Law Enforcement and Prosecution Best Practices: Immigrant Crime Victims, Language Access and the U Visa

Denver, Colorado
August 30-31, 2018

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

This project was supported by Grant No. 2017-TA-AX-K063 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed in this publication are those of the author and do not necessarily reflect the view of the Department of Justice, Office on Violence Against Women.

Welcome

- Faculty introductions
- Staff introductions
- Housekeeping
- Pre-training assessment


NIWAP
National Immigrant Women's Advocacy Project
Supporting immigrant women and children through education and policy advocacy.

NIWAP

http://niwaplibrary.wcl.american.edu

- Newsletters/FAQ
- Trainings
- Past Trainings
- Manuals
- Regulations & Policies
- Multilingual Materials
- Immigration
- Public Benefits & Economic Relief
- Family Law
- Criminal Justice
- Law Enforcement
- Judges
- Language Access
- Access to Legal Services
- Public Policy
- Research & Statutes
- VAWA Confidentiality
- Dynamics, Culture & Safety

USB Drive Materials

- U Visa Toolkit For Law Enforcement Agencies And Prosecutors
- DHS: U and T Visa Law Enforcement Resource Guide
- DHS memos and policies
- Tools for officers to promote language access
- Bluecard Tool Screening Victims for Immigration Protections

Course Learning Objectives

- Articulate the intent and basic requirements of the U Visa
- Enhance victim and community safety and hold offenders accountable by utilizing immigration relief as a crime fighting tool
- Analyze requests for assistance with immigration relief applications in the context of victim and offender dynamics
- Implement pretrial and trial strategies to combat common defenses to cases involving immigrant victims of crime

Participant Introductions, Goals and Expectations

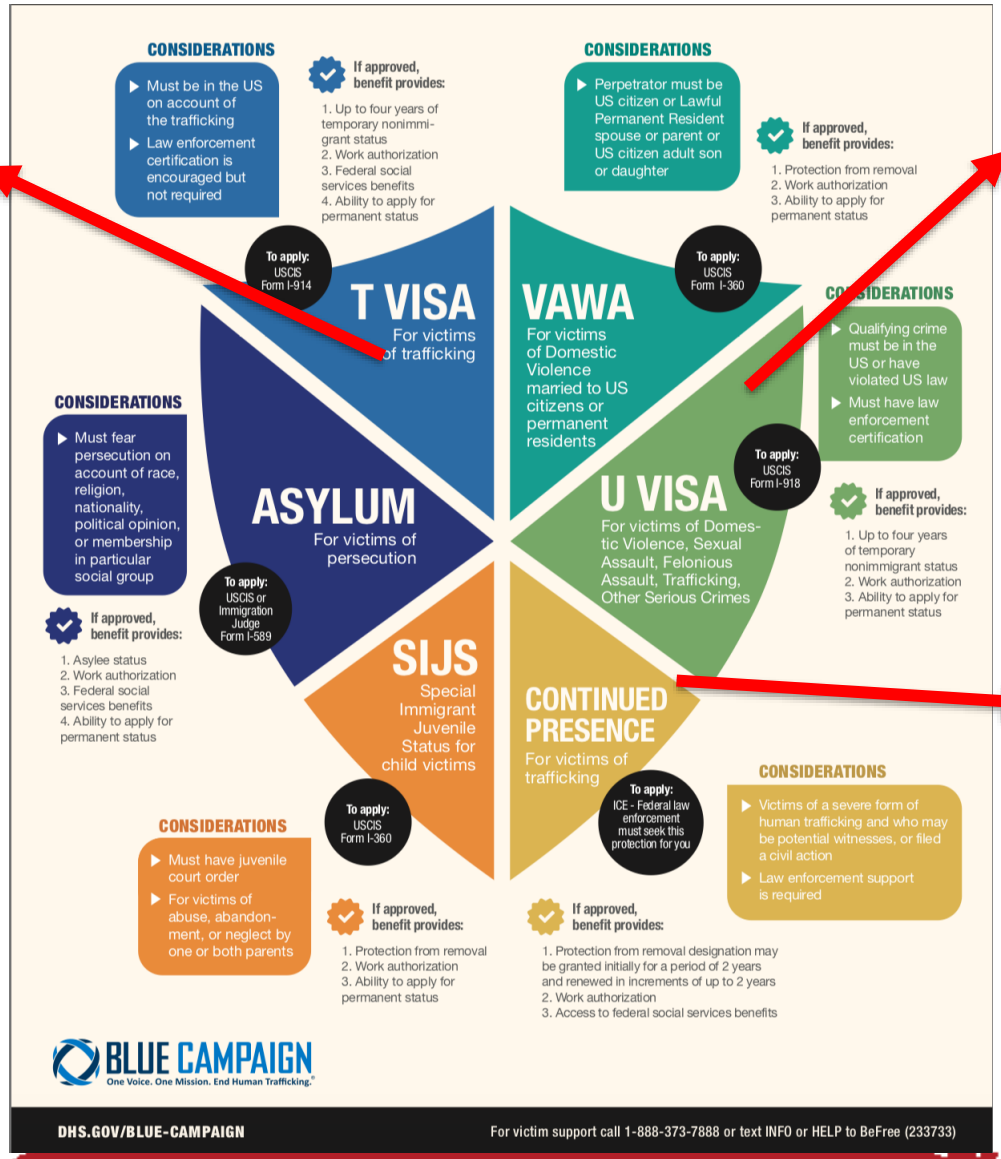


Immigration Relief As A Crime Fighting Tool

NIWAP

Immigration Relief for Crime Victims

T VISA
For victims of trafficking



U VISA
For victims of Domestic Violence, Sexual Assault, Felonious Assault, Trafficking, Other Serious Crimes

CONTINUED PRESENCE
For victims of trafficking
To apply:

Why do you think these forms of immigration relief exist for victims of crime?

Legislative Intent

- We want crimes reported to police
- No one should be a victim of crime, especially violent crime
- Offenders prey upon the most vulnerable in our communities, often immigrants
- Without victims reporting crimes, we don't know about the most dangerous offenders
  - Domestic Violence
  - Sexual Violence

Goals of Immigration Relief



U Visa Statistics
11/2011

% of U Visas	Criminal Activity
76.1% = Domestic Violence & Sexual Violence	
9.9%	Felonious Assault, Murder, Manslaughter
8.47%	Kidnapping, Being Held Hostage, Unlawful Criminal Restraint, Torture
5.3%	Blackmail, Extortion, Perjury, Obstruction of Justice, Attempts, Conspiracy, Solicitation

Domestic Violence & Officer Safety

Colorado

Demographics (2016)*

- 9.8% population is foreign born
  - 39.7% naturalized citizens
  - ~27.5% lawful permanent residents
  - ~32.8% undocumented and temporary status
- Immigrant population rose 47.3% between 2000 to 2016
- 22.9% of children in the state under age 18 have one or more immigrant parents
  - 89.2% of children with immigrant parents in the state are U.S. native.

Sources:
http://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202014.pdf; http://www.migrationpolicy.org/data/state-profiles/state/demographics/CO (last visited: Feb. 2018)

Colorado

Countries/Regions of Origin and LEP (2016)*

- Latin America – 52.3%
  - Mexico (42.9%)
  - South America (4.3%)
  - Central America (4%)
- Asia – 24.7%
  - China (4.6%)
  - India (4%)
  - Vietnam (3.4%)
  - Korea (3.0%)
  - Philippines (2.0%)
- Europe – 13.1%
  - United Kingdom (2.5%)
  - Germany (2.5%)
  - Russia (1.3%)
- Africa – 5.8%

- Limited English Proficiency
  - Naturalized citizens 31.3%
  - Non-citizens 58.9%
- Languages Spoken at Home
  - Spanish (626,322)
  - Mandarin or Cantonese (27,291)
  - Vietnamese (19,691)
  - Korean (15,183)
  - German (22,181)
  - French (19,423)
  - Russian (13,592)

Source:
https://www.migrationpolicy.org/data/state-profiles/state/language/CO
(last visited: Feb. 2018)

Have you seen immigration status being used as a means to assert power and control in the context of domestic violence?

How?

