

Editor's Introduction

This special double issue reflects the many combined years of experience and the deep wisdom gained by its authors, who have served as legal advocates for clients whose cases span family law and immigration law. It is, unfortunately, often the case that even the best-prepared domestic violence attorney is relatively unschooled in immigration matters and unprepared to handle the intricate legal challenges posed by their undocumented clients' immigration status. This is especially the case when the client has a vindictive ex-partner who seeks to harm her through the manipulation of immigration authorities and legal processes. "Winning Custody Cases for Immigrant Survivors" thus provides a potentially life-saving tool upon which advocates can rely in order to best position their clients to achieve physical and emotional safety as well as ensure the rights of the women and their children to legally remain in this country.

This issue of *Family and Intimate Partner Violence Quarterly* is a special one, and in more ways than one. As opposed to the usual collection of articles covering a diverse range of topics related to intimate partner violence, FIPVQ Volume 9, Numbers 2 and 3, consists of an extended treatment of a single topic whose theme is aptly reflected by its title: *Winning Custody Cases for Immigrant Survivors: The Clash of Laws, Cultures, Custody and Parental Rights*. In this masterpiece, authors Veronica T. Thronson, Carole Angel, Soraya Fata, Rocio Molina, Benish Anver, Kalli Wells, and Leslye Orloff have composed the equivalent of a "best practices" guidebook for legal personnel and DV advocates who are doing their best to serve and protect what is perhaps the most vulnerable population of survivors in our country: undocumented immigrant women. Many of these women have courageously fled their native countries to escape domestically violent relationships, often with children in tow, arriving in the U.S. with strong determination but possessing very few resources, especially those required to help them establish their right to remain in this country. Many, of course, speak little or no English; the luckier ones are able to rely, on the language ability and financial resources, however meager, of family members or acquaintances who arrived

here before they did. Some immigrant females have married American men with the hope of establishing a more stable life here, only to be confronted with the reality that their protector is actually a perpetrator. These women, married to abusive husbands who are U.S. citizens, live in constant fear of their partners' threats to reveal their undocumented immigration status to authorities, which effectively keeps them captive and constantly living on the threshold of disaster.

This rigorously researched, finely detailed guide is especially timely given what is taking place in the current political arena. Ever since the inauguration of Donald Trump in January, 2017, newscasts have been preoccupied with his controversial executive orders banning refugees from entering the U.S. for 120 days and barring immigrants from Iran, Iraq, Syria, Sudan, Libya, Yemen and Somalia, predominantly Muslim countries, for three months. According to the executive branch, the ban was issued in the interests of national security, as a means of preventing the mass migration of Middle Eastern immigrants, as has occurred in some European nations, into the U.S. According to many who promote immigrant rights in particular and social justice in general, the ban is racist, anti-Muslim, and illegal. In any event, the executive orders have sent waves of fear and dread into immigrants now living in the U.S. who came from countries all over the globe, and not only from Middle Eastern nations. These recent events have rendered the information provided in this issue all the more pertinent, timely, and potentially life-saving. It is designed to bring domestic violence advocates and attorneys up to speed on the most recent knowledge and best strategies for helping to bring about optimal outcomes for their immigrant clients, especially those who are both victimized by domestic violence and subject to the constant fear of losing contact with their children due to their undocumented immigration status.

The issue starts out with a case study in a section aptly entitled *Maria L's Story*. This beginning segment provides a detailed narrative of the case of a Guatemalan mother who, due primarily to her lack of understanding of the English language, ended up being charged with medical neglect of her child by uncomprehending DHHS workers. While her case was unfolding, Maria L. was taken into custody by immigration officials and deported. After Maria lost her parental rights termination case, the trial court's decision was overturned by the Nebraska Supreme Court. The successful appeal was made possible by the help of legal advocates who were schooled in the legal knowledge and strategies described later in this article. As the authors put it, Maria L.'s legal situation was an exceedingly complex one, involving "immigration, custody, child abuse and neglect, language access, civil rights and constitutional law." The case exemplifies how very crucial it is for advocates to understand the legal intricacies of these kinds of cases and how difficult it can be to gather all of the information necessary to pursue these types of actions. It is, after all, the rare attorney who possesses specialized knowledge and experience spanning all of the multiple realms of the law that intersected in Maria's case.

In the second article, *Serving Limited English Proficient Immigrant Victims*, we learn that Limited English Proficient (LEP) individuals have more rights under U.S. law than most people realize. This section advises readers on the nature of those rights and the best way to access them. Apparently, those prosecuting Maria L., as discussed in the first section, did not realize that federal law mandates the provision of “meaningful language access” for LEP individuals who are served by federal, state, or local agencies. This means providing an interpreter who is competent in the language of the LEP person. Using a Spanish interpreter with an individual who, like Maria, spoke an entirely different language (in her case, an indigenous language called Quiche) clearly did not qualify as meaningful language access, and of course, did not serve her advocacy needs. The authors proceed to instruct readers in how to interpret and apply the prescription for meaningful access in ways that will optimize outcomes for LEP clients.

The third article is entitled *Identifying the Forms of Immigration Relief Available for Battered Immigrant Victims*. Here, advocates will learn about the many forms of relief available to immigrant battered women through the provisions of the Violence Against Women Act (VAWA) and other federal laws and mandates. This is absolutely crucial information for attorneys helping immigrant clients, as the application of one or more of these provisions can spell the difference between a client’s getting deported versus being allowed to remain in the U.S.—in many cases, truly the difference between life or death.

In the fourth article, *Preparing Immigrant Clients for Encounters with DHS*, advocates encounter a range of strategies to help reduce the risk that their clients with VAWA Confidentiality protections will be apprehended, held, and deported by immigration officials. This is followed by *Seeking Protection Orders for Immigrant Victims*, which discusses the desirability of seeking out and obtaining protection orders for immigrant victims of domestic violence. Included in this section are recommendations about language and provisions that ought to be included in the protective order application and strategies for counteracting perpetrators’ attempts to defeat their victims’ petitions for legal protection.

The next section, *Utilizing VAWA Confidentiality Protections in Family Court Proceedings*, discusses the application of three different types of VAWA Confidentiality and Victim Safety Provisions to immigrant clients’ family court cases. This part of the article ought to be particularly valuable to legal advocates who do not regularly handle family court matters that intersect with federal immigration law and VAWA protections.

The next section, *Obtaining Custody of Children for Battered Immigrants*, possibly contains the most important information of all, at least as far as the values and priorities of most female immigrant victims are concerned. The thesis of this section is best summarized by the authors’ assertion: “The non-abusive parent’s immigration status should not be used to justify awarding custody to an abusive parent, betraying the children’s best interests.” The article

then proceeds to outline legal strategies designed to circumvent the kind of unjust child custody outcomes that many abusers strive to bring about.

Immigrant victims of domestic violence often find themselves in a dire economic situation, especially as they are often reliant upon their abuser for financial sustenance. The next portion of the article, *Providing Economic Relief for Immigrant Victims: Child Support and Spousal Support*, describes remedies available to help ameliorate victims' vulnerability to their abusers' financial machinations. Some of these remedies are designed to assist immigrant victims who are in dire need of financial support from their abuser, but others are designed to help victims in the unfortunate position of having a child support obligation levied against them by the family court, due to a successful custody petition brought by their abusers.

The next segment, *Protecting Parental Rights When the Immigrant Parent Is Detained or Deported*, advises advocates about the best possible strategies to be used in worst-case scenarios, such as when an immigrant mother is separated from her children due to deportation proceedings. Fortunately, under the U.S. Constitution, as pointed out by the authors, "Immigrant parents, both documented and undocumented, including those in detention, in deportation proceedings, and those deported have a constitutional right to raise, nurture and determine the custody of their children." This part of the article offer instructions to advocates on actions they must take, deliberately and promptly, to ensure that their immigrant clients' right to nurture and care for their children is preserved.

We then come to the final set of recommendations in a section entitled *Representing Undocumented Children Who Have Been Abused, Neglected, or Abandoned (Special Immigrant Juvenile Status)*. As it turns out, abused, neglected, or abandoned children of undocumented immigrants have the possibly of attaining lawful permanent residency—the so called "green card" status—through an application for Special Immigrant Juvenile Status (SIJS). Given that being a minor child, having undocumented status, and suffering from neglect or abuse places an individual in a triply vulnerable position, it greatly behooves those who advocate for such children to take advantage of the instructions in this final section.

All members of the domestic violence advocacy, along with the immigrant clients whom they serve, owe a debt of deep gratitude to the authors of the material spanning the length of this issue of *Family and Intimate Partner Violence Quarterly*. As Editor, I wish to offer the author my deepest thanks and gratitude for providing us with this masterpiece.

—Mo Therese Hannah, Ph.D.
Editor

Winning Custody Cases for Immigrant Survivors: The Clash of Laws, Cultures, Custody and Parental Rights

By Veronica T. Thronson, Carole Angel, Soraya Fata, Rocio Molina, Benish Anver, Kalli Wells and Leslye E. Orloff¹

INTRODUCTION

Immigrant victims of domestic violence, sexual assault and human trafficking face an array of challenges in the family law system. Abusers of immigrant women use immigration-related abuse² as a powerful form of emotional abuse in order to coercively control and trap immigrant victims of domestic

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² Historically, immigration laws have made lawful permanent residents and citizens responsible for filing immigration papers on behalf of their spouses and children. In non-abusive relationships, the citizen or lawful permanent resident spouse would file immigration papers, either before or shortly after the marriage, requesting that their spouse be granted lawful permanent residence. Research has found a strong connection between power and control over immigration status and physical and sexual abuse. Dutton, Mary Ann et al., *Characteristics of Help-Seeking*

violence and their children in relationships with abusers.³ Evidence of immigration-related abuse might include: threats of deportation, threats to turn her in to the Department of Homeland Security (DHS) if she tells anyone about his abuse, refusal to file or threats to withdraw immigration papers filed for the victim or her children, or threats to raise her immigration status in custody, protection order or divorce cases.⁴

When attorneys represent an immigrant client and that client is a victim of domestic violence, sexual assault, human trafficking or other violent crime, approaching cases in a manner that enhances protections for particularly vulnerable victims requires knowledge of legal and social services options that were specifically developed to help immigrant crime victims. This special volume provides an overview of family law options for immigrants and immigrant victims, with a particular focus on how to address and respond

Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications, 7 Geo. J. on Poverty L. & Pol'y 245, 293 (2000), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf>; Raj, Anita & Silverman, Jay, *Immigrant South Asian Women at Greater Risk for Injury From Intimate Partner Violence*, 93 Am. J. Pub. Health 435-437 (2003). When a U.S. citizen marries a foreign born spouse, the probability of domestic abuse in that relationship climbs to almost three times the national average. Hass, Giselle Aguilar, et al., *Battered Immigrants and U.S. Citizen Spouses*, at 3 (April 24, 2006), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/copy_of_BB_RSRCH_ImmVictims_Battered_Imm.pdf. Congress has recognized this clear connection between control over immigration status and domestic violence. "[T]he Battered Immigrant Women Protection Act of 2000 . . . Title V continues the work of the Violence Against Women Act of 1994 ("VAWA") in removing obstacles inadvertently interposed by our immigration laws that may hinder or prevent battered immigrants from fleeing domestic violence safely and prosecuting their abusers by allowing an abusive citizen or lawful permanent resident spouse to blackmail the abused spouse through threats related to the abused spouse's immigration status. . . . VAWA 2000 addresses the residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or have arisen since as a result of 1996 changes to immigration law." Violence Against Women Act of 2000 Section by Section Summary, 146 Cong. Rec., S10,195 (daily ed. Oct. 11, 2000).

³ Dutton, Mary Ann & Goodman, Lisa, *Coercion in Intimate Partner Violence: Toward a New Conceptualization Sex Roles*, Vol. 52, Nos. 11/12, 743 June 2005, available at: <http://www.mendeley.com/research/coercion-in-intimate-partner-violence-toward-a-new-conceptualization>; Immigrant survivors of sexual assault, particularly sexual assault perpetrated in the workplace, experience similar forms of entrapment as undocumented workers or workers who have work visas that are tied to the particular employer who is perpetrating acts of sexual violence against the victim. Sexual assault victims can end up in family court if they became pregnant as a result of the sexual assault or because the sexual assault victimization led or contributed to the break-up of the victim's relationship with her children's father. See generally, Orloff, Ed. *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* (2013), available at: <http://niwaplibrary.wcl.american.edu/reference/manuals/sexual-assault> (hereinafter *Empowering Survivors*).

⁴ Orloff, Leslye E. & Kaguyutan, Janice V., *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. Gender Soc. Pol'y & L. 95, 98-99 (2002). available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/vawa-self-petition-and-cancellation/research-reports-and-data/VAWA_Offering_Helping_Hand_History.pdf.

effectively when immigration status, language access and other issues intersect in family court cases involving immigrants.

We start with an example of a case that made its way over the course of several years to the Nebraska Supreme Court, which issued a unanimous decision returning custody of a child to a Guatemalan immigrant mother whose parental rights had been terminated. With the assistance of DHS officials, the mother was reunited with her children and allowed to remain in the United States on humanitarian parole to ease her children's adjustment to reunification with their mother. Over the past few years immigration policies have changed significantly in ways that can either harm or help immigrant parents, particularly those who are victims of domestic violence or sexual assault. However, an immigrant victim's ability to attain the protections offered under today's immigration laws depends largely on the victim's ability to access legal assistance and advocacy services from attorneys and advocates who are knowledgeable about immigrant victims legal rights.⁵ This volume is designed to help attorneys develop case plans that position immigrant clients to best take advantage of the immigration and family law protections available to help battered immigrants. Filing applications for immigration benefits early in the case offers victims protection from deportation, access to health care and some public benefits, and sets the victim on a path to obtaining work authorization.

This volume highlights key issues that arise for attorneys representing battered immigrants in custody cases. Our goal is to provide an overview and to direct attorneys to resources that provide additional information, evidence checklists, legal research and tools when such issues arise for their clients. Attorneys representing immigrant victims in family court cases can and should work with victim advocates to collect information and help immigrant survivors file for immigration relief as soon as possible. We provide tools and resources to help screen clients for immigration relief eligibility and to locate immigration attorneys in your state who have expertise working with immigrant survivors.⁶

In the vast majority of cases, a domestic violence or family attorney can assist her client in filing a Violence Against Women Act (VAWA) self-petition or U visa immigration case using the tools and materials referenced in this volume. Experts on immigration law and immigrant victims in your state and national technical assistance providers can support attorneys in this representation. When a client's immigration case is complex, the attorney should help the client find and collaborate with an experienced immigration attorney

⁵ Ammar, Nawal, Orloff, Leslye, Dutton, Mary Ann, and Hass, Giselle Aguilar, "Battered Immigrant Women in the United States and Protection Orders: an Exploratory Research" 37 *Criminal Justice Review* 337 (2017) at 14.

⁶ To locate an immigration expert in your area with experience working with immigrant victims go to the National Directory of Programs with Experience Serving Immigrant Victims, available at: <http://niwaplibrary.wcl.american.edu/reference/service-providers-directory>.

who specializes in representing immigrant victims. Complex immigration cases include cases in which the client has a criminal history, is involved in a removal proceeding, or has an outstanding removal or deportation order. Coordination of case strategy between the immigration and family attorney is essential to promoting victim safety, particularly when she is involved in custody litigation.

Maria L.'s Story¹

Maria L. is an undocumented Guatemalan native who lived in Nebraska. Her native language was Quiche, an indigenous language of Guatemala. Maria had four children. Two of her children lived with her in the United States and her other two children lived back home in Guatemala. Her youngest, Angelica, was born premature in 2004 with an array of problems, including respiratory issues. Maria sought hospital assistance when Angelica was one month old and voluntarily signed up for Healthy Starts, a Nebraska State Department of Health and Human Services (DHHS) program, in order to receive guidance on how to best care for her daughter. In 2005, Maria took Angelica to the hospital for emergency treatment related to her daughter's respiratory problems. The hospital treated Angelica and, following the hospital visit, she was doing better. When Angelica was discharged, hospital employees told Maria L. something that she did not understand. The hospital employees never determined Maria's native language and only communicated with her in English and possibly some Spanish. Maria was limited English proficient and did not speak or understand much Spanish.

Maria was told to bring the infant back for a follow-up visit, but due to the language barrier missed the appointment. Maria understood that she should return to the hospital if Angelica did not get better. Since Angelica recovered by following the treatment she was prescribed at the hospital, Maria did not return for the follow-up visit. Hospital employees never communicated to Maria that she needed to return to the hospital nor did they communicate to her the consequences of not returning to the hospital with Angelica for a checkup. When she failed to bring Angelica back to the hospital for the follow-up visit, a Healthy Starts employee was sent to check on Angelica and called the State DHHS to report abuse and neglect based upon the missed follow-up doctor's appointment. The State DHHS worker came to Maria's home accompanied by another uniformed official whom Maria believed to be an immigration officer. She was terrified and when asked who she was, Maria told them she was the babysitter. After determining that she was the children's

¹ In re Interest of Angelica L., 277 Neb. 984 (2009).

mother and not the babysitter, the officers arrested Maria for “obstructing a government operation.” The abuse and neglect report filed that day led to the opening of a child abuse and neglect case that resulted in Maria’s two youngest children who were with Maria in the United States, Angelica and Daniel, being taken into custody by the State. The children were taken to the hospital and then released into foster care.

Shortly after Maria’s arrest, she was taken into custody by United States immigration officials and was placed in detention to await removal proceedings. A notice of a hearing on the neglect petition, written in both English and Spanish, was given to Maria while she was in immigration detention. At the hearing, Maria was not provided a Quiche interpreter, only one who spoke Spanish, and she pled guilty to neglect in order to avoid a prolonged trial and in an attempt to get her children back faster.

A reunification the case plan was put in place. Shortly after the neglect trial, Maria was deported. A case worker called Maria in Guatemala and read her the case plan in Spanish over the phone. She never received a written copy of the case plan or an oral interpretation of the plan in her native language. During her time in detention and once she was deported, she was unable to comply with the reunification plan, which required regular calls and physical visitation. With the help of a Guatemalan priest, Maria got information about what the case plan required of her and with his help did what she could to comply while she was in Guatemala. Based on Maria’s failure to strictly comply with the case plan, the State filed a motion to terminate parental rights. Maria received a humanitarian visa from the U.S. Department of Homeland Security to come to the termination of parental rights hearing, but she lost her case.

The trial court determined that Maria was an unfit parent, stating “Maria’s fear of deportation serves as no excuse for her failure to provide the minimum level of health care to her children.” In response to Maria being unable to comply with the case plan, the court stated that “being in the status of an undocumented immigrant is, no doubt, fraught with peril and this would appear to be an example of that fact.” The court found that it was in the best interests of the children to stay with the foster parents. The court discussed the extent to which Daniel and Angelica would receive better opportunities in the United States as compared to Guatemala.

Maria’s termination of parental rights case was appealed to the Nebraska Supreme Court, which issued a unanimous decision overturning the trial court’s rulings. The appeal raised several legal issues, including an insufficient weight given to the fundamental importance of the parent-child bond and a violation of Maria’s due process rights. As discussed later in this volume, termination of parental rights may occur only where there is clear and convincing evidence that the parent is unfit and when there are no clearly demonstrated efforts of reunification. Best interests of the children should not be based solely on one environment being ‘superior’ over the other. Further, Maria’s due process right to sufficient notice was violated when DHHS failed to adequately communicate the case plan in the mother’s native language. DHHS, the courts,

and the hospital in this case all failed to provide Maria meaningful language access as required under Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, and national origin.

The Nebraska Supreme Court stated that the trial court must find by clear and convincing evidence that the parent is unfit. Further, the Court stated that it is Maria's constitutional right to raise her children in her own culture and with the children's older siblings in Guatemala. The Nebraska Supreme Court articulated a presumption that it is in the best interests of the child to be in the care and custody of a fit parent. The Court stated that there is an

“[o]verriding presumption that the relationship between parent and child is constitutionally protected and that the best interests of a child are served by reuniting the child with his or her parent. This presumption is overcome only when the parent has been proven unfit. The right applies to all immigrant parents, without regard to their immigration status, whether or not the parent is deported from the United States.”²

The Court found that while Maria's lack of medical judgment was concerning, it was not sufficient to warrant the termination of parental rights. “The law does not require the perfection of a parent.” The Court further noted that Maria attempted to provide her daughter with medical care on several occasions despite her overwhelming fear of being deported.

The Nebraska Supreme Court importantly ruled that neither immigration status nor unequal country status should be considered under the best interest standard.

“Whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests. We reiterate that the best interest of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another. The fact that the State considers certain adoptive parents, in this case the foster parents, better or this environment better, does not overcome the commanding presumption that reuniting the children with Maria is in their best interest – no matter what country she lives in. As we have stated, this court has never deprived a parent of the custody of a child merely because of financial or other grounds a stranger might better provide.”³

This case is illustrative of many family law cases involving immigrants. The cases are often complex, raise multiple legal issues, and involve an intersection of several distinct areas of law. Maria's case traversed areas of the law including immigration, custody, child abuse and neglect, language access, civil rights and constitutional law. When representing immigrants in family court, it is important to understand the many different areas of the law that come into play in order to best serve your client. Maria was an undocumented immigrant mother; her experiences would have been even more complex and potentially dangerous for Maria and her children had she been a victim of domestic abuse.

² In re Interest of Angelica L., 277 Neb. 984 (2009).

³ *Id.*

Serving Limited English Proficient Immigrant Victims

The number of Limited English Proficient (LEP)¹ individuals who participate in court proceedings has sharply increased in recent decades. The U.S. Census Bureau American Community Survey estimates that over 24 million individuals in the United States speak English “less than very well” and would be considered LEP.² Currently, LEP individuals account for over eight percent of the U.S. population.³ As Maria L.’s case illustrates, failure of our justice, social services, and health care systems can have devastating effects on the families of LEP individuals. Under federal law all federal, state and local programs that receive any federal funds are required to provide meaningful language access for LEP individuals whom the agency serves, protects, or encounters. The goal of these federal mandates is to enhance the ability of the courts, police, prosecutors, child and adult protective services agencies, hospitals, and government funded programs to provide language access through the use of qualified interpreters and translation of vital documents.

CONSEQUENCES OF FAILING TO PROVIDE LANGUAGE SERVICES

Often LEP victims do not report domestic violence or sexual assault due to language barriers. Unaware that interpretation services exist, LEP victims assume that their only options are to either hire an interpreter at their own cost

¹ Individuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English can be Limited English Proficient, or “LEP.” These individuals may be entitled to language assistance with respect to a particular type of service, benefit, or encounter. See Limited English Proficiency, *Frequently Asked Questions*, available at: <http://www.lep.gov/faqs/faqs.html> (last visited April 15, 2014).

² U.S. Census Bureau, American Community Survey, *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for the United States: 2006-2010*, <http://go.usa.gov/nZ1> (last visited April 15, 2014); Pandya, Chhandasi, McHugh, Margie & Batalova, Jeanne, LEP Data Brief: Limited English Proficient Individuals in the United States: Number, Share, Growth, and Linguistic Diversity. Migration Policy Institute National Center on Immigration Integration Policy (2011), available at: <http://www.migrationinformation.org/integration/LEPatabrief.pdf>.

³ *Id.*

or to request assistance from family or friends.⁴ The consequences of failing to provide language access for LEP parents and crime victims can be severe.

- **Health Care:** Improper diagnosis and treatment, failure to communicate the need for follow up visits, unwarranted reports to child protective services, incorrect information in hospital reports that could influence family, criminal and immigration cases.
- **Child and Adult Protective Services:** Due to incorrect information in the case file, children may be wrongly taken into state custody. LEP parents may fail to receive meaningful notice of hearings and are at a disadvantage in defending themselves in child abuse and neglect cases. Agencies may develop reunification plans that the LEP parents do not understand and cannot follow; ultimately, their parental rights are unjustly terminated.
- **Police and Prosecutor:** Information reported at the crime scene can be misunderstood; due to language barriers police fail to hear from the immigrant victim and may only interview perpetrators at the crime scene;⁵ arrest of the victim; failure to arrest the perpetrator;⁶ incorrectly interpreted information may be written in a police report, which undermines the credibility of the victim and can result in the perpetrator gaining dismissal or not being prosecuted or convicted in a criminal case due to “conflicts” between information in the police report and the testimony at trial.⁷
- **Courts:** Lack of access for LEP individuals to protection order, custody and child support proceedings, lose children in child abuse, neglect and termination of parental rights proceedings.

LANGUAGE SERVICES AVAILABLE TO LEP PERSONS

Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d *et seq.* (Title VI), and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3 789d(c) (Safe Streets Act) prohibit national origin

⁴ See National Immigrant Rights and Public Interest Legal Center, *Serving Limited English Proficient Victims of Sexual Assault and Domestic Violence: A Survey of Issues 17* (2006). The language access obligations of courts are contained in: Perez, Thomas E., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Chief Justice/State Court Administrator (August 16, 2010) (on file with author), available at http://niwaplibrary.wcl.american.edu/reference/additional-materials/language-access/government-documents/final_courts_ltr_081610.pdf.

⁵ See Szabo, Krisztina E., Stauffer, David, Anver, Benish, and Orloff, Leslye E., “Early Access to Work Authorization For VAWA Self-Petitioners and U-Visa Applicants,” 25 (February 12, 2014) available at http://niwaplibrary.wcl.american.edu/pubs/final_reporton-early-access-toead_02-12/.

⁶ Orloff, Leslye E., Dutton, Mary Ann, Hass, Giselle, Ammar, Nawal, “Battered Immigrants Willingness to Call for Help and Police Response” 13 *UCLA Women’s L. J.* 43, 63 (2003).

⁷ Orloff, Leslye E., LaRiviere, Michael, Ivie, Stacey, “Why Using an Interpreter is Beneficial to Law Enforcement” (2017). Available at <http://niwaplibrary.wcl.american.edu/pubs/law-enforcement-benefits-of-qualified-interpreters/>.

discrimination by recipients of federal financial assistance. Title VI and Safe Streets Act statutes, executive orders and regulations prohibit all recipients of federal funding from administering programs in a manner that has the effect of subjecting individuals to discrimination based on their national origin.⁸ Executive Order 13166 imposes a legal obligation on courts, police, prosecutors, adult and child protective services agencies, welfare agencies, and other programs receiving federal funding to ensure meaningful access for LEP persons under the national origin nondiscrimination provisions of Title VI of the Civil Rights Act of 1964, and implementing regulations.⁹ In 2002, the Department of Justice issued a final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons¹⁰ (DOJ Guidance). This guidance requires that courts, police, prosecutors and other federally funded programs:

- Issue language access policies;
- Ensure their programs provide meaningful access to LEP persons;
- Demonstrate an application of consistent language access standard;
- Bear the burden of the costs of language access, not the person seeking services; and
- Inform persons seeking services of their right to language access assistance.

Attorneys should be aware of the four factor analysis used to determine whether recipients of federal funding have taken “reasonable steps” to ensure meaningful access either through interpretation services or translated vital documents or both:

1. Number or proportion of LEP persons in the eligible service population: Programs receiving any federal funding or federal assistance, including federal funds distributed by the states that serve or should potentially be serving LEP persons are obligated to have language access policies under Title VI.¹¹ Recipients should take into consideration the “number or proportion of LEP persons eligible to be served or *likely to be encountered* by the

⁸ See 28 C.F.R. §§ 42.1 04(b)(2), 42.203(e); Exec. Order No. 13166 (August 11, 2000) available at: <http://www.justice.gov/crt/about/cor/Pubs/eolep.php>.

⁹ See Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000).

¹⁰ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002).

¹¹ See generally, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002); See generally, Orloff, Leslye, Baran, Amanda, and Cohen, Martha, *Ensuring Language Access to Immigrant Victims of Sexual Assault*, in Empowering Survivors (2013), available at: <http://niwaplibrary.wcl.american.edu/language-access/training-materials-tools-and-best-practices/language-access-info-for-service-providers/2-LEP-MANUAL-ES.pdf>.

program.”¹² Programs serving victims that receive any federal funding or assistance should use U.S. Census data to determine the proportion of certain languages spoken in their service area. Agencies can then take reasonable steps to ensure that they have access to interpreters internally or can contract outside interpretation services for languages other than English that are spoken in their service areas to ensure those groups are not excluded from accessing the agency’s services.¹³ Programs should also develop and implement plans to provide language access to identify LEP populations in their service area who need translation of key documents to meet the needs of those communities.¹⁴ DOJ Guidance to Recipients states that grantees are in compliance with regard to translation requirements when they translate vital or critical documents¹⁵ “in all languages that are spoken by the lesser of 1,000 or five percent of members of the population of persons ‘eligible to be served or likely to be encountered or affected’ by the grantees’ activities.”¹⁶

2. Frequency with which LEP individuals come in contact with the program: What constitutes “reasonable steps” that an organization must take differs depending on how frequently LEP persons access the organization’s services. For example, reasonable steps for an organization that serves one LEP person on a single instance will be different than reasonable steps for an organization that is based in a community where many LEP persons will be accessing the programs and services daily.

¹² Anver, Benish, Orloff, Leslye, Kolic, Jelena, and Stauffer, David, Translation Requirements for Vital Documents, Intake and Notice of LEP Assistance for DOJ and HHS Grantees Serving Immigrant Crime Victims at 3 (March 9, 2014), available at: <http://niwaplibrary.wcl.american.edu/language-access/language-identification-tools-1/vital-documents-information-and-determining-translation-needs-for-service-providers/Translation%20for%20Vital%20Documents%20LEP%20Final.pdf>.

¹³ Exec. Order No. 13,166, 65 Fed. Reg. 50121, 50124 (Aug. 16, 2000)(“[A] factor in determining the reasonableness of a recipient’s efforts is the number or proportion of people who will be excluded from the benefits or services absent efforts to remove language barriers.”)

¹⁴ *Id.* at 5 & 7-34 (explaining the DOJ “safe harbor” provisions regarding translation of vital documents and how they assist grantees comply with Title VI obligations to translate “vital documents” as well as a step by step guide on how to determine languages spoken in grantees’ service areas with U.S. Census data. The “safe harbor” provisions apply to translation requirements for grantees and not interpretation services. This publication also includes a state by state chart of languages spoken by more 1,000 residents in each state, other than English).

¹⁵ The determination of which documents are considered “vital” for the purposes of translation is generally dependent upon several considerations, including “importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner.” *Id.* at 3-4.

¹⁶ *Id.* at 5. It should be noted that “when there are fewer than 50 persons in the language group that constitutes five percent of the eligible population, grantees may, instead of translating vital documents, provide written notice in that language of the group members’ right to receive competent oral interpretation free of charge.

3. Importance of the service provided by the program: When programs offer services for victims of domestic violence, sexual assault and immigrant parents at risk of losing custody of their children, access to services can save lives, keep families together and enhance safety. This is the section of the four factor test that in cases involving LEP victims of domestic violence, sexual assault, stalking, dating violence, human trafficking and other crimes predominates the four factor analysis because of the health and safety issues at stake if LEP victims and their children are denied services. Delays in access to these services can be devastating for LEP parents and their children. LEP victims and parents need language access at all stages of a protection order, custody or family law case affecting their rights including intake, interviews prior to delivering services, during case preparation, and at all hearings or trials. Attorneys working with immigrant and LEP victims should have a plan for providing translated documents to their clients and should assess the impact of their written documents on an LEP person's legal rights, health, and safety when determining which documents require translation.¹⁷ This plan should also include a method for identifying interpreters for LEP victims who are aware of and comfortable fully and accurately interpreting sensitive issues related to domestic violence and sexual assault and how to appropriately address the issues in a culturally sensitive manner.¹⁸
4. Resources available to the program: Attorneys should consider the most cost-effective methods for providing language access. These could include identifying and training interpreters in various languages who assist their office on an as needed on a fee for service basis, securing a contract with a language line for languages not covered by interpreters recruited, and coordinating with other local groups to standardize certain documents that require translation and sharing resources to maintain these documents.¹⁹ Similar methods can be used to maximize the resources needed for interpretation, such as developing a pool of qualified interpreters that an agency or grantee can contract to work on cases.²⁰ Use of technology, Skype

¹⁷ *Id.* at 3-4 (listing examples of critical documents that may require translation so that the program is in compliance with Title VI and are ensuring that they are providing meaningful access to their services to the local LEP population).

¹⁸ Orloff, Leslye, Baran, Amanda, and Cohen, Martha, *Ensuring Language Access to Immigrant Victims of Sexual Assault*, in *Empowering Survivors* 10-11 (2013), available at: <http://niwaplibrary.wcl.american.edu/language-access/training-materials-tools-and-best-practices/language-access-info-for-service-providers/2-LEP-MANUAL-ES.pdf>.

¹⁹ *Id.* at 6 (outlining strategies to help programs efficiently and effectively comply with Title VI and DOJ Safe Harbor provisions).

²⁰ Orloff, Leslye, Baran, Amanda, and Cohen, Martha, *Ensuring Language Access to Immigrant Victims of Sexual Assault*, in *Empowering Survivors* 11 (2013), available at: <http://niwaplibrary.wcl.american.edu/language-access/training-materials-tools-and-best-practices/language-access-info-for-service-providers/2-LEP-MANUAL-ES.pdf>.

and teleconferences can be used to facilitate communication with clients using trained qualified interpreters from other parts of the country. Programs can collaborate to share the costs of interpretation services.

