# Impact of DHS Enforcement Priorities on Courts: VAWA Confidentiality and Custody

## New Mexico Webinar
## August 21, 2018

**Judge Lora Livingston**
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Travis, County, Texas



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# Learning Objectives

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

- Recognize when parties are and are not likely to become subject to immigration enforcement;
- Implement courthouse policies and practices that promote access to justice for immigrant survivors of domestic violence;
- Serve the public and issue decisions, based on accurate information about immigration laws and DHS policies, in ways that protect immigrant survivors of domestic violence; and
- Craft court orders that reflect an understanding of DHS sensitive locations and VAWA confidentiality policies.

**Have you had a party raise the immigration status of an opposing party or a witness in a case you were hearing/handling?**

# What types of cases?

# Many Immigrant Victims of Domestic Violence, Sexual Assault and Other Crimes Are Eligible for Immigration Relief

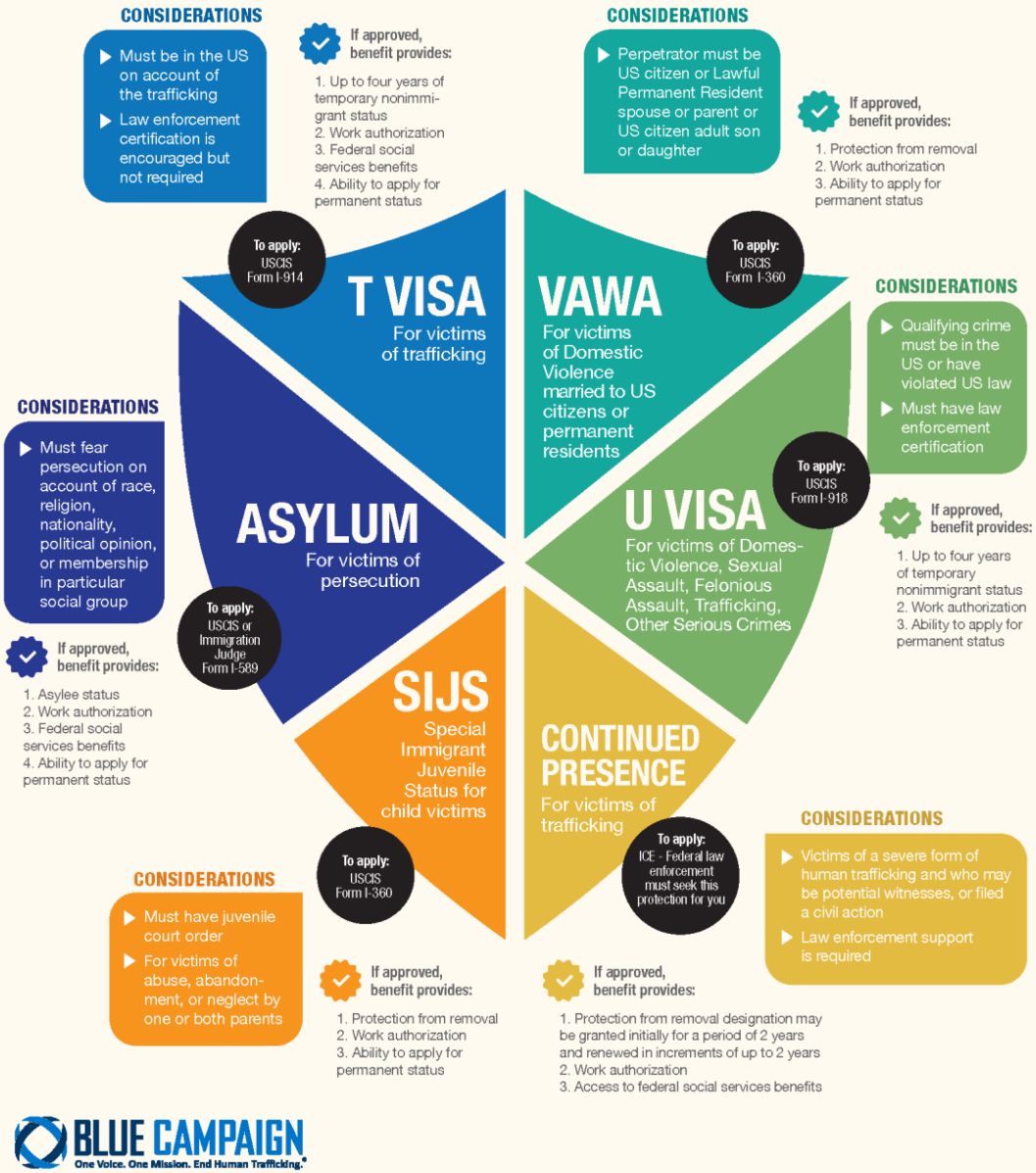
# Immigration Relief Available for Immigrant Victims of ---