Immigration Related Abuse

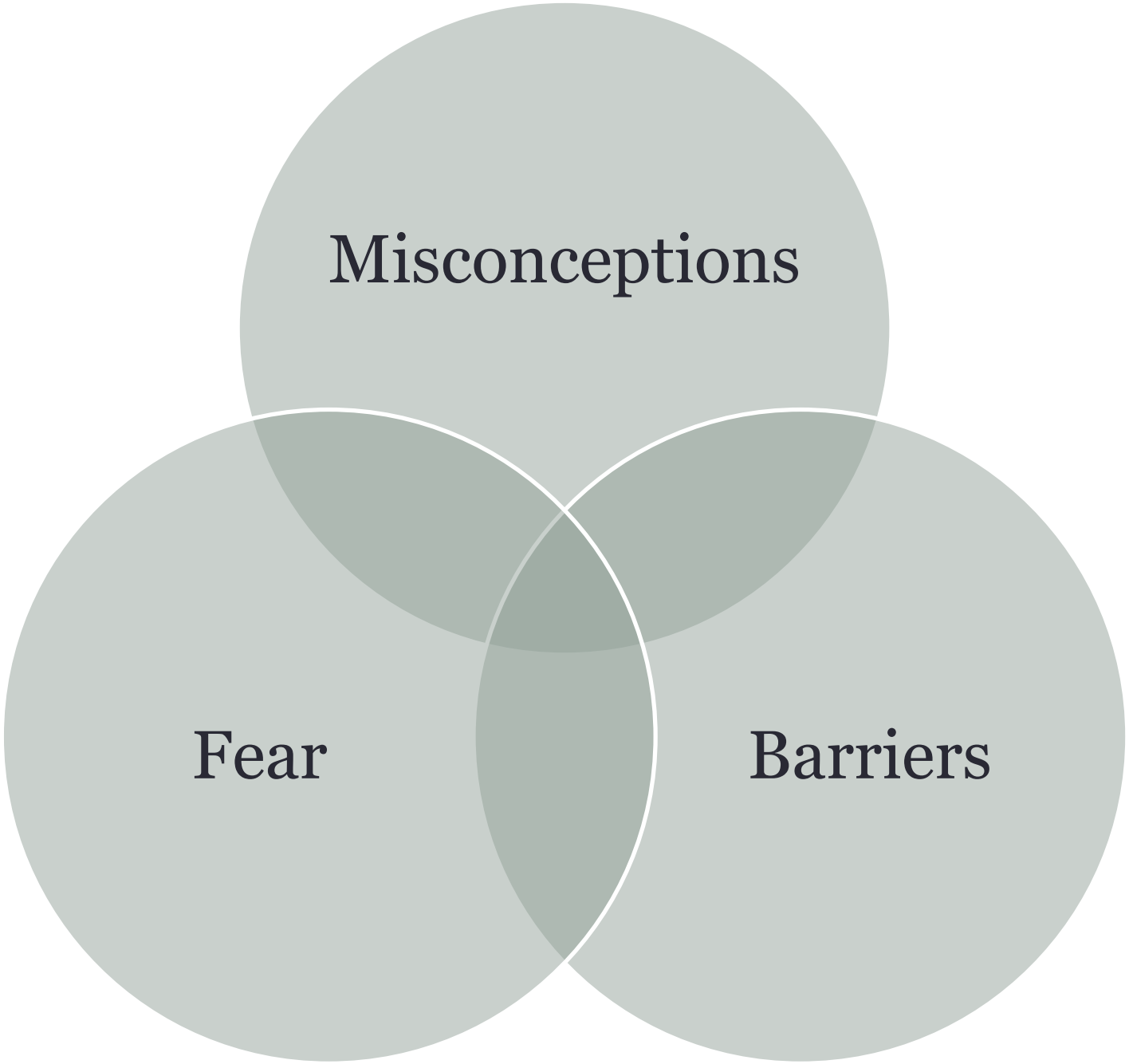
- Refusal to file immigration papers
- Threats or taking steps to withdraw an immigration case
  - Family or work based visas
- Forcing survivor to work with false documents
- Threats/attempts to have her deported
- Calls to DHS to turn her in – have her case denied

Coercive Control

- 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.
- 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)

What prevents immigrant victims from reporting crime?


Misconceptions
Fear
Barriers

Fears

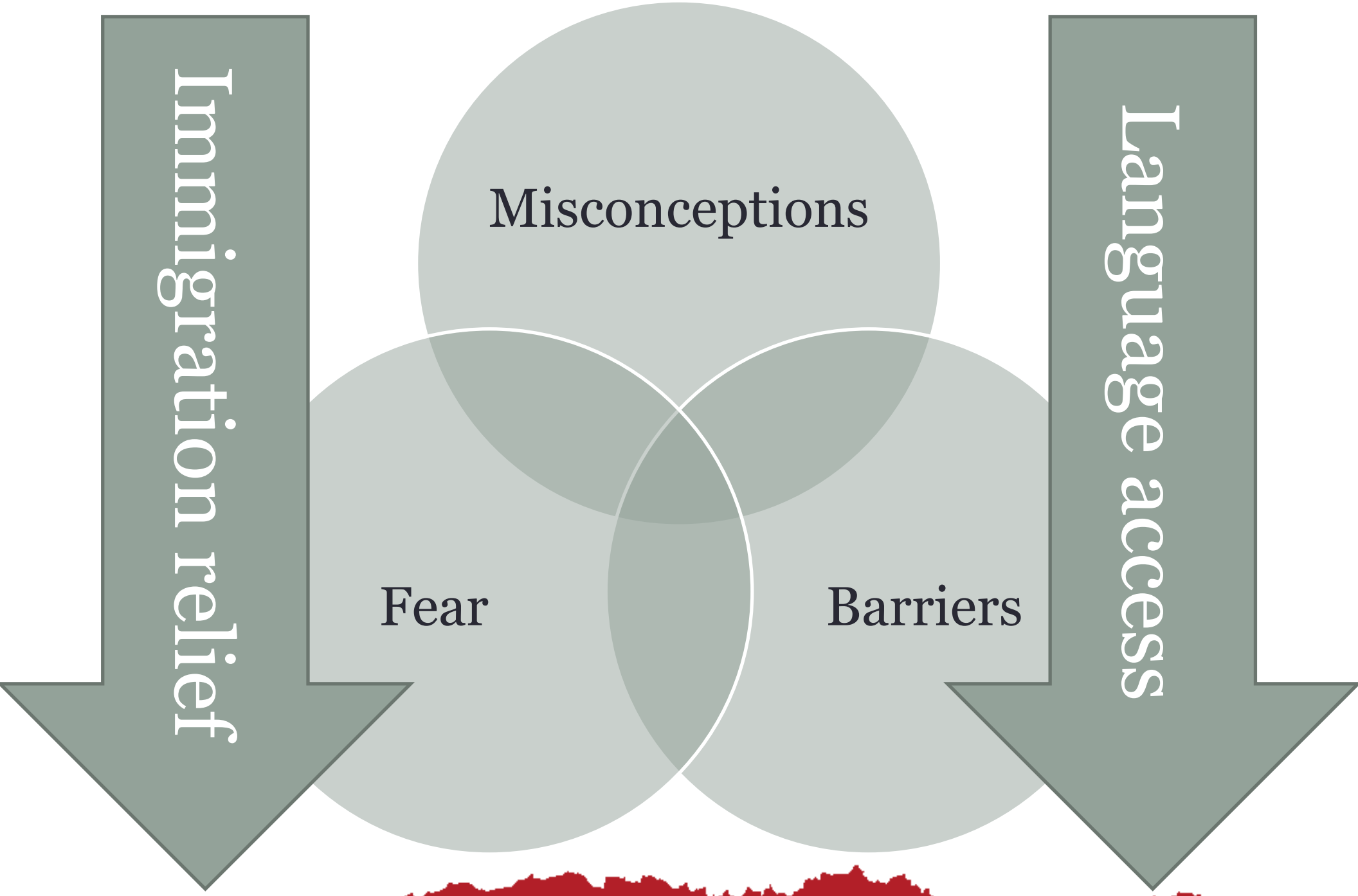
- Deportation
- Returning to home country
- Separation from children
- Lack of contact with family
- Family in danger in their country of origin
- Ostracism from the community
- Retaliation

Misconceptions

- Legal rights as a victim of a crime
- The law regarding domestic violence
- Police will arrest them
- Local police are immigration officers
- No services are available
- Police are corrupt
- Criminal justice system will do nothing

Barriers

- Do not speak or understand English
- Financial dependence on perpetrator
- Isolation
- Lack of education, child care, or transportation,
- Community pressure
- Family pressure
- Religious factors


Immigration relief
Misconceptions
Fear
Barriers
Language access

How do law enforcement and prosecution benefit from the U visa?





U Visa Benefits

- Encourages victims to report crimes
- Improves investigation and prosecution of violent crimes
- Increases potential to convict most dangerous criminals
- Demonstrates commitment to protecting immigrant community members
- Enhanced immigrant community involvement
- Makes it easier to identify victim witnesses
- Reduces repeat calls and recanting victims
- Fosters community policing partnerships
- Enhances officer and community safety

apigbv
ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE

Language Access

Best practices to successfully investigate and prosecute cases involving non-English speaking victims

Source of Language Access Laws

- Title VI- No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving financial aid assistance.
- LEP Executive Order 13166 (2001)
  - Requires all agencies receiving any federal financial assistance to
  - Ensure meaningful language access
  - Develop and implement language access plans
  - "Where the denial or delay of access may have life or death or other serious implications, the importance of the full and effective delivery of LEP services is at its zenith."

DOJ Model Guidance

- Police provide free language access to:
  - LEP persons who request it
  - *When officer decides it is helpful* to the criminal investigation or prosecution
- Police will inform members of the public that language assistance is available free of charge
- Language access provided in persons primary language

DOJ Sample Policy Center City Police Department

DOJ Approach to language access outline in:

Steps for Obtaining Interpreters

First responders – What do you do when you arrive at a crime scene?



NIWAP

First Response

apigbv
ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE

- Locate and secure the scene
- Are there any weapons?
- Is anyone injured?
- Identify the people involved
  - Victim
  - Offender
  - Witnesses
- If offender is not on the scene
  - Where is the suspect?
  - Are they a continuing danger?
  - Is suspect in possession of weapon?



DOJ and Exigent Circumstances

apigbv
ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE

- Use the most reliable *temporary i*nterpreter available to address exigent circumstances
  - –Fleeing suspect
  - –Weapons
  - –Life threatening to the officer /victim/or public

DOJ Requirements for Investigations & Interrogations

apigbv
ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE

- "A qualified interpreter shall be used for any interrogation or taking of a formal statement where the suspect or witness' legal rights could be adversely impacted"
  - Criminal interrogations
  - Crime witness interviews
- Vital written materials translated into primary language
  - Miranda warnings

Case Study
Jose Lopez Meza - 2008



- Charged with first degree murder:
  - Meza shook his 3-week old son, killing him
  - Spanish-speaking officer assisted with the interview
  - Court-appointed certified interpreters reviewed the recording of the interview
    - Interpreting officer left out information and misinterpreted several statements made by the suspect and the detective
- Charges were dropped to manslaughter

https://www.idahopress.com/news/prosecutors-new-evidence-in-nampa-baby-s-death-merits-murder/article_7c9d0be9-78f1-598a-99cf-662b048630b6.html

Language Access

Impact on criminal investigations and prosecutions?