WORKING WITH INTERPRETERS

Attorneys who cannot communicate with a client due to language barriers should seek out the services of an interpreter.²¹ It is important to ensure that the client trusts the interpreter. Attorneys should advise clients to be open and honest when they do not understand something the interpreter says. Make sure the client knows that if she has to explain something several times, it is not to question the validity of her statement, but to ensure that the attorney and the client understand everything that is being said. Interpreters should be reminded of the necessity of keeping information confidential. It is good practice to have the interpreter sign a confidentiality agreement that incorporates references to the Interpreters Code of Conduct.²²

²¹ The following is a list of actions that the advocate or attorney should take before and during client interviews:

- Attempt to choose an interpreter from the interpreter pool who has been trained and who is appropriate in terms of gender, age, class, etc.;
- Look for interpreters who speak the same dialect as the client in order to avoid misunderstandings;
- Make it clear to the client that both advocates/attorneys and interpreters are bound by agency confidentiality rules;
- Speak through the interpreter using simple, jargon-free sentences;
- Avoid colloquialism, idioms, slang, and similes since they can be confusing and often impossible to translate;
- Speak directly to and look at the client as the interpreter translates and actively look at and listen to the client as she speaks.
- Listening to the client shows the client respect and ensures that the attorney or advocate does not ignore her body language.
- Give the interpreter time to interpret by framing questions in short sentences, speaking slowly, and pausing often.
- Ask the client to answer questions slowly, to break after every few sentences, and to concentrate on what she plans to say next while the interpreter translates.
- Inform the client to ask for clarifications when she needs them.
- Give the interpreter one or two short breaks if the session is long.
- Have the interpreter ask the client to repeat the information communicated if clarification is necessary. Allow plenty of time for interviews and testimony presented in court with interpreters.
- In court, encourage the judge to be realistic about how long the case will take using the interpreter. Take the time to present the case in the same manner as in a case not using interpreters. Do not succumb to pressure from opposing counsel or the court to shorten the case because interpretation takes longer. The client has the right to a fair trial.

²² National Association of Judiciary Interpreters and Translators, Code of Ethics and Professional Responsibility available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/118>; Washington State Interpreters Program, Code of Conduct for Court Interpreters (1986) available at <http://niwaplibrary.wcl.american.edu/pubs/lang-lawpol-interpreterscode1986/>.

It is useful for advocates and attorneys to develop relationships with interpreters from the surrounding communities who speak the languages of the LEP populations, so that they will be available when needed. Providing domestic violence training for interpreters will not only ensure proper communication between the victim and the advocate but will also allow clients to feel more comfortable when relating their stories. One of the most important services on behalf of an LEP client will be to advocate for and secure appropriate language interpretation services from courts, police, prosecutors, social services agencies, and others with whom your client interacts. With advance planning, attorneys can ensure that their client receives high quality interpretation from a qualified interpreter, substantially reducing delays related to interpreters. Advocacy that results in the use of a qualified interpreter in each instance a client interacts with any government agency will reduce the chances that opposing party in a custody, protection order, or child support case could impeach a client's credibility at trial using "inconsistent" statements from a police, hospital or social services case workers report. If qualified interpreters are not consistently used, a client could make identical statements in her native language that are incorrectly interpreted for the police report and correctly interpreted by qualified court interpreters. As a result opposing counsel in the custody case could use the incorrectly interpreted prior statement in the police report to impeach a client's credibility in the custody case.

It is important to make sure that the interpreter is a neutral third party. Using the client's children or companion as an interpreter is extremely dangerous for the client, particularly if her companion is her abuser, her abuser's friend or her abuser's family member. The client may be reluctant to speak freely in the presence of friends or children in an effort to protect them from the truth or out of embarrassment. Additionally, children of abuse victims may be traumatized by the abuse or fear that the abuser may punish them if they were to help the victimized parent.²³ If a client has brought someone with her to the interview to do the interpreting, the attorney should consider calling the National Domestic Violence Hotline for brief interpretation services. The person working the Hotline can help determine whether the victim feels comfortable and safe enough to use a friend or family member as an interpreter to communicate basic information, determine language access needs, undertake an initial intake, and determine immediate actions that may be needed to secure a client's safety. However, best practice would involve obtaining the assistance of a qualified interpreter to communicate with the client as early as possible in the representation. This approach ensures that attorneys representing immigrant victims have the accurate information needed to develop case strategy, evidence and testimony leading to more successful outcomes in the case.

²³ Fitzpatrick, Meaghan, Husain, Alina and Orloff, Leslye E. Understanding the Significance of a Minors Trauma History in Family Court Rulings (2017).

BEST PRACTICES BY THE COURTS

Issues Identified by the Department of Justice

Recognizing the particular need for greater language access to courts in 2011, then Attorney General Eric Holder issued a memorandum reaffirming the “Federal Government’s Renewed Commitment to Language Access Obligations under Executive Order 13166.” (DOJ Courts Letter)²⁴ The Department of Justice identified four areas of particular concern in which state court system policies and practices “significantly and unreasonably impede, hinder, or restrict participation in court proceedings and access to court operations based upon a person’s English language ability.” Courts have been given notice that DOJ expects them to stop engaging in the activities listed below.

Attorneys representing LEP immigrant victims and parents should provide the trial court, the chief judge and the chief court administrator with copies of the DOJ Courts Letter.²⁵ Advocating that the court provide interpreters for LEP parties ensures that the court does not engage in the following practices:

- Limiting the types of proceedings for which qualified interpreter services are provided by the court. Some courts only provide competent interpreter assistance in limited categories of cases, such as in criminal, termination of parental rights, or domestic violence proceedings. DOJ, however, views access to *all* court proceedings as critical.²⁶ DOJ guidance also requires courts to provide language assistance to non-party LEP individuals whose presence or participation in a court matter is necessary or appropriate; this includes parents and guardians of minor victims of crime or of juveniles and family members involved in delinquency proceedings.²⁷
- Charging interpreter costs to one or more parties. Title VI and its regulations “prohibit practices that have the effect of charging parties, impairing their participation in proceedings, or limiting presentation of witnesses based upon national origin.”

²⁴ Memorandum from Holder, Eric, Attorney General, U.S. Department of Justice, to Heads of Federal Agencies, General Counsels, and Civil Rights Heads, *Federal Government’s Renewed Commitment to Language Access Obligations Under Executive Order 13166* (February 17, 2011), available at: http://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf.

²⁵ See Letter from Perez, Thomas E., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Chief Justice/State Court Administrator (August 16, 2010) (on file with author), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/language-access/government-documents/final_courts_ltr_081610.pdf.

²⁶ See DOJ Guidance, 67 Fed. Reg. at 41462. It states that “every effort should be taken to ensure competent interpretation for LEP individuals during *all* hearings, trials, and motions,” *Id.* at 41471 (emphasis added), including administrative court proceedings.

²⁷ In addition, DOJ guidance states that “Proceedings handled by officials such as magistrates, masters, commissioners, hearing officers, arbitrators, mediators, and other decision-makers should also include professional interpreter coverage. DOJ expects that meaningful access will be provided to LEP persons in all court and court-annexed proceedings, whether civil, criminal, or administrative including those presided over by non-judges.”

- Restricting language services to courtrooms. DOJ guidance interprets the meaningful access requirement as extending to court functions that are conducted outside the courtroom such as court signage, information services, clerk's office filings, temporary protection order, permanent protection order hearings, motions, temporary and enforcement hearings, settlement negotiations, court appointed custody investigators, and mediation.
- Meaningful access to all court appointed and supervised personnel. It is DOJ's position that "in order for a court to provide meaningful access to LEP persons, it must ensure language access in all such operations and encounters with professionals." This requires that courts ensure effective communication with court-appointed or supervised personnel.

National Center for State Courts Recommended Best Practices

In 2003, the National Center for State Courts (NCSC) conducted a National Institutes of Justice funded study on the capacity of LEP petitioners to receive civil protection orders. At the conclusion of that study, NCSC issued a white paper setting out five essential components for an effective court response to the language assistance needs of LEP domestic violence survivors.²⁸ The following NSCS findings, together with the DOJ Courts Letter, are helpful aids for advocating for language access in your local courts. Courts should:

- Create an environment that encourages LEP individuals to access the court's services. Courthouses should have signage in multiple languages and use language identification cards. The court should employ bilingual staff at all stages of the protection order process for the primary language groups served by the court. Court documents, including petitions, temporary and final orders, instructions, and materials about services used in the protection order process should be available in the more common languages spoken by LEP petitioners.²⁹ State courts should provide training to judges and court staff on interpreter qualifications and how to assess them, when and how to request an interpreter, how to work with interpreters in the courtroom, language and cultural diversity, including immigrants' legal rights to access to justice, and sensitivity to concerns of immigrants and other LEP persons. The court should not

²⁸ Uekert, Brenda K., PhD, Peters, Tracy, MA, Romberger, Wanda, Abraham, Margaret, PhD, Keilitz, Susan, JD, *Serving Limited English Proficient (LEP) Battered Women: A National Survey of the Courts' Capacity To Provide Protection Orders*, (The National Center for State Courts, June 2006), available at: http://niwaplibrary.wcl.american.edu/language-access/government-materials/research-studies-on-language-access/LANGAC_NIJReport_06.30.06.pdf.

²⁹ See examples from the District of Columbia Superior Court, available at: <http://www.dccourts.gov/dccourts/superior/dv/forms.jsp>.

inquire about immigration status of parties and should guarantee that the protection order process is the same for all persons.

- Ensure the quality and professionalism of court interpretation. For the languages most commonly spoken by LEP petitioners, judges need to know how to determine whether an interpreter is qualified. For a few languages (e.g. Spanish), courts could require interpreter certification. Courts should also ensure that interpreters adhere to the Model Code of Professional Responsibility for Interpreters in the Judiciary.³⁰
- Work collaboratively with community-based organizations to improve language assistance and service needs of LEP communities served by the court. This should include involving organizations serving specific immigrant and ethnic communities and groups in collaborative community response work on domestic violence and sexual assault. Courts should engage in proactive outreach to community-based organizations to identify immigrant communities that may not access the court to learn about cultural issues that may be barriers for LEP and immigrant domestic violence survivors. Community networks can assist courts and attorneys in finding qualified court interpreters.
- Participate in and use national networks to expand resources for providing appropriate language assistance services. On-line resources are available from the U.S. Department of Justice,³¹ the U.S. Department of Health and Human Services,³² the Consortium for State Court Interpretation,³³ and The National Association of Judiciary Interpreters and Translators.³⁴ Use the internet to gather information on languages and cultures of LEP groups in the community. Collaborate with universities and other courts nationally to develop mechanisms for securing interpreters in less frequently called-for languages. Creatively use in-person and telephonic interpreting to fill gaps and provide interpretations for all languages at all stages of the protection order process.

³⁰ See National Center for State Courts, Model Code of Professional Responsibility for Interpreters in the Judiciary, available at: <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/118>.

³¹ See Limited English Proficiency (LEP): A Federal Interagency Website, www.lep.gov.

³² See Office on Women's Health, U.S. Department of Health and Human Services, www.4woman.gov/minority/.

³³ See www.ncsconline.org/D_Research/CourtInterp.html.

³⁴ See <http://www.najit.org/>.

Identifying the Forms of Immigration Relief Available for Battered Immigrant Victims

THE IMPORTANCE OF IMMIGRATION RELIEF FOR YOUR CLIENT

Drawing on our opening case example, if Maria L. had been a victim of domestic violence and was screened for crime victimization early on, she would have been able to seek release from detention and to comply with the reunification plan put in place. It also would have reduced the chance of being deemed an unfit parent at the trial level and becoming separated from her children.

Even if attorneys do not have a background in immigration law, it is important to screen your clients to determine whether or not they may be eligible for VAWA, T, or U visa relief.¹ When representing immigrant parents, and in particular immigrant parents who are victims of violence, it is important to screen early for potential immigration relief because filing for VAWA, T or U visa relief significantly enhances the victim's protection against deportation. This is particularly important if any of the following are true in your client's case:

- Law enforcement agencies in your community are actively involved in immigration enforcement;
- Your client is a victim of domestic violence, sexual assault, stalking, child abuse, human trafficking or other crimes;
- Your client's abuser is or has been using immigration related abuse including threatening to turn your client in to immigration authorities;²

¹ Useful tools include: DHS Infographic Protection for Crime Victims (January 12, 2017) available at <http://niwaplibrary.wcl.american.edu/pubs/dhs-protections1-6-links-121516/> and Fata, Soraya and Orloff, Leslye E., Immigration Protection Screening Checklist available at <http://niwaplibrary.wcl.american.edu/pubs/fam-checklist-immprotectionscreening/>.

² Immigration related abuse is 10 times higher when physical and/or sexual abuse are present in a relationship as compared to emotionally abusive relationships. Dutton, Mary Ann et al., *Characteristics of Help-Seeking Behaviors, Resources, and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *Geo. J. on Poverty L. & Pol'y* 245, 292 (2000), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characterisc_tics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf; Hass, Giselle et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in *Domestic*

- Your client is or may become involved in a custody, protection order or divorce case.

Early identification of immigrant victims who are eligible for immigration relief under VAWA helps ensure that the victim receives protections that she otherwise would not. Victims receive protection from deportation under VAWA confidentiality laws which become significantly stronger once the victim files a VAWA self-petition, T visa or U visa case.³ When primary caretaker immigrant parents who become subject to immigration enforcement inform DHS officials that they have children they are caring for, DHS officers can exercise prosecutorial discretion to not detain the immigrant parent.⁴ Victims who apply for immigration relief under VAWA or the T or U visa programs are protected from immigration enforcement under DHS policies, receive enhanced VAWA confidentiality protections,⁵ gain access to some otherwise unavailable public benefits,⁶ and are placed on a path to legal work authorization. These special protections for immigrant victims position your client for better outcomes in the family law case.

In order to improve victim safety and minimize the impact of immigration-related issues in your family law case as well as better prepare attorneys representing immigrant victims it is important to screening clients early for crime victimization, immigration relief eligibility, and immigration case red flags.⁷ Clients will also be better prepared to participate in their case if potential immigration relief is identified early. Attorneys representing immigrant victims in

Violence: Global Response 93-113 AB Academic Publishers Great Britain (2000), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSCH_Lifetime_Prevelence_DV_Latinas.pdf.

³ DHS policies issued beginning in 2010 offer enhanced protection from arrest, detention and deportation of immigrant crime victims. These policies will be discussed in greater detail later in this chapter. DHS policies are available at <http://niwaplibrary.wcl.american.edu/topic/vawa-confidentiality/vawaconf-statutes-regs/>.

⁴ Johnson, Jeh, Sec., Dep't of Homeland Sec., to ICE, CBP, USCIS, Ass. Sec. for Policy, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, 1, 5 (Nov. 20, 2014), available at <http://niwaplibrary.wcl.american.edu/pubs/dhspoliciesforapprehensiondetentionandremoval112014/>; Immigration and Customs Enforcement, *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities* (August 23, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/ice-parental-interests/>. Although this policy was rescinded in early 2017, DHS may on a case by case basis exercise discretion not to detain or remove an immigrant parent, particularly a crime victim. Such policies were initiated in 2007. See Press Release, Department of Homeland Security, *Kennedy, Delahunt Announce New Guidelines for Immigration Raids* (Nov. 16, 2007).

⁵ See generally, Orloff, Leslye E., *Confidentially and Breaches of Confidentiality, in Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants* (2013), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/tools/3.2_BB_IMM_VAWAConf_Confidentiality-Breaches-MANUAL-BB.pdf.

⁶ Benefits vary from state to state, differ based on the form of immigration relief a victim has received or is applying for and depend on the length of time a victim has been in the U.S. Benefits that immigrant crime victims may receive can include health care, housing, post-secondary educational grants and loans, and food stamps for their children. For further information about which benefits your client may be eligible for in your state go to <http://niwaplibrary.wcl.american.edu/public-benefits/state-benefits>.

⁷ Red flags include being a stowaway, entering on an international exchange visitor visa (for example, scholars, teachers, professors, leaders in a field, among others, coming to the United

family court cases often collect most, if not all, of the information needed to help the victim file a VAWA self-petition or a U visa application. If the client has an uncomplicated⁸ VAWA or U visa case, attorneys are strongly encouraged to help the client file a VAWA self-petition or a U visa case rather than refer her to an immigration attorney for representation. If the client is also working with a victim advocate, the advocate can assist attorneys in collecting the information needed to prepare the client's self-petition or U visa case.⁹ Tools have been developed to assist family attorneys in representing their immigrant victim clients in VAWA self-petitioning, battered spouse waiver, U visa and T visa cases. These include trauma-informed interviewing questionnaires,¹⁰ evidence checklists¹¹ and training manuals¹² covering immigrant victim's legal rights under family, immigration,

States temporarily); having been deported, removed, or placed in immigration court proceedings; engaging in marriage fraud; evading a draft; committing domestic violence, stalking, child abuse; child abduction; violating a protection order, or having child protective services intervene in your family; having criminal convictions; committing prostitution, espionage, sabotage, torture, genocide, polygamy, illegal gambling; money laundering, unlawful voting; falsely claiming citizenship; severe violations of religious freedom; drug abuse/addiction; being a habitual drunkard; being a member of the communist party; having a mental disease or disorder; lacking a vaccination record; misrepresenting your immigration status; or being primarily dependent upon the government for support (public charge). A screening check list is available at <http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/tools/VAWA-Red-Flags.pdf>.

⁸ After screening your client for immigration red flags, if your client has any red flag issues in her case, the case may be complicated. Since most applicants filing VAWA self-petitions and U visas are undocumented, entering the U.S. without inspection or overstaying a visa are not necessarily a complicating factor if no other red flags exist. If the VAWA self-petitioner or U-visa applicant you represent entered the U.S. without inspection or overstayed a visa, you should consult with an immigration attorney with expertise working with immigrant victims to discuss any special issues in your client's case that may necessitate representation by an immigration attorney when your client applies for lawful permanent residency based on their approved VAWA self-petition or U-visa.

⁹ See, Szabo, Krisztina, Molina, Rocio, Fletcher, Maria Jose, Lorduy, Mercedes V., Yang, Edna, Dutton, Mary Ann, and Orloff, Leslye, *Advocate's and Attorney's Tool for Developing a Survivor's Story: Trauma Informed Approach* (2013) available at <http://niwaplibrary.wcl.american.edu/pubs/tool-trauma-informed-approach>. For a list of advocates and attorneys in your state with experience working with immigrant victims go to <http://niwaplibrary.wcl.american.edu/reference/service-providers-directory>.

¹⁰ Dutton, Mary Ann, Szabo, Krisztina, Molina, Rocio, Fletcher, Maria Jose, Lorduy, Mercedes V., Yang, Edna, and Orloff, Leslye, *Trauma Informed Structured Interview Questionnaires for Immigration Cases (SIQI)* (2013) available at <http://niwaplibrary.wcl.american.edu/pubs/trauma-informed-siqi/>. Offering trauma informed assistance to immigrant victims also includes developing the skills to effectively assist immigrant victims who experience crisis during recounting their abuse histories while preparing their immigration and family court cases. For help supporting immigrant victims in crisis view: Dutton, Mary Ann and Orloff, Leslye E, "Training for Advocates and Attorneys on Trauma Informed Work with Immigrant Women" (2014) available at <https://youtu.be/05Z95q1bkG4>.

¹¹ NIWAP, *Evidence Checklist FOR IMMIGRANT VICTIMS APPLYING FOR THE CRIME VICTIM VISA (U VISA)*(2013) available at <http://niwaplibrary.wcl.american.edu/pubs/imm-checklist-evidenceforuvisa/>; NIWAP, *Evidence Check list for IMMIGRANT VICTIMS APPLYING FOR VAWA SELF-PETITIONING* (2013) available at <http://niwaplibrary.wcl.american.edu/pubs/evidence-checklist-vawaselfpetition/>.

¹² Two training manuals addressing the legal rights of immigrant victims of domestic violence and sexual assault are available at <http://niwaplibrary.wcl.american.edu/manual/>.

language access and public benefits laws. The trauma informed interviewing tool can also be extremely helpful to attorneys preparing for family court litigation.¹³ By representing the immigrant victim in both her family law and immigration cases,¹⁴ attorneys avoid what can be long waiting lists at legal assistance programs with expertise on VAWA, T and U visa cases. Attorneys also conserve those programs resources to handle the more complex cases and prevent the client from having to go through the trauma of retelling her story to yet another attorney.¹⁵

Whenever an immigrant victim takes action, whether to leave her abuser or seek legal protections, she is most at risk of retaliation from the abuser.¹⁶ For that reason it is important to have a safety plan.¹⁷ One must consider the potential of the abuser's retaliation once the victim serves the perpetrator with notice of a temporary protection order, or divorce or custody proceeding. Immigrant victims are particularly vulnerable to the perpetrator's immigration related abuse.¹⁸ It is important to strategically plan the timing of any protection

¹³ Fitzpatrick, Meaghan and Orloff, Leslye E., How to Prepare Your Case Through a Trauma Informed Approach: Tips on Using the Trauma Informed Structured Interview Questionnaires for Family Court Cases (SIQI) (July 23, 2015) available at <http://niwaplibrary.wcl.american.edu/pubs/siqi-for-family-lawyers-7-23-15/>.

¹⁴ For a list of advocates and attorneys in your state with experience working with immigrant victims go to <http://niwaplibrary.wcl.american.edu/reference/service-providers-directory>.

¹⁵ Evidence check lists and training materials on how to prepare a VAWA self-petition or U visa application for your client are available at http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/tools/VAWA_Self-Petitioning-Checklist_English_2008.pdf (self-petitioning); http://niwaplibrary.wcl.american.edu/immigration/u-visa/tools/UVISA_Evidence-Check-List.pdf (U-Visa); http://niwaplibrary.wcl.american.edu/immigration/human-trafficking/tools/HT_T-Visa-Checklist_2009.pdf (T-Visa).

¹⁶ Between 1995-96, 80 percent of women who were stalked by former husbands were physically assaulted by that partner. Stalking in America: Findings from the National Violence Against Women Survey (Center for Policy Research 1997); Carlson, B. E., Battered Women And Their Assailants, 22 SOCIAL WORK 455 (1997); Brown, M. A. (1986) Social support, stress and health. A comparison of expectant mothers and fathers, Nursing Research 35, 72-76; Moore, Donna M. (1979) "An overview of the problem." Pp. 7-32 in Moore, Donna M. (ed.), Battered Women. Beverly Hills, CA: SagSaunders, D. G., & Browne, A. (2000). Intimate partner homicide. In Ammerman, R. T. & Hersen, M. (Eds.), Case studies in family violence. (2nd ed., pp. 415-449). New York: Plenum; Saunders, D. G., & Browne, A. (2000). Intimate partner homicide. In Ammerman, R. T. & Hersen, M. (Eds.), Case studies in family violence. (2nd ed., pp. 415-449). New York: Plenum; Raj, A., & Silverman, J. (2003). Immigrant South Asian women at greater risk for injury from intimate partner violence. American Journal of Public Health, 93, 3, 435-436; See Ganley, Anne L., Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases, in Domestic Violence in Civil Court Cases: A National Model for Judicial Education 23, 24 (Agtuca, Jacqueline A. et al. eds., 1992 see also Desmond, Elis, Post—Separation Woman Abuse: The Contribution of Lawyers as "Baracudas", "Advocates", and "Counsellors", 10 Int'l J.L. & Psychiatry. 403, 408 (1987).

¹⁷ See Orloff, Leslye E., "Interviewing and Safety Planning for Immigrant Victims of Domestic Violence," in *Breaking Barriers: A Complete Guide to Legal Rights and Resources of Battered Immigrants* (2013).

¹⁸ See Hass, Giselle Aguilar, Dutton, Mary Ann, & Orloff, Leslye E., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in Domestic Violence: Global Responses 93-113 (A B Academic Publishers ed., 2000), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSCH_Lifetime_Prevalence_DV_Latinas.pdf See also Dutton, Mary Ann, Orloff, Leslye E., & Hass,

order, custody case or other legal remedy she may pursue, in light of her safety needs, immigration status, and need for protection from deportation.

Increased immigration enforcement has had a significant impact on immigrant victims and their families. Detention can have grave consequences on immigrant victims, particularly with regard to child custody, as will be discussed later in this chapter. Beginning in 2010 the DHS began implementing a series of policies designed to focus DHS enforcement resources on criminals, national security risks and egregious repeat immigration law violations. These policies were designed to encourage DHS officials to exercise prosecutorial discretion to not enforce immigration laws against immigrant parents who are caretakers of children, pregnant and breastfeeding mothers and immigrant crime victims. However, many of these policies were rescinded in 2017 and victims will be best able to benefit from the Violence Against Women Act's (VAWA) statutory, regulatory, and policy protections if they have already filed their VAWA, T or U visa immigration case before they come in contact with immigration enforcement officials. These VAWA protections as well as the greater likelihood DHS will detain undocumented parents when perpetrators alert them to the victim's lack of status, change the way family attorneys should proceed in cases involving non-citizen clients.

For many years, attorneys working with immigrant victims believed the first step in ensuring victim safety was to pursue a civil protection order (CPO) and to seek immigration relief afterward. However, to help immigrant victims benefit most from VAWA and VAWA confidentiality protections, safety planning strategies now encourage the filing for VAWA immigration relief (self-petition, T visa or U visa) first, before the victim goes to court for a protection order. Once the immigration case is filed, if the perpetrator retaliates by turning the victim into local law enforcement or DHS, DHS will have knowledge of her victimization and should not act to initiate removal proceedings. Should local DHS officials try to arrest, detain or deport an immigrant crime victim, advocates and attorneys across the country can and do successfully advocate to secure an immigrant victim's release from detention. Technical assistance is available to help attorneys should their client be stopped, arrested or detained by DHS, particularly when the client has suffered abuse or crime victimization.¹⁹

Giselle Aguilar, Symposium Briefing Paper, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *Geo. J. on Poverty L. & Pol'y* 245 (2000), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf>; Dutton, Mary Ann, Ammar, Nawal, Orloff, Leslye & Terrell, Darci, Cosmos Corporation, *Use and Outcomes of Protection Orders by Battered Immigrant Women, Revised Technical Report* (November 10, 2006).

¹⁹ Technical assistance including case consultations, strategy, legal research and materials is available from the National Immigrant Women's Advocacy Project at American University, Washington College of Law. To request technical assistance please visit: <http://niwaplibrary.wcl.american.edu/ovw-grantee-technical-assistance/about-technical-assistance>. Technical assistance requests can be submitted by phone at 202-274-4457 and via email at niwap@wcl.american.edu.

SCREENING FOR THE FIVE FORMS OF RELIEF AVAILABLE FOR IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE, PARENTS OF CHILD ABUSE CHILDREN AND VICTIMS OF SEXUAL ASSAULT

This section outlines three areas upon which attorneys working with non-citizen battered parents should focus when screening their clients:

- Legal immigration benefits for which immigrant victim parents may be eligible.
- Steps immigrant parents they can take to secure release from detention if they are turned in to DHS by the abuser or in any other way become a target of immigration enforcement.
- How to identify a temporary guardian who can care for the immigrant victim's children should she be detained by immigration enforcement authorities so as to avoid placement of her children with her abuser or in foster care.

Many immigrant victims of domestic violence and/or sexual assault are eligible to file for and be granted immigration relief related to their victimization, including VAWA self-petitions, T visa, and U visas. It is important to screen as early as possible for immigration relief. Immigration relief offers the victim the following benefits:

- Protection from detention or deportation,
- Path to lawful permanent residency and ultimately citizenship,
- Increased access to public benefits, including housing,
- Access to legal work authorization,
- Economic independence from potential abusers,
- Ability to travel to and from the U.S. (with some exceptions),
- Improved access to family law remedies, such as protection orders, custody and more ability to limit involvement of child protective services with the family.

Immigrant victim parents may qualify for immigration relief based in part on their having been battered or subjected to extreme cruelty. Some clients may qualify for multiple forms of immigration relief. It is important for family attorneys to screen cases early to identify survivors who qualify for immigration relief and to consult with immigration experts in your state who can help attorneys determine whether family attorneys can represent the victim in her immigration case, or if the complexity of the victim's case necessitates representation by an immigration attorney. When this happens, immigration and family law attorneys need to work together to develop a joint strategy. When the immigration case is filed first, the victim will have greater protection from immigration enforcement and detention. Particularly in contested custody cases involving an abusive parent and a non-citizen non-abusive parent, serving

perpetrators in family court cases can trigger calls to DHS in retaliation and to gain advantage in the family court case to win custody or have the protection order case dismissed.²⁰ If the VAWA immigration case is filed prior to serving the perpetrator with notice in the family court case, when the perpetrator retaliates by calling to turn the victim in to immigration authorities, the victim can be protected from DHS enforcement actions based on special DHS policies designed to protect immigrant crime victims.

There are six primary²¹ ways your client may be eligible to attain legal immigration status without the abuser's knowledge, cooperation or control. The immigration relief an immigrant victim qualifies to receive depends on:

- Who is the perpetrator of abuse
- Whether the perpetrator is the victim's spouse or former spouse
- Whether the perpetrator is the victim's parent, step-parent, or son or daughter over 21 years old
- Whether your client's child has been abused
- The immigration status and/or citizenship of the abuser
- If the victim's spouse or parent ever filed immigration papers for her
- If the victim came to the United States on a fiancé visa
- Whether the victim has filed a police report or is willing to cooperate with police, prosecutors, or other government officials (e.g. the EEOC, child protective services, adult protective services)

The immigration options for battered immigrants are:²²

The VAWA Self Petition

The self-petition under the Violence Against Women Act²³ helps battered immigrant spouses, children, and some elder abuse victims who are abused and

²⁰ See Immigrant Victims Rights and Protections, Legal Momentum (2011)(Discussing steps victims should take if they become subject to immigration enforcement), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/cultural-competency/safety-planning/Immigrant-Victims-Rights_7-20-11.pdf.

²¹ There are a total of twelve forms of immigration relief available to assist different groups of battered immigrants and other immigrant victims. For further information on each of these forms of relief, see Cara, Alicia & Orloff, Leslye, *Know Your Rights, in Empowering Survivors* (2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/other-immigration/5.1-Know-Your-Rights-MANUAL-ES.pdf>.

²² To assist with screening in family immigration cases, see Fata, Soraya, *Immigration Protection Screening Checklist for Family Lawyers*, available at: <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/custody/Immigration-Protection-Screening-Checklist.pdf>. To assist with case planning, understanding how immigration options affect benefits access, identifying how each of the options differs in eligibility, ease of access to work authorization, and at protection from deportation, see Orloff, Leslye, Molina, Rocio, Helein, Pete, Carcamo-Cavazos, Andrea and Anver, Benish, *Comparing Forms of Immigration Relief for Immigrant Victims of Crime* (2010), available at <http://niwaplibrary.wcl.american.edu/immigration/introduction-to-immigration-relief-for-immigrant-victims/Comparing-Forms-of-Immigration-Relief.pdf>.

²³ You can assist your client in filing a self-petition, unless she has issues in her case that are immigration red flags. For a flow chart to help you determine VAWA self-petitioning eligibility

the parents of child abuse victims abused by a U.S. citizen spouse, former spouse, parent, step-parent or over 21 year old son or daughter or by a lawful permanent resident spouse, former spouse, parent or step-parent. Screening questions might include:

- Is your client married or formerly married (within the past two years) to a U.S. citizen or a lawful permanent resident, *or*
- Is your client the parent of an adult, over 21-year old U.S. citizen son or daughter
- Has your client or client's under 21 year old child been battered or subjected to extreme cruelty²⁴
- The perpetrator of the battering or extreme cruelty is or was the victim's
 - o U.S. citizen spouse, former spouse, parent, step-parent, or over 21 year old son or daughter
 - o Lawful permanent resident spouse, former spouse or parent
- Did your client live with the perpetrator for some period of time?
- Did any of the abuse occur in the United States?

The Battered Spouse Waiver

The battered spouse waiver²⁵ helps battered spouses of U.S. citizens who filed immigration applications and attained conditional permanent residence for the foreign born spouse; the client will have a lawful permanent residency card that expires two years after it was issued.

- Did your client's U.S. citizen husband file immigration papers for her?
- Does your client have a lawful permanent residence card that expires two years after it was issued?

for children and adult applicants, See Rebecca Story, Olavarria, Cecilia & Praeda, Moira Fisher, *Preparing the VAWA Self-Petition and Applying for Residence*, in *Empowering Survivors* (2013), available at: <http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/articles/9-VAWA-Cancellation-MANUAL-ES.pdf>; See also VAWA Self-Petition and Cancellation, available at: <http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation>.

²⁴ Battering or extreme cruelty for immigration law purposes is defined as a form of abuse inflicted upon another person that includes, but is not limited to, any actions that cause or threaten to cause physical, mental, psychological, or emotional harm, and any actions or inaction that is a part of an overall pattern of abuse, power, or control. These include acts that destroy the peace of mind and happiness of the injured party or cause distress and humiliation to the injured party. Rape, molestation, forced prostitution, incest, and other forms of sexual abuse are also considered forms of battery. 8 C.F.R. § 204.2(c)(1)(vi).

²⁵ Battered spouse waiver cases are the least complicated forms of immigration relief for immigrant victims. If your client has no red flagged issues, you can assist your client in filing a battered spouse waiver case. See Olavarria, Cecilia & Preda, Moira Fisher, *Additional Remedies under VAWA: Battered Spouse Waiver*, in *Breaking Barriers* (For information on how to assist a client filing for a battered spouse waiver), available at: http://niwaplibrary.wcl.american.edu/immigration/battered-spouse-waiver/tools/3.5_Battered-Spouse-Waiver_2004-MANUAL-BB.pdf.

