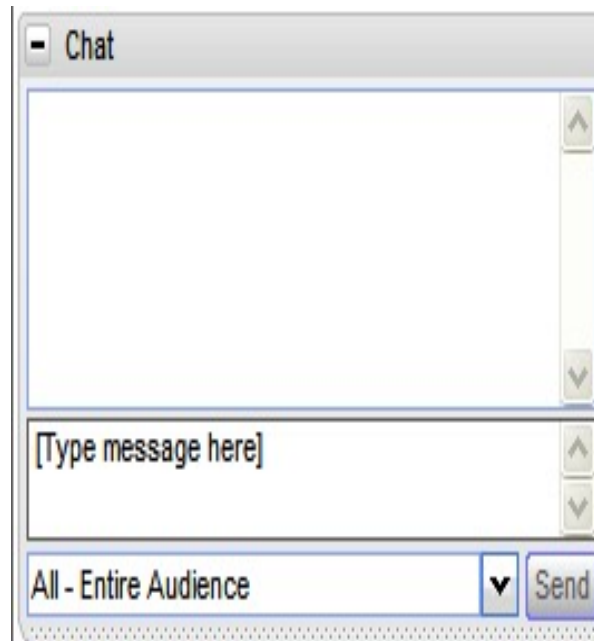
# Affidavits of Support and Divorce Cases

# Immigration Law Requires Affidavits of Support

- In family based immigration cases citizen spouses must sign an Affidavit of Support for the intending immigrant
  - Ensuring that the intending immigrant will not fall into poverty and rely on public assistance.
- Victims could have affidavits of support if their citizen husband ever filed immigration papers
- Enforcing affidavits of support should be a routine part of divorce cases in mixed immigration status families



# How would you get a copy of the affidavit of support?



## What evidence would have been submitted with the affidavit of support? (Check all that apply)



- A. 3 years of tax returns
- B. Evidence of current employment including self-employment
- C. Proof of income sufficient to sustain spouse at or above 125% of the federal poverty guidelines
- D. 12 months of bank statements

# Supporting Evidence

- 3 years of tax returns
- Federal income tax return and all supporting tax documents (W-2s, 1099s, Form 2555, and tax schedules) for the most recent tax year.
- Bank statements covering the last 12 months or a statement from an officer of the bank or other financial institution in which the sponsor has deposits, the account balance averaged over a 12 month period, and current balance.

# Proof of Sponsor's Current Income

- Pay stubs or other documentation of pay for the past six months.
- Evidence of other income such as
  - Tax Exempt Interest,
  - Qualified Dividends,
  - IRA distributions,
  - Pension,
  - Annuities,
  - Social Security Benefits (only SSA-1099 and/or SSDI-1099).

# Letter from current employer

- Dates of employment
- Nature of the job
- Yearly salary earned
- Number of hours per week worked
- Prospects for future employment and advancement

# Supporting Evidence

- Evidence of ownership, value, and dates acquired of stocks, bonds, and certificates of deposit;
- Evidence of ownership, value/equity, and dates acquired of other personal property;
- Evidence of ownership, a recent licensed appraisal or county tax assessment, any mortgage/lien or lien release of any real estate, and dates acquired.

# State Family Courts Have

- Enforced Affidavits of Support as contracts
- Used Affidavits of Support to set
  - Spousal support obligations and levels
  - Child support levels
- No duty to mitigate

# I-864 Affidavit of Support: Duration and Enforceability

- This responsibility lasts until the non-citizen either:
  - Becomes a U.S. citizen = Naturalizes;
  - Credited with forty (40) hours of work under the Social Security Administration - INA §213A;
  - Ceases to hold be a lawful permanent resident and departs the U.S.;
  - Obtains in removal proceedings a new grant of lawful permanent residency;
  - Dies



# Divorce does not end the obligation

- It is possible that none of these happen until the death of the parties involved.
- The Affidavit of Support itself specifically warns “that divorce **does not** terminate your obligations under this Form I-864.”
- Estrangement, loss of contact between the spouses, premarital or divorce agreements to not end the responsibility
- There is no statute of limitations on enforcement