U Visa:
Basics & Best Practices

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

U Visa Basics

- The U Visa grants a temporary 4 year stay for qualified crime victim applicants
  - Some U visa holders will qualify for lawful permanent residency– no guarantee
  - U.S. citizenship can only be attained after lawful permanent residency for 5 years + proof of good moral character
- Only 10,000 U visas granted annually
- Can be revoked

U Visa Basics
Cont'd.

- Application for a U Visa requires a certification from a government official
- Certification is one part of the overall application
- Victim must submit additional documentation and proof in full application for U Visa

Who Can Certify?

"Law Enforcement" & "Law Enforcement Agency" =

- Federal, state, and local
  - Law enforcement
  - Prosecutors
  - Judges, Magistrates, Commissioners
- Departments of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC)
- Child and Elder Abuse investigators and agencies
- Other government agencies with criminal, civil, administrative investigative power

Qualifying Criminal Activity

Abduction	Hostage	Sexual Assault
Abusive Sexual Contact	Incest	Sexual Exploitation
Blackmail	Involuntary Servitude	Slave Trade
Domestic Violence	Kidnapping	Stalking
Extortion	Manslaughter	Torture
False Imprisonment	Murder	Trafficking
Felonious Assault	Obstruction of Justice	Witness Tampering
Female Genital Mutilation	Peonage	Unlawful Criminal Restraint
Fraud in Foreign Labor Contracting	Perjury	Prostitution
Rape	Attempt, conspiracy or solicitation to commit crime or similar activity	

U Visa Requirements

Victim	Helpful	Harm
• Qualifying criminal activity • Possesses information about the crime • Criminal activity occurred in U.S. or violated U.S. law	• Has been, is being, or is likely to be • Detection, investigation, prosecution, conviction, or sentencing	•Substantial physical or mental abuse as a result

U Visa Application Process

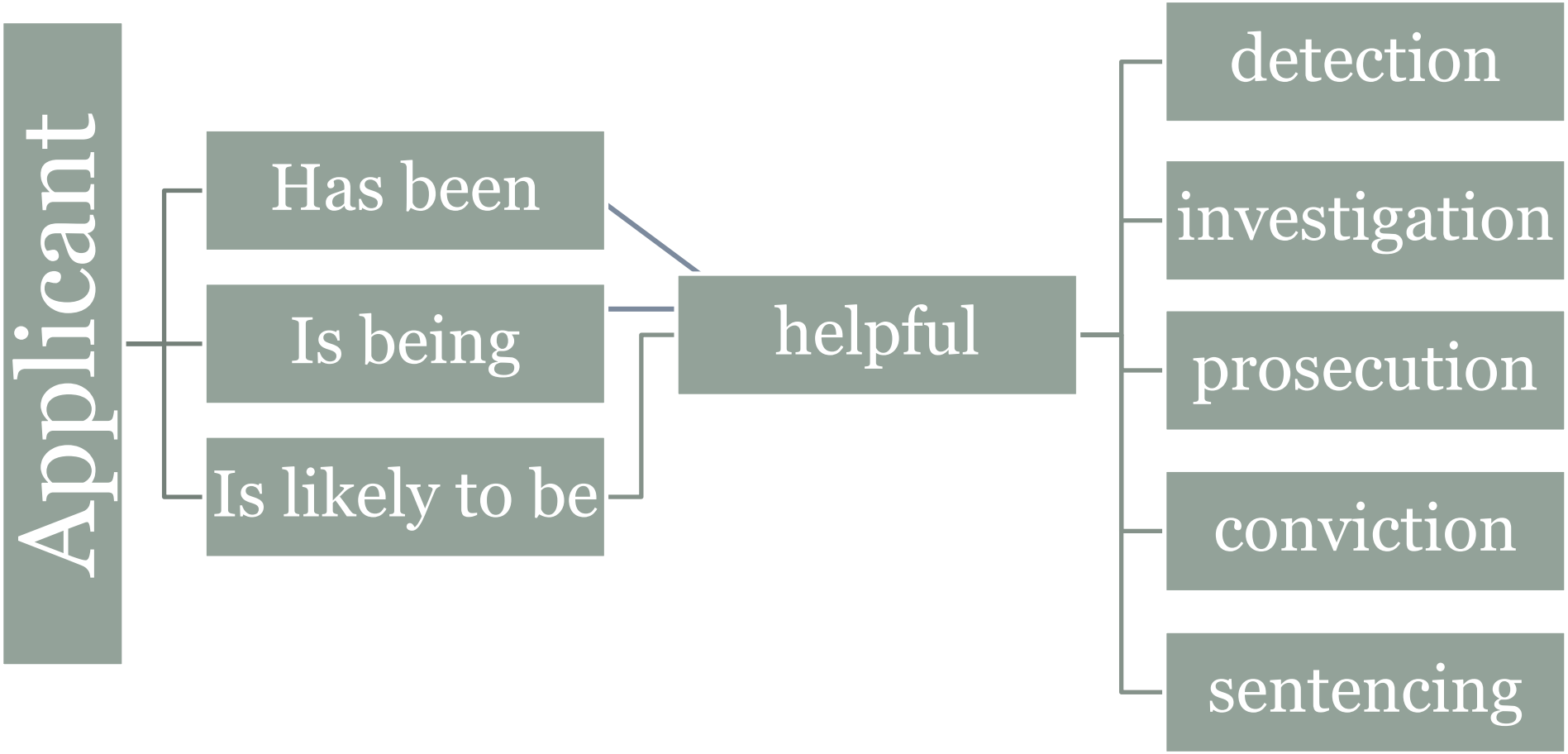
Filing to decision:
Decision to receipt of U Visa
(36-48 months):



Who can apply?

- Victims of qualifying criminal activity
- Parents and guardians can apply as an "indirect victim" if:
  - the victim is a child under 21 years of age and/or
  - is incompetent, incapacitated, or deceased due to murder or manslaughter
- Bystanders victimization – very limited
- For child victims a "next friend" can provide helpfulness

Helpfulness



Making Determination

- Certifying agency determines "helpfulness"
- Helpfulness can include:
  - Calling 911
  - Providing a description of offender
  - Allowing photographs to be taken
  - Giving information about the offender's whereabouts
  - Statement about prior bad acts

Not Required

- Conviction
- Charges filed
- Offender arrested
- Testimony at trial
- Necessary witness
- Within statute of limitations
- Offender is identified
- Offender alive

Victim-centered approach

Analyzing Requests for Certification

- What criminal activity occurred?
- Identify the victim or indirect victim
- Determine helpfulness
- Identify if any family members were implicated in the crime
- Note any injuries observed; provide documentation

U-visa Application Victim Flow Chart

Criminal activity occurs.

IF: The victim has been helpful, is being helpful, or is likely to be helpful to law enforcement
OR
The victim is under 16 years of age and victim's parent, guardian, or next friend has been helpful, is being helpful, or is likely to be helpful to law enforcement
OR
The victim is 21 years of age or older and is deceased due to the criminal activity, incapacitated, or incompetent;
the spouse and/or children under 21 of the victim have been helpful, are being helpful or are likely to be helpful to law enforcement
OR
The victim is under 21 years of age and is deceased due to the criminal activity, incapacitated, or incompetent;
the victim's spouse, children, parents, or unmarried siblings under 18 have been helpful, are being helpful or are likely to be helpful to law enforcement
THEN
Victim (or legal representative) seeks I-918B, Law Enforcement Certification.
(if victim is not working with a service provider, law enforcement officers can refer victims at this point.)

Law Enforcement provides victims with:
1. I-918 Law Enforcement Certification signed in blue ink and completed by
   a. the head of the certifying agency; OR
   b. a person in a supervisory role specifically designated by the head of the agency to sign certifications
2. Any supporting documentation such as reports and findings; and
3. In the case of 1b) a letter from the head of the agency designating another person to sign the certification (designee letter).

Victim submits U-visa application to the Victims and Trafficking Unit of USCIS showing that the victim meets each of the U-visa eligibility requirements.

The application includes*:
- U visa application form – Form I-918
- Law Enforcement Certification – Form I-918, Supplement B
- Documents related to victim's identification
- Victim's signed statement describing the facts of the victimization
- Any information related to victim's criminal history, including arrests
- Any information related to victim's immigration history, including prior deportation
- Any information related to victims health problems, use of public benefits, participation in activities that may pose national security concerns, and moral turpitude
- Any information related to the victim's substantial physical or mental abuse suffered
- Other documentation such as police reports, medical records, letters of support from service providers.

Eligible family members can also apply.

* Other administrative documentation is also required. More information is available at www.legalmomentum.org.

Within about 1 month, victim receives receipt notice from USCIS confirming filing of U-visa application.

Within about 9 months, victim receives decision on U-visa application. If approved, victim receives work permit. If applications for family members are approved and they are abroad, consular processing begins.

After 3 years, U-visa holders (victims) apply for lawful permanent residence ("green card")
The application includes:
- Adjustment of Status Application- Form I-485
- Any information related to the victim's continuous presence in the U.S. since obtaining U-visa status
- Any information indicating that USCIS should exercise its discretion to grant lawful permanent residence
- Any information indicating that the U-visa holder has not unreasonably refused to cooperate with an ongoing investigation or prosecution

Eligible family members can also apply.

NIWAP

<u>Government Official</u> provides victims with:

1. I-918 Law Enforcement Certification signed in blue ink and completed by:
   a. the head of the certifying agency; OR
   b. a person in a supervisory role specifically designated by the head of the agency to sign certifications
2. Any supporting documentation such as reports and findings; and
3. In the case of 1b) a letter from the head of the agency designating another person to sign the certification (designee letter).

U Visa Certification Form Highlights

Supplement B, U Nonimmigrant Status Certification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-918
OMB No. 1615-0104
Expires 02/28/2019

Certification form is located in your materials.
Please locate to follow along.