- Does your client believe that she is required to remain in her marriage to her U.S. citizen husband for two years?
- Has your client been subject to battering or extreme cruelty?

Cancellation of Removal Under VAWA

Cancellation of removal or suspension of deportation under the Violence Against Women Act²⁶ helps battered immigrants in deportation or removal proceedings who are victims of abuse or child abuse perpetrated by a U.S. citizen or lawful permanent resident spouse, former spouse, parent, step-parent. Parents of child abuse victims whose other parent is a U.S. citizen or lawful permanent resident may also be eligible. This remedy is only available to a victim who is in removal proceedings who can show extreme hardship if she were to be removed and has been in the United States for three years of continued presence. Relevant screening questions:

- Has your client had an order of deportation or removal issued against her?
- Is your client currently in removal proceedings?
- Is your client a spouse, former spouse (may file beyond the two year limitation), child or step-child of a U.S. citizen or lawful permanent resident?
- Was your client's child abused by the child's other parent who is a U.S. citizen or lawful permanent resident?²⁷
- Did your client or your client's child suffer battering or extreme cruelty perpetrated by a person described above?
- Has your client lived in the U.S. continually for at least three years?²⁸
- How did your client enter the U.S.?

²⁶ VAWA cancellation of removal cases require representation by an immigration attorney with experience representing immigrant crime victims. See National Directory of Programs with Experience Serving Immigrant Victims, National Immigrant Women's Advocacy Project (For a list of programs in your state with this specialized experience with whom you can collaborate), <http://niwaplibrary.wcl.american.edu/reference/service-providers-directory> (last visited April 15, 2014).

²⁷ The parent of a child abuse victim may file for VAWA cancellation even if she was never married to the child's citizen or lawful permanent resident abusive parent. This relief is available to the non-citizen parent of an abused child without regard to the child's citizenship or immigration status. This is one category of immigrant victims who can only file for VAWA cancellation and does not qualify to file a VAWA self-petition.

²⁸ Some limited absences are allowed. INA § 240A(b)(2)(B) (an immigrant will not be considered to be in violation of the continuous presence requirement if she can demonstrate a connection between her absence and the "battering or extreme cruelty perpetrated against" her. No absence related to the battering or extreme cruelty will count towards the 90-day or 180-day limits and such absences or aggregation of absences that exceed 180 days, they will not be considered to have broken the period of continuous presence. Additionally, absences connected to battering or extreme cruelty are excluded in computing the time the immigrant has been physically present for the purposes of the 3 year requirement set forth in the statute.

- What extreme hardship would be caused to the client or her child or in the case of an abused immigrant child, his parent if battered immigrant were to be removed from the United States?²⁹

The U Visa³⁰

Helps victims of certain criminal activity perpetrated in the United States who have been, are being, or are willing to be helpful in the detection, investigation, prosecution, conviction or sentencing of the perpetrator. This form of relief is limited to a list of crimes that generally fall within the following categories: domestic violence, sexual violence, kidnapping, holding persons hostage, felonious assault, murder, extortion, and human trafficking.³¹ Screening questions include:

- Is your client a victim of any of the following criminal activities including attempts, conspiracy and solicitation to commit any of the following : rape; torture; trafficking; incest; domestic violence; sexual assault; prostitution; sexual exploitation; female genital mutilation (FGM);³² being held hostage; slave trade; involuntary servitude, stalking, fraud in foreign labor contracting, kidnapping; false imprisonment; perjury, or any similar activity.
- Did the criminal activity occur in the U.S.? If not, was it in violation of U.S. law?
- Does the client have information that has been, is being or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing of the perpetrator?
- Did the client do any of the following or is she willing to do any of the following:
 - o Call the police for help
 - o Make a police report
 - o Speak to the police or prosecutors
 - o Participate in a hearing or trial

²⁹ Rebecca Story, Olavarria, Cecilia & Preda, Moira Fisher, *VAWA Cancellation of Removal, in Breaking Barriers* (2013) (a list of extreme hardship factors described fully), available at: <http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/articles/3.4-VAWA-Cancellation-2010-MANUAL-BB.pdf>.

³⁰ You can assist your client in filing a U-visa unless she has issues in her case that are immigration red flags. See *VAWA Red Flags*, (A flow chart to help you determine your client's U-visa eligibility), available at: <http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/tools/VAWA-Red-Flags.pdf>.

³¹ See Orloff, Leslye E., Molina, Rocio, Helein, Pete, Carcamo-Cavazos, Andrea, and Anver, Benish, *Comparing Forms of Immigration Relief for Immigrant Victims of Crime* (2010) (More details of Eligibility, Benefits and U Visa Process), available at: <http://niwaplibrary.wcl.american.edu/immigration/introduction-to-immigration-relief-for-immigrant-victims/Comparing-Forms-of-Immigration-Relief.pdf>.

³² U.S. Government Fact Sheet on Female Genital Mutilation or Cutting (FGM/C) available at http://niwaplibrary.wcl.american.edu/pubs/fgm_notice_-_english/.

The T Visa³³

The T visa helps victims of labor and sex trafficking. Sex trafficking occurs when “a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.” Helpful screening questions include:³⁴

- Was your client involved in a commercial sex act induced by force fraud or coercion?
- Was your client induced to perform a commercial sex act when under the age of 18?
- Was your client subjected to involuntary servitude, peonage, debt bondage or slavery by force, fraud or coercion?
- Was your client kidnapped, coerced or recruited to migrate to the United States?
- Does your client have control over her own identity documents?
- Has your client’s movement been restricted since arriving in the United States?
- Is your client under the age of 18, or has your client done or is willing to do the following?
 - o Make a police report
 - o Speak to police or prosecutors
 - o Participate in a trial or hearing
 - o Willing to assist in an investigation or prosecution of her traffickers

Work Authorization for Abused Immigrant Spouses and Children of Work Visa Holders (A, E(3), G, and H)

Immigrants who are granted a work visa are often allowed to obtain immigration visas for their spouse and children. The visas granted for spouses and

³³ The Trafficking Victims Protection Act defines “severe forms of trafficking in persons” as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.” Trafficking Victims Protection Act, 22 U.S.C.A. § 7102 (West 2008). Trafficking cases require representation by immigration attorneys with expertise representing trafficking victims.

³⁴ See Sample Questions for Identifying a Trafficked/Enslaved Person, VIDA Legal Assistance (June 2011), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/human-trafficking/training-materials/Sample-Questions-for-Identifying-a-Trafficked-Person.pdf>.

children of work visa holders do not include legal work authorization. When spouse and/or child abuse occur in households of immigrant work visa holders, without access to legal work authorization the abused spouse or the non-abusive parent of an abused child cannot flee the family home. To remedy this problem, VAWA 2005 added a section to the Immigration and Nationality Act allowing abused immigrant spouses to obtain the work authorization they needed to leave the abuser and sustain themselves and their children apart from the abuser.³⁵ Section 106 “provides eligibility for employment authorization for spouses of certain nonimmigrants in cases where the spouse has been battered or subjected to extreme cruelty. Employment authorization is a benefit granted for a limited period of time and will not establish eligibility for a lawful status in the United States.”³⁶ To attain access to permanent legal status in the United States, abused spouses will need to apply for immigration protection through the U visa program. The legal work authorization provided by Section 106 will provide visa holding abused spouses an important economic bridge while they file and await approval and receipt of U visa status. Helpful questions that identify immigrants eligible for Abused Visa Holder Spouse Work Authorization:

- Does your client have an A, E(3), G or F visa?
- Is your client married to or formerly married (within the past two years) to a spouse with one of the following work visas:³⁷
 - o A visa (Foreign government diplomats and officials, immediate family members of foreign government diplomats and officials, and their personal employees, attendants, or domestic workers;
 - o E(3) visa Australian specialty occupation worker;
 - o G visa for foreign government or international organization representative, immediate family members of foreign government or international organization representatives, and their personal employees, attendants, or domestic workers; and
 - o H visa for specialty occupation worker, temporary or seasonal agricultural worker, temporary non-agricultural worker, trainee or special education visitor, and immediate family members of specialty occupation workers.
- Has your client, or your client’s under 21 year old child, been battered or subjected to extreme cruelty by a visa holding spouse with an A, E(3), G or H visa?

³⁵ Section 106 of the Immigration and Naturalization Act.

³⁶ U.S. Citizenship and Immigration Services, Instructions for Application for Employment Authorization for Abused Nonimmigrant Spouse (2017) (USCIS Form I-765V) available at: <https://www.uscis.gov/i-765v>.

³⁷ U.S. Citizenship and Immigration Services, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants Revisions to the *Adjudicator’s Field Manual* (AFM); Revision of Chapter 30.13 (AFM Update AD16-01) PM-602-0130 (March 8, 2016) available at: <http://library.niwap.org/wp-content/uploads/H-visa-765.pdf>.

- Did the battering or extreme cruelty occur during the marriage and after admission to the U.S. with an A, E(3), G or H visa?
- Does your client currently reside in the United States?

UTILIZING DHS STATUTES, REGULATIONS, AND IMPLEMENTING POLICIES DESIGNED TO ENHANCE PROTECTIONS FOR IMMIGRANT CRIME VICTIMS

Federal immigration laws impose multiple requirements on DHS. DHS has a legal obligation under VAWA and the Trafficking Victim's Protection Act and the amendments made to both laws over the past two decades to offer protection for adult and child immigrant crime victims. This statutory obligation is no more or less a part of the immigration laws DHS implements than DHS' immigration enforcement role.³⁸ DHS' obligations also include statutory and regulatory requirements to receive and adjudicate a wide range of immigration petitions including family and work based visas, crime victim visas, temporary visas and applications for lawful permanent residency and citizenship.

DHS crime victim statutes, regulations, and policies recognize that crime perpetrators seek to elude prosecution by convincing DHS officials to pursue enforcement actions against crime victims and witnesses. DHS VAWA and VAWA confidentiality implementation policies strive to stop DHS from unwittingly helping human traffickers, rapists, sexual assault perpetrators, child abusers, and domestic violence and other crime perpetrators avoid criminal sanctions and/or gain advantage in a family law case. Very commonly in retaliation for being served with a protection order or custody case or because an immigrant victim is taking steps to leave an abusive relationship or employment, perpetrators will call DHS to report the victim as an undocumented immigrant. Federal VAWA Confidentiality Immigration laws and statutorily created immigration benefits for crime victims were designed as tools to help DHS enforcement officials from responding to calls from perpetrators by initiating immigration enforcement actions and the arrest, detention, or removal of immigrant crime victims from the United States. These laws and policies were designed to enhance protections for immigrant crime victims and prevent DHS from expending enforcement resources on immigrant victims who are eligible for and often already pursuing legal immigration status. These laws allow DHS to focus its enforcement resources on the agencies highest priorities for removal.

³⁸ U.S. Department of Homeland Security, Instruction Number 002-02-001 Implementation of Section 1367 Information Provisions 5 (November 7, 2013) (Discussing the "Department's missions of effectively administering the laws preventing violence against women and children.") available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

VAWA CONFIDENTIALITY'S PROTECTIONS FOR IMMIGRANT VICTIMS AGAINST DETENTION, REMOVAL, AND IMMIGRATION ENFORCEMENT

Federal immigration laws pose dual requirements on the Department of Homeland Security (DHS). DHS has a legal obligation under VAWA to offer protection for crime victims, which is no more or less a part of the immigration laws DHS implements than DHS' immigration enforcement role. DHS crime victim policies recognize that crime perpetrators seek to elude prosecution by convincing DHS officials to pursue enforcement actions against crime victims and witnesses. VAWA confidentiality laws strive to stop DHS from unwittingly helping perpetrators avoid criminal sanctions by initiating or continuing to pursue a victims arrest, detention or removal from the United States.

There have been two decades of bi-partisan legislation and issuance of statutorily mandated implementing guidance by both DHS and its predecessor agency Immigration and Nationality Service (INS) offering VAWA confidentiality protections to immigrant crime victims. In creating VAWA's confidentiality provisions, Congress was explicit about its intent. In drafting the legislative history of VAWA confidentiality Representatives, James Sensenbrenner and John Conyers issued a House Judiciary Committee Report stating that:

“In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings. In 2000, and in this Act, Congress extended these protections to cover victims of trafficking, certain crimes and others who qualify for VAWA immigration relief. These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims' immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims.”³⁹

“This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt

³⁹ Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP'T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 122 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005/>.

to remove victims of domestic violence, sexual assault and trafficking, as prohibited by section 384 of IIRIRA.”⁴⁰

VAWA confidentiality statutes mandate that DHS

“shall provide guidance to officers and employees . . . who have access to information covered by this section [VAWA confidentiality] regarding the provisions of this section, including the provisions to protect victims of domestic violence and severe forms of trafficking in persons or criminal activity.”⁴¹

When DHS issued its All DHS memo implementing VAWA confidentiality and discussing the penalties imposed by the statute for violations (up to \$5000 penalty and/or disciplinary action), DHS explained the implications of violations as follows:

“Violations of Section 1367 could give rise to serious, even life-threatening, dangers to victims and their family members. Violations compromise the trust victims have in the efficacy of services that exist to help them and, importantly, may unwittingly aid perpetrators retaliate against, harm or manipulate victims and their family members, and elude or undermine criminal prosecutions.”⁴²

The DHS VAWA Confidentiality implementation policies apply to all DHS officials who encounter crime victims or VAWA confidentiality protected cases or applicants in their work. With a particularly focus on:

“Those employees who work with applicants for victim-based immigration relief or who have access to protected information, such as United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).”⁴³

To ensure that DHS officials knew about and complied with VAWA confidentiality requirements, DHS developed and required that all of its officers

⁴⁰ Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP'T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 122 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawalghist-dojexcerptshr-3402-09-22-2005/>.

⁴¹ 8 U.S.C. 1367(d).

⁴² Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 15, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁴³ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 1, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

receive VAWA confidentiality training. The DHS 2013 All DHS Directive required that:

“All DHS employees who, through the course of their work may come into contact with victim applicants or have access to information covered by 8 U.S.C. 1367 complete the VAWA: Confidentiality and Immigration Relief training, which is currently on Component’s Learning Management Systems (LMS). The VAWA Training was developed by FLETC in collaboration with subject-matter experts from several DHS Components, including USCIS, ICE and CBP. No later than 180 days after the enactment of this policy, and on an annual basis thereafter, the Component Heads, or his or her delegates, of CIS OMB, CRCL, USCIS, ICE and CBP report to the Review Committee the rate of compliance for this training.”⁴⁴

ICE has had VAWA confidentiality policies in place since 2007.

“The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), which became effective on January 5, 2006, expanded various protections for aliens seeking immigration benefits as crime victims and amended various sections of the Immigration and Nationality Act (INA). As a result, operational units of U.S. Immigration and Customs Enforcement (ICE) will be required to follow new procedures when taking certain actions in cases involving aliens eligible to apply for VAWA benefits or T or U nonimmigrant status. This interim guidance explains how VAWA 2005 affects the current operating procedures of the Office of Investigations (DI) and the Office of Detention and Removal Operations (DRO).”⁴⁵

“For purposes of this interim guidance, if an officer believes there is any credible evidence that the alien may be eligible for VAWA benefits or I or U nonimmigrant status, the requirements of 8 U.S.C. § 1367, described below, must be followed along with standard operating procedure.”⁴⁶

A significant number of domestic violence perpetrators are actively involved in attempting to get their immigrant victim spouses and intimate partners subjected to immigration enforcement and removed from the United States. For example, among VAWA self-petitioners and U visa applicants 26.7% experience their perpetrators actively making calls to immigration

⁴⁴ Department of Homeland Security, “Implementation of Section 1367 Information Provisions,” (Nov. 1, 2013) at p. 3, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-section-1367/>.

⁴⁵ Torres, John P. and Forman, Marcy, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 1 and 23 *available at* <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

⁴⁶ Torres, John P. and Forman, Marcy, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 2 and 24 *available at* <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

enforcement authorities to trigger enforcement actions against the victim and have their victims who are seeking VAWA immigration protections removed from the United States.⁴⁷ For this reason, VAWA Confidentiality's Legislative History states that:

“This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual assault and trafficking, as prohibited by section 384 of IIRIRA. In determining whether a person furnishing information is a prohibited source, primary evidence should include, but not be limited to, court records, government databases, affidavits from law enforcement officials, and previous decisions by DHS or Department of Justice personnel. Other credible evidence must also be considered. Government officials are encouraged to consult with the specially trained VAWA unit in making determinations under the special “any credible evidence” standard.”⁴⁸

“(T)he Secretary of Homeland Security and the Attorney General and other Federal officials may not use information furnished by, or derived from information provided solely by, an abuser, crime perpetrator or trafficker to make an adverse determination of admissibility or removal of an alien. However, information in the public record and government data bases can be relied upon, even if government officials first became aware of it through an abuser.”⁴⁹

In implementing VAWA confidentiality statutory protections for immigrant crime victims, ICE stated that:

“Section 1367(a) of Title 8 of the United States Code, as amended by VAWA 2005, prevents ICE employees from making an adverse determination of admissibility or deportability of an alien using information

⁴⁷ See Szabo, Krisztina E., Stauffer, David, Anver, Benish, and Orloff, Leslye E., Early Access to Work Authorization For VAWA Self-Petitioners and U-Visa Applicants 25 (February 12, 2014) available at http://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/.

⁴⁸ Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP'T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 122 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005/>.

⁴⁹ Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP'T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 122 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005/>.

furnished solely by certain people associated⁵⁰ with the battery or extreme cruelty, such as the abuser or a member of the abuser's family living in the same household as the victim. For purposes of this interim guidance, an adverse determination of admissibility or deportability would include placing an alien in removal proceedings or making civil arrests relating to an alien's violation of the immigration laws. Section 1367(a) also generally prohibits ICE employees from disclosing any information about a VAWA, T, or U beneficiary to anyone, especially those who might use the information to the alien's detriment, i.e. an abuser who may wish to have the victim removed from the United States."⁵¹

When INS first implemented VAWA confidentiality protections in 1997, INS recognized that:

"These provisions, and the Congressional and public scrutiny which accompany them, warrant particular care whenever an INS office or employee suspects that an alien with whom they are dealing might have been subject to domestic violence."⁵²

DHS policies are designed to ensure that:

"Adverse determinations of admissibility or deportability against an alien are not made using information furnished solely by prohibited sources associated with the battery or extreme cruelty, sexual assault, human trafficking or substantial physical or mental abuse, regardless of whether the alien has applied for VAWA benefits, or a T or U visa."⁵³

⁵⁰ These prohibitions since 1997 have bared reliance on adverse information provided by the perpetrator or the perpetrator's relatives. Family members living in the home with the victim and/or the perpetrator are included among those from whom adverse information is precluded, but the bar is not limited to this group. Paul Virtue, Immigration and Naturalization Service, Non-Disclosure and Other Prohibitions Related to Battered Aliens: IIRARA Section 384 (May 5, 1997) at 3 *available at* <http://niwaplibrary.wcl.american.edu/pubs/confvawa-gov-insconfvawamemo-05-05-1997/>.

⁵¹ Torres, John P. and Forman, Marcy, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 2 and 24 *available at* <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

⁵² Virtue, Paul, Immigration and Naturalization Service, Non-Disclosure and Other Prohibitions Related to Battered Aliens: IIRARA Section 384 (May 5, 1997) at 3 *available at* <http://niwaplibrary.wcl.american.edu/pubs/confvawa-gov-insconfvawamemo-05-05-1997/>.

⁵³ Department of Homeland Security, "Implementation of Section 1367 Information Provisions," (Nov. 1, 2013) at p. 2, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-section-1367/>. See also, Department of Homeland Security, "Implementation of Section 1367 Information Provisions" at p. 9, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/> ("Section 1367 also prohibits DHS officers and employees from making an adverse determination of admissibility or deportability against an alien using information furnished solely by a prohibited source associated with the battery or extreme cruelty, sexual assault, human trafficking or substantial physical or mental abuse, regardless of whether the alien has applied for VAWA benefits, or a T or U nonimmigrant status.")

“The following are prohibited sources for purposes of this guidance:

- i. A spouse or parent who battered the alien or subjected the alien to extreme cruelty,
- ii. A member of the spouse’s or parent’s family residing in the same household as the abusive spouse or parent,
- iii. A spouse or parent who battered the alien’s child or subjected the alien’s child to extreme cruelty (unless the alien actively participated in the battery or extreme cruelty),
- iv. A member of the spouse’s or parent’s family residing in the same household as the alien who has battered the alien’s child or subjected the alien’s child to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty,
- v. In the case of an alien who is applying for a U visa, the perpetrator of the substantial physical or mental abuse and the criminal activity, and
- vi. In the case of an alien who is applying for a T visa, Continued Presence, or immigration relief as a VAWA self-petitioner, the trafficker or perpetrator.”⁵⁴

In implementing Congressional directives not to contact abusers and perpetrators, seek or rely on perpetrator provided information, DHS provided illustrations in its policy memos informing its officers that:

“There are a number of ways DHS employees might receive “tips” from an abuser or an abuser’s family, such as: calling ICE to report the victim as illegal, a “landlord” (who may actually be a human trafficker) calling ICE to report that his “tenants” are undocumented, or providing information to USCIS rebutting the basis for the victim’s application. When a DHS employee receives adverse information about a victim of domestic violence, sexual assault, human trafficking or an enumerated crime from a prohibited source, DHS employees treat the information as inherently suspect.”⁵⁵

“An assertion of fraud by the prohibited source, such as an accusation that the marriage is fraudulent, ordinarily will not serve as the sole basis for adverse action. Abusers often claim their marriage is fraudulent in order to exact revenge or exert further control over the victim.”⁵⁶

⁵⁴ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 9, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁵⁵ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 10, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁵⁶ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 11, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

“Information provided solely by prohibited sources must be independently corroborated. Examples of prohibited sources include: the abuser in the case of a VAWA petitioner, the human trafficker in the case of a T status applicant, or the perpetrator of substantial physical or mental abuse in the case of a U status applicant. In such cases ICE employees cannot rely solely on these sources when making an adverse determination of admissibility or deportability “This prohibition is important to note because ICE officers sometimes receive information from upset or disgruntled spouses, abusers, traffickers, or family members.”⁵⁷

It is important for advocates, attorneys and family lawyers working with immigrant victims to know that VAWA confidentiality protections designed to prevent immigration enforcement actions against and the removal of immigrant crime victims continue to be in full force and in effect as of March of 2017. Since VAWA confidentiality protections are statutorily created and VAWA confidentiality implementation policies are mandated by statute,⁵⁸ changes are unlikely absent Congressional action. Thus, VAWA confidentiality offers the following crime victims significant protection that advocates and attorneys can use should immigrant victims become subjects of immigration enforcement actions. DHS also confirmed that the prohibited source requirements of VAWA confidentiality extend to—⁵⁹

- Family violence victims who were battered or subjected to extreme cruelty by their
 - o Spouse⁶⁰
 - o Parent⁶¹
 - o Family member living in the same household⁶²
 - o **Note:** For these domestic violence cases, the prohibited source bars apply whether or not the victim has filed, or is in the process of filing a VAWA confidentiality protected immigration case.⁶³

⁵⁷ Torres, John P. and Forman, Marcy, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 2 and 24 *available at* <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

⁵⁸ 8 U.S.C. 1367(d).

⁵⁹ 8 U.S.C. 1367(a)(1).

⁶⁰ Includes former spouses INA Section 240(a)(1)(A)(iii)(II)(aa)(CC) and INA Section 240(a)(2)(B)(ii)(II)(aa)(CC).

⁶¹ The immigration law definitions apply in VAWA confidentiality cases. The definition in the Immigration and Nationality Act Section 101(b)(1) and (2) cover abuse by step-parents of step-children even when state family laws would not recognize a parent child relationship based on the facts of the case.

⁶² Includes abuse of parents by over 21 year old citizen sons or daughters. INA Section 240(a)(1)(A)(vi).

⁶³ Virtue, Paul, Immigration and Naturalization Service, Non-Disclosure and Other Prohibitions Related to Battered Aliens: IIRARA Section 384 (May 5, 1997) at 3 *available at* <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-gov-insconfvawamemo-05-05-1997/> (“While the first category of potential abusers enumerated above—spouse or parent – parallels the

- Victims in *the process of applying for status*
 - o As a victim of criminal activity⁶⁴ under the U visa
 - o As a victim of human trafficking under the T visa
 - o Covered by the U visa or in the process of applying for a U visa.
- Victims of spouse abuse with A, E(3), G or H visas who have been battered or subjected to extreme cruelty by their work visa holder spouses who apply for work authorization under INA Section 106 receive VAWA confidentiality protections.⁶⁵

“The process of applying for status” has been interpreted to cover victims who have not yet filed applications for immigration relief. Generally, once a DHS official learns that the immigrant is a victim in the process of preparing an application the victim receives VAWA confidentiality protection. This could include informing local immigration officials that the victim has or is seeking a protection order and will be filing a VAWA, T, U or VAWA work authorization for abused spouses of visa holders’ application. The All DHS Memo states that—

“The lack of a pending or approved VAWA self-petition does not necessarily mean that the prohibited source provisions do not apply and that the alien is not a victim of battery or extreme cruelty. Similarly, although the prohibited source prohibition with respect to T or U nonimmigrant status applies only to applicants for such relief, the victim might be in the process of preparing an application. Accordingly, whenever a DHS officer or employee receives adverse information from a spouse, family member of a spouse, or unknown private individual, the employee will check the Central Index System (CIS) for the COA “384” flag. Employees will be sensitive to the fact that the alien at issue may be a victim and that a victim-abuser dynamic may be at play.”⁶⁶

category which can give rise to a claim of immigration status under the VAWA provisions, the other three categories reflect an expansion of protection to battered aliens who are not eligible for status under VAWA. Such expansion to include those who have suffered abuser at the hands of another family member in the same household is similar to IIRAIRA section 384 which makes individuals abused by other member of the spouse or parent’s family ‘qualified aliens’ for purposes of public benefits.”)

⁶⁴ U Visa criminal activities include: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, fraud in foreign labor contracting, hostage taking, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, and attempt conspiracy or solicitation to commit any of these crimes and any similar activity where the elements of the crime are substantially similar.

⁶⁵ U.S. Citizenship and Immigration Services, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants Revisions to the Adjudicator’s Field Manual (AFM); Revision of Chapter 30.13 (AFM Update AD16-01) PM-602-0130 (March 8, 2016) at 3 available at <http://niwaplibrary.wcl.american.edu/pubs/h-visa-765-2/>.

⁶⁶ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 10, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

“Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), commonly referred to as “384 provisions,” protects the confidentiality of victims of domestic violence, trafficking, and other crimes who have filed for or have been granted immigration relief. Anyone who willfully uses, publishes, or permits any information pertaining to such victims to be disclosed in violation of section 384 of IIRIRA will face disciplinary action and may be subject to a civil money penalty of up to \$5,000 for each violation. Therefore, in order to fully comply with and prevent violations of these confidentiality provisions, U.S. Citizenship and Immigration Services (USCIS) has developed a quick and reliable method for DHS components to verify whether an individual has a pending or an approved Violence Against Women Act (VAWA) self-petition or T or U nonimmigrant status petition/application.”⁶⁷

In addition to these VAWA confidentiality protections, DHS has undertaken efforts to significantly increase DHS’s role in identifying crime victims, including victims of human trafficking, domestic violence, sexual assault, U visa listed criminal activities and immigrant children who have been abused, abandoned or neglected by one of the child’s parents. Agency-wide initiatives such as the DHS Blue Campaign, aim to combat trafficking and help immigrant victims of sexual assault, domestic violence and other crimes covered by the U and T visa programs.⁶⁸ DHS has also developed a number of tools that assist police, prosecutors, courts, victim advocates and attorneys in identifying immigrant crime victims who are eligible for various forms of immigration relief.⁶⁹ These tools should be routinely used by family law and legal aid attorneys and victim advocates to screen clients for immigration relief eligibility. Early identification and filing of a VAWA, T or U visa case provides immigrant victims protection from deportation that attorneys and advocates can help ensure that victims receive.

To deter immigration enforcement actions against crime victims in 2010 DHS established a special code or “flag” in the electronic database used by DHS. This “384 flag” was developed to prevent DHS officials from pursuing enforcement actions against victims who have filed for crime victim related protections under U.S. immigration laws, regulations, and DHS policies.

⁶⁷ Department of Homeland Security, “Broadcast Message on New 384 Class of Admission Code,” available at <http://niwaplibrary.wcl.american.edu/pubs/dhs-broadcast-class-admission-code/>.

⁶⁸ *Fact Sheet: DHS Blue Campaign* (Dep’t of Homeland Sec.) (April 2011), http://www.dhs.gov/news/gc_1279809595502.shtm (last modified March 8, 2012) (hereinafter “Blue Campaign Fact Sheet”).

⁶⁹ See U.S. Department of Homeland Security, *Protections For Immigrant Victims* (January 12, 2017), available at: <http://niwaplibrary.wcl.american.edu/pubs/dhs-protections1-6-links-121516/>; and U.S. Citizenship and Immigration Services, *Immigration Options for Crime Victims* (June 30, 2011), available at: <http://niwaplibrary.wcl.american.edu/pubs/imm-options-victims-of-crimes/>.

When an individual files⁷⁰ a VAWA self-petition,⁷¹ a U visa, a T visa, battered spouse waiver applicants, VAWA cancellation of removal, or VAWA suspension of deportation application, DHS enters a “384 Flag” on their case file. This “384 Flag” allows DHS employees to “verify quickly whether an individual is covered by the confidentiality provisions” of the Violence Against Women Act,⁷² and facilitates DHS agent’s ability to “fully comply with and prevent violations” of VAWA Confidentiality.⁷³ The 384 flag alerts DHS employees that an individual is protected by the VAWA Confidentiality provisions, that immigration enforcement, detention or removal actions are generally not to be taken against the victim, and that information about the existence of, actions taken in and filings made in the victim’s immigration case may not be released.⁷⁴ The code 384 will be permanently maintained and the VAWA confidentiality protections continue to apply from the time of filing through adjudication and indefinitely once the case is approved. Should the VAWA confidentiality protecting case be denied, confidentiality continues to apply unless the case is denied on its merits and until all final appeal rights are exhausted.⁷⁵

In 2011, DHS’s Immigration and Customs Enforcement issued a memo entitled “Prosecutorial Discretion: Certain Victims, Witness, and Plaintiffs.”

⁷⁰ U.S. Department of Homeland Security, Instruction Number 002-02-001 Implementation of Section 1367 Information Provisions 6 (November 7, 2013) (“The nondisclosure provision provides protection as soon as a DHS employee has reason to believe that the alien may be the beneficiary of a pending or approved victim-based application or petition, and the limitation ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted.”) available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁷¹ VAWA self-petitioners also include applicants for protection under the VAWA protections offered in the Cuban Adjustment Act (VAWA CAA); the Nicaraguan Adjustment and Central American Relief Act (VAWA NCARA) and the Haitian Refugee Immigration Fairness Act (VAWA HRIFA), See U.S. Department of Homeland Security, Instruction Number 002-02-001 Implementation of Section 1367 Information Provisions 6 (November 7, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁷² U.S. Department of Homeland Security, Blue Campaign, Executive Summary: Blue Campaign Stakeholder Meeting with Senior Counselor Alice Hill, at 2 (Dec. 10, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Stakeholder-Meeting-Executive-Summary-Dec-10-2010.pdf> (hereinafter “Blue Campaign Memo”).

⁷³ U.S. Citizenship and Immigration Services, DHS Broadcast Message on New 384 Class of Admission Code (Dec. 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf>.

⁷⁴ *Id.*; U.S. Department of Homeland Security, Instruction Number 002-02-001 Implementation of Section 1367 Information Provisions 6 (November 7, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>

⁷⁵ U.S. Citizenship and Immigration Services, DHS Broadcast Message on New 384 Class of Admission Code (Dec. 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf>.

This memo also known as the Victim Witness Memo continues in full force and effect from 2011 through the time of the writing of this chapter in 2017. The policies set forth in the Victim Witness memo were designed by DHS to set

“forth agency policy regarding the exercise of prosecutorial discretion in removal cases involving the victims and witnesses of crime, including domestic violence . . . [i]n these cases, ICE officers, special agents, and attorneys should exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice . . . [a]bsent 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. . . .

To avoid deterring individuals from reporting crimes and from pursuing actions to protect their civil rights, ICE officers, special agents, and attorneys are reminded to exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints. Particular attention should be paid to: victims of domestic violence, human trafficking, or other serious crimes; witnesses involved in pending criminal investigations or prosecutions. . . .