# How do Sponsored Immigrants Earn Qualifying Quarters

- Sponsored immigrants earn the quarters themselves
- Sponsoring spouse earned qualifying quarters during the marriage that can be credited to the immigrant spouse
  - Divorce cuts off immigrant spouse quarters spouse earned; death of sponsor does not
- Immigrant children can count the qualifying quarters earned by sponsor parent when child was under 18 years old
- A combination of the above

# Preclusion Issues

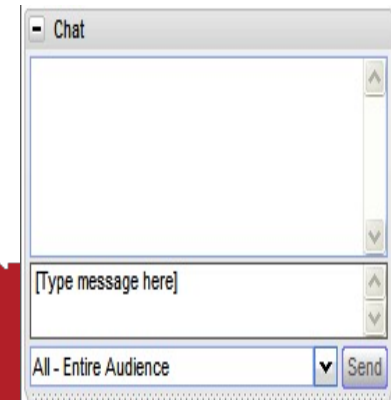
- Attorneys should be aware and inform litigants that if an Affidavit of Support exists
- Litigants, including battered immigrant spouses might need to seek enforcement during their divorce litigation to avoid claim preclusion issues.

# Federal or State Courts?

- Federal and state courts have both exercised jurisdiction over Affidavit of Support enforcement actions.
- State courts have found little difficulty in exercising such jurisdiction, though rationales have differed.
- In some places, federal courts have exercised jurisdiction over enforcement actions.

# Amount Due Per Year Depends on Household Size - Example

Citizen sponsored his immigrant spouse and step-child for lawful permanent residency. During the marriage, the citizen and immigrant spouse had two more children. The immigrant spouse needed to separate from the citizen spouse due to domestic violence, and lived with the three children apart from the abusive citizen spouse for three years. The immigrant spouse did not receive any income or support from the abuser for those three years, and she filed for divorce and enforcement of the affidavit of support. **What would be the household size for the affidavit of support obligation?**



# 2021 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES & DC

Persons in family/household	Poverty guideline
For families/households with more than 8 persons, add \$4,540 for each additional person.	
1	\$12,880
2	\$17,420
3	\$21,960
4	\$26,500
5	\$31,040
6	\$35,580
7	\$40,120
8	\$44,660

# Calculating the Affidavit of Support

- Poverty Guideline for 2 people for 2021  
–  $17,420 \times 125\% = 21,775$
- Poverty Guideline for 2 people for 2020  
–  $17,240 \times 125\% = 21,550$
- Poverty Guideline for 2 people for 2019  
–  $16,910 \times 125\% = 21,138$
- Total due under affidavit of support =  
64,463

# Is there a sharing of quarters issue?





# Affidavit of Support and Spousal Support

- A Michigan court found that the obligation under the Affidavit is “separate and distinct from any obligation to pay spousal support,” and that the trial court had erred in “conflating the two obligations and applying them in a manner it found equitable.”
  - *Greenleaf v. Greenleaf*, Docket No. 299131, 2011 WL 4503303, at 3 (Mich. Ct. App. Sept. 29, 2011)

# Greenleaf v. Greenleaf

- This court ordered that “the trial court shall first determine plaintiff’s obligation under the Affidavit of Support and enforce that obligation.”
- “After having determined plaintiff’s obligation under the Affidavit of Support, the trial court shall make a separate determination whether defendant is entitled to spousal support.”

# Enforceability of the Affidavit Support

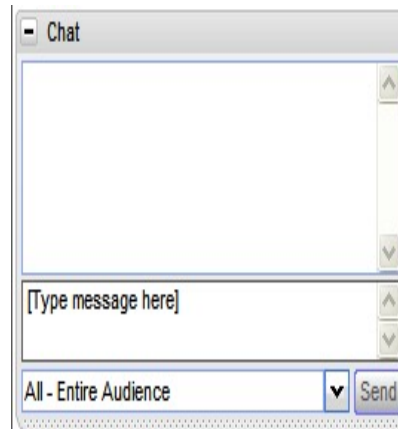
- Courts have found the I-864 Affidavit of Support enforceable and have ordered support payments to a former spouse.
  - *See, Shumye v. Felleke*, 555 F.Supp.2d 1020(N.D. Cal.2008); *Stump v. Stump*, 2005 WL 2757329 (N.D. Ind. Oct. 25, 2005); *Cheshire v. Cheshire*, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010, at \*2-4 (M.D. Fla. May 4, 2006)
  - *Kumar v. Kumar* A145181 (Cal. App. Div. II, July 28, 2017)(enforceable and no duty to mitigate)
- As part of a family law property settlement, the sponsored immigrant may surrender his or her right to sue to enforce the Affidavit of Support.
  - 71 F.R. 35732, 35740 (June 21, 2006).