Part 1. Victim Information

1. Alien Registration Number (A-Number) (if any)

► **A-**

2.a. Family Name (Last Name)

2.b. Given Name (First Name)

2.c. Middle Name

Other Names Used (Include maiden names, nicknames, and aliases, if applicable.)

If you need extra space to provide additional names, use the space provided in **Part 7. Additional Information**.

3.a. Family Name (Last Name)

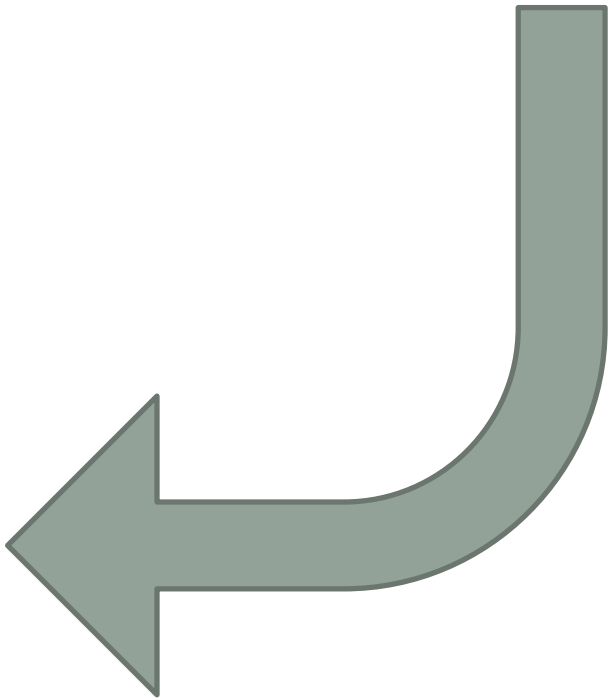
3.b. Given Name (First Name)

3.c. Middle Name

4. Date of Birth (mm/dd/yyyy)

5. Gender ☐ Male ☐ Female

This is sometimes filled out by the victim's immigration attorney or advocate.



In addition to the head of the agency, one or more certifying officials can be designated as a "Certifying Official"

Part 2. Agency Information

1. Name of Certifying Agency

Name of Certifying Official

2.a. Family Name (Last Name)

2.b. Given Name (First Name)

2.c. Middle Name

3. Title and Division/Office of Certifying Official

Part 3. Criminal Acts

If you need extra space to complete this section, use the space provided in **Part 7. Additional Information**.

1. The petitioner is a victim of criminal activity involving a violation of one of the following Federal, state, or local criminal offenses (or any similar activity). (Select **all applicable** boxes)

- ☐ Abduction
- ☐ Abusive Sexual Contact
- ☐ Attempt to Commit Any of the Named Crimes
- ☐ Being Held Hostage
- ☐ Blackmail
- ☐ Conspiracy to Commit Any of the Named Crimes
- ☐ Domestic Violence
- ☐ Extortion
- ☐ False Imprisonment
- ☐ Felonious Assault
- ☐ Female Genital Mutilation
- ☐ Fraud in Foreign Labor Contracting
- ☐ Incest
- ☐ Involuntary Servitude
- ☐ Kidnapping
- ☐ Manslaughter
- ☐ Murder
- ☐ Obstruction of Justice
- ☐ Peonage
- ☐ Perjury
- ☐ Prostitution
- ☐ Rape
- ☐ Sexual Assault
- ☐ Sexual Exploitation
- ☐ Slave Trade
- ☐ Solicitation to Commit Any of the Named Crimes
- ☐ Stalking
- ☐ Torture
- ☐ Trafficking
- ☐ Unlawful Criminal Restraint
- ☐ Witness Tampering

You can & should certify multiple offenses when present.

Dates do not have to be precise – you can use months, seasons or years.

Provide the dates on which the criminal activity occurred.

2.a. Date (mm/dd/yyyy) _____

2.b. Date (mm/dd/yyyy) _____

2.c. Date (mm/dd/yyyy) _____

2.d. Date (mm/dd/yyyy) _____

3. List the statutory citations for the criminal activity being investigated or prosecuted, or that was investigated or prosecuted.

_____

_____

4.a. Did the criminal activity occur in the United States (including Indian country and military installations) or the territories or possessions of the United States?

☐ Yes ☐ No

4.b. If you answered "Yes," where did the criminal activity occur?

5.a. Did the criminal activity violate a Federal extraterritorial jurisdiction statute?

☐ Yes ☐ No

5.b. If you answered "Yes," provide the statutory citation providing the authority for extraterritorial jurisdiction.

6. Briefly describe the criminal activity being investigated and/or prosecuted and the involvement of the petitioner named in **Part 1.** Attach copies of all relevant reports and findings.

7. Provide a description of any known or documented injury to the victim. Attach copies of all relevant reports and findings.

Make copies of all reports and photographs and attach.

Be as specific as possible, highlighting visible injuries observed and if you are aware of mental injury.

Let's skip Part 4 for now and go to Part 5

Part 5. Family Members Culpable In Criminal Activity

1. Are any of the victim's family members culpable or believed to be culpable in the criminal activity of which the petitioner is a victim? ☐ Yes ☐ No

If you answered "Yes," list the family members and their criminal involvement. (If you need extra space to complete this section, use the space provided in **Part 7. Additional Information**.)

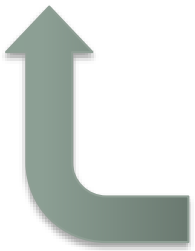
2.a. Family Name (Last Name)

2.b. Given Name (First Name)

2.c. Middle Name

2.d. Relationship

2.e. Involvement



Because many applications will include domestic violence, this may likely be the defendant.

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

"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"

REMEMBER: This is merely a certification of the above information and does not confer any immigration relief.

Part 7. Additional Information

If you need extra space to complete any item within this supplement, use the space below or attach a separate sheet of paper; type or print the agency's name, petitioner's name, and the Alien Registration Number (A-Number) (if any) at the top of each sheet; indicate the **Page Number, Part Number**, and **Item Number** to which your answer refers; and sign and date each sheet. If you need more space than what is provided, you may also make copies of this page to complete and file with this supplement.

1. Agency Name

Petitioner's Name

2.a. Family Name (Last Name)

2.b. Given Name (First Name)

2.c. Middle Name

3. A-Number (if any)

► **A-**

4.a. Page Number **4.b.** Part Number **4.c.** Item Number

4.d.

5.a. Page Number **5.b.** Part Number **5.c.** Item Number

5.d.

6.a. Page Number **6.b.** Part Number **6.c.** Item Number

6.d.

Let's go back to Part 4 now

Part 4. Helpfulness Of The Victim

For the following questions, if the victim is under 16 years of age, incompetent or incapacitated, then a parent, guardian, or next friend may act on behalf of the victim.

1. Does the victim possess information concerning the criminal activity listed in **Part 3.**? ☐ Yes ☐ No

2. Has the victim been helpful, is the victim being helpful, or is the victim likely to be helpful in the investigation or prosecution of the criminal activity detailed above? ☐ Yes ☐ No

3. Since the initiation of cooperation, has the victim refused or failed to provide assistance reasonably requested in the investigation or prosecution of the criminal activity detailed above? ☐ Yes ☐ No

If you answer "Yes" to **Item Numbers 1. - 3.**, provide an explanation in the space below. If you need extra space to complete this section, use the space provided in **Part 7. Additional Information**.

Why do you think it's set up this way?

Reasons for Refusal

- Fear
- Threats or intimidation
- Family pressure
- Family unity
- Financial
- Known v. unknown
- Victim-offender dynamics

Are you in the best position to determine the reasons the victim may refuse to assist?

Witness Tampering

- Coordinate to detect signs
  - Change in frequency of contact
  - Missed appointments
  - Recantation or minimization
- Investigate
  - Follow up with victim
  - Contact victim advocate, immigration attorney, others that had contact with victim
  - Interview friends, neighbors, and family
  - Jail calls

"Only unsuccessful intimidation ever came to the attention of police or prosecutors."

Kerry Healey, National Institute of Justice, Research in Action, Victim and Witness Intimidation: New Developments and Emerging Responses (Oct. 1995) https://www.ncjrs.gov/pdffiles/witintim.pdf

