U Visa: Prosecutors Best Practices For Serving Immigrant Domestic and Sexual Violence Victims

Battered Women's Justice Project
ICJR Orientation
Orlando, Florida
January 30, 2019

NIWAP
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.

Learning Objectives

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

- Understand the wide range of topics and various ways NIWAP can support your work with immigrant survivors of domestic and sexual violence
- Hold offenders more accountable by using the U Visa certification as a crime fighting tool
- Enhance victim/community safety using the U and T visa certification programs
- Implement pretrial & trial strategies to combat common defenses in cases involving immigrant victims of domestic and sexual violence

Types of Technical Assistance

- Training in local jurisdictions
- National in-person and webinar trainings
  - Scholarships for prosecutors for Aug 2019
- Roundtables prosecutors/officers only
- Training materials and practice tools
- Model U/T visa certification policies
- 24/7 web library and training videos
- Prosecutor to Prosecutor TA on cases/policies
- Directory of service providers

USB Drive Materials

- U Visa Toolkit For Law Enforcement Agencies And Prosecutors
- DHS: U and T Visa Resource Guide
- DHS memos and policies
- Prosecutor tools
  - Discovery
  - Pretrial & trial strategies in immigrant victim cases
- Bluecard Tool: Screening Victims for Immigration Protections

How Best Practices in Domestic Violence Investigations Involving Immigrant Victims Promote Officer Safety

NIWAP

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

Qualifying Criminal Activity

75% of cases filed are domestic and sexual violence

- 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

U Visa Basics

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

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 is 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?

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
- When victims' refusal to cooperate was not unreasonable based on totality of circumstances still U visa eligible

Certification

- Prosecutors can sign certification forms
  - Must be designee
- Any certifying agency can certify at any time they have probable cause
- Certify based on information the prosecutor/police have
  - Do not need and should not seek additional information or materials
- Certifying prosecutor should consider not being the trial prosecutor

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

Cross-Examination

- Applying for or receiving an immigration benefit goes to the witness' credibility, bias, or motive to lie – they can be asked about it.
  - Prepare victim and witness
  - Consider making immigration related abuse part of your case in chief
  - Take the "sting" out of the questions by addressing immigration during your case in chief
  - 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 offer rebuttal evidence in the form of "Prior Consistent Statements"
- Door to this testimony call be opened at any time, but is likely done during cross-examination
- Be prepared with legal brief and case law

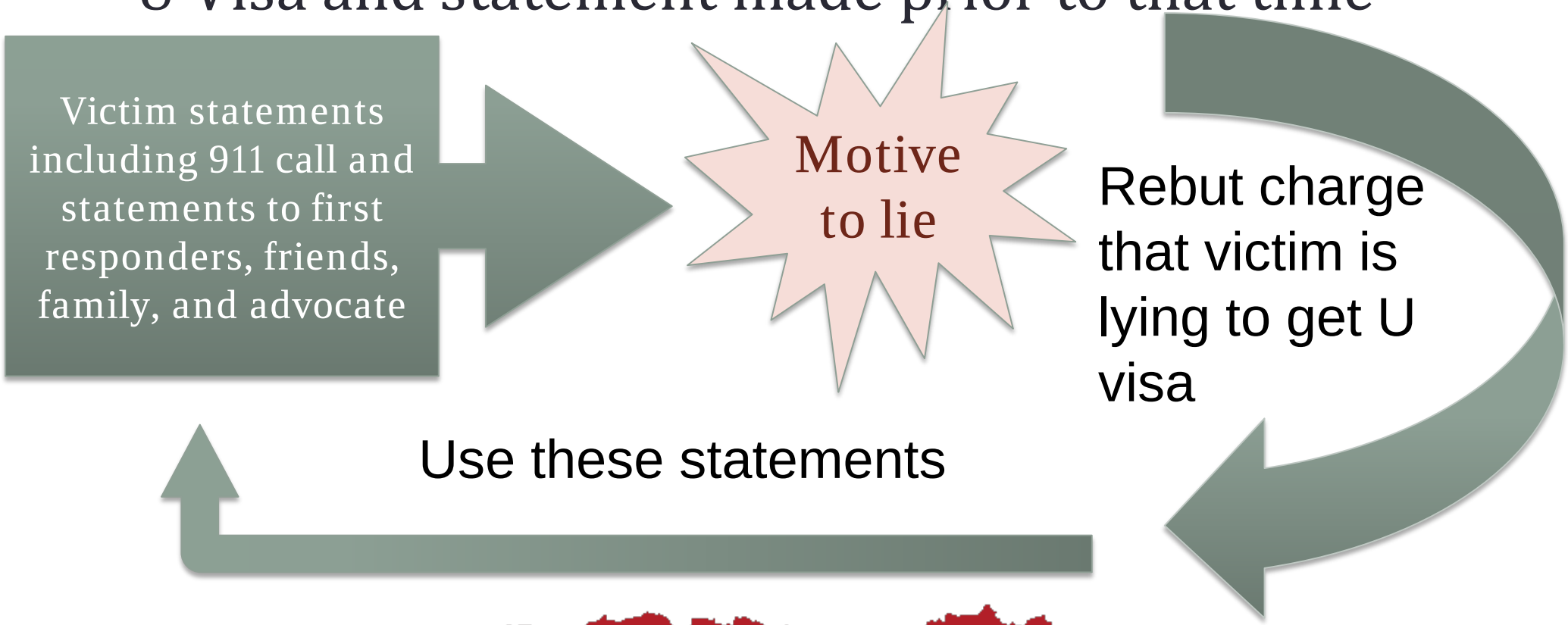
Prior Consistent Statements

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



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

Questions?