# Effect of a Pre 1997 I-134 Affidavit of Support

- Do not create a legal obligation
- Not legally binding contracts
- Helpful evidence for spousal and child support - the affidavit of support may be
  - Be considered with other evidence in deciding alimony after a long marriage
  - Impact the amount of alimony
  - Used to impute income regarding ability to pay spousal or child support
  - Provide helpful evidence of income and assets

# Child Support in Mixed Immigration Status Families

# What are the immigration related issues you have seen in child support cases?



# How Paying Court Ordered Child Supports Helps an Immigrant Parent

- Payment of child support through the court provides a non-citizen parent with a history of child support payments
- This is helpful evidence of good moral character for immigration cases for both parents
  - Cancellation of removal
  - Naturalization
  - Obtaining relief in immigration court
    - Can be used to show hardship to family members

# How Receiving Court Orderd Child Support Helps the Immigrant Parent Receiving Child Support

- Provides a custodial immigrant parent with evidence of child support that can be used as income in when applying for lawful permanent residency
  - Avoids public charge



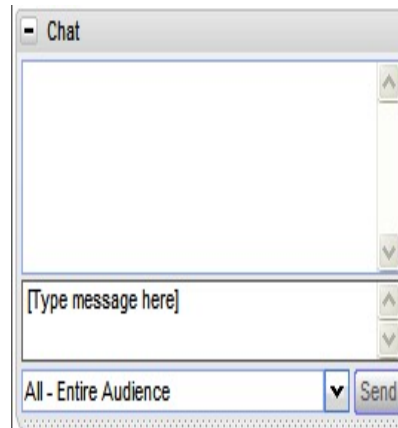
# Immigration Issues Arising in Child Support Cases

- Lack of legal work authorization is not a valid defense to non-payment of child support
- Can order child support, but not a job search, of an undocumented non-custodial parent
- Can order non-custodial parent to obtain an ITIN and pay taxes
- Criminal convictions for willful failure to pay child support can be deportable theft/fraud related crimes of moral turpitude

# Importance of Wage Withholding

- Creates documented track record of payment
- Improves safety for immigrant victims
- Courts have found employers who willfully violate wage withholding orders liable to the custodial parent for the amount of child support ordered withheld.
  - State v Filipino, Conn. Super. LEXIS 266 (2000)
  - Belcher v Terry, 420 S.E.2d 909 (1992)
  - Child Support Recovery Srvs., Inc. ex rel S.C. v. Inn at the Waterfront, Inc., 7 P3d 63 (Alas. 2000)

# How Might You Establish A Non-Custodial Immigrant Parent's Income for Child Support Purposes?



# Proof of Non-Custodial Immigrant Parent's Income

- Undocumented workers can be ordered to pay child support based on
  - Child Support Guidelines
  - Actual earnings
  - Employer's statements
  - Evidence of earning capacity
  - Attributed income (e.g. minimum wage)
- Undocumented workers can pay state & federal taxes on income earned using an IRS issued
  - Tax ID number (ITIN)

# Protection Orders and Immigrant Survivors



# Immigrants and Protection Orders

- All persons are eligible to receive civil protection orders without regard to the immigration status of any party or child
- Immigrant victims and their children often need creative protection order remedies using the state catch all provisions
- The definition of domestic violence under U.S. immigration laws is broader than all state protection order and criminal laws

# Immigration Law Definition of Domestic Violence

- “Battery or Extreme Cruelty”
- Includes
  - All forms of abuse covered in state civil protection order statute
  - All forms of abuse that constitute domestic violence under state criminal laws
  - Plus – Forms of abuse that are extreme cruelty
    - No physical harm or crime required

# NIJ Funded CPO Study Found

With support immigrant victims will use and benefit from justice system assistance

- 60.9% did not know about CPOs
- 81% got CPO with help from advocate/attorney
- 96% found them helpful
- 68.3% of violations immigrant related

Ammar, Orloff, Dutton, and Hass, Battered Immigrant Women in the United States and Protection Orders : An Exploratory Research Criminal Justice Review 37:337 (2012)



