



What's Immigration Status Got to Do with It?
Prosecution Strategies for Cases Involving Undocumented Victims

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Criminal offenders will often identify and prey upon the most vulnerable within our communities. Among those that are targeted are immigrants who may be too afraid to report the offenders to police. When these crimes do come to the attention of police and prosecutors, additional challenges arise where the defense claims the victim may have ulterior motives for reporting the crime, including taking advantage of immigration relief that is available to victims of crime.

I. Role of Immigration Status in Your Case

A criminal investigation should include an inquiry into the motives and motivations of the offender. If there is evidence that the victim was targeted because of their known or perceived immigration status, that evidence may be relevant to the case. Likewise, in cases where the victim is known to the offender, there will likely be evidence that the offender used the victim's immigration status to threaten the victim, to assert power and control in a relationship, to keep the victim from reporting the crime, and/or to pressure the victim into dropping charges.

Prosecutors should fully analyze the evidence in their case to develop a theory of whether the victim's immigration status is relevant or not relevant to the charged crimes. Where the victim's immigration status is relevant, prosecutors may choose to develop a trial strategy which stresses that the offender engaged in premeditated victim-selection, intending to escape criminal responsibility because the victim was unlikely to report the crime and/or unlikely to participate in a criminal investigation and prosecution. In domestic violence cases, a prosecutor may want to

¹ If you need technical assistance on a cases involving an immigrant crime victim please contact NIWAP at (202) 274-4457 or info@niwap.org. Prosecutors should also call AEQUITAS for technical support for prosecutors working on cases involving immigrant victims (202) 558-0040 or info@aequitasresource.org.

² For more information related to this topic see: Jane Anderson, Leslye E. Orloff, and Benish Anver, *VAWA Confidentiality and Criminal Cases: How Prosecutors Should Respond to Discovery Attempts for Protected Information* (2017), available at: <http://niwaplibrary.wcl.american.edu/pubs/discovery-and-vawa-confidentiality-tool-final-7-24-17>; Jane Anderson & Benish Anver, *Quick Reference Guide for Prosecutors: U Visa and VAWA Confidentiality Related Case Law* (2017), available at: <http://niwaplibrary.wcl.american.edu/pubs/case-law-quick-reference-tool-7-24-17-final-w-logo>; Jane Anderson, Leslye E. Orloff, and Benish Anver, *Certifying Early: When Should You Sign a U or T Visa Certification for a Victim?* (2017), available at: <http://niwaplibrary.wcl.american.edu/pubs/certifying-early-7-1-17-final-w-logo>.

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introduce evidence that the defendant threatened the victim with deportation as a way to assert power and control of the defendant over the victim.¹ Establishing immigration related abuse is both effective in reducing the impact of the questions that the defense may raise about the victim's immigration status and in establishing evidence of the cycle of violence, dynamics of the abusive relationship, and the various tools used by the perpetrator to abuse the victim.

Immigration-related abuse includes:

- Refusal to file immigration papers on behalf of spouse/child/parent's behalf
- Threats or taking steps to withdraw an immigration case filed on the victim's behalf (family or work based visas)
- Forcing victim to work with false documents
- Threats/attempts to have the victim deported
- Calls to the Department of Homeland Security to turn the victim in for detention or removal and/or have her immigration case denied

Statistics:

- Among abusive spouses who could have filed immigration papers for survivors²:
 - 72.3% never file immigration applications for victims
 - Of the 27.7% who do file, there is a mean delay of 3.97 years
- 65% of immigrant victims report some form of immigration related abuse³
- Perpetrator of crimes against immigrant victims are actively involved in efforts to have victims detained or deported through⁴:
 - Reporting to the Department of Homeland Security
 - VAWA cases 38.3%
 - U visas 26.7%
 - Convincing police to arrest the victim instead of the perpetrator when the victim calls the police for help 15.4%
- When immigrant victims receive protection orders, they are commonly not effective in stopping immigration related abuse⁵
- Connection between abuse and control over immigration status⁶:
 - Abuse rates among immigrant women⁷:
 - Lifetime as high as 49.8%
 - Those married to citizens and lawful permanent residents- 50.8%
 - Those married to U.S. citizens- 59.5%
 - Research has found that, where immigration related abuse exists, usually physical or sexual abuse is also present⁸