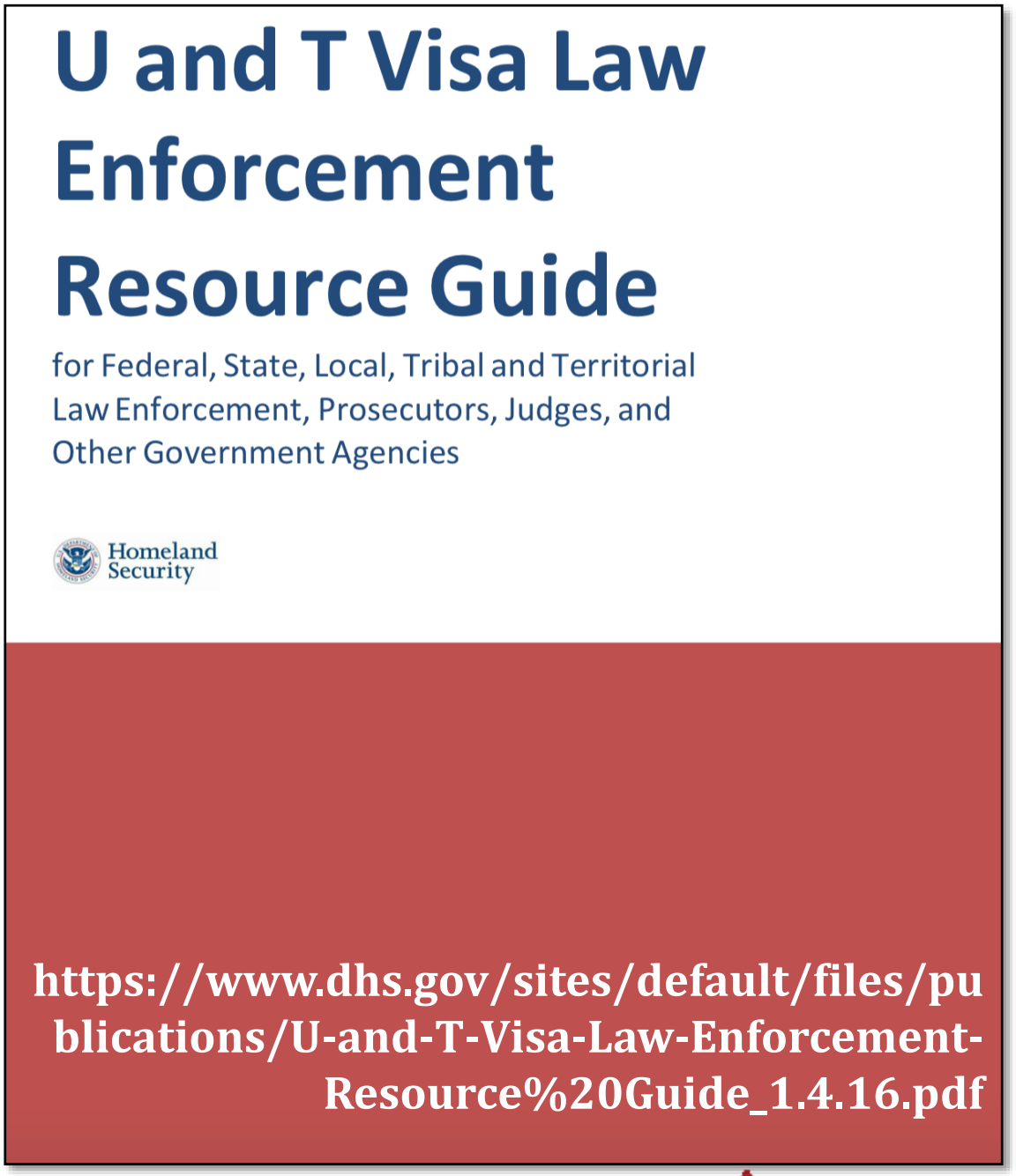
NIWAP

What if you still believe the victim has "unreasonably refused" to assist in the investigation or prosecution?

3. Since the initiation of cooperation, has the victim refused or failed to provide assistance reasonably requested in the investigation or prosecution of the criminal activity detailed above?

☑ Yes ☐ No

DHS provides victim an opportunity to explain. If you just don't sign, the victim has no opportunity explain. They are unable to apply.


U and T Visa Law Enforcement Resource Guide
for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies
Homeland Security
https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf

NIWAP

Small Group Activity

Analyzing Eligibility

- Review Case Scenario
- Consider whether you would recommend that the U Visa certification be signed
- Why or why not?
  - What factors are you considering when you make your recommendation?
  - What, if any, additional information do you need?

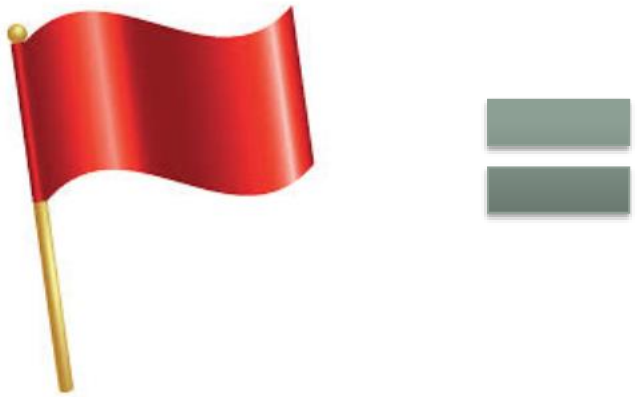
Report Back

- Share the basic facts of your Case Scenario
- Would you would recommend that the U Visa certification be signed
- Why or why not?
  - What factors did you consider?
  - Do you need any more information?

When should you sign a U Visa Certification?

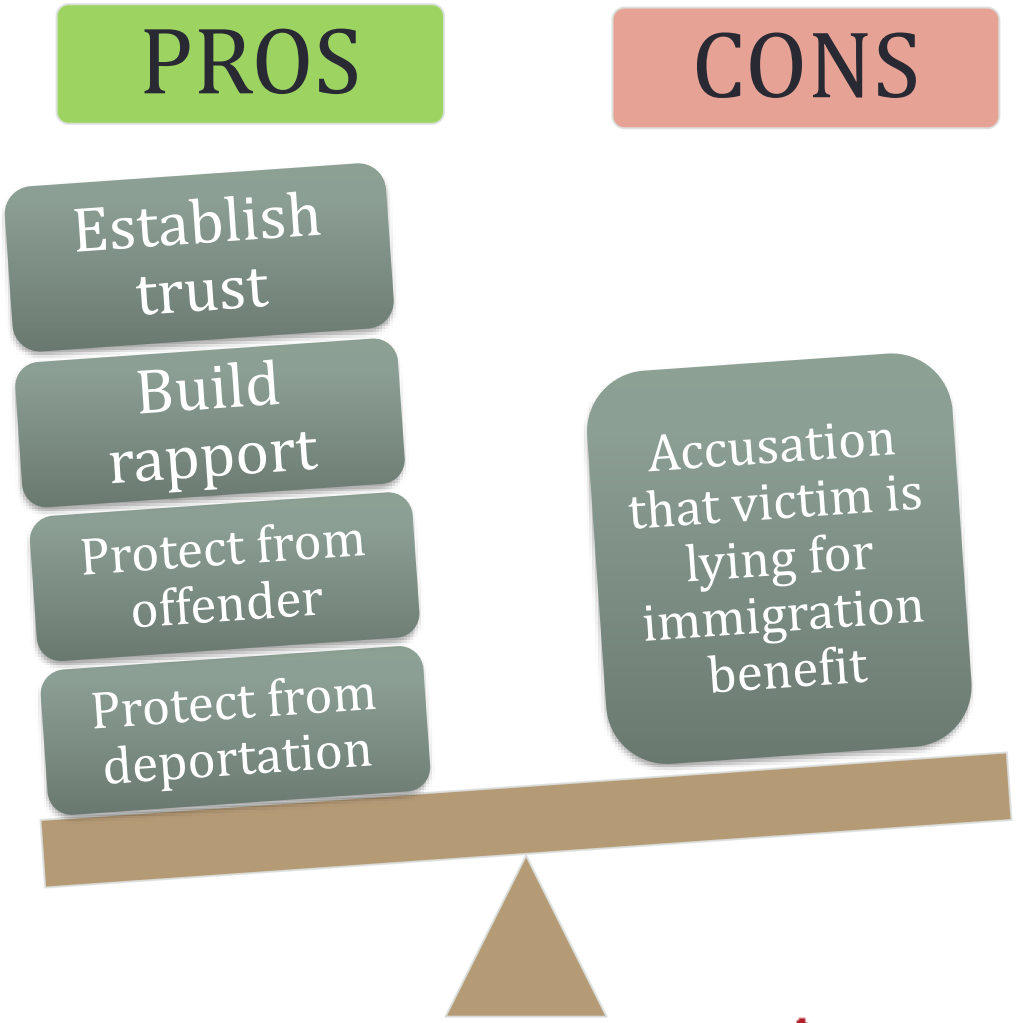
Timeline

- Certification must be included in the initial application for a U Visa
- Once the initial application is processed:
  - Victim is entered into a database and flagged as an applicant for a U Visa



- Immigration proceedings will not be initiated
- Offender can not intimidate with threats

Certifying Early



Prosecution Strategies

Topics

- Certification
- Discovery
- Pretrial Litigation
- Trial Strategies

Certification

- Prosecutors can sign certification forms
  - Must be designee
- Any certifying agency can certify at any time they have probable cause
- Certification policies & practices should be discussed at collaborative partner meetings
  - e.g. CCR, MDT, Task Force
- Certifying prosecutor should consider not being the trial prosecutor

Discovery and Due Process

Must provide defense with any materials within the state's control that may effect the credibility of any witness or that goes to any witnesses motive to lie or bias

1. Is it within the state's control?
2. Does it go to the witness' credibility, bias, or motive to lie?

Custody and Control

Within	Not Within
• Certification form • Accompanying documentation; e.g. police reports, photographs, medical records • Communications from immigration attorney • Attachments provided to you	• Materials not provided to you – U visa application – VAWA application – T visa application – Attachments to application – Other materials submitted • Immigration file – Includes existence of & actions taken in the case

Strategies to Limit Risk

- Certify based on information the prosecutor/police have
  - Do not need and should not seek additional information or materials
- Work with local attorneys and advocates working with immigrant victims
  - Tell them you will not accept more information
  - Do not accept materials offered/sent

Response to Motions to Compel

- Concede existence of certification
- Provide copy of certification and only accompanying documents that are in your custody and control
- Move to quash subpoena for immigration file
  - Confidentiality protections
  - Impermissible "fishing expedition"
  - Case law

State v. Marroquin-Aldana

2014 ME 47, ¶ 20, 89 A.3d 519, 525

- Court ruled there was "insufficient justification" to disclose additional documentation when the defense had the certification form
- Provided defense opportunity to cross-examine victim and call credibility into question
- Court noted the "high level of protection" given to documents filed with immigration

Hawke v. U.S. Dep't of Homeland Sec.