# Protection Orders

- All persons are eligible to receive civil protection orders without regard to the immigration status of any party or child
- Protection order issuance = no effect on immigration status
- A conviction *or finding* of violation of the “*protection against* abuse provisions” of a protection order is a deportable offense
- Best practices Padilla advisals

# Effect of Protection Order Issued Against Immigrant Victims

- Increases perpetrators power and coercive control
  - Victim is one step away from deportation
  - A violation of a protection order is a deportable offense
    - Findings enough – conviction not required
- Perpetrators who are successful in convincing courts to issue protection orders are often also successful obtaining findings that the victim violated the order

# Findings that Victim Violated a Protection Order Could Cut Off Access to Immigration Relief

- Having an order of protection issued against a noncitizen could prevent them from establishing good moral character that is a requirement for immigration relief - Examples:
  - VAWA self-petition
  - VAWA cancellation of removal
  - Naturalization
  - Exercise of discretion for inadmissibility waivers in VAWA, U and T visa cases

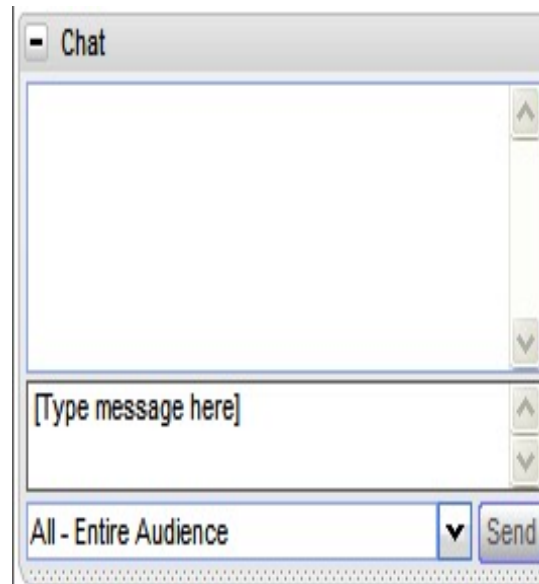
# Effects of “No Findings” Protection Orders

- Can allow the abuser to keep his firearms
- Increase danger to a survivor and her children
- Undermine state laws regarding domestic violence and custody

# Beneficial Findings to Include When Issuing Protection Orders

- In contested cases
  - Findings of physical, sexual and emotional abuse of immigrant, her child or step-child
- In all cases showing an:
  - Existence of parent/child or spousal relationship by checking this box on standard court orders
- Include creative remedies

What are some examples of creative protection order remedies you have obtained for your clients?



# Creative Protection Order Remedies

- Catch all provisions in civil protection order statutes, opportunity to offer relief designed to help:
  - Curb future abuse, harassment
  - Interfere with abuser/perpetrators ability to exert power and/or coercive control
  - Offer victim remedy-relief for past abuse
  - Help victim overcome victimization and build new post abuse life
- Nexus with victimization
- Opportunity for courts to counter immigration related abuse and order culturally helpful remedies

# Victims Who Stay: No Unlawful Contact Protection Orders

- No state's protection order statute requires separation of the parties
- Provisions
  - No abuse
  - No unlawful contact
  - Batterer's treatment



# The Majority of Immigrant Victims Stay With Their Abusers ...

- Until their immigration case is approved or the victim receives work authorization
- Percent who leave before receiving work authorization or approval
  - VAWA self-petitioners 33.9%
  - U visa victims 30.1%

# Using Catch-all Provisions to Stop Immigration Related Abuse

- Defendant must obtain prior court approval before contacting any government agency (immigration officials, CPS, IRS, Welfare, etc.) concerning the petitioner except
  - Police emergency
  - Subpoena
- Cooperate in and not withdraw any case he has filed for petitioner with immigration authorities (e.g. work visa holders, I-130s)

# Provisions that Deter Parental Kidnapping

- Not remove the children from the court's jurisdiction
- Turn over passports of parties and/or children
- Sign statement that no visa or passport should be issued to children absent court order
- Supervised visitation
- Bond

# Remedies That Help a Victim's Immigration Application

- Turn over documents/evidence in abuser's control needed for the victim's immigration case.
- What might some of those documents be?