II. Pretrial Litigation

By engaging in proactive pretrial litigation, prosecutors have an opportunity to preview their case for the judge. This provides judges a context for the evidence on which the judge at trial will be asked to rule. Issues regarding immigration status may be unfamiliar to criminal court judges and so it is particularly important that pretrial motions are brought to ensure that rulings can be made after careful consideration of the facts, applicable law, and underlying policy considerations. Pretrial motions are by their nature very case and fact specific. Examples of the types of motions that may be brought pretrial include the following:

- Motion to admit other bad acts, including acts that involve threats of deportation or other abuses of legal process⁹
- Motion to exclude immigration status as irrelevant or motion to limit testimony regarding immigration status
- Motion to allow for expert testimony on immigration relief available to victims of crime
- Motion to allow for expert testimony on victim responses to trauma, in particular in cases where the victim is undocumented and threatened with deportation
- Motion to strike motion to compel production of federal immigration file contents

III. Testimony of the Victim

A. Direct Examination

Preparation is key and victims should be advised of what types of questions will be asked, beyond those that are designed to elicit the relevant facts of the case. If the victim's immigration status is relevant to the prosecution's case in chief, questions should be designed to elicit evidence that support's the prosecution's theory. This would include cases in which immigration related abuse was part of the power and control exerted by the perpetrator, specifically in cases of domestic violence, intimate partner sexual assault, trafficking, or in cases where immigration related threats are part of a witness tampering or obstruction of justice case. In any case in which the defense may be able to ask questions about immigration status, it is imperative that the prosecution first ask questions on direct examination so that the jury does not first hear about it from the defense. Prosecutors should collaborate with victim services to ensure that victims have an effective safety plan and are supported throughout trial preparation to be prepared for these types of questions.

B. Cross Examination

Victims will be subject to cross-examination regarding the facts of the case and on any potential motives to lie or biases, including relevant questions about their immigrant status. The defense may ask questions to inflame jurors that may have anti-immigrant sentiments, to attack the credibility of a victim who may be perceived as "illegal", to allege that the victim is only testifying on behalf of the prosecution to curry favor with the government, or to receive an

immigration benefit. The prosecutor should address these types of prospective questions and answers during trial preparation with the victim. Victims who have already filed VAWA, U or T visa immigration cases are likely to be better able to respond effectively to cross examination regarding immigration status because they can be more confident that their testimony will not subject them to deportation. This confidence and trust is built from positive relationships with advocates, police and prosecutors.¹⁰

C. Rebuttal Questioning

Asking questions on rebuttal allows the prosecutor to provide the victim with an opportunity to clarify any issues that may have been raised during cross-examination. Where the defense has explicitly or implicitly accused the victim of lying about the charged incident in return for an immigration benefit, the prosecution is allowed to rebut the allegation with additional testimony and evidence.¹¹ Specifically, once the defense “pursues a line of questioning designed to impugn the motives of a witness”, the defense assumes the risk that the prosecution will introduce rebuttal evidence in the form of a prior consistent statement under Federal Rules of Evidence 801(d)(1)(B). *United States v. Simmons*, 567 F.2d 314, 321-22 (7th Cir.1977); *United States v. Montague*, 958 F.2d 1094, 1096 (D.C. Cir. 1992).

Federal Rule of Evidence 801 concerns statements which are not considered hearsay, including prior consistent statements that are introduced to rebut allegations of recent fabrication, charges that the witness has been improperly influenced, or has a recent motive to lie.¹² Since these statements are not considered hearsay, they are not subject to a *Crawford*¹³ analysis regarding whether they are testimonial or not. Also, the statements are admitted as substantive evidence under the Federal Rule¹⁴.