In deciding whether or not to exercise discretion, ICE officers, agents, and attorneys should consider all serious adverse factors. . . [i]n the absence of these or other serious adverse factors, exercising favorable discretion, such as release from detention and deferral or a stay of removal generally, will be appropriate. Discretion may also take different forms and extend to decisions to place or withdraw a detainer, to issue a Notice to Appear, to detain or release an alien, to grant a stay or deferral of removal, to seek termination of proceedings, or to join a motion to administratively close a case.”⁷⁶

In 2011, DHS also established guidelines for the exercise of prosecutorial discretion. The memo states that:

“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. In practice, the vast majority of state and local law enforcement agencies do not generally arrest

⁷⁶ Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to all field office directors, special agents in charge and chief counsel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, at 3 (on file with author) (June 17, 2011) (hereinafter “Crime Victims and Witnesses Memo”), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf>.

victims or witnesses of crime as part of an investigation. However, ICE regularly hears concerns that in some instances a state or local law enforcement officer may arrest and book multiple people at the scene of alleged domestic violence. In these cases, an arrested victim or witness of domestic violence may be booked and fingerprinted and, through the operation of the Secure Communities program or another ICE enforcement program, may come to the attention of ICE. Absent special circumstances, it is similarly against ICE policy to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties.”⁷⁷

Under this memo DHS officials are required to exercise their prosecutorial discretion on a case-by-case basis when making arrest, detention, removal and enforcement decisions involving immigrant crime victims and witnesses. Special attention is to be paid to:

- “victims of domestic violence, human trafficking, or other serious crimes;
- Witnesses involved in pending criminal investigations or prosecutions;
- Plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and
- Individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor.

In evaluating whether to exercise prosecutorial discretion under this memo in the case of an immigrant victim or witness DHS will also carefully assess whether the immigrant is an enforcement removal priority for national security or public safety reasons. News articles published in March of 2017 quote Immigration and Customs Enforcement (ICE) spokespersons who state that this 2011 policy remains in effect and as in the past for immigration enforcement purposes. ICE “will take into consideration if an individual is the immediate victim or witness to a crime, in determining whether to take enforcement action.”⁷⁸ “Particular attention is paid to victims of domestic violence, human trafficking and other serious crimes . . . ICE also works closely with its state and local law enforcement partners to help make eligible individuals aware of, and pursue, U visas for victims of crimes including

⁷⁷ *Id* at 1-2.

⁷⁸ Caplan-Bricker, Nora, *I Wish I'd Never Called the Police*” Slate (March 19, 2017) available at http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html.

domestic violence and T visas for victims of human trafficking.”⁷⁹ It appears that the 2011 Victim Witness Memo may still be a tool advocates and attorneys and their law enforcement and prosecutor partners working on cases involving immigrant victims can use to help fend off immigration enforcement actions that perpetrators attempt to get immigration enforcement officials to initiate against victims. This memo has been particularly helpful for victims of domestic violence, sexual assault, stalking, and human trafficking.

DHS also implemented procedures for expedited Adjudication of VAWA Self-Petitions, T and U Visa Cases within 30 or 45 Days. Under this policy, ICE notifies the VAWA Unit at the DHS Vermont Service Center when an immigrant in removal proceedings or in immigration detention has a pending application for immigration benefits, including VAWA, T or U visa applications.⁸⁰ ICE is also required to send the immigrant victim’s “A” file, or immigration case file, to the VAWA Unit.⁸¹ The VAWA Unit must then endeavor to adjudicate the victim’s application for VAWA, T or U visa immigration relief within 45 days, or within 30 days if the victim is detained.⁸² However, the VAWA Unit has some discretion as to the extent to which it will meet these adjudication targets.⁸³ The VAWA Unit requires attorneys working with immigrant victims in detention and in removal proceedings to request expedited adjudication based on the following additional factors: severe financial loss to company or individual; extreme emergent situation; humanitarian situation; Department of Defense or national interest situation; DHS error; and compelling DHS interest.⁸⁴

⁷⁹ Tyler Kingkade, *Domestic Abuse Victims Aren’t Coming Forward Because They’re Scared Of Being Deported* BuzzFeedNews available at https://www.buzzfeed.com/tylerkingkade/trump-domestic-abuse-victims-are-more-afraid-of-being?utm_term=.iwbBY9x3v#.evWZzDxY6.

⁸⁰ Pending Applications Memo (August 20, 2010) (This memorandum extends to all approved and pending but likely to be approved immigration cases in which the applicant has an immediate basis for immigration relief and includes VAWA, T and U-visa cases), available at: <http://niwaplibrary.wcl.american.edu/pubs/imm-gov-icememoalienspend10/>.

⁸¹ *Id.*

⁸² Memorandum from U.S. Citizenship and Immigration Services, *Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator’s Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11-16 (PM-602-0029)* (February 4, 2011), available at: <http://www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/coordination-adjud-removal-proceedings.pdf>.

⁸³ *Id.*

⁸⁴ See U.S. Citizenship and Immigration Services, *Expedite Criteria*, (June 17, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=16a6b1be1ce85210VgnVCM10000082ca60aRCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD>. Expedite requests made in VAWA confidentiality protected cases are made directly to the VAWA Unit of the Vermont Service Center. See also Pending Applications Memo (E-mail to Leslye Orloff from Lynn A. Boudreau, Assistant Center Director, Vermont Service Center VAWA Unit (March 4, 2011) stated that requests to expedite cases must come directly to the Vermont Service Center from Immigration and Customs Enforcement. The expedite criteria that can be used by the stakeholder community is outlined below:

- Severe financial loss to company or individual
- Extreme emergent situation
- Humanitarian situation
- Department of Defense or National Interest Situation
- USCIS error
- Compelling interest of USCIS

The effect of VAWA confidentiality laws is to offer some significant protection against immigration enforcement actions, detention and removal for immigrant crime victims. These VAWA confidentiality protections are statutory and remain in place unless the statute is amended. These VAWA confidentiality protections against removal, detention and the enforcement of civil immigration laws against victims are augmented and supported by the ICE Victim Witness Memo that has been in effect since 2011.

With good victim advocacy, client education and counseling, and legal assistance, most victims should be able to avail themselves of these protections. As a result of VAWA confidentiality protections in family court cases, immigrant victims will be unlikely to be at high risk for removal from the United States. When a party to a family court case or a party's child has been subjected to battering or extreme cruelty or other forms of crime victimization, the filing of a VAWA, T visa, U visas or INA Section 106 battered immigrant work authorization application will provide victims protection from deportation.

These protections will help most, but not all victims. There are a few categories of immigrant crime victims who, as of 2017, will be much less able to avail themselves of these VAWA confidentiality protections. These categories are immigrant victims—

- With criminal histories
- Who are in removal proceedings
- With outstanding orders of removal
- Who are subject to reinstatement of removal

One result of police not using qualified interpreters at crime scenes is that some victims end up being arrested either with or instead of their perpetrators when victims call police for help.⁸⁵ It is extremely important, particularly in times of increased immigration enforcement that police responding to calls for help from victims of domestic violence follow U.S. Department of Justice directives on use of qualified interpreters at crime scenes.⁸⁶ Also in domestic

⁸⁵ See generally, Szabo, Krisztina E., Stauffer, David, Anver, Benish, and Orloff, Leslye E., *Early Access to Work Authorization For VAWA Self-Petitioners and U-Visa Applicants 25* (February 12, 2014) available at http://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/ (15.4% of victims who reported being subject to immigration enforcement reported that immigration enforcement was initiated as a result of VAWA self-petitioners calling police for help during a domestic violence incident.) See also, Lee, Natalia, Quinones, Daniel, Ammar, Nawal and Orloff, Leslye E., *National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access 25* (April 16, 2013). (In a survey reporting on 14,341 of LEP immigrant victims who called the police for help in only 12% (n=1,637) of the cases did the officer speak to the victim in the victim's own language. In less than half (42.6%, n= 5,803) of cases did the officers identify the language the victim spoke and in 30% of the cases (n=4,165) an unqualified interpreter was used. Officers used a language line 960 times (7.0%) and a qualified interpreter on 1,419 occasions (10.4%).

⁸⁶ See U.S. Department of Justice: *Model Police Department Directive: Limited English Proficiency Guidelines* (2005) available at <http://niwaplibrary.wcl.american.edu/pubs/doj-ojp-lep-police-model-policy/>.

violence cases, police must follow best practices in crime scene investigations making primary or predominant aggressor determinations and not criminally charging victims who were acting in self-defense. Failure to use qualified interpreters in domestic violence crime scene investigations leads to increased arrest of LEP victims for domestic violence. Whether the victim's arrest is in addition to or instead of the primary or predominant perpetrator of domestic violence in the relationship, arresting an immigrant victim is not a benign event. It can severely undermine a victim's access to VAWA, U and T visa immigration protections and it increases the danger of ongoing abuse for the victim and her children.

It is extremely important for family law attorneys, victim advocates and other service providers working with immigrant crime victims to learn whether the victim has a criminal or immigration removal history.⁸⁷ Victims identified as having criminal or removal histories should be referred to an immigration attorney with expertise on domestic violence, sexual assault and human trafficking dynamics experienced by immigrant victims.⁸⁸ Advocates and attorneys should also advise victims what to do should they become the target of an immigration enforcement action.

⁸⁷ The types of issues that could make the immigrant victim's VAWA, U visa or SIJS immigration case more complex include this issues list in the "Red Flag" screening tool available at: <http://niwaplibrary.wcl.american.edu/pubs/vawa-red-flags/>.

⁸⁸ To locate attorneys with this expertise across the country see <http://www.niwap.org/directory/>.

Preparing Immigrant Victim Clients for Encounters with DHS

Attorneys, victim advocates, police and prosecutors should become familiar with and have readily available copies of VAWA confidentiality statutes and the DHS policies implementing them,¹ as well as a copy of the 2011 ICE Victim Witness Policy.² These policies can be used to advocate with DHS officials who may be considering or who have initiated an immigration enforcement action, detention or a removal action against an immigrant crime victim. Victims who should be protected include but are not limited to victims eligible for, in the process of applying for, who have filed for and who have received protection under VAWA or the Trafficking Victims Protection Act. This includes VAWA self-petitions, Battered Spouse Waivers, VAWA cancellation of removal, VAWA suspension of deportation, the T and U visa and INA Section 106 work authorization for abused spouses of work visa holder programs.

A. STRATEGIES FOR IMMIGRANT VICTIMS WHO HAVE FILED VAWA CONFIDENTIALITY PROTECTED CASES

Attorneys working with immigrant crime victims who have filed cases with DHS for VAWA, T, U visa or other VAWA Confidentiality protected immigration cases should have victims take the following steps to help prevent immigration enforcement, detention and removal:³

- All immigrants have a right to call their attorney before speaking to DHS officials.

¹ Orloff, Leslye E., *The Three Prongs of VAWA Confidentiality Protections for Immigrant Victims of Domestic Violence, Sexual Assault, Human Trafficking and Other U Visa Criminal Activities* (March 3, 2017) available at: <http://niwaplibrary.wcl.american.edu/vawa-confidentiality-materials-tools/>.

² Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to all field office directors, special agents in charge and chief counsel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, at 3 (on file with author)(June 17, 2011) (hereinafter “Crime Victims and Witnesses Memo”), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf>.

³ Molina, Rocio, Ngyuen, Ho Thanh, Fletcher, Maria Jose, Irwin, Donna, and Orloff, Leslye E., *Working With Survivors Who Are At High Risk of Immigration Enforcement Action* (July 25, 2012) available at <http://niwaplibrary.wcl.american.edu/pubs/imm-qref-riskenforcementaction-7-25-12/>.

- Ask for an interpreter if the victim is limited English proficient. To help victims, particularly those who are limited English proficient, convey this vitally important information to immigration enforcement officials, attorneys should provide the client with a written document requesting that DHS provide a qualified interpreter to facilitate the victim's communication with DHS officials.
- Provide DHS officials with an attorney's Letter:⁴ The request for a qualified interpreter listed above could be included in a letter drafted by the victim's attorney addressed to DHS officials that
 - List's the "A" number from the victim's immigration case;
 - Explains that the victim's immigration case is one that receives VAWA confidentiality protection under 8 U.S.C. 1367;
 - Provides the attorneys cell phone number; and
 - Asks the DHS official to look up the victim's "code of admission" associated with the victim's A number.
- VAWA prima facie determination letter. Once an immigrant victim has filed a VAWA self-petition and receives a prima facie determination from DHS, carrying and showing a copy of the prima facie determination to immigration enforcement official can be a very helpful way to inform immigration enforcement officials that the victim has VAWA confidentiality protection.
- Ask the DHS Official to check the "384 Red Flag" System: DHS officials have been directed to check the "Central Index System" for the name and/or "A" number of potential victims. As discussed above, VAWA confidentiality protected case files are flagged with a 384 code in the DHS database. DHS policy is not to pursue enforcement actions against crime victims and witnesses, except in limited circumstances that include national security, public safety, and history of criminal convictions or history of egregious immigration violations.
- Memorize their "A" Number: Immigration cases are assigned an identification number that begins with the letter "A." A victim should memorize this number and should provide it if stopped by an immigration enforcement official or local police. She should also tell the authorities that she is a crime victim and that she has filed a VAWA confidentiality protected immigration case with DHS.

⁴ The authors recognize that there are safety planning challenges and concerns that the victim's attorney will need to work through with the victim to weigh and if possible address about how the victim can safely carry this information, particularly in cases in which the victim continues to reside with the abuser. Some clients will not be able to safely carry this paper work with them. For these victims getting an immigration case filed as soon as possible is an even greater imperative. Filing an immigration case will give the victim an "A" number they can memorize write down for DHS officials should the victim be stopped.

B. STRATEGIES FOR VICTIMS WHO ARE IN THE PROCESS OF FILING FOR VAWA, T OR U VISA IMMIGRATION RELIEF

- Attorney's or Victim Advocate's Letter: VAWA confidentiality protection begins at different times for immigrant crime victims.
- Spouse, Child and Elder Abuse: For immigrant victims of spouse, child and elder abuse who have suffered battering or extreme cruelty VAWA confidentiality prohibitions against DHS reliance on perpetrator provided information begins when DHS first learns that the immigrant is a victim of spouse, elder or child abuse. These protections apply equally to all immigrant victims without regard to the perpetrator's immigration status. Both undocumented and lawfully present immigrant victims benefit from these protections. Attorneys and advocates working with immigrant victims should provide a letter that the victim can show to DHS officials who encounter the victim that explains and outlines the evidence that the client has been battered or subjected to extreme cruelty. If a court has issued a civil protection order, a stay away order in a criminal case or there has been a finding of abuse in a civil or criminal court proceeding, it can be useful for the letter to reference the case number and the victim may want to consider also carrying a copy of the order.
- Intimate Partner Abuse and Other U and T Visa Listed Criminal Activities: Dating violence victims, other family violence victims, human trafficking victims and victims of other U visa criminal activities receive VAWA confidentiality protection the moment a DHS official is informed that the victim is in the process of filing a T visa or U visa application. Attorneys and victims' advocates should provide immigrant victims whom they have identified through screening as U or T visa eligible with a letter informing immigration officials that the victim is in the process of preparing to file a T or U visa application. Once U visa victims obtain a certification from law enforcement, prosecution, or other U visa certifying agency, carrying a copy of the certification provides excellent evidence for DHS that the victim is in the process of filing a U visa application. Similarly, obtaining a T visa endorsement provides helpful evidence should the victim be stopped by DHS officials.
- Visa Holder Spouses Applying for Work Authorization Under VAWA: Spouses of visa holders will have A, E(3), G or H visas and should memorize and provide their "A" numbers if they are stopped by immigration enforcement officials. They may additionally, provide a copy of their victim based work authorization application, but this should not be necessary because the victim has legal immigration status through her visa.

C. FACTORS ALL IMMIGRANT CLIENTS SHOULD INFORM IMMIGRATION ENFORCEMENT OFFICIALS ABOUT

There are a number of factors that may additionally be useful for attorneys and victim advocates to inform clients that they should tell DHS officials should they become the target of immigration enforcement activities. With good advocates and good case facts, particularly in cases of immigrant victims, these factors may contribute to a victim not being detained.

- Victims who are pregnant: If the victim is pregnant DHS policy provides for the victim's release from detention.⁵ Immigrants who are pregnant must immediately inform immigration enforcement officials of their pregnancy.
- Nursing mothers and primary caretakers of children: For over a decade DHS has had policies in place that encouraged DHS immigration enforcement officials not to detain nursing mothers and primary care takers of children. Informing immigration enforcement officials that an immigrant client is a nursing mother and/or the primary caretaker of children should contribute to the parent receiving humanitarian release from detention, particularly if the parent is a crime victim.⁶

⁵ Homan, Thomas, Identification and Monitoring of Pregnant Detainees (August 15, 2016) available at: https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentificationMonitoringPregnantDetainees.pdf; See also ICE's 2011 Performance-Based National Detention Standards (February 2013 Errata), at 82, available at: <http://niwaplibrary.wcl.american.edu/pubs/ice-pregnancy-policy/>, ("The classification officer should inquire about and remain alert to signs of any special vulnerability or management concern that may affect the custody determination. Special vulnerabilities may include disability, serious medical or mental health needs, risk based on sexual orientation or gender identity, advanced age, pregnancy, nursing, sole caretaking responsibilities, or victimization, including individuals who may be eligible for relief related to the Violence Against Women Act (VAWA), victims of crime (U visa), or victims of human trafficking (T visa). (To detain individuals confirmed to have vulnerabilities, ICE Officers must prior to the individual's arrival at the facility have obtained concurrence from the Field Office Director (FOD) and sent a significant event notice (SEN) to Headquarters.)")

⁶ Kennedy, Delahunt Announce New Guidelines For Immigration Raids (November 16, 2007), available at: <http://niwaplibrary.wcl.american.edu/pubs/imm-tkit-guidelinesimmraids/>; See also, Letter from Susan Cullen, Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees When Conducting Worksite Enforcement Operations (February 7, 2008), available at <http://niwaplibrary.wcl.american.edu/pubs/imm-qref-humanitarianconcernsguidelines>.

Seeking Protection Orders for Immigrant Victims

Civil orders of protection offer immigrant victims of domestic violence, sexual assault, trafficking, or other criminal activity an immediate legal remedy without involving the criminal justice system designed to enhance victim safety.¹ A National Institute of Justice funded survey of 153 battered immigrant women living in 10 states (CA, DC, FL, GA, IA, MN, MA, NJ, OH, TX, WI), who spoke 19 different languages found that for the majority of immigrant victims protection orders were incredibly useful.² Although most (60.9%) of immigrant women do not know about protection orders at the time they seek help from advocates or attorneys for domestic violence, immigrant women who seek protection orders with the assistance of advocates or attorneys largely (87.9%) find them to be helpful or very helpful.³ The vast majority (98.1%) of immigrant women who receive protection orders report that they would recommend protection orders to other battered immigrant women.⁴ Advocates and attorneys play a crucial role in informing battered immigrant women that domestic violence is a crime and that there are legal remedies under family and immigration laws available to help battered immigrants, including those who are undocumented.⁵

Battered immigrant women who choose to seek protection orders often have experienced high levels of physical violence with over two thirds reporting within the past year experiencing more than three incidents of significant

¹ *D.C. Intrafamily Offenses Act, 1969: Hearings on H.R. 8781 Before Subcomm. No. 1 To Establish Family Court System*, 91st Cong. (1969). For more information about protection orders, see Orloff, Leslye E. & Klein, Catherine F., *Domestic Violence: A Manual for Pro Bono Lawyers*, (Ayuda) (2d ed. 1992). For an amicus brief on protection orders, see also *Brief for Ayuda et. al. as Amici Curiae Supporting Petitioner* at 9, *United States v. Dixon*, 509 U.S. 688 (1993) (No. 91-1231) (“The Criminal Justice System Alone Cannot Ensure Victims’ Safety”); National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice, Recommendations from the National Council of Juvenile and Family Court Judges’*, Family Violence Project (1990).

² Dutton, Mary Ann, Ammar, Nawal, Orloff, Leslye & Terrell, Darci, *Use and Outcomes of Protection Orders by Battered Immigrant Women: Revised Final Technical Report 29* (2006), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSRCH_DV_Use_Outcomes%20Protection_Orders.pdf.

³ *Id.* at 41.

⁴ *Id.*

⁵ *Id.* at 50-51.

physical violence (46% with physical pain lasting more than a day; 39.5% slammed against a wall; 39.1% had resulting cuts and bruises and 35.9% being beaten up).⁶ Immigrant victims obtaining protection orders also reported high rates of sexual assault and coercion; with 56.9% reporting having sex because they were afraid of what would happen if they did not and 51.3% reporting forced sexual relations and 48.3% reporting more than three incidences of forced sexual violence over the past year.⁷ The majority were concerned for their own (86.2%) and their children's (77.6%) safety.⁸ Significantly, immigrant victims applying for protection orders also experienced high rates of immigration related abuse. When a victim's abusive U.S. citizen spouse filed immigration papers for her, 39% used threats or actual withdrawal of papers filed as a form of coercive control.⁹ Additionally, 51% of abusers of immigrant victims, sometimes, often or very often threatened or actually reported their undocumented victims to immigration officials.¹⁰

This section highlights important issues that arise in cases when immigrant victims are seeking protection orders. It also provides guidance on the types of creative remedies that family law experts have found to be most useful to have included in the protection orders of their immigrant victim clients. The role that protection orders play in helping victims obtain documentation in the abuser's control that can be submitted to DHS in support of the victim's immigration application. As discussed above, most immigrant victims' safety is best protected when they file their immigration case before they serve the perpetrator with notice of the protection order proceeding. In VAWA and U visa immigration cases, victims have several opportunities as the immigration case is being adjudicated to supplement the record with additional information. The civil protection order process provides a particularly effective and safe way for the victim to acquire from the perpetrator additional documentary evidence needed to support her immigration application.

SPECIAL ISSUES THAT ARISE IN CASES OF IMMIGRANT VICTIMS SEEKING PROTECTION ORDERS

This section will discuss three issues that arise often in protection order cases of battered women whether or not they are immigrants, but are particularly significant in cases of immigrant victims:

- Seeking and obtaining full contact protection orders that allow the victim and the perpetrator to continue to live together or reunite following a separation;

⁶ *Id.* at 42.

⁷ *Id.*

⁸ *Id.* at 43.

⁹ *Id.*

¹⁰ *Id.*

- Assuring that protection orders issued are jurisdictionally sound; and
- Preventing issuance of a protection order against the victim.

The Value of Full Contact Protection Orders

All state protection order laws allow courts to issue protection orders that do not require or contemplate separation of the victim and the abuser. Since the 1980s, attorneys for immigrant victims have been using full contact protection orders in cases of immigrant victims. U.S. immigration laws have been designed to allow victims to file for immigration relief while the victim continues to reside with the abuser. Obtaining immigration relief prior to separation improves victim safety because victims with approved cases are secure in knowing that they will be protected from deportation.

It is only after approval of the victim's immigration case that the victim receives legal work authorization. The ability to work lawfully is crucial to an immigrant victim's ability to support herself and her children independent of her abuser. Among immigrant victims filing VAWA self-petitions, 73.9% must wait more than 6 months after filing to receive work authorization and 36.7% have longer waits of between 13 months and 2 years.¹¹ Battered immigrants applying for U visas have longer wait times given that the government only issues 10,000 visas per fiscal year. As of this writing, USCIS had received 60,710 applications for FY2016 with the number of pending applications reaching a high of 150,604.¹² USCIS is currently processing U visa applications received on May 2014.¹³

Attorneys can play an important role supporting immigrant victims who may be reticent to file for a protection order because they believe they must leave their abusers before they will be granted one. Victims who have reunited with the perpetrator by the date of the protection order hearing, who have not separated, or who plan to return to live with the perpetrator can obtain a protection order that includes provisions against further abuse and an order that the perpetrator receive counseling.¹⁴ "No further abuse" provisions allow

¹¹ Orloff, Leslye E., National Survey on Timing of Access to Work Authorization by Immigrant Victim VAWA Self-Petitioners and U-Visa Applicants (September 28, 2011), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Timing-of-Access-to-Work-Authorization-6.4.12.pdf>.

¹² https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2016_qtr4.pdf.

¹³ *Id.*

¹⁴ If the respondent is not fluent in English, he should be ordered to attend a certified program in a language in which he is able to communicate. If there is no program in the respondent's language, he should be ordered to arrange for an accompanying interpreter for all sessions. See Letter from Perez, Thomas E., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Chief Justice/State Court Administrator (August 16, 2010) (on file with author), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/lan-guage-access/government-documents/final_courts_ltr_081610.pdf. See also Asian & Pacific Islander Institute on Domestic Violence, *Language Access & Interpretation*, <http://www.api-adv.org/organizing/interpretation.php> (last visited on April 15, 2014).

for full contact and permit parties to continue to live together. Protection order remedies can also include orders that give child custody and support to victims should the parties separate. Such orders can also grant child support payments while the parties continue to reside together, which can be helpful when the abuser has been limiting the victim's access to money. Remedies can also include providing the victim with access to or copies of documentation that will help her in her immigration case.¹⁵

Other significant advantages to obtaining a protection order, even when the parties plan to continue living together, are: 1) the abuser can be charged criminally if the "no further abuse" order is violated, and police will respond to the abuse more seriously, and 2) evidence that the protection order was issued can provide evidence that will support the victim's VAWA or U visa application.

The Necessity of Jurisdictionally Sound Protection Orders

In protection order proceedings across the country, for a range of reasons, perpetrators of domestic abuse may be willing to enter into consent protection orders having agreed to the remedies that the order will contain. However, some perpetrators, particularly those who are represented, will only enter into protection orders by consent if the protection order on its face includes a statement that the court has made no findings of abuse. Perpetrators will negotiate for no-findings protection orders for a variety of reasons:

- To avoid prohibitions in state and federal law on possession of firearms¹⁶
- To avoid findings that could be harmful to the perpetrator in a custody proceeding¹⁷
- To prevent the entry of a finding that could serve as a basis for spousal support or a more favorable property division to the victim in a divorce case¹⁸
- To undermine the usefulness of the protection order as evidence in the victim's immigration case

¹⁵ If the parties are continuing to live together and you are considering seeking documentation that will be helpful in the victim's immigration case it is important to evaluate the safety of the victim and any risks that could be involved in taking actions that could signal to the perpetrator that the victim has filed a VAWA or U-visa immigration case.

¹⁶ See May, Lisa D., *The Backfiring Of The Domestic Violence Firearms Bans*, 14 Colum. J. Gender & L. 1, 34-35 (2005) ("Rather than properly applying state laws that would trigger the federal statutes, some judges misapply the state laws for the very purpose of circumventing the application of the federal firearms bans.").

¹⁷ See Lemon, Nancy K. D., *Statutes Creating Rebuttable Presumptions Against Custody To Batterers: How Effective Are They?*, 28 Wm. Mitchell L. Rev. 601, 664-65 (2001).

¹⁸ Carra, Alicia (Lacy), Orloff, Leslye, Knott, Jason & Mitchell, Darren, *Jurisdictionally Sound Protection Orders*, in *Empowering Survivors* at 3 (2013), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/language-access/government-documents/final_courts_ltr_081610.pdf.

For a protection order to be legally binding, the court must have subject matter jurisdiction to issue the order.¹⁹ Orders issued without subject matter jurisdiction are not enforceable under VAWA's full faith and credit provisions.²⁰ Subject matter jurisdiction in a protection order case is based on an occurrence of domestic violence such as assault, battery, or other acts covered by the state domestic violence statute, including stalking, threats, sexual assault, and attempts to cause bodily injury. Protection orders issued without such findings violate the full faith and credit provision of VAWA and are therefore unenforceable across state lines, thus putting victims' safety at risk.²¹ An uncontested order for protection without a finding of domestic violence can be vacated for lack of jurisdiction, as parties cannot consent to give a court jurisdiction that the court would not otherwise have.²²

While it is important to make a finding of violence, it is not always necessary to hold a full evidentiary hearing in cases where the respondent consents to the protection order. Subject matter jurisdiction may be based on an admission by the respondent of one or more acts that qualify as domestic violence under the state protection order statute. Subject matter jurisdiction can also be obtained by an uncontested affidavit or pleading offered by petitioner.²³ If there is no admission and all of the allegations in the protection order petition are contested, the court must hold a hearing and issue a protection order based upon the court's findings of domestic violence.

The Dangers of Protection Orders Issued Against Immigrant Victims

While it is never recommended practice for a family law attorney to encourage her client to enter into a protection order issued against the victim, for immigrant women practices that result in the issuance of a protection order against them by consent or after a hearing are particularly dangerous. The issuance of a protection order against a perpetrator has no immigration ramifications for either the perpetrator or the victims. However, conviction or issuance of court findings, that a protection order has been violated becomes a

¹⁹ See Schramek v. Bohren, 429 N.W.2d 501, 502 (Wis. Ct. App. 1988); Gilbert v. State, 659 So. 2d 233 (Fla.1995); Master v. Eisenbart, No. 90-2897, 1991 Wisc. App. LEXIS 1270 (Wis. Ct. App. Sept. 18, 1991). See also generally Lemon, Nancy, Domestic Violence Law (West) (2006).

²⁰ 18 U.S.C. 2265(b)(1).

²¹ 42 U.S.C. § 13981 (1994).

²² Bryant v. Williams, 161 N.C. App. 444 (N.C. Ct. App. 2003); See Capron v. Van Noorden, 6 U.S. 126 (1804) ("jurisdiction over the subject matter cannot be affected by agreement or consent"); Bush v. United States, 703 F.2d 491 (11th Cir. 1983); Latin Am. Cas. Ins. Co. v. Hi-Lift Marina, Inc., 887 F.2d 1477 (11th Cir. 1989); Am. Policyholders Ins. Co. v. Nyacol Products, Inc., 989 F.2d 1256 (1st Cir. 1993).

²³ Carra, Alicia (Lacy), Orloff, Leslye, Knott, Jason & Mitchell, Darren, *Jurisdictionally Sound Protection Orders*, in Empowering Survivors at 3, available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/language-access/government-documents/final_courts_ltr_081610.pdf.

deportable offense for any non-citizen.²⁴ If an immigrant victim agrees to issuance of a protection order against her, or if she has a protection order issued against her after trial, she will be in the precarious position of being one step away from deportation. If her perpetrator can convince a judge who makes a finding in any court proceeding (custody, divorce, criminal contempt, or protection order enforcement case), the victim could be facing deportation.

It is therefore incumbent upon attorneys representing immigrant victims to do all they can to ensure that protection orders are not issued against non-citizen victims. This will require, in some instances, going to trial to fight issuance of a protection order against an immigrant victim.²⁵

There are two ways protection orders can be issued by courts against victims: mutual protection orders and cross claim protection order proceedings. A mutual protection order is an order issued against both the petitioner and the respondent in a protection order case filed by the victim. These are cases in which the petitioner filed the case, served the perpetrator, and at hearing on the victim's request for a protection order, the court issues a protection order against both the perpetrator and the victim. One goal of the 1994 VAWA was to stop courts from issuing mutual protection orders. VAWA barred jurisdictions with practices of issuing mutual protection orders from receiving VAWA funding under the Grants to Encourage Arrest Program²⁶ and granted full faith and credit enforceability only to protection orders that were issued after the party against whom the protection order was entered was given reasonable notice, an opportunity to be heard and due process.²⁷ Victims should object to the issuance of any mutual protection order, stating that the order violates their due process rights and should request a full hearing.

Although mutual protection orders are unenforceable under VAWA's full faith and credit provisions, abusers are not barred from going to court and requesting a protection order against the victim alleging that he has also been a victim of domestic violence. Attorneys representing immigrant victims whose abusers have filed protection order cases against them should carefully interview the client to evaluate the history of domestic violence in the

²⁴ Lawful permanent residents can be deported for protection order violations. For this reason, attorneys and advocates need to work closely with immigrant victims to do safety planning around protection order violations to determine whether prosecution of a non-citizen for violation of a protection order will enhance or harm victim safety. For detailed information on how to assist an immigrant victim with safety planning when protection orders are violated, see Orloff, Leslye, Olavarria, Cecilia, Martinez, Laura, Rose, Jenifer & Noche, Joyce, "Battered Immigrants and Civil Protection Orders," in *Breaking Barriers* at (2013), 4 available at: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/protective-orders/5.1_BB_Family_ProtectionOrders_Battered_Immigrants_Civil_Protection-MANUAL-BB.pdf.

²⁵ *Id.*

²⁶ 42 U.S.C. § 3796hh(c)(3) ("certify that their laws, policies, or practices prohibit issuance of mutual restraining orders of protection except in cases where both spouses file a claim and the court makes detailed findings of fact indicating that both spouses acted primarily as aggressors and that neither spouse acted primarily in self—defense").

²⁷ 18 U.S.C. § 2265.

relationship. In any case where there appears that there may be merit to the abuser's claim that the victim also perpetrated abuse, the victim's attorney should investigate the case to determine whether the victim was acting in self-defense. If so, the victim's attorney should come to court prepared to litigate the self-defense case and prove that the battered immigrant client is the actual victim in the relationship. The goal is to win dismissal of the perpetrator's protection order case against the victim and receive a protection order issued on the victim's behalf against the perpetrator.²⁸ This approach is very important to pursue particularly during times of increased immigration enforcement since violation of a protection order is a deportable offense and issuance of a protection order against a victim can put immigrant victims one step away from removal.

CRAFTING CREATIVE AND EFFECTIVE PROTECTION ORDERS

Protection orders may address and contain a wide range of remedies that can be used to address the specific needs of immigrant victims of domestic violence. To be most effective, protection orders should be as specific, and contain as much relief, as possible to minimize the harm exerted upon a victim by her abuser. When the parties have children in common, it is essential that the protection order award custody to the non-abusive parent and address any visitation rights of the perpetrator. The victim's attorney should be creative in advocating for remedies that reduce the power and control issues the victim may be experiencing with the relationship. Relief in protection orders should be tailored to meet the individual safety concerns of the immigrant victim client.²⁹

Abusers may take advantage of gaps in relief, or lack of specificity, to further harm the victim. In other cases, gaps in the relief or lack of specificity create difficulty in enforcing some provisions. In addition to the protections generally included in state protection order statutes, immigrant victims need protections included that address their particular needs.