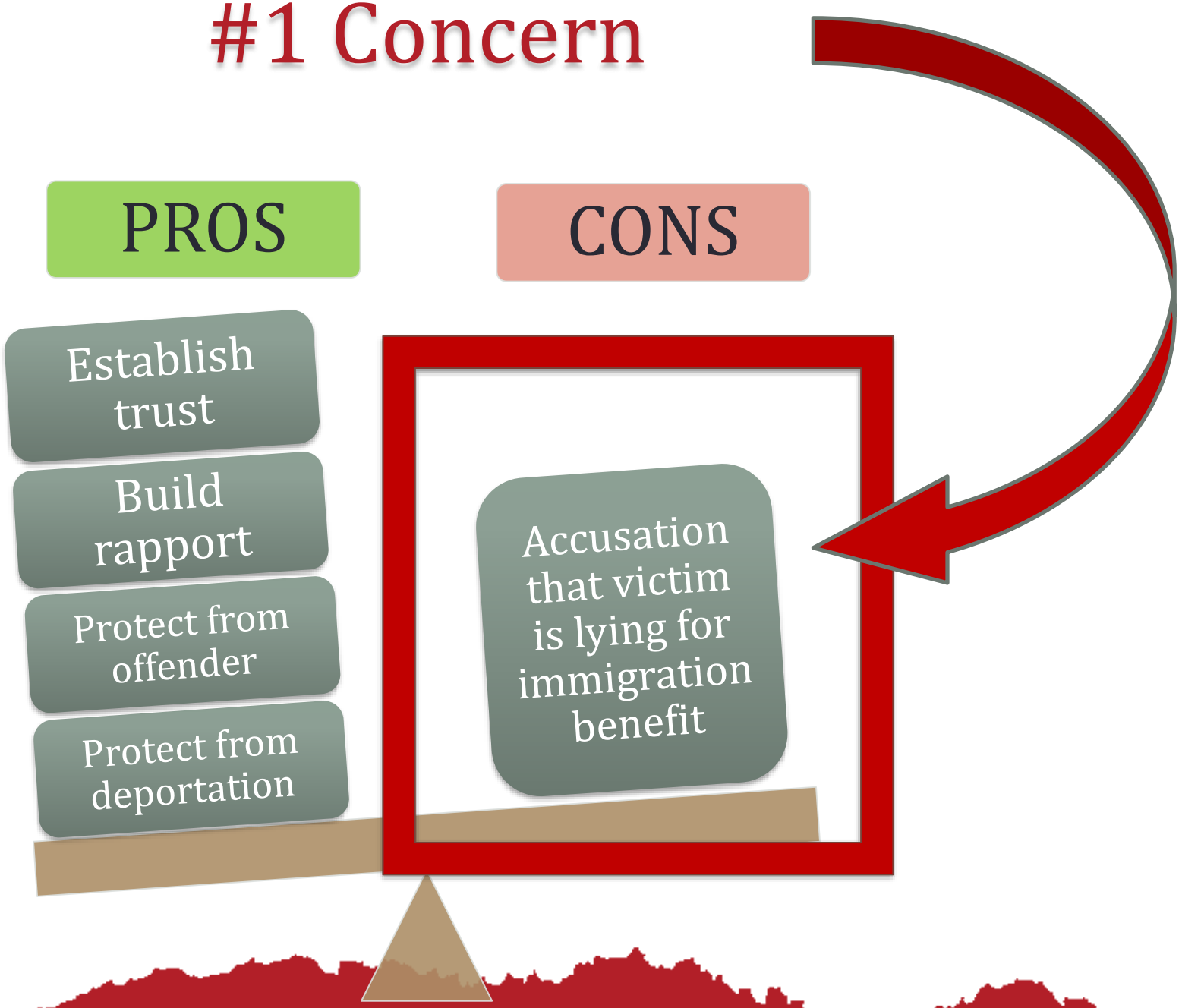
No. C-07-03456 RMW, 2008 WL 4460241, at *7 (N.D. Cal. Sept. 29, 2008)

"[T]he strict confidentiality of the Violence Against Women Act still applies to any petitions filed by Mrs. Hawke. While Mr. Hawke's Sixth Amendment right to Compulsory Process permits him access to some information held by the government, it does not permit him to receive absolutely privileged information like any records held by DHS here."

NIWAP

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

#1 Concern


PROS
CONS
Establish trust
Build rapport
Protect from offender
Protect from deportation
Accusation that victim is lying for immigration benefit

Is the victim's immigration status ever relevant to the prosecution's case?

Analyze Case

Victim Selection	• Did the offender chose the victim because of a real or perceived vulnerability?
Criminal Act	• Did the offender use the victim's immigration status to commit a criminal act?
Escape Detection	• Was the victim prevented from reporting the crime to police because of their immigration status?

Victim Selection

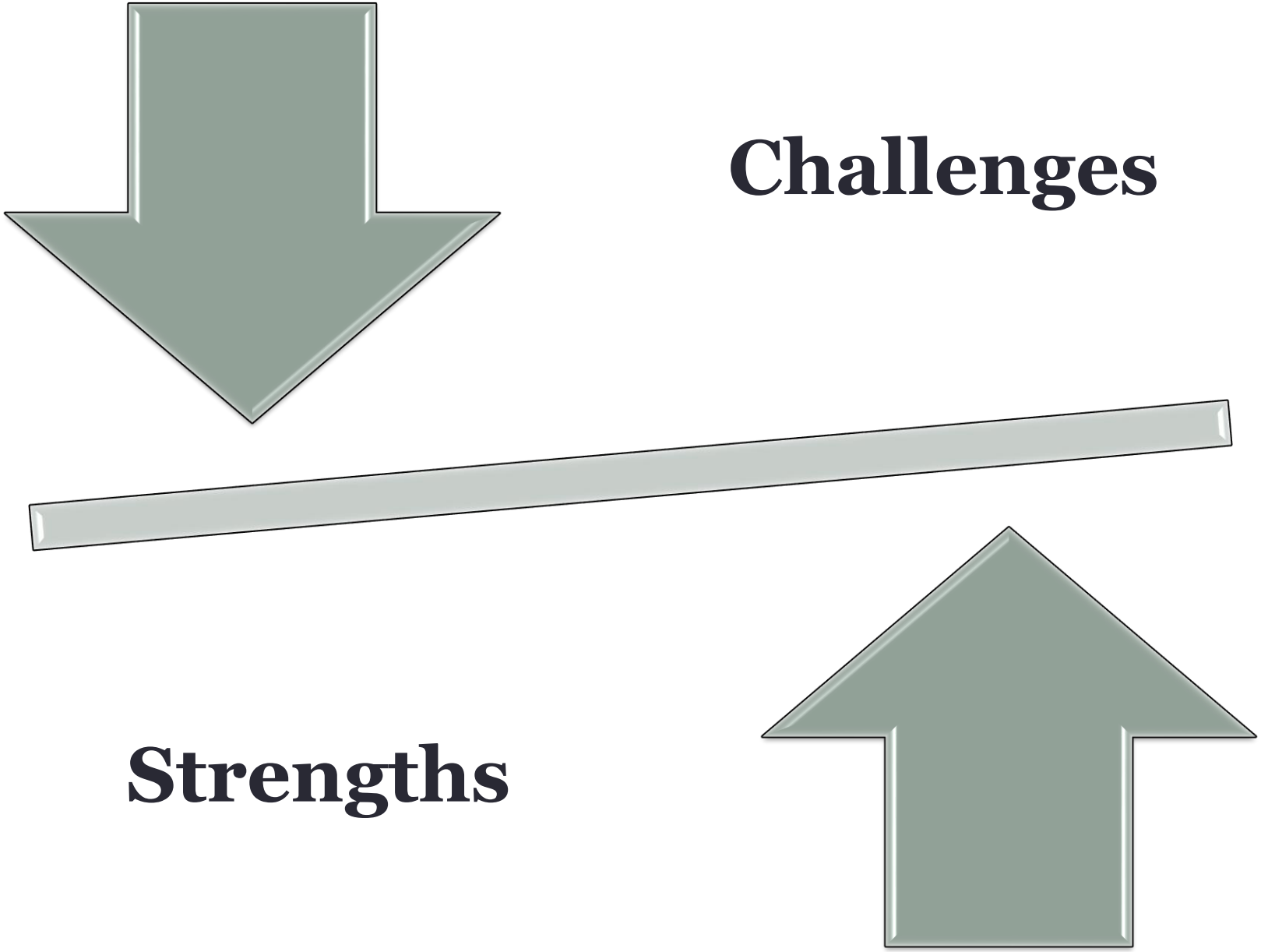
- Chose a particular area of town to commit crime
- Target victims working in specific venues; e.g. agriculture, hospitality, or construction
- Victimize known immigrant
- Instill vulnerability by jeopardizing victim's immigration status

Criminal Act

- Human trafficking
- Rape by threats
- Power and control within domestic violence relationship
  - Intimate partner, spouse, child, elder abuse
- Threats as part of stalking or harassment
- Witness intimidation or tampering
- Threats in cases of robbery, extortion, felonious assault, or false imprisonment

Escape Detention

- Delayed reporting
- Lack of reporting
- “Uncooperative” during investigation or prosecution
- Threats:
  - Deportation
  - "No one will believe you”
  - "You will never see your children again"
  - Financial


Challenges
Strengths

Pretrial Strategies

- Preview evidence for judge
- Brief complex legal issues
- Establish evidence that will and will not be admitted at trial
- Requires thoughtful consideration of case well in advance of trial date

Motions in Limine

Immigration Status	Other Bad Acts	Experts
• Exclusion • Limitation	• Prior threats • Subsequent threats or intimidation	• Victim Dynamics • Immigration Relief

Immigration Status

- Exclude if irrelevant
  - No immigration benefit provided
  - Not relevant to offender's crime
- Cross-examination will be allowed as to application for immigration benefit
  - Limit scope
  - Opens the door to rebuttal evidence

People v. AlvarezAlvarez

No. G047701, 2014 WL 1813302, at *5 (Cal. Ct. App. May 7, 2014), review denied (July 16, 2014)

"The visa was a tangential, collateral issue, and allowing evidence about it invited speculation about the legal status of both [the victim] and, potentially, defendant, which was completely irrelevant to this case. The trial court was well within its discretion in excluding reference to the visa."