In order to admit a prior consistent statement, that prior statement typically¹⁵ must be made prior to the victim having a reason to fabricate or lie about the incident. Therefore, it is important to establish a timeline of statements made by the victim, in relation to when the victim was advised of possible immigration relief. Often a victim first learns about U visas,¹⁶ T visas¹⁷ or VAWA self-petitions¹⁸ from a victim advocate or other service provider¹⁹ with whom they were put in contact after the victim reported the crime to the police. If that is the case, the victim would have likely made prior statements to a 911 operator, responding officers, medical personnel, and investigators. The victim could have also confided in friends, family, or colleagues. The prosecutor should work with the investigator to document or record any statements that the victim made prior to the victim learning about the immigration benefit.

During trial, the prosecution should be vigilant to note the defense’s explicit or implicit charges of fabrication and be prepared to make the argument that the defense “opened the door” to the introduction of the victim’s prior consistent statements. The prosecutor can only introduce the prior consistent statements after the victim has testified, but the statements may be introduced

through any witness, including the victim herself, police officers, recorded 911 calls, and friends or family to whom the victim confided. It is notable that while the prior statement must be consistent with the testimony given at trial, it need not be identical in every way. *See U.S. v. Vest, C.A.1 (Mass.) 1988, 842 F.2d 1319, certiorari denied 109 S.Ct. 489, 488 U.S. 965, 102 L.Ed.2d 526.*



IV. Use of Expert Witness Testimony

Using an expert witness to testify about immigration related abuse and the form of immigration protection the witness is seeking (U visa, T visa, or VAWA) generally, may be helpful in rebutting the defense counsel’s attempt to impugn the victim’s credibility by trying to introduce her immigration status, or lack thereof. Expert witnesses can testify to:

- Dynamics of domestic violence, immigration related abuse and its role in the cycle of abuse²⁰
 - Including the fear of deportation, the impact that has on immigrant victims,²¹ and how the U visa, T visa and VAWA immigration relief helps victims come forward to report crimes.²²
- How the U visa, T visa, and VAWA help to sever the control the abuser had over the victim’s:
 - Immigration status;
 - Deportation, retention, or removal
 - Ability to seek help from criminal justice system; and
 - Financial independence
 - Custody of children the abuser and the victim may have together
- General U visa information²³
 - What the signing of a U Visa and T Visa certification actually means (NOT an automatic conferring of citizenship or visa)
 - Helpfulness requirement for U visas
 - Cooperation requirement for T Visas
 - Why the U visa, T visa, and VAWA immigration relief were created to help immigrant victims of domestic violence, sexual assault, human trafficking, and other crimes
 - Anti-fraud measures that the Department of Homeland Security has in place to determine eligibility of the victim²⁴

¹ Mary A. Dutton, Lisa A. Goodman, *Coercive control in intimate partner violence: New conceptualization*, 52 *Sex Roles*, 743, 746-747 (2005); Leslye E. Orloff, Brittnay Roberts and Stefanie Gitler, *Battering and Extreme Cruelty: Drawing Examples from Civil Protection Order and Family Law Cases* (2013) available <http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-ExtremeCrueltyinCPOFamLawCases-10.13.13.pdf>; Mary Ann Dutton, Krisztina Szabo, Rocio Molina, Maria Jose Fletcher, Mercedes V. Lorduy, Edna Yang, and Leslye Orloff, *Trauma Informed Structured Interview Questionnaires for Immigration Cases (SIQI)*, 16-23, (July 21, 2015) available at <http://niwaplibrary.wcl.american.edu/pubs/trauma-informed-siqi/>

² Mary Ann Dutton, et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas*, 7 *GEO. J. ON POVERTY L. & POL'Y* 245, 259 (2000)