The catch-all provisions in state protection order statutes are used by judges to offer further life-saving help to immigrant victims. Although your client may or may not directly request the following remedies, it is important that as counsel for a battered immigrant attorneys are able to show her all the potential remedies available to her. After reviewing this list with a battered immigrant client, it is important that attorneys discuss with a client any other

²⁸ For further information on case strategies if the perpetrator of abuse seeks a protection order against an immigrant victims, see Orloff, Leslye, Olavarria, Cecilia, Martinez, Laura, Rose, Jenifer & Noche, Joyce, *Battered Immigrants and Civil Protection Orders*, in *Breaking Barriers* at 29-31 (2013), available at: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/protective-orders/5.1_BB_Family_ProtectionOrders_Battered_Immigrants_Civil_Protection-MANUAL-BB.pdf.

²⁹ See generally, *id.*

concerns she may have regarding what she believes might trigger future abuse. This discussion could reveal other creative remedies that could be included in the protection order to cut off additional avenues of coercive control.

Traditional Remedies Available Through Protection Orders

- **No Contact Provisions:** Include all locations frequented by the victim (e.g. place of worship, immigrant community organizations, drug-store, health care provider, employer). No contact at work protections are crucial for battered immigrants whose legal work authorization may be tied to a particular employer and is not transferable.
- **Custody:** Obtaining custody awards as part of a civil protection order is crucial for non-citizen battered immigrants, because the custody determination is being made in the context of court findings regarding the abuse. Getting these awards early, even if custody needs to be litigated as part of the protection order case, undermines the ability of the perpetrator to downplay the abuse and raise immigration status as a negative factor in a later custody case. Also, having the custody decision in place strengthens the victim's confidence in the justice system and takes away from the abuser a powerful tool.
- **Visitation:** Even in cases of severe violence, it can be very difficult to cut off visitation by an abuser. It is therefore recommended that an attorney work with the client in preparation for the civil protection order case to design the safest way to exchange the children. The safest exchange provisions are those that do not contemplate any contact between the victim and the perpetrator (e.g. pick up and drop off by a third party trusted by both parents; pick up and drop off at the children's school, etc.). If a no-contact approach to visitation exchange is not possible, then identify a safe public location where there will be witnesses. This can include drop off and pick up at a police station (which works very well when the abuser is a non-citizen) or use of a visitation center.
- **Child and spousal support:** Although immigrant victims are eligible to receive legal work authorization through their application for a VAWA self-petition or U visa, victims typically have waits of longer than a year before they receive legal permission to work. Obtaining a child support and/or spousal support order with payments made through the court can provide crucial support immigrant victims need to support themselves and their children while living apart from their abusers. Obtaining a court ordered child support award provides the victim evidence of income that can be useful in her immigration application as proof that she is not likely to become a public charge. It also provides non-citizen perpetrators with evidence they have been paying child support that they will need to prove good moral character in any application they file for citizenship. In some instances the

victim will have a U.S. citizen or lawful permanent resident spouse who as part of a family based visa petition on the victim's behalf may have signed an affidavit of support. That affidavit provides evidence of the perpetrators ability to pay spousal support.³⁰

- Order to Vacate Provisions: Vacate orders are particularly important as they allow the victim and the children to remain in the family home and in a community where she is less isolated linguistically and culturally than she would be if she were to move to shelter. The vacate order should prohibit the perpetrator from re-entering the home, require that all keys be turned over and order that he refrain from damaging the property or tampering with or interfering with utilities³¹ or mail service. It should explicitly state that the abuser is not allowed to remove any financial records or other documents from the home when he vacates.
- Court ordered participation in a batterer's treatment program: When the perpetrator is limited English proficient, it is essential that any order for treatment include the requirement that the perpetrator participate in a program that is run in his native language or that an interpreter be provided to facilitate his participation. This removes the possibility that the perpetrator will use the excuse that interpretation was not provided to excuse his non-participation in the program.
- Respondent shall pay the medical expenses of the victim and shall maintain health insurance for the victim and children in common: This is particularly important for non-citizen victims only some of whom will qualify for health care public benefits under specified conditions (pregnancy, child birth, medical emergency) and must otherwise rely on HHS funded primary care clinics for health care.³²

Creative Protection Order Remedies

Catch-all provisions, or residual clauses, in state protection order statutes can be used in a creative manner to obtain culturally specific relief for immigrant victims of domestic violence. Catch all provisions are to be broadly interpreted to provide victims with the relief specifically needed in each case to help cut off the abusers' ability to exert coercive control and to reduce the abusers' opportunities for ongoing abuse.³³ These provisions can also be used

³⁰ Issues that arise in custody, child support and spousal support cases involving immigrant victims are discussed in more detail below.

³¹ Utility companies in some states have begun requiring social security numbers to reconnect utility service. As a last resort, as part of the protection order or in a motion to modify the protection order, if the abuser is ordered to leave the home, he should also be ordered to leave the utilities in his name with his social security number and not to interfere with the service.

³² For the location of public health clinics in your clients jurisdiction that are open to all persons without regard to immigration status go to www.hrsa.gov and type in the victim's zip code.

³³ *Powell v. Powell*, 547 A.2d 973, 975 (D.C. 1993).

to remove barriers that prevent victims from being able to leave their abusers. Courts have the power to exercise discretion to order additional relief as necessary to prevent abuse.³⁴ In *Maldonado v. Maldonado*,³⁵ the court confirmed the wide range of relief provided by a catch-all provision and included provisions to assist the battered immigrant petitioner:

[T]he husband shall relinquish possession and/or use of the wife's pocketbook, wallet, working permit, ID Card, bank card, Social Security card, passport and any other item of the children's personal belongings, table, four chairs and dishes. . . . the husband shall not withdraw the application for permanent residence that he had filed on behalf of the wife.³⁶

Immigration related abuse is 10 times higher in physically and sexually abusive relationships than in emotionally abusive relationships. The power and control an abusive spouse has over the victim's immigration status provide a potent tool that perpetrators use to abuse immigrant spouses. Abusers often control access to documentary evidence that the victim needs to proceed with her VAWA self-petitioning case without the abuser's knowledge or assistance. Exchange of property provisions in protection orders can be a helpful and safe way for the victim to obtain the documentation she needs for her immigration case. Protection order courts across the country commonly include the following creative remedies in protection orders issued to immigrant victims:

- Turn over documents or copies of documents: This includes evidence of a valid marriage (wedding photos, love letters, marriage license, photos from family trips, children's birth certificates, joint bank accounts, insurance policies, tax returns, holiday cards addressed to both parties); evidence of the abuser's citizenship or lawful permanent residency status ("A" number, passport number, copy of green card); evidence of prior divorces of the perpetrator (divorce orders); evidence that the parties lived together (lease, utility bills, phone bills); copies of any documents the perpetrator filed with DHS in an application for benefits for the victim and/or the parties' children.³⁷

³⁴ *Id.*

³⁵ *Maldonado v. Maldonado*, 631 A.2d 40 (D.C. 1993).

³⁶ *Id.* at 41.

³⁷ Rebecca Story, Olavarria, Cecilia & Preda, Moira Fisher, *VAWA Cancellation of Removal*, in *Breaking Barriers* at 6-10 (2013), available at: <http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/articles/3.4-VAWA-Cancellation-2010-MANUAL-BB.pdf>; see also Olavarria, Cecilia & Preda, Moira Fisher, *Additional Remedies Under VAWA: Battered Spouse Waiver*, in *Breaking Barriers* at 3-4 (2013), available at: http://niwaplibrary.wcl.american.edu/immigration/battered-spouse-waiver/tools/3.5_Battered-Spouse-Waiver_2004-MANUAL-BB.pdf.

- Turn over victim's personal property. This clause should include clothing, personal property and effects as well as cultural and personal religious items. For immigrant victims of domestic violence it is important to include essential identity documents, passport, visa, work permit and/or other immigration documents for her and her children.
- Continue with case filed on victim's behalf. The respondent shall not withdraw an application for permanent residency that he has filed on the petitioner's behalf, and shall take any and all action to ensure that the petitioner's application for permanent residency is approved.
- Do not contact government officials about the victim. The respondent shall not contact any government agency, including but not limited to the DHS, the (particular) Embassy, or the (particular) Consulate about the petitioner, absent permission from the court, a police employee, or a subpoena. This protection order provision reduces the abuser's ability to interfere with the processing of her immigration case.
- Pay costs of documents destroyed, lost or stolen. The respondent shall pay to the petitioner through the court all costs associated with replacing documents destroyed, hidden or claimed to be missing by the respondent, including the petitioner's or the children's passports, alien registration cards, social security cards, birth certificates, bank cards, work authorization documents, driver's licenses, or papers in any immigration case filed on behalf of the petitioner or the children.
- Sign Freedom of Information Act (FOIA) Request. This request authorizes DHS to turn over to the victim copies of immigration case files filed by the perpetrator, including those filed to provide benefits to the victim and/or her children.
- Provisions designed to prevent child abduction domestically and internationally.³⁸ Can require that the perpetrator turn over the children's passports to the court; the perpetrator not remove the children from the jurisdiction or the country, require that the perpetrator and

³⁸ In 1988, the Department of Justice estimated that parents or family members abducted 354,000 children in the United States. It is suspected that 31.8% of these abducted children were taken out of the U.S. In the event that batterers successfully remove children to other countries, it may be particularly difficult to trace or retrieve the children. If a provision designed to prevent removal of the children from the United States is included in the protection order, a copy of the order must be forwarded to the Office of Passport Services within the Bureau of Consular Affairs of the United States Department of State to prevent the issuance of passports or duplicate passports for the children if the respondent attempts to obtain them. The children should also be registered in the State Department's Children's Passport Alert Program that will notify the victim if the abuser tries to obtain another passport for the children.

victim sign statements asking the embassy of the abuser's home country not to issue a visa or passport to the parties children absent court order. These provisions should be included in the protection order whenever there is a risk or threats of parental kidnapping. Anytime the abuser makes threats that he will take the children and/or that he will prevent the victim from seeing the children ever again, it is important to explore with the victim the likelihood of a future international child kidnapping situation.³⁹

³⁹ Checklist of Questions to ask:

1. Does the abuser have family members or friends living abroad?
2. Does the abuser have the financial means to travel abroad with the children?
3. Has he in fact taken trips abroad in the past to visit family living abroad?
4. Has the abuser himself lived abroad?
5. Is the abuser's country of origin a member and signatory to the Hague Convention?
6. Has the abuser made threats to kidnap the children or prevent the petitioner from seeing them?
7. Did the abuser recently lose or leave his job here in the United States?

Utilizing VAWA Confidentiality Protections in Family Court Proceedings¹

OVERVIEW OF VAWA CONFIDENTIALITY PROTECTIONS

A number of federal and state laws protect the confidentiality of information relating to domestic violence and sexual assault victims by restricting the disclosure of information collected by victim service providers and state and federal agencies.² Congress created VAWA Confidentiality protections to prevent abusers and crime perpetrators from using immigration enforcement officials, and information provided by victims to the government in support of their VAWA related immigration cases, to abuse non-citizen victims. VAWA Confidentiality and Victim Safety Provisions provide three types of protection to immigrant victims of violence:³

- “Nondisclosure provisions” protect the confidentiality of information an immigrant victim provides to DHS, DOJ, or the Department of State

¹ For statutes, legislative history, articles, bench briefs, sample motions and other materials on VAWA confidentiality go to: National Immigrant Women’s Advocacy Project Web Library, *VAWA Confidentiality*, <http://niwaplibrary.wcl.american.edu/vawa-confidentiality>; see also Orloff, Leslye, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, in *Empowering Survivors* (2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man--Confidentiality-MANUAL-ES.pdf>; see also Orloff, Leslye, *VAWA Confidentiality*, in *Breaking Barriers*, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/tools/3.2_BB_IMM_VAWAConf_Confidentiality-Breaches-MANUAL-BB.pdf.

² For a state by state chart on the range of confidentiality protections available in each state see Waters, Laura, Cantrell, Spencer and Orloff, Leslye E., *States Confidentiality Statutes* (October 6, 2014), available at: <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-tool-stateconfstatutes/>. See also, Kilpatrick Townsend & Stockton LLP, Laura Waters, Orloff, Leslye E. and Molina, Rocio, *SERVICE PROVIDER CONFIDENTIALITY SAFEGUARDS: BEST PRACTICES* (June 16, 2014) available at <http://niwaplibrary.wcl.american.edu/pubs/service-provider-confidentiality-safeguards/>.

³ IIRIRA § 384, 8 U.S.C. § 1367; U.S. Department of Homeland Security, Instruction 002-02-001, Implementation of Section 1367 Information Provisions (November 7, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>; U.S. Department of Homeland Security, DHS System Number: 002-02, Implementation of Section 1367 Information Provisions (November 1, 2013) available at <http://library.niwap.org/wp-content/uploads/2015/pdf/CONF-VAWA-Gov-DHSImpSection1367-11.1.2013.pdf>.

to prevent abusers, traffickers and crime perpetrators from obtaining any information about the existence of the case, outcomes, or information contained in the case and using the information to harm the victim, locate her or interfere in the adjudication of the victim's case.⁴

- “Source limitations” prevent immigration enforcement agencies from using information provided solely by an abuser, trafficker or U visa crime perpetrator, a relative, or a member of their family,⁵ as a basis for adverse immigration action against an immigrant victim. Adverse actions prohibited include but are not limited to denial of immigration benefits, initiation of and enforcement action against the victim, detaining or removing the victim. These protections apply whether or not she has ever filed or qualifies to file for VAWA related immigration relief.⁶
- “Enforcement limitations” prohibit enforcement actions at any of the following locations: domestic violence shelters; rape crisis centers, victim services programs; family justice center or supervised visitation center. Enforcement actions are prohibited at courthouses, or in connection with the appearance of the victim at a courthouse, if the victim's appearance is related to a protection order case, a child custody case or other civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking. If DHS undertakes any part of an enforcement action at any of these locations, it must disclose this fact in the Notice to Appear and in immigration court proceedings and must certify that such action did not violate section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁷

Violations of VAWA confidentiality non-disclosure rules create serious, even life-threatening dangers to crime victims. Violations also compromise the immigrant victims' trust in the safety and efficacy of services intended to help them, and undermine their willingness and ability to seek justice system protections. In violating VAWA confidentiality, authorities may unknowingly aid crime perpetrators to retaliate against, harm and manipulate victims, and to evade or undermine criminal prosecutions.

⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 384 (a)(2); 8 U.S.C. § 1367(a)(2).

⁵ Memorandum from Virtue, Paul W., Acting Executive Associate Commissioner, Office of Programs, to all INS Employees, *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384* (May 5, 1997), (on file with author) available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/c_VAWAConf_DHSGuidanceSec%20384_05.05.97_FIN.pdf (hereinafter “Virtue memo”).

⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter IIRIRA], Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) § 384 (a)(1); 8 U.S.C. § 1367(a)(1). DHS has not come out with an official interpretation of what constitutes an adverse determination of admissibility or deportability.

⁷ IIRIRA § 384 (a)(2); 8 U.S.C. § 1367(a)(2).

Perpetrators of domestic and sexual violence are actively and continually engaged in efforts to exert power and control over and retaliate against immigrant victims who take steps designed to free themselves from abusive relationships. When victims file for immigration relief, custody, or protection orders, leave the family home, and/or seek help to end the abuse, perpetrators retaliate by stalking them, ongoing violence, using immigration related abuse and other power and control tactics.⁸

There are two primary issues concerning possible danger to the victim if VAWA confidentiality protected information about any immigration case a victim may have filed is released to the perpetrator either by government officials or through family court discovery. First, any information about the existence of a VAWA confidentiality protected case and/or release of information contained in the case could be used by the perpetrator to retaliate against the victim. This retaliation could take the form of physical and sexual abuse, psychological abuse, intimidation, harassment and/or coercive control. Perpetrators will pursue or increase efforts to locate a victim in hiding. Second, perpetrators who learn about the existence of the victim's immigration case may step-up actions designed to have the victim deported or may attempt to communicate with DHS to interfere with the adjudication of the victim's VAWA confidentiality protected immigration case.⁹

In its discussion of VAWA 2005, Congress recommended that removal proceedings filed as a result of violation of VAWA confidentiality provisions be dismissed by immigration judges.¹⁰ This sanction was in addition to the sanctions against individual government officials who violate VAWA Confidentiality Protections that were included in the statute when VAWA confidentiality was created in 1996. To deter individual officers from violating these provisions, 8 U.S.C. § 1367(c) provides that each violation of VAWA

⁸ See Szabo, Krisztina E., Stauffer, David, Anver, Benish and Orloff, Leslye E., Early Access to Work Authorization For VAWA Self-Petitioners and U-Visa Applicants 22 (February 12, 2014) available at http://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/ (56.5% of VAWA self-petitioners and U visa domestic violence victims report ongoing threats, attempts and incidents of physical and sexual assault while their immigration case is pending and 55.8% report this abuse occurring at least monthly).

⁹ See Szabo, Krisztina E., Stauffer, David, Anver, Benish and Orloff, Leslye E., Early Access to Work Authorization For VAWA Self-Petitioners and U-Visa Applicants 25 (February 12, 2014) available at http://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/ (While immigration cases are pending in 26.7% of VAWA self-petitioners and U visa cases perpetrators make calls to DHS to have the victim deported and to trigger immigration enforcement actions against the victim).

¹⁰ See U.S. Department of Justice, *Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402*, H.R. Rep. No. 109-233, at 123 (2005), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/legislative-history/VAWA%20CONF_VAWA%20House%20Judiciary%20Committee%20Report%20Legislative%20History_9.22.05.pdf; see also 151 Cong. Rec. E2606-07 (2005) (statement of Rep. Conyers), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/legislative-history/Conyers-Legislative-History_12.18.05 (hereinafter "Conyers remarks").

Confidentiality or Victim Safety Protections is punishable by a \$5,000 fine and disciplinary action.¹¹ The Department of Homeland Security has designated the Office on Civil Rights and Civil Liberties as the entity that receives, investigates, and adjudicates complaints about DHS officials who have violated VAWA Confidentiality protections.¹² Denying perpetrators access to information about and information contained in VAWA confidentiality protected cases when such information is sought through state family court and criminal court discovery is consistent with this approach and necessary to protect the integrity of the VAWA confidentiality.

In addition to expanding protections relating to confidentiality and source limitations, VAWA 2005 also limited DHS enforcement actions in certain protected locations so as to assure that immigrant victims of domestic violence, sexual assault, trafficking and U visa crimes can safely seek help from police, prosecutors, courts, shelters, and other victims' services without fear of deportation. In explaining these protections, Congress noted that:

“[I]t is very important that the system of services we provide to domestic violence victims, rape victims and trafficking victims and our protection order courtrooms and family courts are places to which victims can safely turn for help without worrying that their abuser may have sent immigration enforcement officers after them when they are seeking service and protection. Section 825(c) establishes a system to verify that removal proceedings are not based on information prohibited by Section 384 of IIRIRA. When any part of an enforcement action was taken leading to such proceedings against an alien at certain places, DHS must disclose these facts in the Notice to Appear issued against the alien. DHS must certify that such an enforcement action was taken but that DHS did not violate the requirements of Section 384 of IIRIRA. The list of locations includes: a domestic violence shelter, a rape crisis center, and a courthouse if the alien is appearing in connection with a protection order or child custody case.”¹³

¹¹ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960 § 817; VAWA 2005 § 825(c).

¹² See U.S. Department of Homeland Security, *Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security*, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/VAWA-CONF_DHS-Complaint-Instructions_2008.pdf (Instructions on how to file a VAWA confidentiality violation complaint were issued by DHS Office of Civil Rights Civil Liberties).

¹³ *Conyers Remarks* at E2606-07, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/legislative-history/Conyers-Legislative-History_12.18.05. These remarks quoted substantially from and reiterated the legislative history and intent contained in the bi-partisan Sensenbrenner – Conyers House Report, H.R. Rep. No. 109-233, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/legislative-history/VAWA%20CONF_VAWA%20House%20Judiciary%20Committee%20Report%20Legislative%20History_9.22.05.pdf.

WAYS ATTORNEYS CAN USE VAWA PROTECTIONS IN FAMILY COURT

Avoiding DHS Immigration Enforcement at Family Court

Attorney should carry copies of VAWA confidentiality policies and training materials to family court proceedings.¹⁴ If a DHS enforcement officer (ICE¹⁵ or CBP¹⁶) arrives at the courthouse¹⁷ to question or arrest a domestic violence or sexual assault survivor, it is likely that the agent does not know about the protections afforded by the Confidentiality Provisions of VAWA. An attorney may be able to prevent her client's arrest and/or detention by educating the agent. Showing the agent and the judge copies of the following documents may be helpful.¹⁸

- **IIRIRA § 384**: prohibits DHS employees from acting solely on information given by the abuser and/or family members of the abuser; prohibits DHS from disclosing any information relating to VAWA self-petitioners or applicants for T and U visas.¹⁹

¹⁴ Immigration and Customs Enforcement and the Office of the Principal Legal Advisor operating memoranda on VAWA confidentiality implementation memos issued in 2007 are available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

¹⁵ Immigration and Customs Enforcement (ICE) handles enforcement of immigration laws generally in the interior of the United States.

¹⁶ Customs and Border Patrol (CBP) handles enforcement of immigration laws at borders, airports, and other ports of entry as well as at DHS checkpoints within the United States.

¹⁷ Follow these same procedures when a DHS official is seeking to conduct an immigration enforcement action at any location protected by VAWA confidentiality including: domestic violence shelters, rape crisis centers, supervised visitation centers, family justice centers, victim's services or victim's services providers or community based-organizations, and courthouses. See INA § 239(e).

¹⁸ ICE immigration enforcement officials would only conduct courthouse enforcement against individuals who are high priorities for removal. Before undertaking an enforcement action at a courthouse, ICE officials are required by DHS policy to check the VAWA confidentiality "384" database to help ensure that enforcement actions are not taken against victims with pending and approved VAWA confidentiality protected cases filed with United States Citizenship and Immigration Service (USCIS). VAWA confidentiality protected cases include immigrant victims who have filed VAWA, T and U visa cases. U.S. Citizenship and Immigration Services, *DHS Broadcast Message on New 384 Class of Admission Code* (Dec. 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf>. ICE also agreed that when it conducts enforcement actions at courthouses, ICE officials will only interview and arrest the targeted high priority individual and no other persons accompanying that individual or other people at the courthouse. Additionally, to the extent possible, immigration enforcement conducted by ICE at courthouses will take place in non-public areas of the courthouse. As of April 2014, these courthouse enforcement procedures are being implemented nationally by ICE, but are not being implemented by Customs and Border Patrol (CBP).

¹⁹ VAWA2005§ 1367, *Penalties for Disclosure of Information*, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/statutes/VAWA%20CONF_8%20USC%201367_2005.pdf (last viewed April 25, 2014).

- INA § 239(e): certification of VAWA confidentiality compliance for enforcement actions at prohibited locations.²⁰
- DHS Broadcast Message on New 384 Class of Admission Code: informs DHS officials “to become familiar with a new code in the Central Index System (CIS). The new Class of Admission (COA) code “384” was created to alert DHS personnel that the individual is protected by confidentiality provisions. Information about the location, status, or other identifying information of any individual with the code “384” may not be released.”²¹
- Memorandum from Paul Virtue, Acting Executive Associate Commissioner, on Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384 (May 5, 1997).²²
- Memorandum from John P. Torres, Director of Detention and Removal Operations, & Marcy M. Forman, Director of Office of Investigations, Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 (January 22, 2007) (designates prohibited locations including, but not limited to, state courthouses, domestic violence shelters, rape crisis centers, victims services centers, and supervised visitation centers and clarifies that a self-petitioner is someone the officer believes presents credible evidence that she is eligible for one of the designated forms of relief).²³
- Memorandum from William J. Howard, Principal Legal Advisor, Immigration and Customs Enforcement (ICE), VAWA 2005 Amendments to the Immigration and Nationality Act and 8 U.S.C. Section 1367 (February 1, 2007)²⁴ (Describing the requirements

²⁰ Immigration and Naturalization Act, § 239(e), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/statutes/VAWA%20CONF_8%20USC%201229_2005.pdf (last viewed April 25, 2014).

²¹ *DHS Broadcast*, available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf> (last viewed April 25, 2014).

²² Memorandum from Virtue, Paul W., Acting Executive Associate Commissioner, Office of Programs, to all INS Employees, *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384* (May 5, 1997), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/c_VAWAConf_DHSGuidanceSec%20384_05.05.97_FIN.pdf.

²³ Memorandum from Torres, John P., Director, Office of Detention and Removal Operations, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, and Forman, Marcy M., Director, Office of Investigations, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, to Field Office Directors and Special Agents in Charge, *Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005* (January 22, 2007), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/VAWA-CONF_Torres-ICE-VAWA-Confidentiality-Memo-Jan-22-2007.pdf.

²⁴ Howard, William J., Principal Legal Advisor, Immigration and Customs Enforcement, VAWA 2005 Amendments to the Immigration and Nationality Act and 8 U.S.C. Section 1367 (February 1, 2007) available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

that ICE trial attorneys are required to follow with regard to VAWA confidentiality protections for immigrant victims)²⁵

- Office of Civil Rights Civil Liberties Complaint Procedures, DHS Office of Civil Rights Civil Liberties, “Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security.” This memo outlines recommended procedures for filing complaints for VAWA confidentiality violations with DHS and lists the types of information and evidence that should be included in the complaint.²⁶

These statutes and DHS memoranda describe federal laws and DHS policies designed to offer protection to immigrant crime victims and to deter detention, removal and enforcement actions against immigrant survivors.²⁷

Keeping VAWA Confidentiality Protected Information Out of State Court Proceedings²⁸

Congress enacted VAWA with the aim of eliminating barriers to women leaving abusive relationships. To that end, the VAWA confidentiality provisions seek to prohibit disclosure of confidential information about, documents filed in, and materials relating to a petitioner’s immigration case to her abuser.²⁹ VAWA confidentiality protections are undermined if the accused batterer or crime perpetrator can obtain the victim’s protected information

²⁵ Procedures that will help attorneys working on cases of victims eligible for VAWA cancellation of removal, VAWA suspension of deportation, VAWA self-petition, U visa, T visa or battered spouse waiver when the victim has been placed in immigration proceedings and/or has an order of removal who encounter problems with ICE trial attorneys in VAWA confidentiality protected cases have been established by the Office of Principal Legal Advisor. See NIWAP, Updates on VAWA Confidentiality Training for Immigration and Customs Enforcement Assistant Chief Counsel and Enforcement and Removal Operations Officers (November 11, 2016) available at <http://niwaplibrary.wcl.american.edu/pubs/ice-opla-vawa-confidentiality-training/>.

²⁶ U.S. Department of Homeland Security, *Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security*, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets/VAWA-CONF_DHS-Complaint-Instructions_2008.pdf. For additional information on VAWA confidentiality, steps to take if your client becomes subject to a DHS enforcement action, and filing VAWA Confidentiality complaints, see Leslye Orloff, *VAWA Confidentiality, History, Purpose, and Violations of VAWA Confidentiality*, in *Empowering Survivors* (2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/sep-tember-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man--Confidentiality-MANUAL-ES.pdf>.

²⁷ All documents are contained in National Immigrant Women’s Advocacy Project’s web library at: <http://niwaplibrary.wcl.american.edu>.

²⁸ Adapted from Model Amicus Curiae Brief developed by Morgan Lewis LLP for Legal Momentum for use as a bench brief or an amicus brief in trial court cases when VAWA confidentiality an issue in a state court proceeding; available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-confidentiality/sample-motions/Family-Ct-VAWA-Conf-Brief.pdf>.

²⁹ *Hawke v. United States Department of Homeland Security, Citizenship and Immigration Services*, 2008 U.S. Dist. LEXIS 87603 (N.D. Cal. Sept. 29, 2008).

through discovery,³⁰ cross examination or by calling the victim as an adverse witness in a state family, civil or criminal court proceeding. Although there are some limited exceptions to the VAWA confidentiality provision's bar on disclosure, none of these permit obtaining the information through state court discovery or through the victim's testimony in a state court case. Most importantly, none allow or could be construed to allow VAWA confidentiality protected information to be turned over to the perpetrator or the perpetrator's attorney.

As VAWA legislative history and case law have demonstrated, VAWA confidentiality permits only very limited disclosure of protected information. Disclosure is authorized only under the following circumstances and with the required limitations:³¹

- Statistical information that complies with census data collection requirements (excluding all personally identifying information)³²
- To law enforcement officials solely for legitimate law enforcement purposes³³ and law enforcement receiving the information is required to treat the information received in a manner that continues to protect the confidentiality of the information³⁴
- In connection with judicial review of rulings made in the victim's immigration case in a manner that protects the confidentiality of such information³⁵
- When adult battered immigrants have been informed about and waived their VAWA confidentiality non-disclosure rights³⁶
- For the disclosure of information to Federal, State, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for public benefits³⁷
- Congressional oversight limited to specific congressional committees and only "information on closed cases under this section in a manner that protects the confidentiality of such information and

³⁰ This may occur through propounding interrogatories, requests for production of documents, a subpoena and/or a deposition.

³¹ 8 U.S.C. § 1367(b).

³² U.S. Department of Homeland Security, Instruction Number 002-02-001 Implementation of Section 1367 Information Provisions, 6 (November 7, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

³³ Id at 7.

³⁴ VAWA 2013 Amendments to VAWA confidentiality 8 U.S.C. § 1367(b)(2). See, *Kavell Joseph and Leslye E Orloff, Violence Against Women Act (VAWA) Confidentiality Interlineated Statute HRAIRA § 384 8 USC §1367 Penalties for Disclosure of Information (July 16, 2016) available at <http://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-interlined/>.*

³⁵ *Hawke* at 8.

³⁶ U.S. Department of Homeland Security, Instruction Number 002-02-001 Implementation of Section 1367 Information Provisions, 7 (November 7, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

³⁷ Id.

that omits personally identifying information (including locational information about individuals)³⁸

- “For purposes of communicating, with the ‘prior written consent of the alien involved,’ with nonprofit, nongovernmental victims’ services providers ‘for the sole purpose of assisting victims in obtaining victim services.’ The victim services providers receiving such referrals are bound by the nondisclosure requirements of Section 1367. Recall that Section 101(i) of the INA (8 U.S.C. section 1101(i)) mandates that DHS provide T nonimmigrants with a referral to an NGO “that would advise the alien regarding the alien’s options while in the United States and the resources available to the alien.”³⁹
- To national security officials to be used solely for a legitimate national security purpose in a manner that protects the confidentiality of such information.⁴⁰

In creating these limited exceptions to VAWA’s confidentiality protections Congress made a concerted effort to ensure that one of the following was true with regard to any information released.

- The information released for statistical or oversight purposes contained no personally identifying information or any other information that could tie the contents of the information released to any individual victim; or
- The agency seeking and receiving the information was mandated to continue to preserve the confidentiality of the information. This applies to courts, law enforcement officials, prosecutors, victim services agencies, federal, state, local and private agencies administering public benefits, and national security officials.

An accused batterer cannot use state court litigation to obtain protected information that could not legally be disclosed to him by federal authorities. In *Hawke*,⁴¹ an abuser sought discovery of his wife’s VAWA self-petition. *Hawke* argued that the VAWA confidentiality disclosure exception at 8 U.S.C. § 1367(b)(3) allowing for “disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information” authorizes civil and criminal discovery into a victim’s confidential VAWA information. The *Hawke* court disagreed⁴² and ruled this exception only applies to judicial review in immigration proceedings not in state court. The court denied the batterer’s request to produce his wife’s immigration records for use in criminal battery proceedings. As *Hawke* emphasizes, VAWA’s confidentiality protections are “strict” and “broad;” prohibiting

³⁸ Id.

³⁹ Id at 7-8.

⁴⁰ Id at 8.

⁴¹ *Hawke* at *16-19.

⁴² Id. at *16-*20.

the “use by or disclosure to anyone . . . of any information.”⁴³ The purpose behind Congress’ language in § 1367 was to prevent abusers from discovering the substance, as well as the existence, of a VAWA or U visa application.⁴⁴

In *Hawke*, the federal district court weighed the arguments presented by the abusive spouse of a VAWA self-petitioner that his constitutional rights were being violated by the nondisclosure against the language and intent behind Congress’ creation of VAWA confidentiality protections. In examining the need for confidentiality in the VAWA application process, the Hawke Court ruled that [w]hile 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.⁴⁵ The language used here is significant because it explicitly recognizes the privilege of VAWA confidentiality as “absolute.”⁴⁶

In *Demaj v. Sakaj*,⁴⁷ a Connecticut federal district court ruled that VAWA Confidentiality protected documents cannot be released even if the person seeking release of the documents intends to use them for impeachment and not to re-adjudicate the respondent’s immigration case. *Demaj* was a case in which the victim had filed a U visa application. The court followed the same reasoning as the *Hawke* court. The court balanced the rights of the abuser against the protections guaranteed to the survivor by the federal immigration VAWA confidentiality provisions.

