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

Gulf Coast Center for Non-violence Conference

Biloxi, Mississippi

August 14, 2018

NIWAP

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

Participant Introductions, Goals and Expectations

Learning Objectives

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

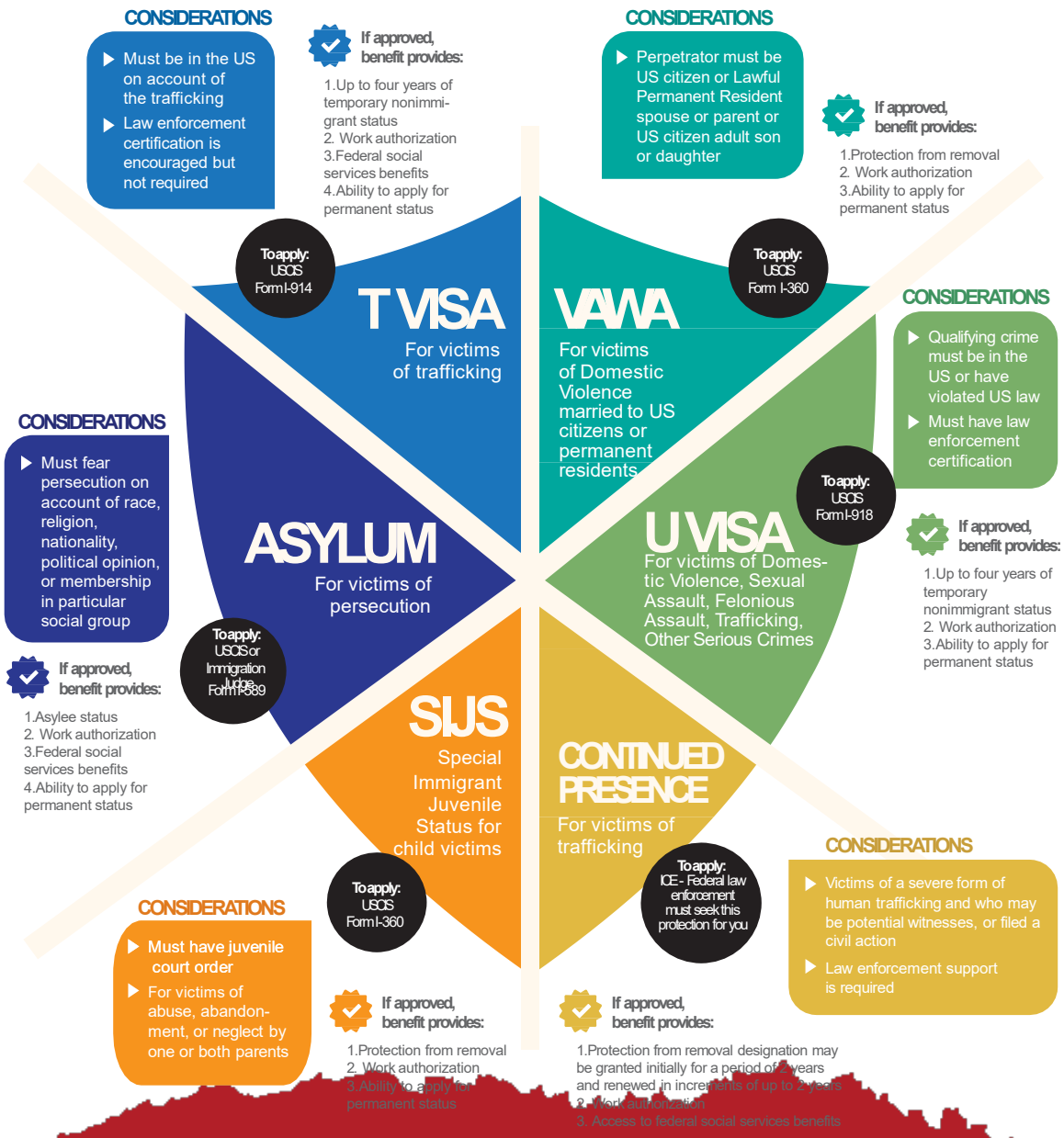
- Understand how investigations can be improved by using language access tools
- Hold offenders more accountable by using the U Visa certification process as a crime fighting tool
- Enhance victim safety and participation in the criminal justice system
- Enhance officer/victim/community safety using language access and certification programs