- Domestic violence
  -- Child abuse
- 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
- **Parent perpetrated**
  - **Child abuse**
  - **Child neglect**
  - **Child abandonment**

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

**In what percentage of the cases you hear involving immigrant litigants or children, has the litigant, a child or a child's parent suffered a U visa listed criminal activity?**

# PROTECTIONS FOR IMMIGRANT VICTIMS




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

DHS.GOV/BLUE-CAMPAIGN

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

NIWAP

# 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:** Locational prohibitions to enforcement unless there is compliance 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 Victim Protections For Whom? Statutes/Regulations/Policies

- VAWA confidentiality
  - VAWA self-petition, cancellation, suspension
  - Battered Spouse Waiver
  - U Visas
  - T Visas
  - Abused spouses of work visa holders who file for VAWA employment authorization
  - *All victims abused by a spouse or parent*

# DHS VAWA Confidentiality Computer System

- Directs use of "red flag" "384" computer system to identify victims who have already filed for or have been granted victim-based immigration relief
- Reminds immigration officers, agents, attorneys about immigration law protections for
  - Victims of domestic violence
  - Crime victims
  - Human trafficking victims

# Victim Witness DHS Memo 2011 Continuing Effect Confirmed 6/18

- 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."

# How does knowledge that a party, parent, child before the court qualifies for crime victim protections impact cases, court rulings and court orders?

# Legal Immigration Status Provides:

- Protection from deportation
- Work authorization
- Driver's licenses (including federally recognized)
- Ability to/from the United States
- Greater access to federal and state funded public benefits and services

# Immigration Relief Expands Benefits Access-NM

**VAWA self-petition**
Filing = Public/Assisted Housing
Prima facie = TANF, Education, Health subsidies; SNAP for children (3 months)

**Battered spouse waivers & Lawful Permanent Residents**
Public/Assisted Housing, TANF, Education, Health subsidies; SNAP for children (1-2 years)

**T Visa/Continued Presence**
Benefits access like refugees
Need HHS certification (3-6 months)

**U visa** (3-4 years)
Upon wait-list approval = health care exchanges *no subsidies*

**Family Based Visa Petition Approved + Battering or Extreme Cruelty** (1+ years)
Public and Assisted Housing

**Special Immigrant Juvenile**
Filing = Eligible for subsidized health care up to age 21
Upon LPR = TANF, Education, Health subsidies; SNAP for children (1+ years)

# What Steps Can Judges Take When They Identify an Immigrant Victim Who May Qualify For Immigration Relief?

# Immigrants Who Appear in Court Who are High Priorities for Removal

# DHS Immigration Enforcement Priorities 2017

- Have been convicted of *any* criminal offense
- Charged with a criminal offense that has not been resolved
- Have committed acts which constitute a chargeable criminal offense
- Are subject to a final order of removal and did not leave the U.S.

# DHS Immigration Enforcement Priorities 2017

- Have abused a program related to public benefits
- Fraud, willful misrepresentation with any official matter before the government
- Risk to public safety or national security

# 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

**In what percentage of the cases you hear involving immigrant crime victims, immigrant parents or children living in immigrant families would one of the parents before you be a high priority for removal?**

# DHS Enforcement Priorities and Victim Protections: Impact on Family Court Domestic Violence Cases

# 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



# Is Immigration Status Relevant to Custody?

- <u>May Also be Relevant</u>
  - In a contested custody case when
    - The court makes findings that one parent perpetrated abuse against the other and
    - The non-abusive parent has a criminal history
  - When a parent has an outstanding order of removal

# What is the Impact of Victim Protections and Enforcement Priorities on State Court Proceedings?

- Protection orders
- Divorce
- Child support
- Domestic violence prosecutions

# U.S. Government Materials Excellent for Courthouse Distribution

- DHS "Know Your Rights" Information
  - Infographic
  - VAWA/T and U Brochure
  - SIJS Brochure
- U.S. Dep't Of State –Rights and Protections for Foreign-citizen Fiancé(e)s and Spouses of U.S. Citizens and Spouses of Lawful Permanent Residents

# VAWA Confidentiality and DHS Policy Limitations on Courthouse Enforcement

# VAWA Confidentiality Bars Limiting Reliance Upon Information Provided by a Perpetrator

- The government cannot gather and/or use information provided solely by:
  - A domestic violence or child abuser
  - A sexual assault or stalking perpetrator
  - A trafficker
  - The perpetrator of any U visa listed crime
  - The perpetrator's family member
  - Other persons associated with the perpetrator
- To take an adverse action against a victim
- 8 U.S.C. 1367(a)(1)