³ Edna Erez and Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* 92 (2003). Available at <http://library.niwap.org/wp-content/uploads/2015/CULT-Tkit-ErezAmmarStudy-11.14.03.pdf>

⁴ Krisztina E. Szabo & Leslye E. Orloff, *The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending* 1, 1 (June 18, 2014), <http://niwaplibrary.wcl.american.edu/pubs/imm-qref-safetyplanning/>

⁵ See Giselle A. Hass, Mary A. Dutton, & Leslye E. Orloff, *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in *Domestic Violence: Global Responses* 93-113 (A B Academic Publishers ed., 2000), available at <http://library.niwap.org/wp-content/uploads/2015/CULT-Rsch-LifetimePrevalenceDVLatinas-00.pdf>; See also Mary Ann Dutton, Leslye E. Orloff, & Giselle Aguilar Hass, *Symposium Briefing Paper, Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *GEO. J. ON POVERTY L. & POL'Y* 245 (2000), <http://library.niwap.org/wp-content/uploads/2015/CULT-Jrnl-GeorgetownHelpseekingBehaviors-00.pdf>; Mary Ann Dutton, Nawal Ammar, Leslye Orloff, & Darci Terrell, *Use and Outcomes of Protection Orders by Battered Immigrant Women, Revised Technical Report*, Cosmos Corporation (November 10, 2006).

⁶ Mary Ann Dutton, et al. *supra* note 2, at 259.

⁷ *Id.* Giselle Aguilar Hass, Nawal Ammar and Leslye Orloff, *Battered Immigrants and US. Citizen Spouses*, *Legal Momentum*, April 24, 2006, at 2, 4, http://library.niwap.org/wp-content/uploads/2015/BB_RSRCH_ImmVictims_Battered_Imm.pdf

⁸ Giselle Aguilar Hass, et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in *Domestic Violence: Global Perspectives* 93, 106-09 (2000), available at: <http://library.niwap.org/wp-content/uploads/2015/CULT-Rsch-LifetimePrevalenceDVLatinas-00.pdf>

⁹ Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, in *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault*, 27, 30-41 (2013) (Discussing Rule 11 Motions treating treats of deportation like threats of criminal prosecution; sample motion *in limine* and memorandum of law)

¹⁰ Krisztina E. Szabo & Leslye E. Orloff, *The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending* 2-3 (June 18, 2014) <http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-SafetyPlanning-06.18.14.pdf> (Willingness to participate in the justice system including seeking protection orders (43.7% U visa, 47.6% VAWA) making police reports for future crimes (50.3% U visa, 36.2% VAWA) and participation in criminal investigations and prosecutions (73.1% U visa, 33.4% VAWA) increases significantly among immigrant victims who have filed VAWA self-petitions and U visas). See also Nawal H. Ammar, Leslye E. Orloff, Mary Ann Dutton, and Giselle A. Hass, *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, 37 *Crim. Just. Rev.* 337 (2012), available at <http://library.niwap.org/wp-content/uploads/2015/pdf/FAM-Jrnl-CrimJustReviewImmWomenPOs09.11.12.pdf>

¹¹ This accusation commonly occurs during the defense's cross-examination of the victim, however it may also occur during voir dire, opening statements, cross examination of witnesses, or during direct examination of defense witnesses.

¹² Fed. R. Evid. 801

¹³ *Crawford v Washington*, 541 U.S. 36 (2004)

¹⁴ Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally. Fed. R. Evid. 801 (Advisory Committee Notes)

¹⁵ Case law actually does not require this as a hard and fast rule; see e.g. "The Fifth and Eleventh Circuits have long held "that the consistent statement need not have been made prior to the time that the alleged motive to fabricate arose." *United States v. Montague*, 958 F.2d 1094, 1097 (D.C. Cir. 1992) citing *United States v. Pendas-Martinez*, 845 F.2d 938, 942 n. 6 (11th Cir.1988). To the same effect, e.g., *United States v. Anderson*, 782 F.2d 908, 915-16 (11th Cir.1986); *United States v. Parry*, 649 F.2d 292, 295-96 (5th Cir. Unit B, June 1981); *United States v. Gandy*, 469 F.2d 1134 (5th Cir.1972).