General Caveats

- Women, men and children can qualify for U Visas
- Victims of almost all violent crimes, and many other crimes are eligible to apply for U Visas
- *That said, many examples that will be used throughout this presentation will refer to female victims of domestic violence and/or sexual assault*

How Best Practices in Domestic Violence Investigations Promote Officer Safety

PROTECTIONS FOR IMMIGRANT VICTIMS



DYNAMICS OF DOMESTIC VIOLENCE EXPERIENCED BY BATTERED IMMIGRANTS

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Department of Homeland Security

Immigration Related Abuse

- Refusal to file immigration papers on spouse/child/parent's behalf
- Threats or taking steps to withdraw an immigration case filed on the survivor's behalf
  - 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 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**.
- 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 barriers and fears prevent immigrant victims from reporting crime?

If they report…

- They will be deported
- Offender will retaliate
  - Harm them
  - Harm family members, children
- Nothing will happen
- Cannot communicate with officers

Major Challenges in working with Immigrant Victims of Crime

1. Fear of deportation
2. Language
3. Lack of knowledge of legal rights
4. Do not trust that police/prosecutors will help them
5. Lack of reporting and/or cooperation as the case moves forward

What countries do the victims in your jurisdiction come from?*

*These slides were produced by The National Immigrant Women's Advocacy Project (NIWAP) at American University, Washington College of Law and Legal Momentum and was supported by Grant Number 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U. S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

Mississippi Demographics (2016)*

- Total foreign born population – 58,766
- 2% of the state's 3 million people are foreign born
  - 40% naturalized citizens
  - ≈17.5 lawful permanent residents and temporary status
  - ≈42.5% undocumented

http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/MS

- 47.3% rise in immigrant population from 2000 to 2016
- 5% of children in the state under age 18 have 1 or more immigrant parents
  - 88.9% of children with immigrant parents in the state are U.S. native.

*Source: http://www.migrationpolicy.org/data/state-profiles/state/demographics/MS (Feb. 2018)

15

Mississippi– Countries/Regions of Origin and Limited English Proficiency (2016)*

- Americas – 47.9%
  - Mexico (30%)
  - South America (4.2%)
  - Canada (3.1%)
- Asia – 31.2%
  - China (6.7%)
  - India (6.1%)
  - Philippines (6%)
  - Vietnam (5.5%)
  - Japan (2.4%)
- Europe – 8.9%
  - Germany (2.5%)
  - United Kingdom (1.7%)
- Africa – 5.4%
- Middle East – 3.2%

Limited English Proficiency

(Speak English less than very well)

- Naturalized citizens 26.9%
- Non-citizens 51.8%

Languages Spoken at Home

- ❖Spanish (67,256)
- ❖Vietnamese (5,951)
- ❖French (3,983)
- ❖Mandarin or Cantonese (3,740)
- ❖German (3,116)
- ❖Tagalog (2,837)
- ❖Arabic (2,114)

*Source: https://www.migrationpolicy.org/data/state-profiles/state/language/MS (Feb. 2018)

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Language Access

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

Source of Language Access Laws

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- 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."

What is Meaningful Access?

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- Meaningful access is defined in the US Department of Justice's own Language Access plan as:

> "Language assistance that results in accurate, timely and effective communication at no cost to the LEP individual. For LEP individuals, meaningful access denotes access that is not significantly restricted, delayed or inferior, as compared to programs or activities provided to English proficient individuals"

Interpretation

The conversion of spoken language into another language verbally

Translation

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- The conversion of written text from one language into the written text of another language

Use of 1st person

Officer: Sir, can you tell me what happened?

Interpreter (into the other language): Sir, can you tell me what happened?

Victim: I was hit in the face repeatedly.