# Helpful Evidence

## **Evidence of Legal Marriage**

- Marriage certificate
- Wedding/family pictures
- Health insurance

## **Good Faith Marriage**

- Children birth certificates
- Love letters, cards, text, emails
- Copies of joint leases/utility bills
- School records
- Letters and other mail addressed to the victim and to the abuser at the same address

## **Evidence of Abuse or Extreme Cruelty**

- Police, medical, court documents about the relationship
- Protection order
- Affidavits of neighbors, relatives, friends

## **Evidence of Abusers Legal Status**

- Abuser's green card or passport
- Copy of I-130 petition
- Social security number

# Important Economic Provisions

- Maintain medical, car, house insurance, mortgage, rent, utility and/or debt payments
- Child support and spousal support
- Enforce Affidavit of Support
- Injunctions against third party institutions not to respond to acts by the abuser that would harm her (banks, retirement funds, utility companies)

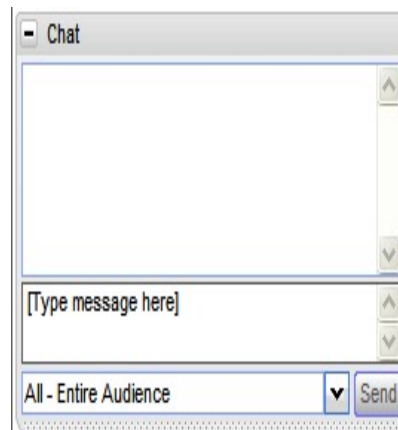
# Important Economic Provisions

- Maintain and/or pay for health care for victim and children
- Provide one time emergency monetary relief
  - Money to repair locks or broken windows
  - Obtain an unlisted telephone number
  - Relocation assistance
- Pay house insurance, mortgage, rent, utility and/or debt payments
- Taxes
  - Turn over income tax statements
  - Respondent ordered to pay victim ½ of refund
  - Victim named trustee for receipt of tax return funds
  - Respondent ordered to sign over check
  - Victim awarded exclusive right to claim children as tax exemptions

# Immigrant Victims and Family Court Cases



What are examples the ways you have seen parties raise immigration status issues in a custody or other family court case?



# Judges Reporting Increases in the Opposing Party Raising Immigration Status in State Court Cases

- 2017 at higher rates (vs 2016)
  - Criminal cases 39%
  - Civil protection order cases 32%
  - Custody cases 31%
  - Divorce cases 23%

Rafaela Rodrigues, Leslye E. Orloff, Amanda Couture-Carron, and Nawal H. Ammar, Promoting Access to Justice for Immigrant Crime Victims and Children: Findings of a National Survey and Recommendations (2018), National Center for State Courts: Courts and Society. <https://niwaplibrary.wcl.american.edu/pubs/trends-in-state-courts-survey-findings>

# Protecting Immigrant Mothers Protects Children

- Immigrant victims who receive help, including immigration relief, child abuse likelihood drops significantly (77% to 23%).
- Children of help seekers 20% less likely to have abuser threaten them
- One third less likely to have abuser threaten to take them away from their mother

Ammar, Orloff, Hass and Dutton, "Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status." (September 2004)

<http://niwaplibrary.wcl.american.edu/pubs/co-occurencedvchildabuse/>

# Is Immigration Status Relevant to Custody?

- Relevant to: Immigrant crime victim presents evidence of immigration related abuse, power and control suffered
  - Either not filing or withdrawing immigration papers
  - Threats to turn victim in for deportation
  - Part of history of violence
- Not relevant to:
  - Core primary caretaker determination
  - Evaluation of parenting skills
  - Best interests of the child determination
  - Requirements regarding custody awards to non-abusive parent



# Myth vs. Fact:

## Parents without Legal Immigration Status

Myth	Fact
Deportation is imminent	DHS policies prevent detention/removal of immigrant parents who are crime victims
Parent is likely to flee U.S. with child	US citizens and lawful permanent residents are more likely to flee with children, especially when <ul style="list-style-type: none"><li>- There have been threats of kidnapping children</li><li>- They are dual nationals</li><li>- They travel freely to and from U.S.</li></ul>
The parent has no livelihood	Abused immigrant parents in family court have a path to immigration relief, work authorization & some benefits
Legally present parent must have custody in order to file for benefits for child	Custody does not affect parent's ability to file for or gain immigration benefits for his children