In *Demaj*, the court found the protections promised by federal VAWA confidentiality were absolute:

“[W]hile it would appear that claims of abuse made in Respondent’s U-Visa application are relevant to Respondent’s credibility as a witness and may be used to impeach Respondent’s testimony at trial, disclosure of these documents for this purpose runs contrary to the intent of the protections afforded by 8 U.S.C. 1367.”⁴⁸

The court also recognized that releasing such documents would interfere with the respondent’s immigration case in an improper manner:

“[t]hus, while Petitioner may need the documents underlying and related to Respondent’s U-Visa application as they may be relevant to her credibility and may be used to impeach her, in order to use these documents in

⁴³ *Hawke v. U.S. Dep’t of Homeland Sec.*, No. C-07-03455, 2008 WL 4460241 *1, *7 (N.D. Cal. Sept. 29, 2008).

⁴⁴ Amici Curiae Brief EEOC v Koch Foods (October 22, 2015) <http://niwaplibrary.wcl.american.edu/pubs/amici-curiae-brief-eeoc-v-koch-foods-october-22-2015/>.

⁴⁵ *Hawke* at *20.

⁴⁶ *Id.*

⁴⁷ 2012 U.S. Dist. LEXIS 18159 at *1 (D. Conn. Feb. 14, 2012); No. 3:09CV255(JGM), 2012 WL 476168 at *1 (D. Conn. Feb. 14, 2012).

⁴⁸ *Demaj* at *18-19.

that manner, Petitioner must seek to undermine the decision of DHS by challenging the veracity of Respondent's statements, upon which both DHS and law enforcement relied, thereby, interfering with Respondent's immigration case."⁴⁹

Case law and DHS memos are consistent with VAWA confidentiality congressional intent of the VAWA confidentiality provisions which were designed to offer special protection from a perpetrator discovering information and to safeguard information contained in a victim's U visa or VAWA immigration case. *Hawke, Demaj*, and § 1367 on its face not only sustain this assertion but also make it clear that this information should not be discoverable. As *Hawke* emphasizes, VAWA's confidentiality protections are "strict" and "broad;" prohibiting the "use by or disclosure to anyone . . . of any information." The purpose behind Congress' language in § 1367 was to prevent abusers from discovering the substance, as well as the existence, of a VAWA or U-visa application.⁵⁰

In a recent Fifth Circuit case, *Maria Cazorla, et. al. and the EEOC v. Koch Foods of Mississippi, L.L.C.*, [hereinafter *Koch*] the Fifth Circuit was asked to consider VAWA confidentiality in the context of an employment discrimination lawsuit filed by the Equal Employment Opportunity Commission (EEOC) alleging that multiple employees during their employment at Koch Foods suffered sexual assault and other crimes committed against them by a supervisor. In the action, Koch Foods served discovery on the EEOC and the plaintiffs seeking information regarding the U visa status of some of the plaintiffs. When the EEOC and plaintiffs objected, Koch filed a motion to compel the discovery, which was granted in part by the District Court. The District Court held that the U visa information was relevant based on the specific defense asserted by Koch, and that the relevance outweighed the *in terrorem* effect on the plaintiffs and the EEOC. The EEOC and Plaintiffs appealed the District Court decision. The Fifth Circuit found that the District Court had failed to fully consider VAWA confidentiality in crafting its discovery orders in the case and that it erred in not fully considering the harm to victims and law enforcement personnel who were not part of this litigation that could occur as a result of discovery that the District Court may order. The Court stated:

"The district court's analysis of the harm that U visa discovery might cause the claimants was imperfect, but not critically so. More pressing is that the district court did not address how U visa litigation might intimidate individuals outside this litigation, compromising the U visa program and law enforcement efforts more broadly."⁵¹

⁴⁹ Demaj at *21.

⁵⁰ Erickson, Carly and Orloff, Leslye E., Court Rulings Confirm Federal VAWA Confidentiality Protections Bar Discovery of VAWA Confidentiality Protected Information in State Family Court Proceedings (June 17, 2014).

⁵¹ Koch at 30.

In *Koch*, the Fifth Circuit decision provided direction to the District Court to reconsider its discovery orders with the history and purpose of VAWA confidentiality protections and the effect that the discovery ordered in the case could have on other VAWA confidentiality protected cases and other victims leaving open the possibility that under Federal Civil Procedure Rule 26 in an employment action between abused employees and an employer, some limited discovery related to U visa cases may be permissible.⁵² The court in considering discovery requests in a civil employment action would be required to consider the harm to the victims and the deterrent effect discovery could have on other claimants who may be deterred from filing employment discrimination actions.

The Fifth Circuit also made an important point in its order about the possibility of limited discovery is based on the premise that a victim's U and/or T visa applications should and could remain anonymous, at a minimum, in the liability phase.⁵³ Such anonymity is not possible in state family and criminal court cases involving victims and perpetrators. In state family and criminal court cases involving a domestic violence or sexual assault perpetrator there is no possibility of maintaining the anonymity of the victim. The victim and perpetrator are family members who are opposing parties in family court litigation or who are the witness and defendant in a state criminal domestic violence case. Therefore, in state family law cases, the *Koch* case is of limited applicability and is significantly distinguishable from the VAWA confidentiality concerns that are at issue in state court domestic and sexual violence cases.

Instead, in ruling on state court discovery requests courts should be governed by the plain language of 8 U.S.C. § 1367, and its legislative history. Courts should adopt the approach taken by courts that have upheld VAWA confidentiality. State family court discovery should deny discovery of VAWA confidentiality protected case information in VAWA self-petitions, T visa and U visa cases. This includes information that could be used to confirm the existence of applications and the information contained in these application case files. Courts should hold that this information is "absolutely privileged" and cannot be compelled for use in either criminal or civil cases as it can pose serious danger to the victim.⁵⁴

⁵² In *Koch* the Fifth Circuit remanded the case to the District court to craft any discovery allowed of VAWA confidentiality protected case information from victims directly to ensure that identifying information about the victims and their family members not be revealed. In the *Koch* case the Federal District Court following the 5th Circuit decision allowed discovery of redacted copies of victim's U visa certifications signed by the EEOC without any identifying information about the employee victim.

⁵³ *Koch* at 33.

⁵⁴ *Hawke v. United States Department of Homeland Security*, 2008 U.S. Dist. LEXIS 87693, at *1 (N.D. Cal. Sept. 29, 2008); No. C-07-03456 RMW, 2008 WL 4460241 at *1 (N.D. Cal. Sept. 29, 2008); *Demaj v. Sakaj*, 6 2012 U.S. Dist. LEXIS 18159 at *1 (D. Conn. Feb. 14, 2012); No. 3:09CV255(JGM), 2012 WL 476168 at *1 (D. Conn. Feb. 14, 2012).

Defending Against Discovery Requests that Violate VAWA Confidentiality and Seeking Rule 11 Sanctions⁵⁵

It is important for attorneys representing immigrant victims in family court cases to take immigration related abuse seriously. Abusers often use immigration related threats as a tool to further control their victims. Immigration related abuse often precedes escalation of abuse or corroborates the existence of physical or sexual abuse. This is because the probability of immigration related abuse is 10 times higher in physically and sexually abusive relationships than in emotionally abusive relationships.⁵⁶ Further, although protection orders are effective in helping reduce ongoing physical abuse against immigrant women,⁵⁷ immigration related abuse continues as the second highest form of protection order violation occurring when immigrant victims obtain protection orders. Significant numbers of immigrant victims (68.3%) experience immigration related abuse after being awarded protection orders. Immigration related abuse includes threats of deportation, refusing to file or withdrawing immigration papers the perpetrator filed on the victim's behalf and threats and attempts to report immigrant crime victims to DHS officials to initiate immigration enforcement actions, detention and removal of victims.⁵⁸ Additionally, 88.1% of immigrant women report abusers violate no contact orders after obtaining a protection order.⁵⁹

Attorneys may be able to use VAWA confidentiality protections to prevent and counter immigration related abuse, perpetrated as part of the abuser's strategy in family court cases. Attorneys representing victims should be prepared to object and brief VAWA confidentiality issues if needed to prevent the use of state court discovery to obtain information about the existence of, outcomes in, and information contained in VAWA confidentiality protected cases. These include VAWA self-petitions, battered spouse waiver, U visa and T visa cases.⁶⁰

⁵⁵ Further information including legal memoranda, sample Motions in Limine, motions for protective orders in discovery and other materials on VAWA confidentiality are available at: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/civil-justice-system/VAWA-CONF_Sample-Motion-in-Limine_2009.pdf.

⁵⁶ Dutton, Mary Ann et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Geo. J. on Poverty L. & Pol'y 245, 292 (2000), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characterisc_tics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf.

⁵⁷ U.S. Citizenship and Immigration Services, DHS Broadcast Message on New 384 Class of Admission Code (Dec. 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf>.

⁵⁸ Ammar, Nawal H., Orloff, Leslye E., Dutton, Mary Ann & Hass, Giselle, *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, 37 Crim. Just. Review 337, 351 (2012), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/family-law-for-immigrants/protective-orders/research-reports-and-data/AmmaretalCPO.pdf>.

⁵⁹ *Id.*

⁶⁰ Sample bench briefs and amicus briefs and motions are available from the National Immigrant Women's Advocacy Project, American University Washington College of Law <http://niwaplibrary.wcl.american.edu/topic/vawa-confidentiality/sample-motions-briefs/>.

In these cases, the family law attorneys should get the court to focus on the plain language of the 8 U.S.C. Section 1367, its legislative history, and the approach taken in by other courts that have upheld VAWA confidentiality.

Case Preparation Strategy

It is highly recommended that immigrant victims involved in family court litigation be screened early for and file applications for VAWA self-petitions and U visa protections as early as possible. Once a VAWA self-petition or U visa case is filed the victim receives VAWA confidentiality protection from deportation and discovery of the immigration case is restricted. Early filing also improves the likelihood that the victim could attain legal work authorization, approval of her immigration case, or depending on the form of immigration relief and the state some access to public benefits before the family court case goes to trial. When victims have pending or approved VAWA self-petitions or U visa cases before the date set for trial counsel for the victim in the family court case has the benefit of being able to consider whether there could be advantages in the family court case of including evidence of immigration related abuse as part of the history of abuse in the relationship. This will be particularly effective in VAWA self-petitioning cases in which the perpetrator could have filed an immigration case on the victim's behalf and either did not file or filed and withdrew the case.

A case in which victim is planning on raising the perpetrator's immigration related abuse and/or power and control over the victim's immigration status affirmatively in the victim's case will need to employ a different strategy with regard to responding to discovery requests than a case in which the goal is to keep all information about the VAWA confidentiality protected case out of the family court proceeding. Each of these scenarios is discussed separately below.

Case Plan to Keep Immigration Status and Information About Any Immigration Case Out of the Family Court Case

If the goal is to prevent information about the victim's immigration status or status or existence of a VAWA self-petition out of the family court, when such information is sought through discovery or on cross examination:

1. First, object to the relevance of such information in a custody, protection order or divorce action. The relevance of a victim's immigration status must be weighed against the in terrorem effect that disclosure of this information would have in discouraging the victim from asserting his/her rights in the family court proceeding.
2. If that argument is unsuccessful, argue that the opposing party's attempt to obtain this information is a pattern of control and further abuse of the victim.
3. Next, argue that the information is not discoverable under *Hawke* and *Demaj*.⁶¹

⁶¹ Sample briefs are available at <http://niwaplibrary.wcl.american.edu/topic/vawa-confidentiality/sample-motions-briefs/>.

- a. At this stage, counsel should consider filing a Motion in Limine to keep all information about immigration status or a victim's VAWA or U visa case out of the family court proceeding.
4. Lastly, if the court does not rule favorably on any or all of the above, argue that if discovery must happen, that it should be limited to an *in camera* review of only the most relevant information. Counsel should argue that the *in camera* review be limited to the U visa law enforcement certification and not the full case file. If additional documents are required by the court for *in camera* review, counsel must remove personally identifying information from the documents provided.

Cases in Which the Victim Will Raise Her Own Immigration Status and/or Immigration Related Power and Control Abuse

When victims have obtained or are in the process of obtaining legal immigration status through a VAWA self-petition or U visa case this can be advantageous to the family court case. It can help victim's demonstrate that she will not be removed from the U.S. and that she has or will be receiving legal work authorization and a driver's license. The fact that counsel and the victim are choosing to affirmatively reveal as part of the family court case that the victim has received or is in the process of obtaining legal status does not mean that all or any part of the victim's federal immigration case file is discoverable through family or criminal court discovery. Counsel should still make the arguments in steps 2-4 above to prevent further discovery of any information contained in a VAWA self-petition case. In family court discovery where the criminal court constitutional protections are not present, discovery of any documents contained in the U visa case including the certification should be denied. As both *Hawke* and *Damaj* held, protecting a victim's present and future safety was precisely Congress' intention when drafting the VAWA confidentiality protections that apply in U-visa and VAWA self-petition cases.

Attorneys representing battered immigrants in family court proceedings may successfully convince courts to grant Motions in Limine that preclude the abuser from obtaining VAWA confidentiality protected information and from threatening deportation in family court proceedings as a violation of Rule 11 of the Federal Rules of Civil Procedure and equivalent state rules. Rule 11 is a remedy for deterring malicious behavior, harassment, and exertion of undue influence in a civil court action.

Rule 11 was adopted to limit abusive and bad faith acts by attorneys and pro se litigants in court.⁶² Rule 11 applies only to assertions contained in papers filed with or submitted to the court. When abusers or crime perpetrators seek discovery of VAWA protected information and/or, in the context of court proceedings, make threats of deportation, criminal prosecution, or other control tactics of immigration related abuse, such threats can constitute Rule

⁶² *Tarkowski v. County of Lake*, 775 F.2d 173, 175-176 (7th Cir.1985).

11 violations. To protect immigrant victims of violence during civil trials, advocates or attorneys may take advantage of either:

Rule 11(b) (1) and argue that threats of deportation or criminal action during a civil trial constitute harassment, cause unnecessary delay, or increase the cost of litigation. Courts have held that an attorney who threatens criminal prosecution to a person involved in the same civil case commits moral turpitude, and the attorney's belief in the person's guilt is no defense, and not even mitigating factor;⁶³ or

Rule 11(b)(2) and argue that threatening deportation or criminal actions in a civil trial is not warranted by existing law, or constitutes a frivolous argument to gain advantage in the civil court case.⁶⁴

⁶³ See *People v. Wickes*, 112 A.D. 39, 49 (S.Ct. N.Y. App. Div., 1906) (citing *People v. Eichler* 75 Hun 26, 26 N.Y.S. 998; appeal dismissed, 142 N.Y. 642).

⁶⁴ See *In re Hart*, 131 A.D. 661, 666-667 (S. Ct. N.Y. App. Div., 1st Dept, 1909) (holding that threatening criminal prosecution in order to force a settlement of a civil action is illegal, improper and unprofessional; a threat for criminal prosecution may even be disguised under a friendly veil, but the court analyzes the intent to induce the other side to act in a certain manner in the civil case).

Obtaining Custody of Children for Battered Immigrants

THE BEST INTEREST OF THE CHILD STANDARD

Judicial actions affecting the care of children are determined under state laws by the “best interests of the child” standard. In applying this “best interests” standard, the court weighs a variety of factors to make a custody determination.¹ “All states recognize [that] the welfare or ‘best-interests’ of the child . . . [is the] paramount concern” in any custody decision.² The Uniform Marriage and Divorce Act³ defines a child’s best interest as encompassing the following factors:

1. The wishes of the child’s parent or parents as to his or her custody;
2. The wishes of the child as to his or her custodian;
3. The interaction and interrelationship of the child with his or her parent or parents, his or her siblings and any other person who may significantly affect the child’s best interest;
4. The child’s adjustment to his or her home, school and community;
5. The mental and physical health of all individuals involved.⁴

THE IMPORTANCE OF COURTS NOT CONSIDERING IMMIGRATION STATUS IN FAMILY COURT PROCEEDINGS

One in five (20%) children in the United States have at least one immigrant parent.⁵ Almost a third (31%) of children living in immigrant parents households live in mixed-status families where at least one of the children is a U.S.

¹ Cahn, Naomi, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand. L. Rev. 1041, 1071 (1991).

² Klaff, Ramsay Laing, *The Tender Years Doctrine: A Defense*, 70 Cal. L. Rev. 335 (1982).

³ Uniform Marriage and Divorce Act § 402 (amended 1970 and 1973), 9 U.L.A. 561 (1998).

⁴ National Coalition Against Domestic Violence, *Myths and Facts Regarding Domestic Violence and Child Custody Disputes*, August 1997; Cahn, Naomi, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand. L. Rev. 1041, 1071 (1991); Scott, Elizabeth & Scott, Robert E., *Marriage as a Relational Contract*, 84 Va. L. Rev. 1225, 1234-35 (1998) (stating that the Uniform Marriage and Divorce Act is the model for several states’ custody statutes).

⁵ Fortuny, Karina, Capps, Randy, Simms, Margaret & Chaudry, Ajay, *Children of Immigrants: National and State Characteristics Brief 9*, (The Urban Institute, August 2009), available at: http://www.urban.org/uploadedpdf/411939_childrenofimmigrants.pdf.

citizen and one or both of the children's parents are immigrants.⁶ In custody cases involving mixed-status families, when one parent is undocumented or has temporary legal immigration status, the citizen or lawful immigrant parent may raise the immigration status of the other parent as a factor in the custody case in an attempt to prejudice the decision maker. These tactics are often used by abusive parents in custody cases to turn the court's attention away from the perpetrators abuse and toward the victim's unlawful immigration status. The most common mixed family scenarios in which one parent may seek to raise immigration status issues with regard to the other non-citizen parent are:

Parent A–	Parent B– undocumented, temporary immigration status	Marital Status	Child – immigration status (immigration law definition of child includes step child)	Parent A could file for legal immigration status for Parent B	Immigration Options for Parent B if Parent B or child subject to battering or extreme cruelty
Citizen-Lawful Permanent Resident	Undocumented	Married	Citizen	Yes	VAWA self-petitioning; VAWA cancellation
Citizen-Lawful Permanent Resident	Undocumented	Married	Undocumented	Yes	VAWA self-petitioning – including child VAWA cancellation if granted, child receives humanitarian parole while the abused VAWA cancellation recipient parent files a family petition for child
Citizen-Lawful Permanent Resident	Undocumented	Married	Lawful permanent resident	Yes	VAWA self-petitioning VAWA cancellation
Citizen-Lawful Permanent Resident	Undocumented	Not married	Citizen	No	U visa If child abused mother can file for VAWA cancellation
Citizen-Lawful Permanent Resident	Undocumented	Not married	Undocumented	No	U visa – including child If child abused mother and the child can file for VAWA cancellation
Citizen	Conditional Permanent Resident	Married	Conditional permanent resident	Yes	Battered spouse waiver- including child
Citizen	Conditional permanent resident	Married	Citizen	Yes	Battered spouse waiver

⁶ *Id.*

Work Visa Holder ⁷	Spousal non-work visa	Married	Child non-work visa	Yes	Work authorization for parent B – U visa including child
Work Visa Holder	Undocumented	Married	Undocumented	Yes	Work authorization for parent B – U visa including child
Work Visa Holder	Undocumented	Married	Citizen	Yes	Work authorization for parent B – U visa
Work Visa Holder	Undocumented	Not married	Citizen	No	U visa
Work Visa Holder	Undocumented	Not married	Undocumented	No	U visa – including child
Undocumented	Undocumented	Married	Undocumented	No	U visa including child
Undocumented	Undocumented	Married	Citizen	No	U visa
Undocumented	Undocumented	Not married	Citizen	No	U visa
Undocumented	Undocumented	Not married	Undocumented	No	U visa including child
Student Visa	Spousal non-work visa	Married	Child non-work visa	Yes	U visa including child
Student Visa	Spousal non-work visa	Married	Citizen	Yes	U visa
Student Visa	Undocumented	Married	Undocumented	Yes	U visa
Student Visa	Undocumented	Not Married	Undocumented	No	U visa including child
Household staff of (A and G visa holders)	Spousal non-work visa	Married	Child non-work visa	Yes	Work authorization for parent B – U visa
Household staff of (A and G visa holders)	Spousal non-work visa	Married	Citizen	Yes	U visa
Household staff of (A and G visa holders)	Undocumented	Married	Undocumented	No	U visa including child
Household staff of (A and G visa holders)	Undocumented	Not Married	Citizen	No	U visa

⁷ 8 U.S.C. 1101(a)(15); INA §101(a)(15)(A) visas are granted to ambassador, public minister, career diplomatic or consular officer, other foreign workers granted diplomatic visas and personal employees of diplomats and their families (e.g. attendants, servants, other personal employees); INA §101(a)(15)(E iii) visas are granted to Australian investors; INA §101(a)(15)(G) visas are granted to foreign nationals who are employees of international organizations (e.g. United Nations, World Bank, etc.); INA §101(a)(15)(H) visas are granted to temporary specialty workers (e.g., technology, chef, nurse, doctor, scientist, agricultural workers, and other immigrants who receive labor certifications).

When making custody determinations, it is important that the court not rely heavily on the immigration status of either parent, but instead focus on the best interests of the child standard which typically looks at a number of factors including who is the primary caretaker, who provides emotional support for the child, who provides financial support for the child, who has been primarily responsible for the child's education and health care, domestic abuse perpetrated by one parent against the other and other factors listed in the state's custody statute. While a growing number of cases have arisen where immigration status has been raised in child custody cases, a majority of courts do not rely on immigration status as a stand-alone factor.⁸

When the justice system allows the victim's immigration status to be raised as a factor in any case, immigrant victims of domestic violence are discouraged from seeking protection against abusive spouses and from cooperating in the criminal prosecutions of their abusers.⁹ These adverse effects, in turn, perpetuate the cycle of violence, a battered immigrant woman's isolation, and continued exposure of the immigrant victim's children to ongoing violence.

An abuser's attempt to raise the other parent's immigration status, outside of the context of immigration proceedings,¹⁰ in an effort to gain favor in a family law proceeding is further evidence of the on-going coercive control¹¹ and abuse in the relationship. Research has found immigration related abuse to be a lethality factor that generally co-exists with physical and sexual abuse.¹² Often, a battered immigrant woman does not have legal status

⁸ Fata, Soraya, Orloff, Leslye E., Carcamo-Cavazos, Andrea, Silber, Alison & Anver, Benish, *Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings*, 47 Fam. L. Q. 191, 194-96 (2013).

⁹ Davidson, Howard, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (American Bar Association, 2d revised ed. Oct. 1994), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/immigrant-families-and-children/The-Impact-of-Domestic-Violence-on-Children.pdf>.

¹⁰ Even in immigration proceedings, federal law has limited an abuser's ability to influence DHS with regard to his spouse's immigration status. *Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 § 384, 8 U.S.C. § 1367* (2001). This federal law bars DHS from releasing information about a victim's immigration case to anyone except law enforcement officers who need access to the information for legitimate communication with abusers. Use of information further precludes USCIS communication with abusers and use of information supplied by abusers to harm the victim's immigration case.

¹¹ Dutton, Mary Ann, Goodman, Lisa & Schmidt, James R., *Development and Validation of a Coercive Control Measure for Intimate Partner Violence: Final Technical Report*, (COSMOS Corporation, December 30, 2005), available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/214438.pdf>; see also Letter from Ammar, Nawal et al., to U.S. Representative Lamar Smith & U.S. Representative Conyers, John Jr., Committee on the Judiciary, (May 31, 2012) (on file with author), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-9-12-2012-san-diego-ca/research/VAWA-IV-House-Researcher-Data-Sign-on.pdf>.

¹² Dutton, Mary Ann, Ammar, Nawal, Orloff, Leslye & Terrell, Darci, *Use and Outcome of Protection Orders by Battered Immigrant Women*, (COSMOS Corporation, 2006), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/RSRCH_DV_Use_Outcomes%20Protection_Orders.pdf; Dutton, Mary Ann, Orloff, Leslye E. & Hass, Giselle Aguilar, Symposium Briefing Paper, *Characteristics*.

because the abuser failed to file immigration papers for her. Abusers will use the immigration process as a way to maintain power and control over the victim.¹³ This tactic underscores the presence of abuse in the household and provides the court with additional evidence in favor of granting custody to the immigrant victim of domestic violence. The non-abusive parent's immigration status should not be used to justify awarding custody to an abusive parent, betraying the children's best interests.¹⁴

Where abusers are allowed to successfully raise immigration status in custody cases, the best interests of the child are compromised when it results in the court placing the child in the custody of the abusive parent.¹⁵ In this arrangement, it is the child who suffers. A child's best interests are preserved when the child is placed in the custody of his non-abusive parent in a non-abusive household. The most successful way to alleviate the long-lasting effects of domestic violence on children is to provide the non-abusive parent with protection and support for her attaining lawful custody.¹⁶

Raising the immigration status of the victim in a custody determination fails in the face of the "best interests" standard because it claims that it is better for children to live with an abusive person rather than with a non-abusive parent who lacks legal immigration status or permanent legal immigration status. In effect, it places children in the hands of the parent who has created the abusive household and in many cases has used immigration status as one of the tactics to assert control over a spouse. This pattern of coercive control in the relationship is many times responsible for assuring that the non-abusive immigrant parent remains without legal immigration status in the United States. Accordingly, a non-abusive parent's immigration status should not be raised nor should it be considered pertinent in custody, protection order, divorce, or other family law proceedings.¹⁷ In order to ensure fairness in

of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications, 7 Geo. J. on Poverty L. & Pol'y 245 (2000), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characterisc_tics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf.

¹³ See Letter from Ammar, Nawal et al., to U.S. Representative Smith, Lamar & U.S. Representative Conyers, John Jr., Committee on the Judiciary, (May 31, 2012) (on file with author), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-9-12-2012-san-diego-ca/research/VAWA-IV-House-Researcher-Data-Sign-on.pdf>.

¹⁴ Davidson, Howard, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (American Bar Association, 2d revised ed. Oct. 1994), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/immigrant-families-and-children/The-Impact-of-Domestic-Violence-on-Children.pdf>.

¹⁵ *Id.*

¹⁶ Schecter, Susan & Edleson, Jeffrey L., *Domestic Violence and Children: Creating a Public Response*, Open Society Institute's Center on Crime, Communities & Culture, pp. 5-6 (2000).

¹⁷ Davidson, Howard, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (American Bar Association, 2d revised ed. Oct. 1994), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/immigrant-families-and-children/The-Impact-of-Domestic-Violence-on-Children.pdf>.

our legal system, courts must guarantee that children of immigrant domestic violence victims receive equal treatment and legal rights to a safe household, a benefit that all children receive.¹⁸

THE REQUIREMENT THAT COURTS CONSIDER DOMESTIC VIOLENCE IN CUSTODY PROCEEDINGS

Most, but not all, states require “that [the] courts consider domestic violence when determining the best interest of a child.”¹⁹ However, inclusion of domestic violence as only one factor to be considered in custody decisions is not proving to be enough to protect victims of domestic violence and their children.²⁰ Despite research,²¹ Congressional findings²² and state statutes to the contrary,²³ in many custody cases domestic violence is not taken seriously.²⁴ When the victim is an immigrant, this problem is exacerbated. The existence of domestic violence should be proof enough that at least one parent has taken actions that threaten the best interests of the child.²⁵ Courts must not separate

¹⁸ *Id.*

¹⁹ The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 Fam. L. Q. 197, 201 (1995)(These states include: Alabama (Ala. Code § 30-3-131), Alaska, Arizona, California, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi(Miss. Code Ann. § 93-5-24(9)(a)(i)), Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York(N.Y. Dom. Rel. Law § 240(1)(a)), North Carolina(N.C. Gen. Stat. § 50-13.2(a)), North Dakota, Ohio, Oklahoma, Oregon(Or. Rev. Stat. § 107.137(1)(d)), Pennsylvania, Rhode Island, South Dakota(S.D. Codified Laws § 25-4-45.5), Texas, Virginia, Washington, Wisconsin, and Wyoming).

²⁰ Brown, Molly A., *Child Custody In Cases Involving Domestic Violence: Is It Really In The “Best Interests” Of Children To Have Unrestricted Contact With Their Mother’s Abusers?*, 57 J. Mo. B. 302, 305 (2001).

²¹ Saunders, Daniel G., *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns*, (National Online Resource Center on Violence Against Women, Revised 2007), available at http://new.vawnet.org/assoc_files_vawnet/ar_custodyrevised.pdf; Stark, Evan, *Coercive Control: How Men Entrap Women in Personal Life* (Renzetti, Claire & Edleson, Jeffery L., ed., 2007); Bowles, Jerry J., Christian, Kaye K., Drew, Margaret B., & Yetter, Kathryn L., *A Judicial Guide to Child to Child Safety in Custody Cases*, (National Council of Juvenile and Family Court Judges, 2008), available at http://ncjfcj.org/sites/default/files/judicial%20guide_0.pdf; Meier, Joan S. *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 Am. U. J. Gender Soc. Pol’y & L 657, 662 (2002-2003) available at <http://www.wcl.american.edu/journal/genderlaw/11/meier.pdf>.

²² H.R. Con. Res. 172, 101th Cong. (1990) (enacted)(Expressing the sense of Congress that for purposes of determining child custody, credible evidence of physical abuse of one’s spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse).

²³ American Bar Association Commission on Domestic Violence, *Child Custody and Domestic Violence by State*, (February 2008), available at: <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Custody.authcheckdam.pdf>.

²⁴ Cahn, Naomi, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand. L. Rev. 1041, 1072 (1991).

²⁵ Brown, Molly A., *Child Custody In Cases Involving Domestic Violence: Is It Really In The “Best Interests” Of Children To Have Unrestricted Contact With Their Mother’s Abusers?*, 57 J. Mo. B. 302, 305 (2001).

issues of abuse from custody. Domestic violence must be recognized as harmful to the entire family.²⁶ Limiting the courts' focus on actions that directly affect the child prevents courts from considering how abuse of a parent also harms the children.²⁷ Since domestic violence has uncontrovertibly injurious effects on children, shifting the custodial standard to require examination of domestic violence in the parents' relationship is imperative.²⁸ For these reasons, the ABA has taken the position that any history of abuse toward an adult in the home of the parent seeking custody must be considered the primary factor in applying the "best interests" standard.²⁹

In 1994, the American Bar Association's Center for Children and the Law issued a report³⁰ that discussed the negative effects children suffer in households rife with domestic violence. The ABA specifically recognized that battered immigrant women and their children face distinct problems.³¹ The report found that abusers whose victims are immigrant parents often use threats of deportation to shift the focus of family court proceedings away from their violent acts to avoid criminal prosecution.³²

"[W]hen the judicial system condones these tactics, children suffer . . . [p]arties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce, or child support proceedings . . . [t]his . . . will ensure that children of domestic violence victims will benefit from . . . laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all other children."³³

CASE STRATEGY RECOMMENDATIONS

Since abusers and their attorney often raise issues of immigration status during trial, it is recommended that attorneys representing immigrant victims in custody cases bring to court materials that can be used to educate the court should the issue be raised by opposing party. The information and research can become part of the record in a number of ways:

- Ask the court to take judicial notice;
- Prepare a bench brief for the court on this issue citing and including copies of appropriate resources;
- Through expert testimony.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Davidson, Howard, *The Impact of Domestic Violence on Children: a Report to the President of the American Bar Association* (American Bar Association, 2d revised ed. Oct. 1994).

³⁰ *Id.* at 13.

³¹ *Id.* at 19.

³² *Id.* at 20.

³³ *Id.*

The materials attorney may want to introduce include:

- The immigrant children's chapter of the ABA report on the Impact of Domestic Violence on Children;³⁴
- Materials that provide an overview of VAWA and U visa immigration relief;³⁵
- Information and articles on immigration related abuse and the dynamics of domestic violence experienced by immigrant victims.³⁶

The following discussion highlights some of the most common examples of how abusers raise immigration status of the victim who is the non-abusive parent in family court cases. For each we recommend a strategy that can assist attorneys as counsel for immigrant victims. It is important to note that research has found that although immigrant victims qualify for immigration benefits under VAWA, most will not know about this option until informed by an attorney or an advocate. Additionally, it is important to note that the quantity of evidence and documentation that a victim must file to successfully be granted VAWA, U or T visa immigration status, is significantly more than the evidence required to prove eligibility in a family based visa petition filed by the citizen, lawful permanent resident or work visa holder spouse. Addressed

³⁴ Davidson, Howard, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (American Bar Association, 2d revised ed. Oct. 1994), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/immigrant-families-and-children/The-Impact-of-Domestic-Violence-on-Children.pdf>.

³⁵ Orloff, Leslye E., Rebecca Story, Lin, Joanne, Angel, Carole & Birnbaum, Debora, *Introduction to Immigration Relief for Immigrant Victims of Sexual Assault and Glossary of Terms*, in *Empowering Survivors* (2013), available at: http://niwaplibrary.wcl.american.edu/immigration/introduction-to-immigration-relief-for-immigrant-victims/IMM_6-Intro-to-Imm-Relief-MANUAL-ES.pdf; Orloff, Leslye, Angel, Carole & Robinson, Sally, *U-visas: Victims of Criminal Activity*, in *Empowering Survivors* (2013), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/u-visa-certification/u-visa-chapters/10_U-visa-MANUAL-ES.pdf; Angel, Carole & Orloff, Leslye, *Human Trafficking & the T-visa*, in *Empowering Survivors* (2013), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/trafficking/11_T-visa-MANUAL-ES.pdf.