Interpreter (into the other language): I was hit the face repeatedly.

No 3rd Person

Officer (to interpreter): Can you ask the victim what happened?

Interpreter (into the other language to victim): Can you ask the victim what happened?

Victim: ???????

DOJ Model Guidance

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- 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?

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First Response

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- 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?

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What do you do when the people at the scene are limited English proficient?

How can you get the information you need *to secure the scene?*

DOJ and Exigent Circumstances

- 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

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- "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

What is a Qualified Interpreter?

- Category for languages that certification does not exist but the interpreter has:
  - completed interpreter training and
  - has experience interpreting.

- Certified by the United Nations for Conference Interpreters (28 U.S.C. §1827).

This is different than a Certified Interpreter

Using Qualified Interpreters

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Benefits

- Safety
- ID offender
- Locate weapons
- Admissible statements (excited utterances)

Harms

- Mistaken ID of offender
- Arrest of victim
- Misinterpretation results in inaccurate statements
- Trauma to children

Bilingual Officer v. Interpreter

- Bilingual officers
  - When they are interpreting, they are not investigating
- Biculturalism v. bilingualism
  - Different words have different meanings:
    - e.g.: Variations on the word "highway" depending on what state you're from.
    - "500 feet" many communities don't know what that distance looks like.

First responders –
Now that emergency is
over what are the next
steps in the investigation ?

The Investigation Begins

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- Call detective
- Call fire/rescue
- Take initial statements
- Call crime scene
- Photograph
- Formal interviews at the station
- Develop probable cause
- Prepare case for prosecution

Other Encounters With LEP Victims

- Dispatch
- Walk into station
- Referrals from other agencies
  - –CPS, APS, Family Justice Center

- How would you identify the langauges?

Language Resources

- Language line
- Video remote interpretation
- Video relay interpretation
- Department interpreters line developed in response to large local refugee population
- Immigrant community based organization partners
- Health care providers
- School systems
- Court systems

Tips for Working with Interpreters

- Control the interview
- Pre-session with the interpreter
  - Where are they located?
  - Establish what your rules are
    - Hand Signals
- Interpreter has to interpret everything that you say
  - Example: when you are explaining confidentiality

Red Flags

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- Can you understand the interpreter?
- Does the LEP person look confused?
- Does the interpreter appear confused?
- Is the interpreter engaging in side conversations?
- Is the interpreter summarizing?
- Is there a change in the individual's demeanor?
- Are they using English words?

Interpretation Best Practices

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- Evaluation systems
- Interpreter uses a dictionary, takes notes
- Interpreter comfortable with subject matter of the case
- Address cultural experiences ahead of time
- Ensure that they do not know the parties
  - If using telephonic interpreters: first ask where they are located
- Team interpreting and interpreter breaks

U Visas as a Crime Fighting Tool

Improving the reporting, investigation, and prosecution of violent crime

& keeping everyone safer

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What, if anything, do you know about U Visas?

Overview of the U Visa

- **What is the U visa?**
- **Purpose:** Why does it exist?

U Visa Basics

- Law enforcement certification is just one part of the overall process it does not = citizenship
- Meant to promote reporting of crime
- Targets offenders who prey on most vulnerable victims
- Offender may be citizen or non-citizen
- Can be “revoked”
- Increases immigrant victim participation in criminal justice system

Purpose of Crime Victim Protections

Congress enacted VAWA self-petitioning (1994) and the U and T visas (2000) to:

- Improve community policing and community relationships
- Increase prosecution of perpetrators of crimes against immigrant victims
- Allow victims to report crimes without fear of deportation
- Enhance victim safety
- Keep communities safe

Major Forms of Relief

- VAWA self-petition
  - Abuse by US citizen or lawful permanent
    - Spouse, former spouse, parent, step-parent, over 21year old child
- Special Immigrant Juvenile Status
  - Immigrant children abused, abandoned or neglected by one of their parents
    - (U.S. or abroad)
- U Visa
- T Visa