¹⁶ Qualifying criminal activities covered by the U visa statute INA Section 101 (a)(15)(U)(iii) are: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, fraud in foreign labor contracting, being held hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, and related criminal activities or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. "DEP'T OF HOMELAND SEC, U and T Visa Law Enforcement Resource Guide, 7 (2015), available at <http://library.niwap.org/wp-content/uploads/DHS-U-and-T-Visa-Law-Enforcement-Resource-Guide-11.30.15.pdf>

¹⁷ T visas provide protection for immigrant victims of severe forms of human trafficking as defined by 22 U.S.C. § 7102(9) and (10): Sex Trafficking, which is defined as: o the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act, or in which the person induced by any means to perform such act has not attained 18 years of age; or Labor Trafficking, which is defined as: the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

¹⁸ Violence Against Women Act self-petitioning protects victims of domestic violence who are the child, step-child, parent, or current/former spouse of a United States citizen or the child, step-child, current/former spouse of a permanent resident (green card holder) and are abused by the citizen or permanent resident may be eligible to apply for a green card themselves without needing the abuser to file for immigration benefits on their behalf. U.S. Citizen and Immigration Services, *Immigration Options for Victims of Crimes Information for Law Enforcement, Healthcare Providers, and Others* (February 2010) available at <http://niwaplibrary.wcl.american.edu/pubs/imm-options-victims-of-crimes/>

¹⁹ Service providers may have a confidential relationship with the victim and this will impact whether the service provider can/should testify regarding any statements made by the victim. Prosecutors should review their local rules to determine whether confidentiality is implicated. Where the service provider is in a confidential relationship with the victim, the prosecutor can still argue that the service provider should be allowed to testify in a limited capacity to establish the timeline when the victim was advised of immigration benefits.

²⁰ For more background information on immigration related abuse, see Leslye Orloff & Olivia Garcia, *Dynamics of Domestic Violence Experienced by Immigrant Victims*, in *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants 7-8* (2016), <http://library.niwap.org/wp-content/uploads/2015/CULT-Man-Ch1.1-DynamicsDomesticViolence2016.pdf>; Jessica Mindlin, Leslye E. Orloff, Sameera Pochiraju, Amanda Baran, and Ericka Echavarria, *Dynamics of Sexual Assault and the Implications for Immigrant Women*, in *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault*, 1 (2014), <http://niwaplibrary.wcl.american.edu/pubs/ch1-dynamics-sexual-assault-implications/>

²¹ *Id.* at 8-11. See Mary A. Dutton, Lisa A. Goodman, *Coercive control in intimate partner violence: New conceptualization*, 52 *Sex Roles*, 743, 745 and 747 (2005); See also Giselle A. Hass, Mary A. Dutton, & Leslye E. Orloff, *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in *Domestic Violence: Global Responses 7(1-3)*, 93-113 (A B Academic Publishers ed., 2000), available at <http://library.niwap.org/wp-content/uploads/2015/CULT-Rsch-LifetimePrevalenceDVLatinas-00.pdf>;

²² Krisztina E. Szabo, David Stauffer, Benish Anver, and Leslye E. Orloff, *Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants*, 28-31 (February 12, 2014), http://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/

²³ Department of Homeland Security: U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies, 3-33 (November 20, 2015), available at <http://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>

²⁴ William A. Kandal, Congressional Research Services, *Immigration Provisions of the Violence Against Women Act* (May 15, 2012) <http://niwaplibrary.wcl.american.edu/pubs/r42477/>; Department of Homeland Security, *Roll Call Videos for Law Enforcement on U Visa Certification and T Visa Endorsement* (September 26, 2013), <http://niwaplibrary.wcl.american.edu/2014/04/dhs-roll-call-videos/>