³⁶ Dutton, Mary Ann, Orloff, Leslye E., & Hass, Giselle Aguilar, *Symposium Briefing Paper, Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *Geo. J. on Poverty L. & Pol'y* 245 (2000), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf>; Hass, Giselle, Dutton, Mary Ann & Orloff, Leslye E., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in *Domestic Violence: Global Responses* 93-113 (AB Academic Publishers 2000), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/cultural-competency/dynamics-of-violence-against-immigrant-women/RSCH_Lifetime_Prevalence_DV_Latinas.pdf; Raj, Anita & Silverman, Jay G., *Immigrant and South Asian Women at Greater Risk of Injury From Intimate Partner Violence*, 93(3) *American Journal of Public Health* 435 (March 2003), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/cultural-competency/dynamics-of-violence-against-immigrant-women/RSCH_IMM_SouthAsian_Women_Risk_DV.pdf.

below are examples illustrating how immigration status is raised in custody trials by the abuser:

- Chooses not to file immigration papers for the victim;
- Argues that immigration status has an impact on the parent's ability to work and provide for their child(ren) and impacts the parent's ability to obtain public benefits;
- Threatens or takes steps to have the victim deported;
- Misrepresents to the court that immigration status has an impact on the child(ren)'s citizenship opportunities;
- Argues that the victim's immigration status places the children at risk of parental kidnapping and undermines the child's stability.

If the Abuser Chooses Not to File Immigration Papers for the Victim:

Parties are married and the victim is undocumented because abuser controls the victim's immigration status: When the immigrant victim is married or was within the past two years married to a U.S. citizen or lawful permanent resident abuser, the victim will in most circumstances qualify for relief under VAWA self-petitioner. If the victim is divorced from a U.S. citizen or lawful permanent resident and the divorce occurred less than 2 years ago, the victim still qualifies for VAWA cancellation of removal. When the victim or any of her children does not have legal immigration status, it is because the abusive citizen or lawful permanent resident spouse failed to file the appropriate immigration papers on her behalf.

Strategy: In these cases, counsel for the immigrant victim should consider presenting evidence to demonstrate that the reason that the victim does not have lawful immigration status and legal work authorization is because the abuser never filed immigration papers on her behalf. Counsel may want to consider raising this affirmatively even when immigration status is not raised by the abuser. This evidence can be used to demonstrate that immigration related abuse plays a prominent role in the power and coercive control in the relationship. Evidence of immigration related abuse corroborates the evidence of domestic violence to support a finding that the children should not be placed in the custody of an abusive parent. Additionally, evidence of the abuser's failure to file immigration papers for his spouse can be introduced as evidence that he cannot be considered "friendly parent" under state custody laws. It is recommended that counsel representing battered immigrants in custody cases who will be making these arguments prepare and file the VAWA self-petition case as early as possible after representation of the immigrant victim is initiated.

The goal should be to have documentation of lawful presence and a prima facie determination by DHS that they believe the victim has a valid

VAWA case. If possible,³⁷ this should be completed before the perpetrator is served with notice of the custody action or before the victim appears in court for hearings that could decide temporary custody. Although it would be ideal to secure approval of the VAWA application before raising these issues affirmatively in the custody action, case processing times at DHS make this a challenging goal.³⁸ However, this approach provides the immigrant victims the greatest possible protection against the abuser's retaliatory actions that could include trying to report her to immigration authorities for deportation.

If The Abuser Argues That Immigration Status Impacts the Victim's Ability to Provide for the Child(ren)

Access to legal immigration status provides the victim with legal work authorization, consequently granting her access to better jobs that pay more and include health care and other benefits. However, it is incorrect to assume that lack of legal work authorization means that the immigrant parent is not working and cannot work. Many immigrants in the U.S. work and earn income to support their families often from multiple jobs.³⁹ The focus of the inquiry in a custody case should be upon the work history of each parent.

In many cases, the reason that the immigrant parent does not have legal work authorization is because the citizen or lawful permanent resident parent did not file immigration papers on their behalf. Where this is true, the parent who refused to file immigration papers for the immigrant parent should not then be able to gain the upper hand in a child custody proceeding by arguing that they, rather than the immigrant parent, are better able to financially support the children. If the citizen or lawful permanent resident parent is

³⁷ In determining the viability of this and other strategies discussed in this chapter, victim safety is paramount.

³⁸ See generally Szabo, Krisztina, Stauffer, David, Anver, Benish & Orloff, Leslye, Early Access to Work Authorization for VAWA Self-Petitioners and U Visa Applicants 19 (February 12, 2014) (illustrating the findings regarding processing times since 2011), available at: <http://niwap.org/reports/Early-Access-to-Work-Authorization.pdf>; see also Orloff, Leslye, VAWA, T and U-Visa Immigration Case Processing Times (February 11, 2011), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/vawa-t-and-u-procedures/DHS-and-IJ-Case-Processing-Times.pdf>; Orloff, Leslye, National Survey on Timing of Access to Work Authorization by Immigrant Victim VAWA Self-Petitioners and U-Visa Applicants, (September 28, 2011)(updated in June 2012), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Timing-of-Access-to-Work-Authorization-6.4.12.pdf>.

³⁹ Dr. Hinojosa-Ojeda, Raul, Raising the Floor for American Workers: The Economic Benefits of Comprehensive Immigration Reform, (Center for American Progress & Immigration Policy Center, January 2010), available at: <http://www.immigrationpolicy.org/sites/default/files/docs/Hinojosa%20-%20Raising%20the%20Floor%20for%20American%20Workers%20010710.pdf>; Capps, Randy et. al., Brief No. 4, *A Profile of the Low-Wage Immigrant Workforce*, in, *Immigrant Families and Workers: Facts and Perspectives*, Urban Institute, Immigration Studies Program, (November 2003), available at: http://www.urban.org/UploadedPDF/310880_low-wage_immig_wkfc.pdf.

employed then they will be able to pay child support when the court awards custody to the non-abusive immigrant parent.

With regard to public benefits, U.S. public benefits laws, policies and regulations are structured so as to provide access to public benefits for citizen and other eligible children without regard to their parent's immigration status.⁴⁰ Undocumented parents can apply to receive public benefits for their citizen children just as citizen parents do. The amount of funding the child receives will be the same whether the application was filed by the citizen or immigrant parent. However, if the citizen parent files the benefits application for their child, they can receive additional funds on their own behalf that the immigrant parent does not qualify to receive.

Strategy:

- Screen the client's case to determine legal immigration options that the immigrant victim client qualifies to receive. Apply as soon as possible so that by the time of the custody case arrives the client is closer to attaining legal work authorization.
- Determine whether the perpetrator could have filed immigration papers that would have granted the victim access to legal work authorization, and if so, prepare to prove that fact in your custody case. Attorneys should argue that the citizen or lawful permanent resident parent was responsible for creating a situation in which the immigrant parent cannot work lawfully and should not benefit from these actions in the custody case.
- If at the time of the custody case the client has a pending application for a VAWA self-petition or U visa, attorneys may want to consider presenting evidence that she is on a path through which she will receive legal work authorization. Counsel could also present evidence about how she is supporting herself and her children through work and how her earning capacity will grow once she receives legal work authorization.
- Seek child support from the perpetrator.

⁴⁰ Letter from Garden, Olivia, Assistant Secretary, Administration for Children and Families, et. al. to State Health & Welfare Officials, *Policy Guidance Regarding Inquiries Into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*, Department of Health and Human Services and Department of Agriculture, (on file with author), available at: <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/origin/policyguidanceregardinginquiriesintocitizenshipimmigration-status.html> (last revised Jan. 21, 2003). (Under federal law, states are required to establish the citizenship and immigration status of applicants for Medicaid (except emergency Medicaid), SCHIP, TANF and Food Stamps. However, states may not require applicants to provide information about the citizenship or immigration status of any non-applicant family or household member or deny benefits to an applicant because a non-applicant family or household member has not disclosed his or her citizenship or immigration status.)

- Consider submitting a brief to the court explaining the issue of access to public benefits for children in immigrant families.⁴¹

If the Abuser Threatens or Takes Steps to Have the Victim Deported

Parties are Not Married, Victim is Undocumented and the Abusive Parent is a Citizen or Has Another Form of Legal Immigration Status:

Strategy: The first step for counsel for the victim in these cases is to determine whether the victim qualifies for the crime victim U visa protections of VAWA 2000 and whether the parties' child was subject to battering or extreme cruelty. If the child was battered or subjected to extreme cruelty, the victim may be able to receive relief from deportation from an immigration judge through VAWA cancellation of removal. In some instances the effect of the child witnessing the mother's ongoing abuse has been grounds for the mother receiving VAWA cancellation of removal. Victims must be placed in removal proceedings before an immigration judge to file for VAWA cancellation of removal. VAWA cancellation of removal cases require representation by an immigration attorney experienced in VAWA cancellation cases. The family law and immigration attorney will need to collaborate in developing case planning and strategy so that the approach followed in proceeding with each case best protects the safety of the victim and her children.

Alternatively, family violence victims abused by intimate partners to whom the victim is not married qualify for U visa immigration relief (regardless of whether the partner is a U.S. Citizen, lawful permanent resident or undocumented). The first step is to work with a local police officer, prosecutor, judge, child abuse investigator or adult protective services investigator⁴² to obtain a certification that the victim will need as a mandatory part of her U visa case.⁴³ U visa applicants must file the U visa case within 6 months of the date of the certification as it expires after 6 months from being signed.

⁴¹ Olavarria, Cecilia, Baran, Amanda, Orloff, Leslye & Huang, Grace, *Public Benefits Access for Battered Immigrant Women and Children*, in *Breaking Barriers* 30-32 (2013), available at: http://niwaplibrary.wcl.american.edu/public-benefits/benefits-for-qualified-immigrants/4.2_PB_BB-PublBens_for_Imm_Women_and_Children-MANUAL-BB.pdf; Pohl, Anna, Sarangapani, Hema, Baran, Amanda & Olavarria, Cecilia, *Barriers to Accessing Services: The Importance of Advocates Accompanying Battered Immigrants Applying For Public Benefits*, in *Breaking Barrier* 1-4 (2013), available at: http://niwaplibrary.wcl.american.edu/public-benefits/benefits-for-qualified-immigrants/4.3_PB_BB-Accompanying_Immigrants_Applying_for_Benefits-MANUAL-BB.pdf.

⁴² Technical assistance including case consultations, strategy, legal research and materials is available from the National Immigrant Women's Advocacy Project at American University, Washington College of Law. Technical assistance requests can be submitted by phone, e-mail or through a secure website. To request technical assistance please visit <http://niwaplibrary.wcl.american.edu/ovw-grantee-technical-assistance/about-technical-assistance> or call (202) 274-4457 or e-mail niwap@wcl.american.edu.

⁴³ To educate police and prosecutors about the U-visa, provide them a copy of the Bureau of Justice Assistance Funded U-visa Toolkit for police and prosecutors available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/tools/police-prosecutors/U-visa_toolkit_August_2011.pdf; for strategies in building relationships with law enforcement.

When the victim has a family court case pending, swift filing of the U visa is strongly advised. Once the case is filed, the victim will receive a receipt from DHS documenting the filing of the U visa case, and her case will be included in the computerized VAWA confidentiality tracking system. This will offer the victim protection from removal and detention should the abuser attempt to turn the victim in to immigration enforcement officials. If the abuser is successful in getting the victim detained by immigration authorities or placed in removal proceedings, DHS will upon the request of the victim's immigration counsel issue an expedited prima facie determination that she has a valid case. This will enable her to be released from detention and delay any adjudication of her removal case until after the U visa case has been adjudicated.⁴⁴

Once the victim has received the receipt notice or prima facie determination in her U visa case, it can be presented in the custody trial as further evidence to demonstrate the physical abuse in the relationship.⁴⁵ When the abuser raises immigration status in the custody case, counsel for the immigrant victim may want to consider using that opportunity to demonstrate immigration related abuse as evidence that the abuser should not be awarded custody and that he will not be considered a "friendly" parent. In the alternative, if the victim is undocumented and has not yet applied for any VAWA-related form of legal immigration status, counsel should object to the abuser raising immigration status in the custody cases. They can use the ABA Report and other materials discussed above. These same arguments should also be made in cases of immigrant victims whose abusers are also undocumented.

If the Abuser Misrepresents to the Court That the Victim's Immigration Status Has an Impact on the Child(ren)'s Citizenship Opportunities

Both parents have the ability to confer citizenship or lawful immigration status upon their natural children, adopted children and step-children without

and prosecutors related to U-visa certification see Konrad, Sonia Parras & Orloff, Leslye E., *The U-Visa Remedy for Immigrant Victims of Sexual Assault and the Need for Multidimensional Collaboration*, in *Empowering Survivors* (2013), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/u-visa-certification/u-visa-chapters/CULTCOMP_4_U-visa-Remedy-MANUAL-ES.pdf.

⁴⁴ Crime Victims and Witnesses Memo at 3, available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf>.

⁴⁵ It is important to assess the safety of this approach. As discussed in the VAWA confidentiality section of this chapter, the perpetrator cannot use family court discovery to learn about the existence of or obtain information from a VAWA confidentiality protected case filed with DHS. Having the victim's immigration case approved prior to litigation of the family court case gives the victim and her counsel the option of raising the fact that the victim is lawfully present or has attained legal immigration status if necessary as a defense to allegations raised by the perpetrator in the case. Before using this strategy in a case, it is important to have a safety plan that anticipates retaliation from the perpetrator once he learns that the victim is on a path to legal immigration status despite his efforts to prevent her from attaining legal status. The point at which the perpetrator learns about the victim's ability to attain legal status through a means he does not control, as with other efforts by victims to free themselves and their children from the abusive relationship, can be particularly dangerous for the victim and her children.

regard to whether or not that parent is awarded legal custody of the children by the court. Both citizen and lawful permanent resident parents can file family based visa petitions to confer lawful permanent residency on their natural, adopted or step-children. There are two caveats.

- **Adoption:** Adoptive children must live with the adoptive parent sponsoring their lawful permanent residency application for a 2 year period of time to attain lawful permanent residency through that parent so long as the adoptive child was adopted prior to their 16th birthday.⁴⁶
- **Step Children:** A stepchild is a child for immigration purposes if the marriage that creates the stepparent-stepchild relationship took place before the child became 18 years old.
- In situations in which the marriage ends as a result of divorce the stepchild-stepparent relationship will be deemed terminated unless it is proven by the stepchild that a family relationship continues to exist as a matter of fact between the stepparent and the stepchild.⁴⁷ Divorce between the child's natural immigrant parent and their citizen or lawful permanent resident step-parent effectively cuts off the child's access to lawful permanent residency through the stepparent.

For immigration purposes, the following are the most common examples of marital relationships that could provide immigration benefits to the child of the non-citizen spouse:

Step-Parent	Natural Parent	Battering or Extreme Cruelty of Child or Natural Parent	Immigration Option for Natural Parent's Child⁴⁸	Effect of Divorce
Citizen	Undocumented or temporary immigration status	No	Family based visa petition (time frame for approval as of April 2014 is approximately 6-7 months) ⁴⁹)	Child must attain conditional permanent residency before divorce unless the stepparent relationship continues after divorce.

⁴⁶ 8 C.F.R. § 204.2(d)(2)(vii)(C).

⁴⁷ See *Matter of Breir*, 8 Immig. Rptr. B1-57 (BIA 1997); *Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981); *Matter of Mourillon*, 18 I&N Dec. 122 (BIA 1981).

⁴⁸ In order for the stepchild to benefit from the stepparent's application, the marriage between the stepparent and the child's natural parent must have occurred before the child turns 16. See INA § 101(b)(1).

⁴⁹ As of January of 2014, the VAWA Unit at the Vermont Service Center at the U.S. Citizenship and Immigration Services had reduced case processing times on VAWA self-petitioning to approximately 7 months. Wait times to approval and work authorization had previously historically been significantly longer. See Scott Whelan, Adjudications Officer (Policy), Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Webcast: *State Courts and the Protection of Immigrant Crime Victims and Children*, American University, Washington

Citizen	Undocu-mented or temporary immigration status	Yes	VAWA self-petition (time frame for approval is approximately 6-7 months)	Abused child's VAWA self-petition must be filed before divorce unless it can be shown that the step parent relationship continues after divorce. ⁵⁰ If the abused child is included in the mother's VAWA self-petition, divorce has no effect. Provided the petition is filed within 2 years of divorce.
Lawful permanent resident	Undocu-mented or temporary immigration status	No	Family based visa(time frame for approval is dependent on the visa bulletin currently wait is 8 months) ⁵¹	Must be filed and approved before divorce unless it can be shown the stepparent relationship continues past divorce.
Legal permanent resident	Undocu-mented or temporary immigration status	Yes	VAWA self-petition (time frame for approval is approximately 6-7 months)	Abused child's VAWA self-petition must be filed before divorce unless it can be shown the stepparent relationship continues after divorce. If the abused child is included in the mother's VAWA self-petition, divorce has no effect. Provided the petition is filed within 2 years of divorce. Must be filed and approved before divorce.
Citizen	Conditional permanent resident ⁵²	No	Conditional Residency Waiver petition (time frame for approval is approximately 6 months – 1 year)	Must file a petition to remove conditions two years after becoming a conditional permanent resident. Since the marriage is no longer viable, the non-citizen spouse may file for a request for a waiver based on "good faith" or "extreme hardship" of the joint-petition filing requirement. ⁵³

College of Law (Jan. 31, 2014) (Judicial training on U visa certification by courts), available at: <http://niwap.org/training/>. Wait times to approval had historically been significantly longer. See also Szabo, Krisztina, Stauffer, David, Anver, Benish & Orloff, Leslye, Early Access to Work Authorization for VAWA Self-Petitioners and U Visa Applicants (February 12, 2014), available at: <http://niwap.org/reports/Early-Access-to-Work-Authorization.pdf>. By 2017 U visa adjudication waits reached 28 months.

⁵⁰ Policy Memorandum from U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, *Eligibility to Self-Petition as a Battered or Abused Parent of a U.S. Citizen; Revisions to Adjudicator's Field Manual (AFM) Chapter 21.15 (AFM Update AD 06-32)*. 3, (August 30, 2011) (on file with author), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/vawa-self-petition-and-cancellation/government-memoranda-and-factsheets/VAWA-Elder-Abuse.pdf>.

⁵¹ The processing times vary based on a variety of factors, including the country of origin of the sponsored individual. Please refer to the U.S. Department of State, Bureau of Consular Affairs monthly visa bulletin for the most current information on processing times at <http://travel.state.gov/content/visas/english/law-and-policy/bulletin.html>.

⁵² Conditional Permanent Residents are spouses of U.S. citizens who are married for less than two years at the time of their interview with DHS to receive permanent residency, DHS grants them a two year conditional permanent residency instead of full, unrestricted lawful permanent residency. This requirement was created to prevent marriage fraud. See U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, *Remove Conditions on Permanent Residence Based on Marriage* (Last updated Feb. 12, 2014), <http://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence/remove-conditions-permanent-residence-based-marriage>.

⁵³ INA § 216(c)(4), 8 U.S.C. § 1186(c)(4).

Citizen	Conditional permanent resident ⁵⁴	Yes	Conditional Residency Waiver petition (time frame for approval is approximately 6 months – 1 year)	Must file a petition to remove conditions two years after becoming a conditional permanent resident. Since the marriage is no longer viable, the non-citizen spouse may file for a request for a waiver based on “battery” or extreme cruelty” petition filing requirement ⁵⁵
Work visa holder	Natural parent can receive legal immigration status dependent on work visa holder	No	Child can receive legal immigration status dependent on work visa holder	Divorce: both natural parent and child losing legal immigration status
Work visa holder	Natural parent has legal immigration status dependent of work visa holder	Yes	Natural parent can apply for legal work authorization and can apply for a U visa if eligible	Divorce has no effect if the natural parent and child apply for U visas
Student visa holder	Natural parent has legal immigration status dependent of student visa holder	No	Child can receive legal immigration status dependent on student visa holder	Divorce: both natural parent and child losing legal immigration status
Student visa holder	Natural parent has legal immigration status dependent of work visa holder	Yes	Natural parent and child can apply for a U visa	Divorce has no effect if the natural parent and child apply for U visas

⁵⁴ Conditional Permanent Residents are spouses of U.S. citizens who are married for less than two years at the time of their interview with DHS to receive permanent residency, DHS grants them a two year conditional permanent residency instead of full, unrestricted lawful permanent residency. This requirement was created to prevent marriage fraud. See U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, *Remove Conditions on Permanent Residence Based on Marriage* (Last updated Feb. 12, 2014), <http://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence/remove-conditions-permanent-residence-based-marriage>.

⁵⁵ INA § 216(c)(4), 8 U.S.C. § 1186(c)(4).

Strategy

- **Expert witness:** Call an immigration attorney as a witness to present evidence describing that the parent-child relationship under immigration law is more expansive than under state family laws. Under immigration laws, a step-child is the same as an adopted or natural born child. An immigration law expert should discuss the fact that the ability to confer immigration status on a child is unaffected by which parent is awarded custody. Both a custodial and a non-custodial citizen or lawful permanent resident parent can file an immigration application for their immigrant child.
- **Divorce:** If the case involves either an immigrant child who is the natural child of the parties or the adopted child of the parties, divorce of the parents should have no effect on that either the natural or the adoptive parent's ability to confer immigration status on the child.⁵⁶ However, in the case of a step child, divorce prior to the time that the step child receives his lawful permanent residency will result in the denial of the child's application. Legal separation could avoid this problem, particularly in cases of a citizen step parent who has filed a family based petition for the immigrant child, as it would delay any divorce and the legal relationship would continue to exist. The legal separation would need to contain protective orders that require the citizen parent to continue with and not undermine the immigration application of the child.

If the Abuser Argues That the Victim's Immigration Status Undermines the Children's Stability

Two of the most frequent ways that this allegation arises in family court cases involving immigrant victims are:

- Allegations that the victim's undocumented status will cause her deportation, making placement of the children with the immigrant victim an unstable home for the children.
- Allegations that victims without legal status in the United States are more likely to flee the jurisdiction and U.S. with their children.

To counter allegations of deportation:

When the opposing party raises the undocumented or temporary immigration status of an immigrant parent in custody proceedings, too often both counsel for the immigrant parent and the court jump to the conclusion that if the immigrant parent is undocumented, then their deportation is imminent. This is not true. Undocumented status does not mean an immigrant parent's deportation is going to occur. Many undocumented parents live in the U.S.

⁵⁶ For an adopting parent to file for an adopted child to receive lawful permanent residency, the child must have been adopted before the child reached the age of 16. INA § 101(b)(1).

for years, working, raising children, without attaining legal immigration status or being deported.⁵⁷ The 1996 immigration law amendments severely limited options for attaining legal immigration status for undocumented immigrants.⁵⁸ However, several of the harshest restrictions in the 1996 law were the three-year,⁵⁹ ten-year⁶⁰ and permanent bars⁶¹ to reentry for immigrants who remain in the U.S. unlawfully for specified periods of time or under specified conditions. These bars are imposed on immigrants who first entered or reentered the United States after April 1, 1997. Immigrants who entered the United States prior to 1996, who never leave, and who at some point in time qualify to become lawful permanent residents can receive lawful permanent residency, without being subjected to the bars.⁶² Prior to 1996, many undocumented immigrants would come to the U.S. for work. When their work was seasonal or there was less work available, they would return home and reenter again for work in the future. As a result of the bars, once immigrants entered the United States, many remained for very long periods of time and were much less likely to leave than immigrants with a legal immigration status that allowed them to travel.

Immigrant crime victims who apply for and are granted U visas, T visas, or VAWA self-petitions can seek waivers of, or may not be subject to,

⁵⁷ Passel, Jeffrey & Cohn, D'Vera, *Unauthorized Immigrant Population: National and State Trends, 2010*, Pew Hispanic Center (February 1, 2011), available at: <http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/> (8 million unauthorized immigrants were part of the workforce, representing 5.2%. The number of children born to at least one unauthorized immigrant parent was 350,000 and they made up 8% of all U.S. births). Taylor, Paul, Lopez, Hugo, Mark, Passel, Jeffrey & Motel, Seth, *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, Pew Hispanic Center (December 1, 2011), <http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/> (“Nearly two-thirds of the 10.2 million unauthorized adult immigrants in the United States have lived in this country for at least 10 years and nearly half (46%) are parents of minor children. . . .” “By contrast, just 38% of legal immigrant adults and 29% of U.S.-born adults are parents of minor children.” “[a]t least 9 million people are in ‘mixed-status’ families that include at least one unauthorized adult and at least one U.S. born child. . . .”

⁵⁸ *Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)*, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

⁵⁹ Noncitizens who beginning on April 1, 1997 are unlawfully present in the United States for a continuous period of more than 180 days but less than one year, and then depart the U.S. can not apply for admission for a period of 3 years from date of departure. INA § 212(a)(9)(B)(i) (I) Consult an immigration attorney regarding waivers that may be available for immigrant victims who are VAWA self-petition, U-visa or T-visa applicants and recipients.

⁶⁰ Noncitizens who beginning on April 1, 1997 are unlawfully present in the United States for a continuous period of one year or more depart the U.S. can not apply for admission for a period of 10 years from date of departure. INA § 212(a)(9)(B)(i)(II). Consult an immigration attorney regarding waivers that may be available for immigrant victims who are VAWA self-petition, U-visa or T-visa applicants and recipients.

⁶¹ Noncitizens who were unlawfully present after April 1, 1997 for more than one year or were ordered removed who left the United States are permanently barred from reentry. INA § 212(a)(9)(C). Consult an immigration attorney regarding waivers that may be available for immigrant victims who are VAWA self-petition, U-visa or T-visa applicants and recipients.

⁶² INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B), 22 C.F.R. § 40.92.

these bars.⁶³ Crime victims can attain lawful permanent residency as VAWA self-petitioners,⁶⁴ U visa, or T visa recipients without leaving the United States and thus without being subjected to the bars. Immigrants applying for lawful permanent residency as VAWA self-petitioners, or a U or T visa applicants who are or have been undocumented, should not leave the United States and travel abroad.⁶⁵ Travel abroad will trigger application of the reentry bars, which prevent them from reentering the United States.⁶⁶ It is only after victims attain full lawful permanent residency that they can travel abroad.

The danger is that, in a custody case, one of the tools the citizen, lawful permanent resident or visa holder parent can use to gain an upper hand is to turn in the undocumented immigrant parent to DHS in an effort to cause her detention or deportation. The DHS civil immigration enforcement policies discussed above can be used to stop the detention or removal of immigrant parents. DHS polices provide additional protection for immigrant victims of domestic violence, sexual assault, human trafficking, and other crimes.

In domestic violence cases, such actions are evidence of immigration related abuse which attorneys can use to help the judge understand is evidence of power and control tactics that are significantly more likely to occur in an abusive relationship. The fact that the perpetrator raises the immigration status of the victim in the custody case is, intrinsically, corroborative evidence of the physical and sexual abuse in the relationship.

⁶³ Praeda, Moira Fisher, Olavarria, Cecilia, Kaguyutan, Janice & Carra, Alicia (Lacy), *Preparing the VAWA Self-petition and Applying for Residence*, in *Breaking Barriers* 23-29 (2013), available at: <http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/articles/CH3.3%20BB%20VAWA%20self-petition%20with%20disc%207.10.13.pdf>; Orloff, Leslye, Angel, Carole and Robinson, Sally, *U-visas: Victims of Criminal Activity*, in *Empowering Survivors* 20-30 (2013), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/u-visa-certification/u-visa-chapters/10_U-visa-MANUAL-ES.pdf; Orloff, Leslye & Angel, Carole, *Human Trafficking and the T-Visa*, in *Empowering Survivors* 21-24 (2013), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/trafficking/11_T-visa-MANUAL-ES.pdf.

⁶⁴ Memorandum from Aytes, Michael L., Assoc. Dir., Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, to Field Leadership, *Adjustment of status for VAWA self-petitioner who is present without inspection* at 2 (April 11, 2008) (on file with author), available at: http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/vawa_11apr08.pdf.

⁶⁵ 8 U.S.C. §1182(a)(9)(B)(i); INA §212(a)(9)(B)(i). (Under the INA, any alien who enters or attempts to reenter the United States without being admitted is inadmissible. There are waivers for VAWA and U-visa victims but once these statuses are granted it does not mean they have been *admitted* for immigration purposes. Every time an immigrant goes through a port of entry he is seeking admission to the country.)

⁶⁶ Waivers for U-visa holders are available for adjudication abroad, however international travel is not recommended. The time it takes to adjudicate a waiver may jeopardize the applicant's ability to apply for permanent residency in the future. 8 U.S.C. §1182(d)(14); INA §212(d)(14).

Strategy

- Determine whether the immigrant victim qualifies for any of the following forms of immigration relief:
 - VAWA self-petitioning;
 - VAWA cancellation of removal;
 - U visa;
 - T visa; or
 - Has a pending case filed by her perpetrator spouse or employer.⁶⁷
- Help her apply for immigration relief before the case is heard by the family court, either by handling the case yourself or referring the case to an immigration attorney or advocate with training on domestic violence immigration cases;
- Identify an immigration expert in the community who can be called to testify to educate the court about:
 - Domestic violence related immigration protections;
 - Deportation and removal priorities at the DHS;
 - How civil violations of immigration law are not crimes;
 - Providing the court with an overview of DHS policies that protect immigrant victims and immigrant parents, both those who are in the process of filing for immigration relief and those who do not qualify;
 - Discussing what steps the perpetrator could have taken to apply for immigration status for the victim and whether and when she could have received work authorization if he had filed;
 - Discussing a hypothetical case similar to your client's and provide an opinion about the victim's possibility of receiving immigration benefits.⁶⁸

⁶⁷ If your client has another immigration case pending you will need to coordinate with her immigration attorney. It is important to know that if the perpetrator (spouse or employer) filed an immigration case for her benefit, the immigration attorney working on that case will most often consider the spouse or the employer, not the victim to be the client. The victim will need to identify her own immigration attorney who has experience working with immigrant victims. See Dutton, Mary Ann, Orloff, Leslye E. & Hass, Giselle Aguilar, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *Geo. J. on Poverty L. & Pol'y* 245, 287 (2000), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics_of%20of%20Help-Seeking%20Immigrant%20Battered%20Women%20OVW%2010.23.01.pdf. As discussed in the protection order section above, if there is a pending immigration matter filed by the perpetrator he can be ordered to follow through with and not withdraw that immigration case in the protection order.

⁶⁸ Ideally, you want to call an immigration attorney to testify who is not representing your client in her immigration case. This best protects attorney client confidentiality helps limit cross-examination to issues about immigration law more generally and not about your client's particular case.

To Counter Allegations That the Victim Will Flee

Allegations of flight in cases of immigrant parents should be treated like any other family court case in which one parent alleges that another parent is likely to flee the jurisdiction with the children. Since lack of documentation does not equal flight, parents who are in court to seek custody should be asked only the questions that are regularly asked in cases where one party charges the other party with being a flight risk.

Strategy: Generally, the parent alleging that the other parent will flee with the children must prove that flight is imminent. This usually requires proof that may include but is not limited to:

- possession/purchase of airline tickets;
- plans to move to another location;
- proof of contacts, family or a job in another location;
- the economic capacity to make the move; or
- other evidence that the other parent is planning to leave with the children.

ADDRESSING PARENTAL KIDNAPPING

Dangers of International and Interstate Parental Kidnapping⁶⁹

The risk of abduction has been found to be particularly acute in the case of parental separation and divorce between parents of mixed-culture marriages.⁷⁰ When the separation involves a parent who is a citizen or dual-citizen of another country, or who otherwise has strong ties to his country of origin, he may try to take unilateral action by returning with the child to his family in his country of origin.⁷¹ Several behavioral indicators for parental abduction include when the foreign born parent:

- threatens to take the child;
- has no financial or emotional ties to United States and/or the community in which the children live;
- has resources to survive in hiding;
- rejects or dismisses child's mixed heritage;
- feels separation/divorce constitute severe loss or humiliation; and
- has family and social support in country of origin.⁷²

⁶⁹ This section is adapted in part from Klein, Catherine & Orloff, Leslye, *International Kidnapping Prevention and the Hague Convention*, in American Bar Association Commission on Domestic Violence Attorney's Manual (2004).

⁷⁰ Johnston, Janet R. et al., Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Early Identification of Risk Factors for Parental Abduction 3-7* (2001), available at: <https://www.ncjrs.gov/pdffiles1/ojdp/185026.pdf>.

⁷¹ *Id.*

⁷² *Id.*

The Hague Convention⁷³ is an international treaty that provides for the prompt return of wrongfully removed or retained children.⁷⁴ Currently, at least eighty-two member countries⁷⁵ of the Hague Conference are signatories. In addition, there are twenty non-member countries⁷⁶ that were not actual members of the Hague Conference but who have chosen to uphold the Convention.

The Convention has two main goals: to establish procedures that allow for the prompt return of children who have been abducted to a foreign country, and to provide that the rights of custody and access under the laws of each member country are respected by other member countries. Through the Convention, parents, rather than governments, may institute legal proceedings on their own behalf to seek the safe return of their children. The Convention is not meant to determine custody arrangements. Rather, it provides a process to accomplish the prompt return of children wrongfully taken by a parent. Securing return of children under the Hague Convention is a difficult and expensive process that often requires legal representation in both countries. The U. S. Department of State⁷⁷ is available to assist parents in filing the application, locating the child abroad, and in providing parents with information about the foreign country's legal system and its attorneys.