# Multiple Choice Exercise:

## Which parents are the *most* likely to be subjects of immigration enforcement?



- A. Immigrants with orders of removal or notices to appear in immigration court
- B. Undocumented immigrant parents
- C. Immigrants with criminal convictions
- D. Lawful permanent residents

# ICE Removal Data

## 2013

- Convicted criminals 82%
- Repeat immigration violators 7.8%
- Ordered removed and failed to depart 1.6%
- Other immigrants 7.7%

<https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>

## 2017

- Criminal convictions 73.7%
- Pending criminal charges 15.5%
- Outstanding notices to appear in immigration court 5.3%
- Ordered removed and failed to depart + reinstatement 2.8%
- Other immigrants 2.6%

<https://www.ice.gov/removal-statistics/2017>

## 2020

- Criminal convictions/pending criminal charges 92%

<https://niwaplibrary.wcl.american.edu/pubs/ice-ero-report-2020>

# Victim Witness DHS Memo 2011

## Confirmed 6/18 & 1/21

- 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.”



# DHS Enforcement Priorities 9.30.2021

- Terrorism, espionage, or threat to national security
- Threat to border security if
  - Apprehended while attempting to unlawfully enter the U.S.; or
  - Apprehended inside the U.S. after unlawfully entering after 11/1/20
- Current threat to public safety due to serious criminal conduct
  - Individual assessment based on totality of the circumstances
  - Gravity and sophistication of the offense, conviction, sentence
  - Nature and degree of harm; Use of dangerous weapons
  - Serious prior criminal record

# **DHS Enforcement Priorities 9.30.2021 and Trasvina ICE 5.27.21 Memo: *Mitigating Factors***

- Crime victim , witness, party in legal proceedings
- Advanced/tender age/pregnancy
- Poor health or serious medical condition
- Length of time in U.S.;
- Person is likely to be granted temporary or permanent immigration relief
- Military or public service by immigrant or family member
- Impact on family in U.S. of loss of caregiver/provider
- History of work in the U.S.
- Pursuit or completion or education in the U.S.
- Time since offense, rehabilitation, conviction vacated or expunged

# Multiple Choice Exercise:

## Who is the *least* likely to flee with children from the United States?



- A. U.S. citizens
- B. Undocumented immigrant victim mothers
- C. Dual national parents
- D. Multiple entry visa holder parents

# Fact: Legal immigrants/naturalized citizens are more likely to flee with children

- **Particularly when**
  - When have been threats of kidnapping children
  - When they are dual nationals
  - Because they can travel freely to and from U.S.
- Research conducted by the U.S. Department of State

# Flight Risk of Foreign Born Parents with Children

- The Ninth Circuit found that “there is no evidence that undocumented status correlates closely with unmanageable flight risk.”<sup>1</sup>

## Assessing Risk Factors for International Child Abduction

- Consider whether the other parent:<sup>2</sup>
  - Has previously abducted or attempted to abduct the child;
  - Has threatened to abduct the child;
  - Has engaged in activities that may indicate a planned abduction including abandoning employment; terminating a lease; or closing bank accounts;
  - Has engaged in domestic violence, stalking, or child abuse;
  - Has refused to follow a child-custody determination; or
  - Has strong family, financial or emotional ties to another country.

1. *Lopez-Valenzuela v. Apaio*, 770 F.3d 772, 786 (9th Cir. 2014).

2. For complete list of risk factors, See Uniform Law Commission, *Uniform Child Abduction Prevention Act*, at 10, (2006), <https://www.uniformlaws.org/viewdocument/final-act-with-comments-7?CommunityKey=c8a53ebd-d5aa-4805-95b2-5d6f2a648b2a&tab=librarydocuments>.

# Multiple Choice Exercise:

What options might be available to an battered immigrant when the abuser seeks custody claiming that the victim has no livelihood?