Other Bad Acts

Fed. R. Evid. 404(b)

- Includes prior and subsequent "bad acts"
- Does not need to rise to the level of criminal activity
- May go to prove motive, knowledge, intent, opportunity, or lack of mistake, self-defense, or accident
- Can be relevant to establish the "nature of the relationship" or explain victim behavior such as delayed reporting or lack of participation

Expert Witness

- Victim responses to trauma
- Dynamics of domestic violence experienced by immigrant victims
- Relationships between offenders and victims in human trafficking cases
- Victim protections under immigration law
- Other subjects that may be outside the common jurors understanding

Fed. R. Evid. 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data…

Where can you find an expert?

Possible Experts

Dynamics	Immigration

• Experience working with immigrant victims
  – DV Shelter
  – Advocates
  – Rape Crisis Center
  – Investigators
• Scholars
	• Immigration attorney
	• Law Professors
	• Other attorneys that have experience with immigration issues; e.g. family law, legal aid

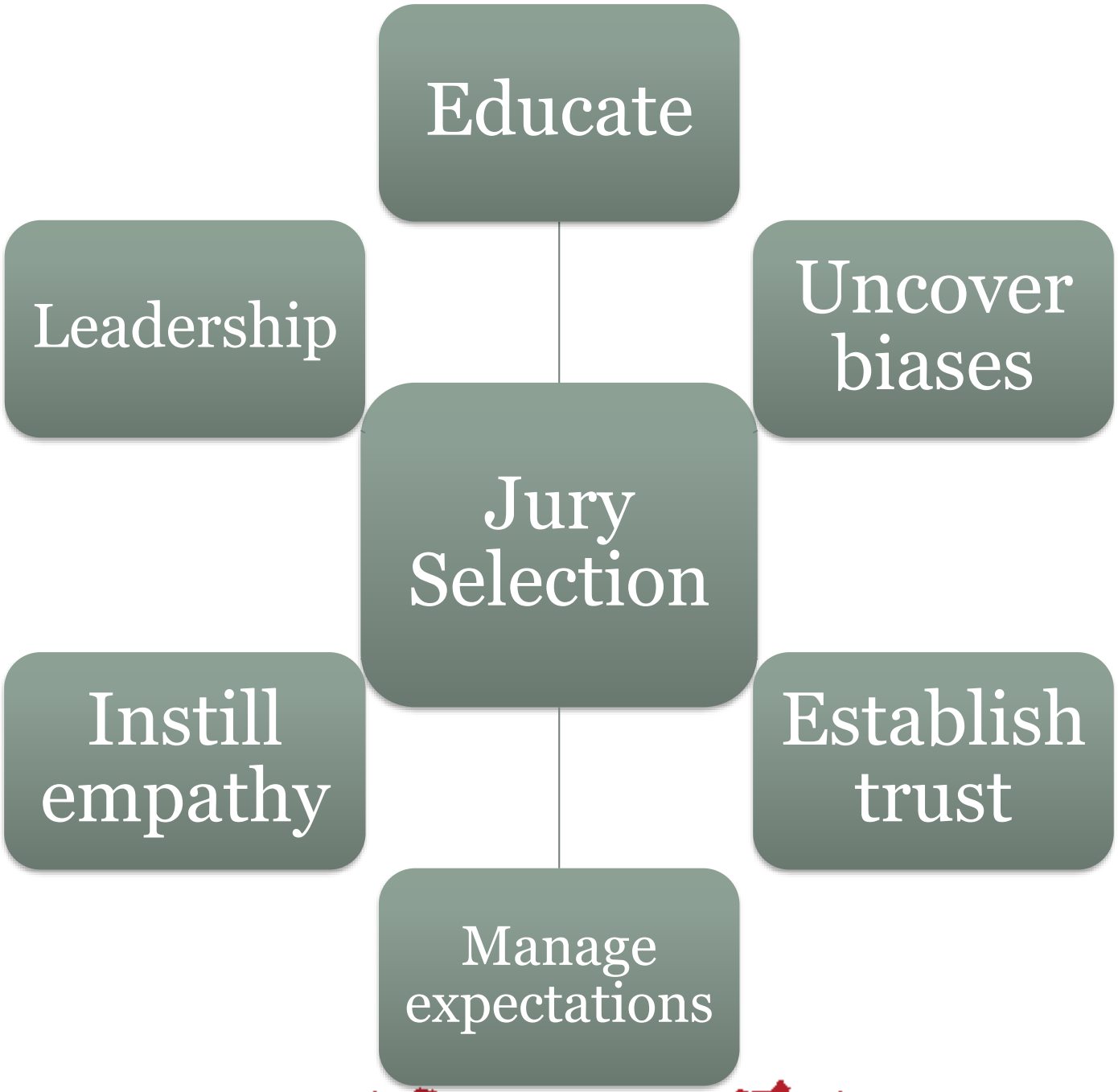
Best Practice: Do not use any expert that is involved with the case or has worked with the victim

State v. Olvera-Guillen
2008-Ohio-5416

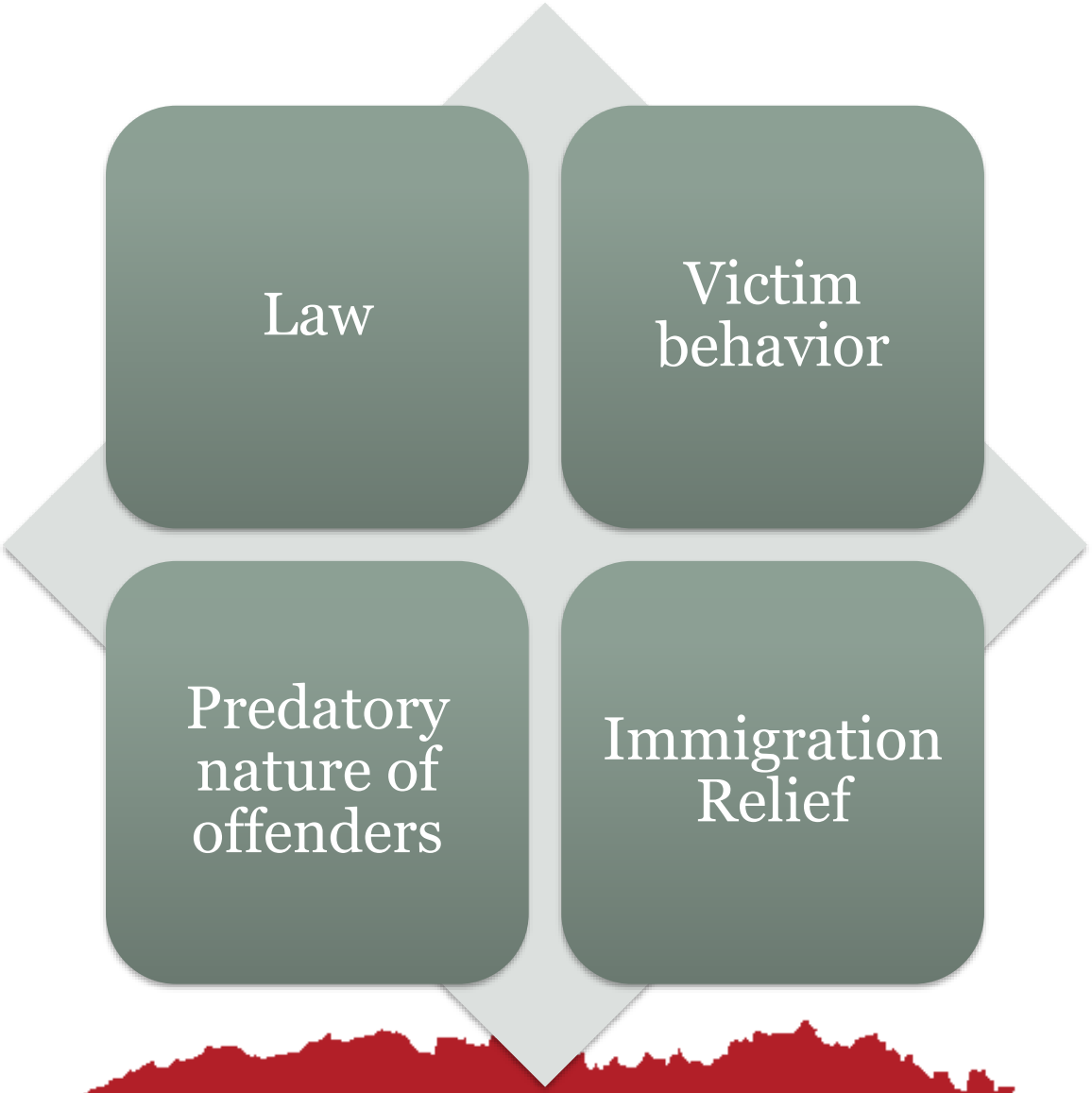
- Court allowed defense to call an expert witness to explain the U Visa process
- Prosecutor's comments not condoned, but not reversible:

"You know there is a very good reason why that U-visa program is in place because without it, people like him, can have free rein. They rape, pillage and plunder a whole underclass of people in this country simply because they are illegal aliens, knowing full well that they in their perpetual fear factor and their state of paranoia are not going to go running to the police."

When do you start talking about immigration status?