Department of Homeland Security

- DHS Video 1

U Visa Requirements

- 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

U Visa Criminal Activities (11/2011 data)

- Domestic violence **45.9%**
- Rape, sexual assault, incest, trafficking **30.4%**
- Felonious assault, murder, manslaughter **9.9%**
- Kidnapping, being held hostage, unlawful criminal restraint, torture **8.47%**
- Blackmail, extortion, perjury, obstruction of justice, attempts, conspiracy, solicitation **5.3%**

Qualifying Criminal Activity

- Domestic violence
- Sexual assault
- Rape
- Incest
- Prostitution
- Torture
- Female genital mutilation
- Felonious assault
- Manslaughter
- Murder
- Kidnapping
- Abduction
- Trafficking
- Involuntary servitude
- Slave trade
- Being held hostage
- Peonage
- Fraud in Foreign Labor Contracting
- False Imprisonment
- Blackmail
- Extortion
- Witness tampering
- Obstruction of justice
- Perjury
- Stalking

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

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

Who Can Certify?

"law enforcement" **&*"law enforcement agencies"*** **=**

- Federal, state, and local
  - Police, sheriffs, FBI, HSI, ATF…
  - 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

U Visa Certification Considerations

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

Things to Know About Certifying

- "Do I believe this person was a victim of a qualifying crime?"
- "Did the person assist or willing to assist in detection, investigation, conviction, prosecution and/or sentencing?"
- Question is **NOT**:
  - Can we prosecute the crime?
  - Can I arrest the offender?
  - Do I have proof beyond a reasonable doubt?
  - Will the prosecutor's office file charges?
  - Is this within the statute of limitations?
  - Did we get a conviction?

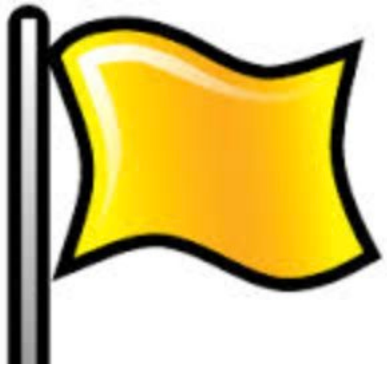
How will a U visa certification request come to you?

- From victim advocate or immigration attorney
- As a police officer you are the first responder
- As a prosecutor you might have continued contact with the victim and might be first to identify victim's U visa eligibility

When should you certify?