- A. Child and/or spousal support
- B. Victim files immigration case and gains legal work authorization
- C. Public benefits available to the child or immigrant parent under state/federal benefits laws
- D. All of the above

# When Victims File For Crime Victim Based Immigration Relief --

- They are on a path to obtain
  - Legal work authorization
  - A driver's license
  - Greater access to state and federally funded public benefits
    - Learn what victims qualify for in your state
    - NIWAP's public benefits map
- Their application is confidential so that their abuser cannot learn they have filed

# Work Authorization by Immigration Status

- VAWA Self Petitioners
  - Abuser US citizen = 4 months
  - Abuser Lawful permanent resident = 1 -1.5 years
- U-Visa applicant = 4 years
- T-Visa applicant = 6 to 8 months
- SIJS applicants = 1 to 3 years



# Trends in Case Law

- “[i]t is true that, theoretically, any illegal alien can be deported. The danger, however, is extremely remote. Statistically, the chances are minuscule that any particular illegal alien will be apprehended and placed in removal proceedings.” *See Hupp v. Rosales*, 2013 IL App (4th) 130433-U. (risk of deportation)
- “...illegal aliens suffer disadvantages. For example, they cannot enter into an employment relationship. But plenty of people have worked, and thrived, as independent contractors all their lives.” *See Hupp v. Rosales*, 2013 IL App (4th) 130433-U. (ability to provide financially)
- Pending removal proceedings being treated as a single factor in the best interest analysis rather than determinative. *See N.C.T. v. F.T.S.*, No. A-3822-16T3, 2018 WL 891216 (N.J. Super. Ct. App. Div. Feb. 15, 2018). (risk of deportation)
- Finding that undocumented immigration status does not make an individual a flight risk. *See Huff v. Vallejo*, 347 Ga. App. 127, 817 S.E.2d 696 (2018). (flight risk)

# Visitation Exchange and Sensitive Locations Protected From Immigration Enforcement

## VAWA Confidentiality

- Victims protected at courthouses in connection with civil/family/criminal cases related to
  - Domestic violence, sexual assault, trafficking, stalking
- Shelters, rape crisis centers
- Supervised visitation centers
- Family Justice Centers
- Programs serving victims

## DHS Policies (ICE & CBP)

- Schools
- Medical treatment & health care facilities
- Places of worship
- Religious or civil ceremonies e.g. weddings and funerals
- Public demonstrations e.g. march, rally, parade

# Immigrant Parents and Child Custody

In re Interest of Angelica L., 277 Neb. 984 (2009)

- Parents have a constitutional right to custody (absent unfitness)
- Applies to all families without regard to:
  - Undocumented immigration status
  - Immigration detention
  - Deportation
- Overriding presumption that:
  - Parent-child relationship is constitutionally protected
  - In children's best interest to stay with/be reunited with their parent(s)
- Child's best interests is most important
  - A comparison of natural vs. adoptive parent's cultures, countries or financial means is not to be made

# Detained Parent Directive

## Aug. 2017 (Updated 1/28/21)

- If parents are detained:
  - Placement near family court when ongoing family court/child welfare cases
  - Bring parents to family court to participate in cases involving children
    - Alternate: video or teleconference participation
  - Facilitate visitation when required by family/child welfare court order
  - Help children travel with deported parent –obtain passports for children
  - <https://www.ice.gov/detain/parental-interest>

# Impact of State Court Orders on Victim's Immigration Case

- Specific written orders are helpful to immigration adjudicators and immigrant parties
- Court orders contain evidence of
  - Abuse, abandonment, neglect, domestic violence, sexual assault, extreme cruelty
  - Family relationships including
    - Marriage
    - Parent-child relationship
    - Step-parent/step-child relationship

# VAWA Confidentiality in State Court Proceedings

# 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
- *DHS notifies staff through “384” computer system*

# VAWA Confidentiality Statutes and DHS Policies and Regulations

- Protect Information About Victim's Immigration Case
- Prohibit 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 prohibited to all persons, not just the perpetrator



# State and Federal VAWA Confidentiality and Discovery Case Law

- Family law - VAWA and U visa case information not discoverable
- Criminal law – only U visa case certification discoverable
  - File not in prosecutors' custody or control
- Civil cases not discoverable except potentially as needed to prove damages to a specific individual
  - In chambers review judge can redact

# *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
- 6<sup>th</sup> 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 (5<sup>th</sup> 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



# Technical Assistance and Materials

- Power Point presentations and materials for this conference at <http://niwaplibrary.wcl.american.edu/WV-Family2021>
  - **NIWAP Technical Assistance**
  - Call (202) 274-4457
  - E-mail [info@niwap.org](mailto:info@niwap.org)
- Web Library: [www.niwaplibrary.wcl.american.edu](http://www.niwaplibrary.wcl.american.edu)

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