Educate
Leadership
Uncover biases
Jury Selection
Instill empathy
Establish trust
Manage expectations

Educate



NIWAP

Manage Expectations

- Victim may not have immediately reported the crime
- Victim may be undocumented
- Victim may have engaged in criminal behavior
- Offender may not have used violence, but merely threats of violence or deportation

Instill Empathy

- Humanize the victim
- Discuss vulnerabilities
- Use jurors to discuss analogous situations involving domestic violence and sexual assault
  - Fears
  - Threats
- Explore what the "American dream" means

Uncover Biases

- Will the juror be able to "get" …
  - Victim is not on trial
  - Predatory nature of offenders
  - Equal protection of the law for immigrant victims
  - Intent of immigration relief for victims of crime

Establish Trust

- Be accurate about the law
- Do not hide “bad facts”
- Be respectful to the judge, defense attorney, defendant, court staff, and jurors
- Establish yourself as the authority in the courtroom

Leadership

- Inspire jurors
- Be authentic and genuine
- Do not be repetitive
- Use appropriate humor
- Demonstrate professionalism
- Be prepared

Offender-Focused Theme

PREYING ON THE MOST VULNERABLE

AMERICAN DREAM BECAME A NIGHTMARE

BETRAYAL OF TRUST, FAMILY, AND THE LAW

POWER OVER THE POWERLESS

PICKED THE PERFECT VICTIM

KNEW THERE WAS NO WHERE TO TURN

Victim Testimony

- Introduce the victim to your jury
- Recreate the reality of the crime
- Illustrate fear and emphasize threats of
  - Deportation
  - Separation from family
  - Loss of employment or financial support
- Address immigration status and application for immigration relief

Cross Examination

Does it go towards the witness' credibility, bias, or motive to lie?

- Courts take a broad view
- Strategize:
  - Take the "sting" out during direct examination
  - Prepare victim for cross-examination
  - Listen for the defense to "open the door" to rebuttal evidence

Rebuttal Testimony

- Once the defendant has alleged that the victim has a motive to lie, the prosecution can introduce the victim's prior consistent statements about the charged crime
- Door to this testimony call be opened at any time, but is likely done during cross-examination

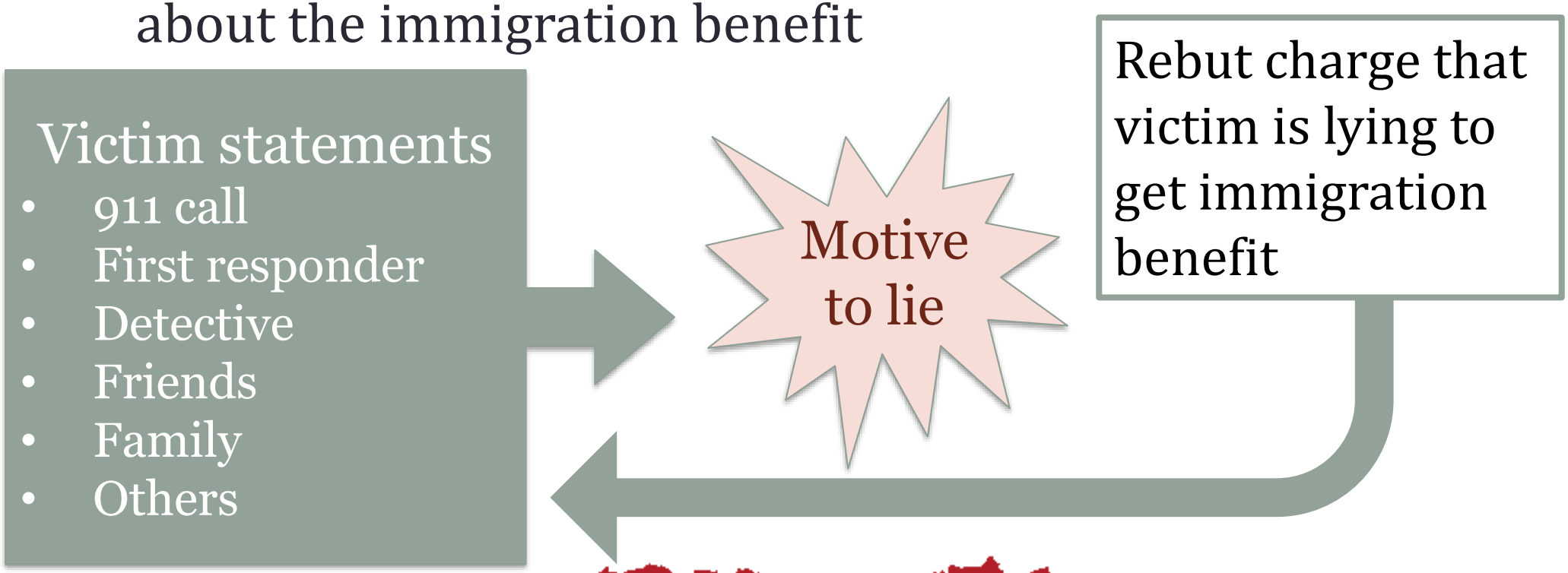
Prior Consistent Statements
F.R.E. 801(d)(B)

- Non-hearsay
- Not subject to Crawford
- Any consistent statement
  - offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying
  - to rehabilitate the declarant's credibility as a witness when attacked on another ground

Introducing Statements

Establish timeline

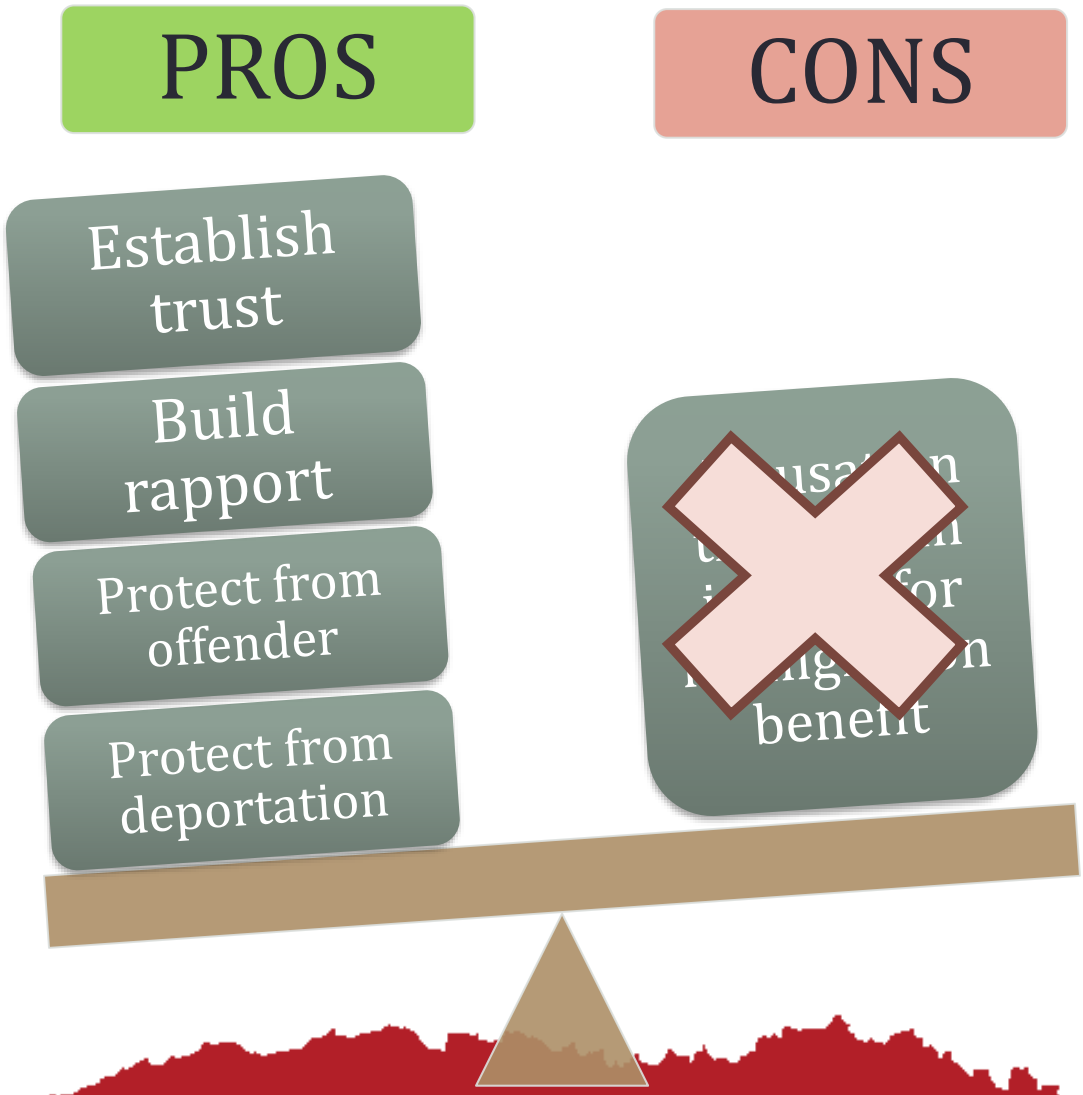
- When did the victim learn about the benefit?
- What Statements were made before the victim learned about the immigration benefit



Example Questions on Rebuttal

- "Defense counsel asked you about your application for a U Visa, when did you first hear about the U Visa?"
  - "After speaking with detective, I spoke with an advocate at the police station"
- "Prior to speaking with the advocate, did you provide the detective with an recorded statement?"

Certifying Early



Going Forward

- When probable cause exists, certify early to ensure victim safety and enhance victim participation
- Focus on the offender's actions throughout the investigation and prosecution
- Litigate discovery and pretrial motions to ensure just results
- Turn challenges into strengths

Resources

http://niwaplibrary.wcl.american.edu

- Technical Assistance
  - Call: 202.274.4457
  - Email: niwap@wcl.american.edu
- Materials
  - Certification and Prosecutor Toolkits
  - DHS Answers to Law Enforcement Reasons for Not Certifying
  - USCIS Q & A on U Visa Certification
  - Roll call training videos

Evaluations & Closing

- Evaluations are in your training packet
  - Please include comments so that we can continue to improve
- Certificates will be provided once you have turned in your evaluations
- Contact us with any questions or concerns
- Be safe!

Thank You!