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



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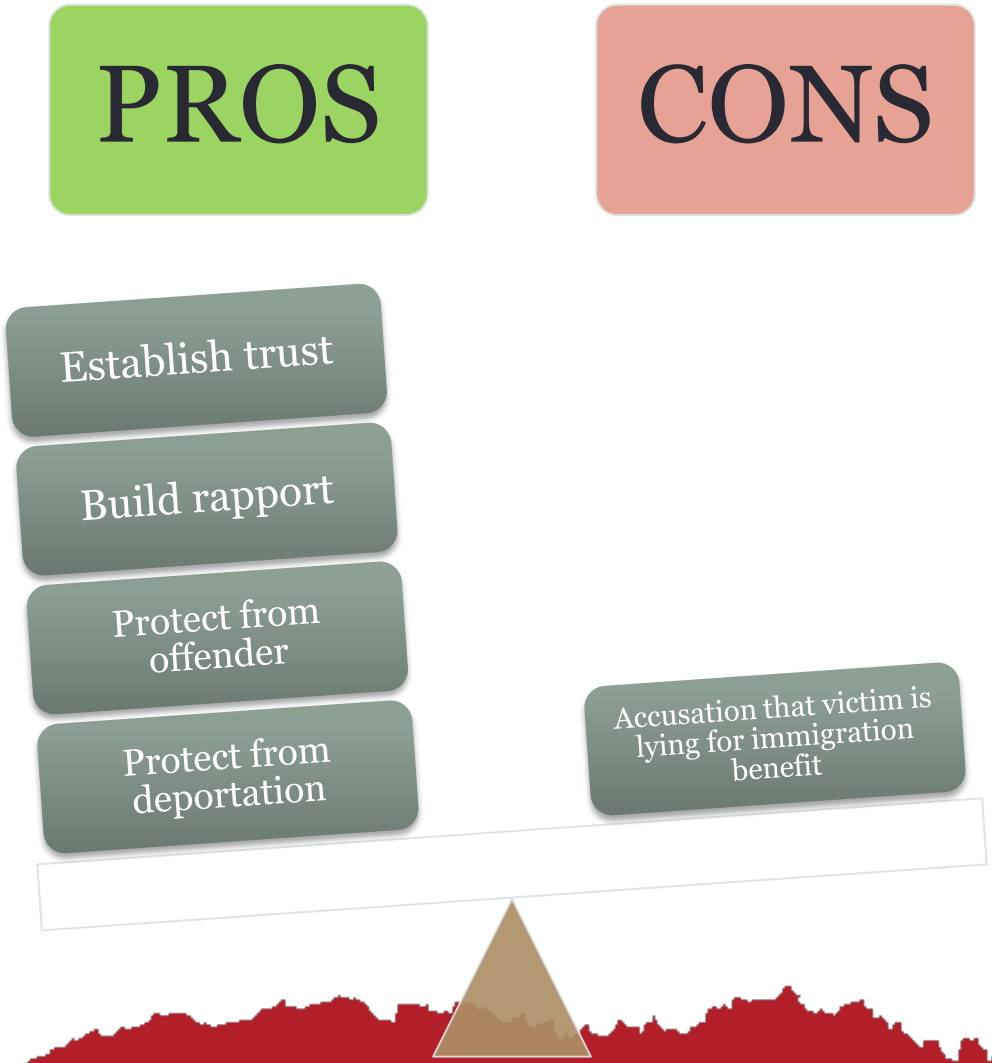
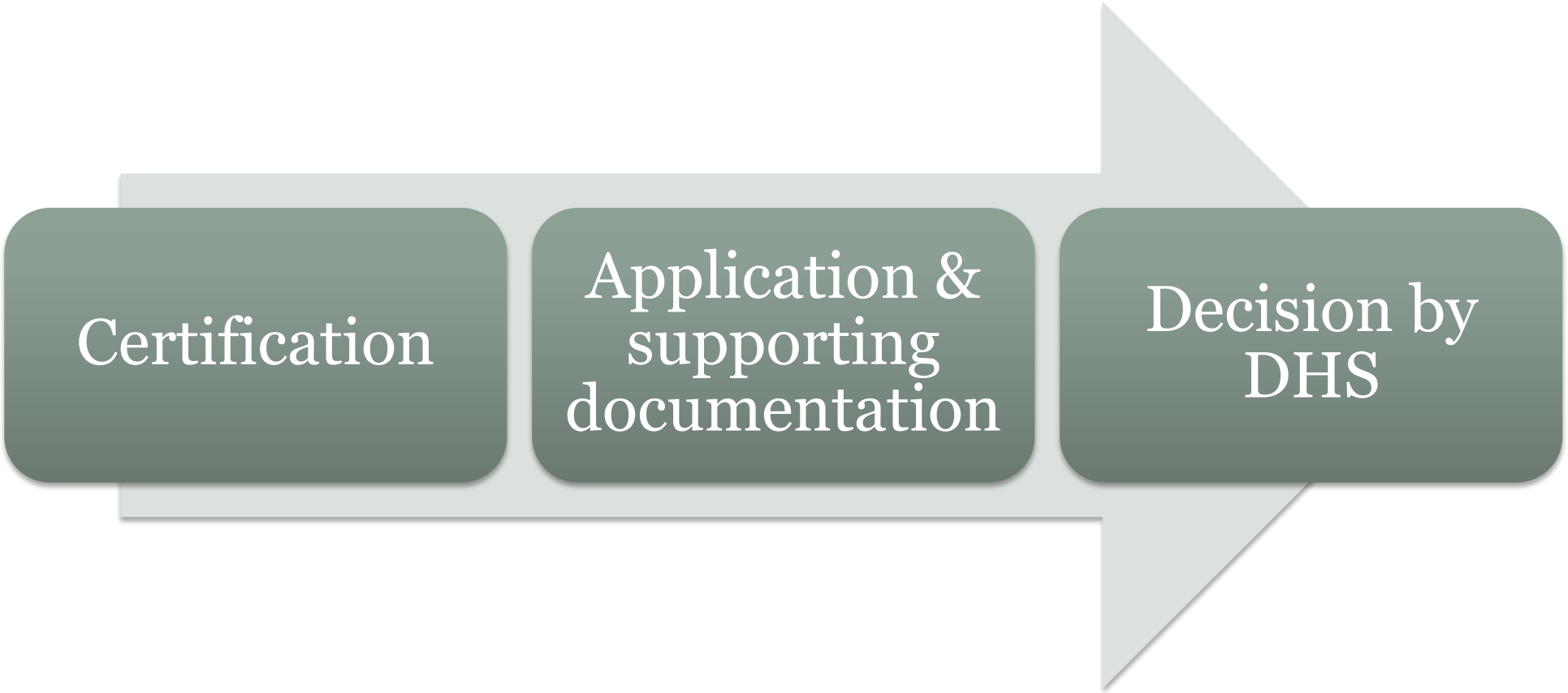
- Immigration proceedings will not be initiated
- Offender can not intimidate with threats