# Adverse Actions Include Using Perpetrator Provided Information To…

- Deny a victims immigration case
- Detain a victim
- Deport a victim
- Initiate an immigration enforcement action against a victim
- Seek out, question or detain a victim at a prohibited location, including courthouse

# The perpetrator provided information bar

- Is enforced in a variety of ways
  - Complaints filed with the office of civil rights at the Department of Homeland Security
  - The prohibited sensitive locations bar

# Locational Prohibitions

- No enforcement--
  - "[A]bsent clear evidence that the alien is not entitled to victim-based benefits"
  - Actions taken must "be handled properly given that they may ultimately benefit from VAWA's provisions"
  - Officers are to follow a specific process aimed at protecting victims that includes obtaining advance permission from a supervisor or ICE general counsel for enforcement actions at statutorily protected sensitive locations
- John P. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007)

# VAWA Sensitive Location Prohibitions

- Enforcement actions are not to be taken unless the action specific procedures designed to protect victims are followed:
  - A shelter
  - Rape crisis center
  - Supervised visitation center
  - Family justice center
  - Victim services program or provider
  - Community based organization
  - Courthouse in connection with any
    - Protection order case, child custody case, civil or criminal case involving or related to domestic violence, sexual assault, trafficking, stalking



# VAWA confidentiality is likely violated when a DHS official comes to the courthouse in response to a "tip" from the perpetrator and arrests a victim who has come to court…….

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

# Are Courthouses Sensitive Locations?

- Courthouses are **not** considered sensitive locations
- Exception: VAWA confidentiality statues and DHS policies treat courthouses as sensitive locations with regard to victims

# VAWA Confidentiality Violations



- Each violation
  - Disciplinary action and/or
  - $5,000 fine for the individual
- Violations also include making a false certification in a Notice to Appear
- VAWA Confidentiality Enforcement Guidance CRCL (2008)

# VAWA Confidentiality Protected Victims

- Receive protections in addition to those offered by VAWA confidentiality
- From each of the following policies
  - Courthouse enforcement
  - Sensitive locations

# January 2018 ICE Courthouse Enforcement Policy: Targeted Immigrant Limitation

- Civil immigration enforcement at courthouses will only occur when
  - ICE officers have information that leads them to believe that a targeted immigrant will be present at a courthouse
- To be targeted an immigrant must
  - Have criminal conviction(s)
  - Be gang members
  - Be a threat to national security or public safety
  - Have been ordered removed and failed to depart, or
  - Have re-entered the country illegally after being removed

# Civil Immigration Enforcement Action Defined

- Action by immigration enforcement action regarding an individual to:
  - Apprehend
  - Arrest
  - Interview
  - Stop
  - Search

# January 2018 Policy: Persons Who are Not Targets

- Will not subject to immigration enforcement persons who are not targets including
  - Witnesses
  - People accompanying others to court
  - Victims

# January 2018 Policy: Avoid Non-Criminal Proceedings

- Avoid enforcement in courthouses or areas within a courthouse that are dedicated to non-criminal proceedings
  - Applies to courts and cases
  - Family cases
  - Civil cases
- Requires Field Office Director/Special Agent in Charge Approval
  - Will involve screening for VAWA confidentiality protected victim's cases

# ICE Policy Directives: Immigration Enforcement at Courthouses

- Civil enforcement actions at courthouses will be planned
- Minimize impact on court proceedings
- Take place in non-public areas
- Be conducted in collaboration with court staff and security
- Use non-public entrances and exits
- Substantial efforts will be made to not alarm the public

# What policies or procedures might courts implement with regard to VAWA confidentiality and courthouse enforcement?

# Sensitive Locations

- Enforcement actions by ICE and CBP are not to occur or be focused at sensitive locations:
  - Schools
  - Medical treatment and health care facilities
  - Places of worship
  - Religious or civil ceremonies: e.g. weddings, funerals
  - During a public demonstration: e.g., march, rally, parade

# Sensitive Location Exceptions

- Exigent circumstances
- Other law enforcement action led the officer to a sensitive location
- Prior approval by a designated supervisor

# How might information about sensitive locations be helpful to courts?

# DHS Victim Protection Statutes/Regulations/Policies

- VAWA Confidentiality
- 384 DHS computer system (VAWA, T visas, U visas)
- DHS victim witness protection memo
- DHS Courthouse Enforcement Policy
- DHS Sensitive Locations Policy
  - *All available in* NIWAP Web library http://niwap.org/go/sji

# Technical Assistance and Materials

- Power Point presentations and materials for this webinar at http://niwap.org/go/jffnm2018
- Judicial Training Manual at http://niwap.org/go/sji
  - **NIWAP Technical Assistance:**
  - Call (202) 274-4457
  - E-mail info@niwap.org
- Web Library: http://niwaplibrary.wcl.american.edu

# Evaluations



# Thank you!