Certifying Early



The U Visa Application Process



Typical length of process = 36 - 48 months

DHS Decision

- Were they a victim of a qualifying crime?
- Did they suffer substantial harm as a result of victimization?
- Assess whether the victim unreasonably did not comply with requests from law enforcement (helpfulness)
- Is the victim admissible?
    - Review of criminal history
    - Review of immigration history

U Visa Facts

- Only 10,000 U visas can be granted annually
- The U visa grants a temporary 4 year stay
- Only 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

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

U Visa Benefits to Law Enforcement and Prosecutors

- 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

Helpfulness Hypotheticals Small Group Activity

- Is this person eligible for a U Visa certification?
- *Stories handout*

Helpfulness in the Regulations

- Statute and DHS regulations: has been helpful, is being helpful or is likely to be helpful in the
    - Detection, or investigation, or
    - Prosecution, or conviction or
    - Sentencing
- There is no degree of helpfulness required
- Law enforcement may complete U visa certification once they assess victim's helpfulness
- The investigation or prosecution can still be ongoing

Helpfulness can be satisfied even if:

- Victim reports a crime where there's no further investigation
- Report is of past crime that the victim did not report at the time
- Perpetrator absconds or is subject to immigration removal
- The perpetrator is being prosecuted for a different crime
- Victim is not needed as a witness
- Victim is dead (indirect victim qualifies)
- Perpetrator is dead
- Victim has a criminal history or is subject to immigration enforcement
- Victim fully discloses story after better understanding rights, the U-visa and meaningful language access

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

What does it mean for a victim to "unreasonably refuse" to provide assistance?

Why would a victim report a crime and then refuse to participate in the ensuing investigation and trial?

Reasons for Refusing to Cooperate

- Fear of reprisal
- Continued threats or violence
- Pressure from either family
- Financial hardship
- Lesser of two evils

Evaluating Whether Victim's Refusal to Provide Assistance/Cooperation was "Unreasonable"

- <u>Considerations:</u>
  - Totality of the circumstances, including the nature of the victimization
  - Victim's fear or the abuser
  - Trauma suffered
  - Force, fraud or coercion

If you still believe the victim is unreasonably refusing…

- Note on the certification, sign, and return to victim or victim's attorney
- Burden shifts to victim to prove the refusal is not unreasonable
- DHS makes the ultimate decision

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.

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Department of Homeland Security

- DHS Video 2

Prosecution Specific Issues

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)
- Certifying prosecutor should consider not being the trial prosecutor

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

Discovery & Due Process Obligations

- 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

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

#1 Concern:

Explicit or implicit accusation that the victim is lying to stay in the country

Cross-Examination

- It goes to the witness' credibility, bias, or motive to lie – they can be asked about it.
  - Discuss during *voir dire*
  - Identify jurors with anti-immigrant attitudes and get them off the jury
  - Prepare victim for cross-examination

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

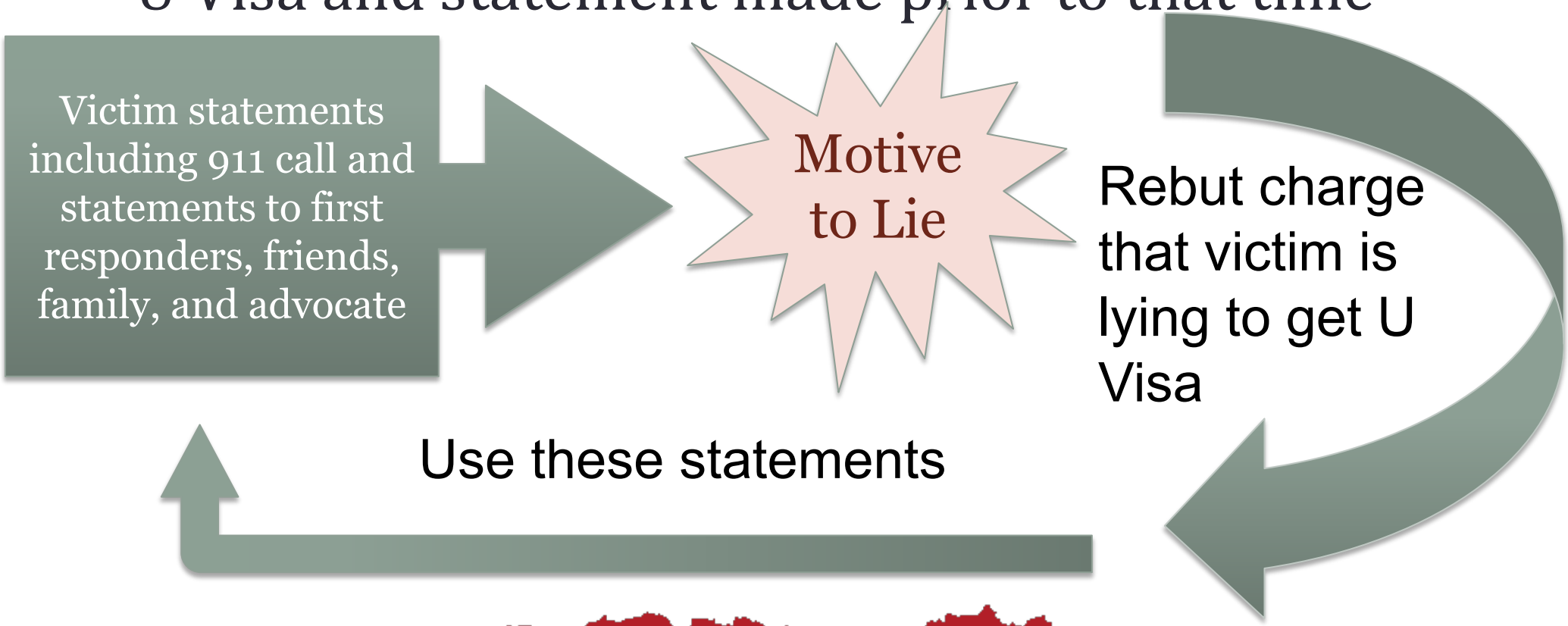
Prior Consistent Statements

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 of when victim was told about U Visa and statement made prior to that time



Victim Statements

- 911 call
- Statements to first responders
- Interview by detective
- Comments made to family, friends, or coworkers
- Conversation with service providers
  - Community-based v. Systems-based

Certify Early

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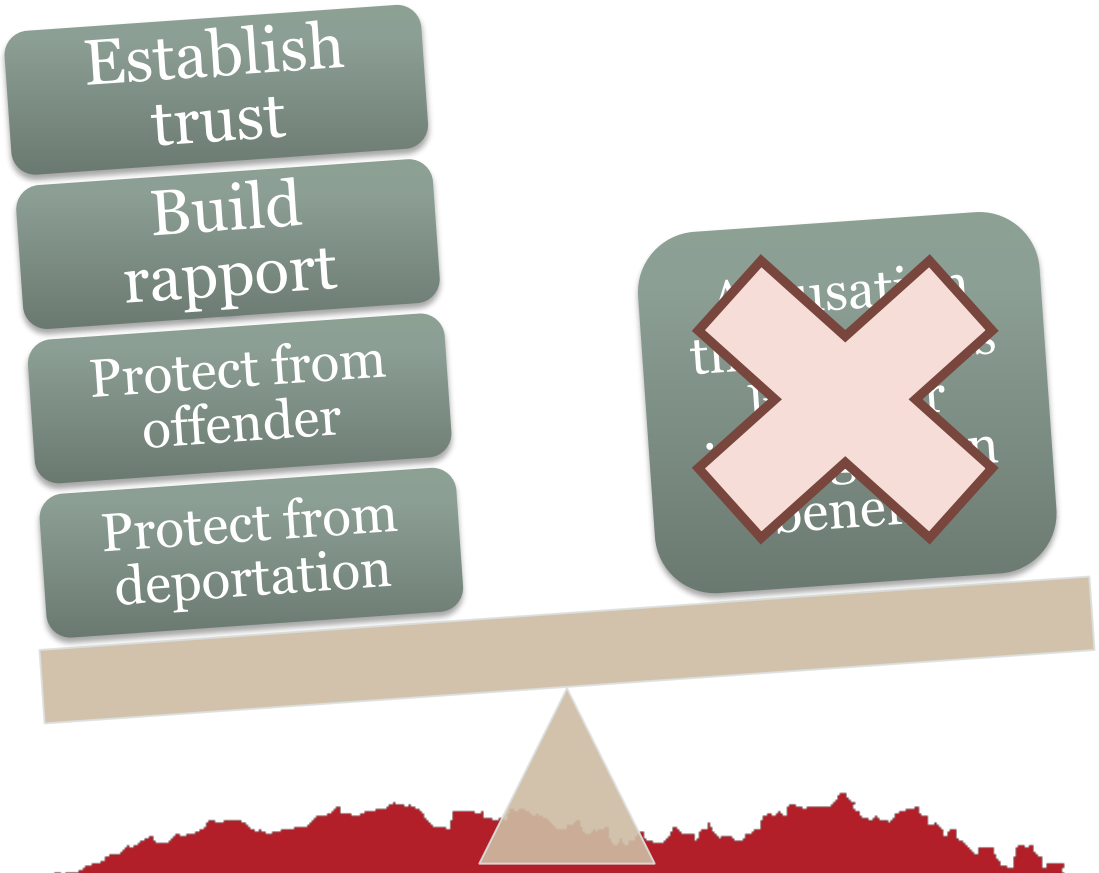

Does your agency have a U-Visa policy/procedure ?

Large Group Discussion

- City of X, Law Enforcement Certification Protocol
- Are these true or false?
  - Identify any problems with the protocol
    - Note provision numbers
  - How could the protocol be improved?
  - What is missing?
  - **MODEL POLICY in USB**

DHS Resources

U.S. Immigration and Customs Enforcement

Victim Assistance Specialist

SAC Atlanta
Alia El-Sawi
Phone: 404-346-2879
alia.el-sawi@ice.dhs.gov

Resources

- **Technical Assistance**
  - Call: 202.274.4457
  - Email: niwap@wcl.american.edu
- **Materials on U visa and Immigrant Victims Legal Rights**
  - Visit http://niwaplibrary.wcl.american.edu
  - U Visa Certification Toolkit
  - DHS Answers to Law Enforcement Reasons for Not Certifying
  - USCIS Q & A on U Visa Certification
  - Roll call training videos
  - All available at: http://niwap.org/lawenforcement

Evaluations

- Evaluations are in your training packet
- Certificates

Thank You!