To secure return of an abducted child using the Hague Convention, the parent must prove they were exercising their "right of custody" when the child was removed from the country. The "right of custody" is not defined as sole custody; it is instead the right to determine where the children will live.⁷⁸

⁷³ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=24 [hereinafter "Hague Convention"].

⁷⁴ *Id.*

⁷⁵ Member States include: Andorra, Argentina, Australia, Austria, The Bahamas, Belgium, Belize, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, China (Hong Kong and Macao), Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Lithuania, Luxemburg, Republic of Macedonia, Malta, Mauritius, Mexico, Monaco, Montenegro, Morocco, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Saint Kitts and Nevis, San Marino, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Ukraine, United Kingdom, Uruguay, Venezuela, Zimbabwe. Notably Bangladesh, Bolivia, Cote d'Ivoire, Egypt, Ethiopia, Ghana, India, Indonesia, Iran, Iraq, Jamaica, Jordan, Kenya, Lebanon, Nigeria, Saudi Arabia, Syria, Tunisia, and United Arab Emirates are not signatories to the Convention. For an updated list of countries that are Convention signatories, please visit <http://travel.state.gov/content/childabduction/english/country/hague-party-countries.htm>.

⁷⁶ Non-Member States include: Bahamas, Belize, Burkina Faso, Colombia, Costa Rica, Ecuador, El Salvador, Fiji, Guatemala, Honduras, Mauritius, Moldova, Nicaragua, Paraguay, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, Turkmenistan, Uzbekistan, and Zimbabwe.

⁷⁷ See *International Parental Child Abduction*, United States Department of State, http://travel.state.gov/abduction/abduction_580.html (last visited April 25, 2014) (describing resources provided by the United States Department of State to assist in instances of international child abduction).

⁷⁸ Article 5(a) of the Hague Convention defines "rights of custody" as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Hague Convention at Article 5(a), available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=24.

Although not required, one of the best ways to prove that a parent has a “right of custody” is if they have been awarded custody in a court order.

There are several defenses under the Hague Convention that can be used to overcome the Convention’s requirement that a child be returned to his state of habitual residence to have the custody case adjudicated. These defenses only permit a court to exercise its discretion under a narrowly defined set of circumstances to decide not to return the child to the habitual residence, and are not mandatory. These exceptions include situations in which:

- More than one year has passed since the abduction and the filing of the application for return of the child, and the child is settled in the foreign country;
- The parent seeking the return was not exercising custody rights, or has consented or acquiesced to the removal or retention of the child;
- There is a risk that if the child were to be returned, the child would be exposed to harm, either physical or psychological, or an intolerable situation;
- A child who is of an age to maturely express his/her desires or objections to the return;
- The return violates the protection of human rights and fundamental freedoms of the foreign nation from whom return is requested. Furthermore, member countries may choose not to cooperate if there is a pending criminal trial against the removing parent.

The Convention does not confer any immigration benefits. If persons who are not U.S. citizens are ordered by the court to return to the United States, they must fulfill the appropriate entry requirements. This applies to children and parents involved in any child abduction case, including a Hague Convention case.⁷⁹ When the abducting parent is ineligible to enter the United States under U.S. immigration laws, the parent may be paroled for a limited time into the United States through the use of a Significant Public Benefit Parole⁸⁰ in order to participate in custody or other related proceedings in a United States court. There is also the possibility of a waiver of visa ineligibility for an undocumented alien pursuant to section 212(d)(3)(A) of the Immigration and Nationality Act. A waiver requires the recommendation of a consular officer or the Department of State (Bureau of Consular Affairs/Visa Office), and the approval of the Department of Homeland Security.⁸¹

⁷⁹ *Id.*

⁸⁰ See INA § 212(d)(5)(A).

⁸¹ U.S. Dep’t of Justice, Office of Juvenile Justice and Delinquency, Family Resource, Ch. 4, 430 (2002). 212(d)(3)(A) provides: an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General.

If a country has not formally joined the Hague Convention, either as a member country or a non-member adherent, the treaty does not apply and a parent must use alternate methods to have the child returned. Parents of children abducted to non-Hague Convention countries face potentially higher obstacles to the child's return than parents of children abducted to Hague Convention countries.⁸² The next section contains strategies that will help prevent international child abduction, several of which are essential for immigrant parents whose children are abducted to non-Hague Convention countries.

Child Kidnapping Prevention Strategies

Attorneys should do a detailed analysis of how they can best defend their clients when flight due to the victim's immigration status is raised. As attorneys prepare for a protection order, divorce, or custody case, they should prepare to present evidence demonstrating that the client will not flee with the children.

Since the risk of parental kidnapping, particularly international child kidnapping, is significant when the non-custodial parent is a naturalized U.S. citizen or an immigrant who has legal status in the United States, it is important that prevention of parental kidnapping be a central part of the case strategy. When representing an immigrant victim, attorneys should gather evidence that demonstrates to the court the need to receive court orders limiting the perpetrator's opportunities to flee with the children. It is particularly helpful to obtain a protection order awarding custody⁸³ or other temporary orders that grant custody to the battered immigrant victim as soon as possible.

The protection order and/or custody order should include provisions designed to prevent child kidnapping both domestically and internationally.

Examples include:⁸⁴

- Granting custody to the non-abusive immigrant parent;
- Providing for supervised visitation with the child for the other parent;
 - If the court will not order supervised visitation, it is extremely important that visitation exchange occur in a location, ideally the lobby of a local police department, where there are witnesses who can verify that the children were not returned and the victim can take swift action to regain custody of the children.
- Turn over the children's passports in court to the victim who is the custodial parent;

⁸² *Id.* See Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, A Family Resource Guide on International Parental Kidnapping 47-48 (2002), available at: <https://www.ncjrs.gov/pdffiles1/ojjdp/215476.pdf>. (list of countries that are treaty partners of the United States for the Hague Convention).

⁸³ Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, A Family Resource Guide on International Parental Kidnapping 10-13 (2002), available at: <https://www.ncjrs.gov/pdffiles1/ojjdp/215476.pdf>.

⁸⁴ See http://travel.state.gov/abduction/prevention/prevention_560.html. (ne exeat right to prevent the abduction).

- Prohibiting issuance of a passport on behalf of the child by the United States passport agency;
- Include an order, signed by the judge, the victim, and the perpetrator, ordering that absent a court order, that the embassy or consulate of the perpetrator's home country;
 - Not issue a passport to the children if the children are dual nationals
 - Not issue a visa to the children if the children are United States citizens
- Specifically prohibiting the removal of the child from the jurisdiction, state, or country without written permission from either the court or the custodial parent;
- Incorporating an agreement between the parties that the provisions of the Hague Convention shall apply in the event of international abduction;
- Requiring the posting of a bond from the parent with connections to a foreign country;
- Explicitly authorizing law enforcement officials to assist in the recovery of the child if he/she is abducted.

In addition to obtaining a protection order, there are a number of measures an immigrant parent can take to prevent international abduction. These include:

- Keeping a record of important information about the other parent, for example, his social security number, driver's license number, bank account information, passport number, or immigrant visa number;
- Obtaining the passports of the children and keeping these passports in a safe place;
- Compiling contact information, such as the addresses and phone numbers of the other parent's family and friends—both within the United States and in foreign countries;
- Keeping a detailed, written description of the child and taking color photos of the child every six months;
- Teaching the child to make telephone calls (especially collect calls) and instructing the child to call home if unusual circumstances occur;
- Filing a writ of ne exeat to prevent the abduction;⁸⁵ and/or

⁸⁵ Orloff, Leslye, Noche, Joyce, Olavarria, Cecilia, Martinez-McIntosh, Laura, Rose, Jennifer, & Baran, Amanda, *Countering Abuser's Attempts to Raise Immigration Status of the Victim in Custody Cases*, in *Breaking Barriers* 11-13 (2013), available at: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/custody/6.1_BB_Family_Custody_Countering-Abusers-MANUAL-BB.pdf.

- Asking the Office of Children's Issues in the Department of State to flag a United States passport application for a child, or to deny issuance of a United States passport for a child.⁸⁶

What to Do When a Child Is Abducted

If a child is abducted, it will be difficult to know whether the abduction is domestic or international. The list below details steps that should be taken immediately.

- File a missing person's report with local law enforcement officials;
- Enter the child's name in the National Crime Information Center [NCIC]; and
- Attempt negotiating a return of the child through such organizations as NCMEC and Child Find America, Inc.

For international child abductions the following actions are also necessary. These are actions that are crucial steps to take, particularly if the child has been abducted to a non-Hague country.

- Contact the Office of Children's Issues at the Department of State to file an application for the prompt and safe return of the abducted child;
- Communicate with the Central Authority of the country to which the child has been abducted (typically, the Office of Children's Issues will assist in this communication); and
- Retain legal counsel in the other country to assist in litigating the return of the child.

Immigration Consequences of Criminal Custodial Interference Convictions

Attorneys working with immigrant victims who are contemplating moving to another state with their children need to be aware that there can be immigration consequences if the victim is convicted of custodial interference. This section will provide an overview of state custodial interference statutes, highlighting the importance of assuring that immigrant victims do not enter into pleas and are not convicted of custodial interference.

Parental kidnapping or custodial interference statutes are generally designed to ensure parents equal access to their children by criminally sanctioning a

⁸⁶ *Id.* at 13-14. For more detailed information on preventing international child abduction and the Children's Passport Alert Program see also Klein, Catherine, Orloff, Leslye, Martinez, Laura, Rose, Jennifer & Noche, Joyce, *The Implications of the Hague International Child Abduction Convention: Cases and Practice*, in *Breaking Barriers* 6-7 (2013), available at: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/international-issues/6.3_FAM_BB_Hague-Intl-Child-Abduction-Convention-Cases-MANUAL-BB.pdf.

parent who hides the child from the other parent.⁸⁷ Currently, almost every state criminally forbids custodial interference by parents or relatives of the child.⁸⁸ While these statutes may be similar in various ways, the availability of statutory exceptions or defenses and the severity of the criminal penalty for conviction vary greatly between states. Generally, state parental kidnapping or custodial interference statutes may be divided into the following categories of applicability:

- Only applicable when a legal custody/visitation order has been issued or after commencement of custody proceedings;⁸⁹
- Applicable with or without a legal custody order; or
- Applicability ambiguous in the absence of a custody order case law in each state controls.

Despite common misconceptions, status as the parent and primary caretaker of a child does not automatically authorize a parent to leave the state with his child without the consent of the other parent or guardian and may not immunize an individual from prosecution under relevant state parental kidnapping laws. Several state criminal custodial interference statutes are at least partially applicable to parents who flee with their children across state lines regardless of whether or not a valid custody or visitation order exists.⁹⁰ These statutes typically assume that parents inherently share equal rights to their child regardless of whether such rights have been documented through a custody order. In these states, an individual fleeing domestic violence may be subject to criminal conviction, unless she is able to invoke a statutory or common law criminal defense in the custodial interference prosecutions.

Non-citizen victims of domestic violence must be particularly careful to avoid criminal convictions for custodial interference. Custodial interference

⁸⁷ The National Center for Missing and Exploited Children, *Family Abduction: Prevention and Response* ix (Hoff, Patricia M., Esq., ed., 6th ed. 2002), available at: http://www.missingkids.com/en_US/publications/NC75.pdf. (NCMEC defines parental kidnapping, also called family abduction, child abduction, or child snatching, as “the taking, keeping, or concealing of a child or children by a parent, other family member, or person acting on behalf of the parent or family member that deprives another individual of his or her custody or visitation rights. Family abductions can occur before or after a court issues a custody determination. The term custodial interference is frequently used in criminal statutes, and the definition of the offense varies from state-to-state.”)

⁸⁸ This section provides an overview of these laws for additional information see Catherine F. Klein, Leslye E. Orloff, Hema Sarangapani, *Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Immigrants Fleeing Across State Lines With Their Children*, 39 *Fam. L.Q.*, 109 (Spring 2005).

⁸⁹ These states are: Arkansas, Iowa, Louisiana, Maryland, Michigan, Mississippi, Nevada, North Carolina, Rhode Island, South Carolina, South Dakota, Texas, and Utah. See end of section for state statute information.

⁹⁰ These states are: Arizona, California, D.C., Florida, Georgia, Hawaii, Idaho, Illinois (if parents are married), Kansas, Maine, Minnesota, Missouri, Montana, Nebraska, New Mexico, Tennessee, and Wisconsin.

convictions are felonies in virtually every state and may be “crimes of moral turpitude” under immigration law. When a parental abduction occurs in violation of an existing court order, the conviction may be for obstruction of justice. These criminal convictions carry with them potentially severe immigration consequences for non-citizen immigrant victims, which could possibly include any of the following:

- The possibility of a negative discretionary finding, leading to a denial of a naturalization application;
- Deportation based upon conviction of an aggravated felony;
- Permanent bars to returning to the United States;
- Having her VAWA immigration case discretionarily denied due to lack of good moral character; or
- Being deemed inadmissible and being denied lawful permanent residence despite approval of her VAWA self-petition because she is found to lack good moral character.

Criminal convictions primarily affect immigration status because they are grounds of inadmissibility and grounds for deportability. When a person applies for permission to enter the United States or to change (adjust) his immigration status to that of a lawful permanent resident (green card holder), he must prove that he are admissible under immigration law. Grounds of inadmissibility include criminal convictions. Thus, a battered immigrant could have her VAWA self-petition approved and, despite that approval, she can be denied lawful permanent residency because she is inadmissible. For battered immigrants in deportation proceedings before an immigration judge who otherwise qualify for VAWA cancellation of removal, criminal convictions could lead to denial. Grounds of inadmissibility generally apply to non-citizens in the following situations:

- Undocumented immigrants who entered the country illegally and have no legal status in the United States when immigration authorities initiate deportation/removal proceedings against them;
- Any non-citizen who is seeking entry into the United States;
- Any non-citizen who is applying for lawful permanent resident status; and
- Lawful permanent residents who are applying for U.S. citizenship.

Effective legal representation of victims is essential so that victims can present all available defenses to the court in order to avoid a custodial interference conviction. If the victim agrees to a plea or is ultimately convicted of custodial interference, this conviction can be used against her by her abuser in subsequent child custody litigation. Convictions can significantly undermine the victim’s ability to obtain court orders that allow her to maintain custody of her children.

Strategies for Advising Survivors Who Wish to Flee the State with Children⁹¹

An attorney advising a survivor who is considering fleeing across state lines with her children to escape an abusive partner must consider numerous factors. Above all, a survivor will need to evaluate what will best keep her and her children safe. A survivor is best equipped to assess her own safety when considering how her abusive partner may retaliate. If she fears that her abuser will kill her or their children, and is also convinced that no intervention by the legal system will prevent him from retaliating, this must guide her decision-making. Her decision will also depend upon the protections that are available to her in each state, such as family support, supportive friends, a supportive immigrant community, a cultural and/or linguistic community support system, economic opportunities, responsiveness of the community to domestic violence, services to assist domestic violence victims, and immigrant community based organizations. It is critical to understand the laws related to custody jurisdiction, relocation, and flight across state or tribal lines in order to assist the survivor make an informed decision about her safety.

The following list of questions and answers are designed to guide attorneys through the process of determining how to advise a battered immigrant survivor contemplating fleeing with her children to another jurisdiction.

- What type of parental kidnapping, custodial interference, or child concealment law does the original state have?

A survivor and her attorney should understand how the law defines and treats crimes of parental kidnapping/custodial interference. This analysis is particularly important to ensure that immigrant survivors do not face criminal sanctions that would cut them off from or make accessing immigration relief exponentially more difficult. While some state criminal custodial interference laws do not apply as long as no court order is in effect, other states criminalize depriving the other parent of contact with the children whether or not a custody order is in effect. Consult your state statutes to determine whether such statutes are applicable to the survivor. Inapplicability of criminal custodial interference statutes does not necessarily mean that a survivor will not be penalized for fleeing custody actions initiated subsequent to her flight.

- Is there a defense or exemption related to domestic violence that could protect a survivor from criminal charges if she flees across state lines with the children?

Your survivor may be able to benefit from a variety of state law exemptions or affirmative defenses to parental kidnapping/custodial interference charges. Some state laws exempt flight from domestic violence from applicability under their criminal custodial interference statutes⁹² or include flight from

⁹¹ Adapted from Goelman, Deborah, Frequently Asked Questions About Laws Governing Interstate Child Custody Cases 4.

⁹² See, e.g., Fla. Stat. Ann. § 787.03(6)(West 2011).

domestic violence as an affirmative defense under the state statute.⁹³ A few laws permit flight from the jurisdiction but then require survivors to meet certain conditions such as making a report to law enforcement and commencing a custody case within a reasonable period of time after fleeing the state.⁹⁴ Others permit flight to protect the parent⁹⁵ or the child from imminent harm.⁹⁶ Others have a general “good cause” defense⁹⁷ or rely upon the criminal defense of necessity.⁹⁸

Before fleeing with the children, survivors should know whether they might rely on any exemptions in the event that criminal charges are brought against them. Contact local domestic violence, legal services, and immigrant organizations in the community to which the immigrant survivor would like to move to learn how receptive local judges in that jurisdiction are to domestic violence victims and immigrants. This will provide a more accurately assessment of how receptive courts will be to the defense raised in parental kidnapping or custodial interference cases. Also, assess the community’s openness to its immigrant populations. In some communities, judges who may be receptive to the needs of victims in family violence cases may hold the views with regard to immigrants that could lead to harmful rulings in cases involving non-citizen victims. Charges of parental kidnapping/custodial interference can result in jail time, loss of custody, and/or loss of access to immigration relief.

- If your survivor is a battered immigrant and is not a citizen of the United States, what are the possibilities that either the original state or the new state could prosecute her for parental kidnapping or custodial interference and how do attorneys assess the potential harm to her future eligibility for legal immigration status?

First assess whether the survivor may qualify for VAWA⁹⁹ or U Visa¹⁰⁰ immigration relief and determine whether the abusive spouse or parent has filed immigration papers for her and/or her children. Many victims will qualify to file a VAWA self-petition, a U visa application or a VAWA cancellation of removal. Assess the strength of her immigration case and initiate that case. Determine what, if any, criminal prosecution or sanctions for violation of

⁹³ See, e.g., 720 Ill. Comp. Stat. 5/10-5(c)(3) (2012).

⁹⁴ See, e.g., Cal. Penal Code § 278.7(c) (West 1996).

⁹⁵ See, e.g., Idaho Code Ann. § 18-4506(2)(b)(West 1987).

⁹⁶ See, e.g., *id.* at § 18-4506(2)(a).

⁹⁷ See, e.g., Haw. Rev. Stat. § 707-726(2)(West 1981).

⁹⁸ See, e.g., *Gerlach v. State*, 699 P.2d 358 (Alaska Ct. App. 1985) (explains necessity defense to a criminal custodial interference matter).

⁹⁹ Orloff, Leslye E., Rebecca Story, Lin, Joanne, Angel, Carole & Birnbaum, Deborah, *Introduction to Immigration Relief for Immigrant Victims of Sexual Assault and Glossary of Terms*, in *Empowering Survivors* (2013), available at: http://niwaplibrary.wcl.american.edu/immigration/introduction-to-immigration-relief-for-immigrant-victims/IMM_6-Intro-to-Imm-Relief-MANUAL-ES.pdf.

¹⁰⁰ *Id.*

existing court orders could occur if the victim fled the jurisdiction with her children. Consult an expert on immigration and crimes to determine what effect any criminal conviction based on a court's finding that the victim has violated court orders could have on her attaining approval of her domestic violence-related immigration case and her attaining lawful permanent residence based on that conviction.¹⁰¹

What type of relocation statute does the state have?

State civil laws also vary by jurisdiction as to whether, and under what circumstances, they permit a parent who has custody of the child to leave the state. Depending upon the state's relocation law and a general sense of typical court rulings, a survivor may wish to petition the court for permission to relocate prior to leaving the state. Thoroughly consult your state's relevant statutes and case law to understand the statutory and applied parameters of such laws. Contact your state domestic violence coalition for a list of attorneys who can advise attorneys on family court practice in the local jurisdiction and about how receptive the courts they are likely to be in cases in which domestic abuse victims seek orders approving relocation. This consultation should include an assessment of the probability that rulings in cases of immigrant victims would be different.

Would a survivor be violating a court order by fleeing the jurisdiction?

Most states allow victims to file for and receive protection orders in the state to which they flee, even when the violence occurred in another state.¹⁰² However, the victim may choose not to obtain a protection order in the new state for safety reasons so as to not provide the abuser information about her location. The protection order case will require service of documents on the abuser. Some victims only seek orders in the new state when the abuser knows or learns she has relocated there.

Courts generally disfavor intentional violations of valid court orders. Barring immediate safety concerns, survivors should, if at all possible, ask a court to modify an existing custody or visitation order prior to leaving the state. If no order exists, a survivor may not wish to obtain a protection order prior to fleeing the state; protection orders may grant visitation to the perpetrator and thereby increase the chances that a battered parent would violate the visitation provisions of such an order if forced to leave the jurisdiction for safety reasons.

¹⁰¹ See Pohl, Anna, Fisher-Preda, Moira, Benson, Ann & Orloff, Leslye, *Battered Immigrants and the Criminal Justice System*, in *Breaking Barriers* (2013), available at: http://niwaplibrary.wcl.american.edu/immigration/enforcement-detention-and-criminal-justice/tools/immigration-consequences-of-criminal-conduct/CRIMINAL_Battered_Immigrants_and_the_Criminal_Justice_System_BB_2004-MANUAL-BB.pdf . For referrals to immigration attorneys, contact: gail@nationalimmigrationproject.org or niwap@wcl.american.edu.

¹⁰² Klein, Catherine F. & Orloff, Leslye E., *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801 (1993).

How have courts in each of the states typically handled interstate custody matters that involved domestic violence?

It will be useful for a survivor to know whether courts in the original state and in the new state tend to penalize victims of domestic violence in child custody cases for flight across state lines.

How have courts in each state typically handled custody cases in which one parent is a citizen and one parent is an immigrant?

It will be important to know how courts in the original state and the new state approach custody cases between a citizen and immigrant parent. This should include a review of case law and discussions with attorneys practicing in family court in both jurisdictions to learn about any biases against undocumented immigrants, and also whether courts are likely to favor citizen parents or parents with legal immigration status.

Do the two states have different custody laws related to domestic violence?

Custody laws vary greatly, and one state may consider domestic violence to a greater degree in custody decisions than the other state. This legal standard in each state may be important for a survivor to know prior to flight from abuse.

Do the states have different laws protecting the confidentiality of information about domestic violence survivors?

If a domestic violence survivor needs to have her identifying information such as address or telephone number kept confidential for safety reasons, she should be aware of what the different states' laws require with respect to confidentiality. For immigrant victims, it will be important to learn how receptive courts may be to keeping VAWA confidentiality-protected immigration information out of state family court proceedings. Talk with local family law practitioners about how receptive courts will be to motions for protective orders precluding discovery of VAWA confidentiality protected information through state court proceedings.

When can a court modify a custody or visitation order that was issued by a court in another state?

The Parental Kidnapping Protection Act (PKPA) gives continuing jurisdiction to the state that issued the initial custody determination. The issuing state then retains jurisdiction over the matter as long as it can do so under state law and at least one parent or the child continues to live there. A court may modify a custody or visitation order from another state only if it has jurisdiction to do so and the court of the initial state no longer has jurisdiction or has declined to exercise it.

Providing Economic Relief for Immigrant Victims: Child Support and Spousal Support

Financial control and isolation are powerful weapons that abusers use to maintain control over their victims. As a result, many domestic violence victims do not have access to bank accounts or charge accounts. In other instances, their abusers make it difficult for their victims to work outside the home, or completely forbid victims from working outside the home. This financial isolation and control is especially exacerbated where the abuser has immigration status and work authorization and the victim does not.¹

The family-based immigration process and laws relating to temporary visas in particular can leave immigrant victims vulnerable to economic abuse. This is because an immigrant spouse, generally, is dependent on the U.S. citizen/lawful permanent resident/temporary visa holder spouse for immigration status. Immigration status determines whether someone can work in the United States legally and whether he or she is eligible to receive certain public benefits. Immigrant victims may lack work authorization² under a variety of situations, such as:

- when an abusive citizen or lawful permanent resident spouse has not filed immigration papers for them;

¹ See Dutton, Mary Ann, Orloff, Leslye E. & Hass, Giselle Aguilar, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Geo. J. on Poverty L. & Pol'y 245 (2000), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf>.

² As an attorney or advocate working with immigrant victims, it is important to warn the client about the immigration consequences of buying or using false papers in order to secure employment, and/or representing herself as a United States citizen, or signing a form stating that she is a United States citizen for purposes of employment. Battered immigrants who could potentially qualify to attain legal immigration status under VAWA could jeopardize their access to VAWA immigration benefits if they do any of these things. 8 U.S.C. §1182(a)(6)(C)(ii), §1227(a)(3)(D)(2003), and IIRIRA §344(c). If you discover that your clients have done any of these things, then they should be referred to an immigration attorney in your area to advise them on how to proceed. For a referral to an immigration attorney familiar with VAWA immigration cases, or for technical assistance to attorneys and victim advocates, please contact the National Immigrant Women Advocacy Project at (202) 274-4457 or email niwap@wcl.american.edu.

- when they received legal immigration status through an immigrant spouse who came to the United States on a work visa and the accompanying spouse visa the survivor received explicitly precludes legal work authorization;
- when they are undocumented;
- when they qualify for immigration relief under VAWA and they have not filed or have filed and are awaiting approval of their case. Immigrant victims under current DHS procedures do not receive work authorization until their immigration case is approved. As a result, victims often wait for significant periods of time before they receive legal work authorization. The wait times are generally as follows:
 - VAWA self-petitions
 - When abuser is a U.S. Citizen and the victim files the VAWA self-petition and the application for lawful permanent residency simultaneously – (6 months, 26.1% of applicants)³
 - When the abuser is a lawful permanent resident – at least three years⁴
 - U visa applicants – (6 months 6.1%, 7-12 months 63.9%, 13 to 18 months 30%)⁵
 - Trafficking victims
 - With continued presence – (90 days)⁶
 - T visa application (From 6.5 months to 2 years 3 months)⁷

Additionally, some immigrant victims of domestic violence have an immigration visa that requires them to work for a particular employer.⁸ If they leave the employment through which they obtained their visa, they are considered to be in violation of the terms of their visa, lose their legal immigration status and become undocumented. Abusers of immigrant women on employment-based visas may harass and abuse them at work which can cause

³ Orloff, Leslye E., *National Survey on Timing of Access to Work Authorization by Immigrant Victim VAWA Self-Petitioners and U-Visa Applicants*, (Legal Momentum Sept. 28, 2011) available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/vawa-t-and-u-procedures/Timing-of-Immigrant-Victim-Access-to-Work-Authorization.pdf> view.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See INA § 101a(15); 8 U.S.C. § 1101 (2003); 8 C.F.R. § 274a.12(b) (2003). For example, persons on H, J, O, and TN visas have specific visas related to their employer, and their spouses and children, as “derivatives” on their visas, may or may not be authorized to work.

immigrant victims to lose their jobs, and thus lose their legal immigration status.⁹

Economic independence plays a key role in whether or not a domestic violence survivor will be able to successfully leave a relationship with an abuser. Issues of economic survival particularly impact battered immigrant women, who also face linguistic and cultural barriers in addition to less access to public benefits than other victims.¹⁰ Research indicates that the lack of access to financial resources is one of the most significant factors preventing immigrant victims of domestic violence from leaving their abusers.¹¹

For many low-income immigrant victims of domestic violence, achieving adequate financial assistance usually requires a combination of help from family, friends, public assistance, employment, and child support. Women often must leave their support systems and move to a confidential location to escape the abuse, leaving them with few resources to start over in another community.¹²

CHILD SUPPORT

When the Abuser Is Granted Sole or Joint Custody

A statutory duty to support children is imposed on parents in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam.¹³ While this section focuses on obtaining child support for immigrant custodial parents, it is important to note that immigrant victims may also have a case for child support initiated against them when they are not the custodial parent. Abusers who are custodial parents may bring child support proceedings against low-income victims of domestic violence in retaliation for leaving the relationship.

⁹ This pattern is typical of abusers in general. See, e.g., Tolman, Richard M., & Raphael, Jody, *A Review of Research on Welfare and Domestic Violence*, 56 J. Soc. Issues 655, 664-68 (2000); Raphael, Jody, *Prisoners of Abuse, Domestic Violence and Welfare Receipt 6-10* (Taylor Institute, 1996). Similarly student visa holders receive visas that require them to attend college, university, graduate school or high school in this country. When student visa holders are victims of intimate partner violence or sexual assault, victims who leave school as the result of the abuse also violate the terms of their student visa and become undocumented.

¹⁰ See Orloff, Leslye, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & Mary J. of Women & L. 597, 614-21 (2001).

¹¹ See Dutton, Mary Ann, Orloff, Leslye E. & Hass, Giselle Aguilar, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Geo. J. on Poverty L. & Pol'y 245, 259, 295-99 (2000), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characteristics_of_Help-Seeking_of_Immigrant_Battered_Women_OVW_2010.23.01.pdf.

¹² Davis, Martha F. *The Economics of Abuse: How Violence Perpetuates Women's Poverty*, in *Battered Women, Children, and Welfare Reform: The Ties That Bind* 17, 18 (Ruth Brandwein ed., 1999).

¹³ Rutkin, Arnold H., 3-33 Family Law and Practice § 33.02 (Rutkin, Arnold H., ed., Bender, Matthew 2004).

Even victims who have not yet attained legal work authorization can be ordered to pay child support.¹⁴ When working with a low-income immigrant victim against whom child support is being sought, it is important to review your state's child support statute. Many states have recognized the need for a parent to reserve a portion of income to meet his or her basic subsistence needs before the child support award is calculated.¹⁵ Attorneys should explore what the immigrant victim's income and resources are and whether advocacy for a basic subsistence reserve is appropriate.¹⁶

If the immigrant victim and abuser have a shared custody agreement or if there is a court order awarding shared custody,¹⁷ the amount of child support awarded in many jurisdictions can be adjusted to reflect the percentage of time that each parent has physical custody of the children. The child support guidelines are rebuttable presumptions of an appropriate amount of child support. In other jurisdictions, the child support guidelines reflect the traditional custodial arrangement in which one parent has sole legal and physical custody of the child and the other parent exercises visitation rights. In these jurisdictions, counsel for the immigrant victim should argue that the amount of support ordered should reflect the custody agreement.¹⁸ When the immigrant victim incurs costs related to care for the children under a shared-custody arrangement, her child support order should be adjusted accordingly.

Benefits of Obtaining Court Ordered Child Support As Early As Possible

Securing and enforcing child support and spousal support awards for immigrant victims can provide an important resource to enhance an immigrant victim's economic security. Such awards provide critical income for low-income battered immigrants who may not yet be eligible to work and who are often

¹⁴ *Asal v. Asal*, 960 P.2d 849, 850 – 851 (Okla. 1998) (Although the former husband claimed that he could not work due to his current immigration status, he was ordered to pay support because his testimony indicated that his mother was paying his expenses, and that he could work in the United States, but had not found work).

¹⁵ *Id.*

¹⁶ Attorneys representing immigrant victims with low-wage work need to be aware that the fact that the victim may not have work authorization will not protect her against having to pay child support, whether or not the amount is calculated taking into account a subsistence reserve.

¹⁷ This should not occur in domestic violence cases. Most states have family court laws or rules that consider domestic violence as part of the custody case (e.g. presumptions against awarding custody to abusive parents) that should deter judges from awarding custody to the perpetrator. However, courts around the country continue to award custody to abusers; see Bancroft, R. Lundy, Silverman, Jay G. & Ritchie, Daniel. *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (SAGE Series on Violence against Women) (Sep. 14, 2011); Meier, Joan S. *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 *Am. U. J. Gender, Soc. Pol'y & L.*, 657 (2003).

¹⁸ Rutkin, Arnold H., 3-33 *Family Law and Practice* § 33.02 (Rutkin, Arnold H., ed., Bender, Matthew 2004).

not eligible to receive a full range of public benefits. Even when immigrant victims can access public benefits for themselves and their children or can access VOCA crime victim's assistance funds, child and spousal support are important additional sources of economic support.

Obtaining child support awards early in representation of an abuse victim in a protection order proceeding or through temporary orders can provide a range of benefits to the victim, such as:

- Court ordered child support with payments made through the court
 - Provides a safe avenue through which victims receive support
 - Provides non-citizen victims with evidence of child support payment that the victim will need to provide DHS in any application filed to become a naturalized U.S. citizen
 - Creates an ongoing obligation to pay child support and an accruing debt for unpaid child support that creates a future opportunity for the victim to collect unpaid child support through state child support enforcement agencies.
- Attachment of tax refunds
- Inability of the perpetrator to get car loans without paying outstanding child support debt
- The fact of a child support order provides immigrant victim evidence of income due to her that she can use to prove to immigration officials that she is not likely to become a public charge and provides evidence to support the victim's application for lawful permanent residency
- Unpaid child support is a fact that can put a victim in a better position in any future child custody litigation.

In working with immigrant victims it is important to work with the client to determine whether child support can be safely pursued. Screening for eligibility for VAWA or U visa immigration relief is an important first step in this analysis. An immigrant victim who may be concerned that pursuing custody or child support could trigger reprisal from the perpetrator who will follow through on threats to have the victims deported. Determining that the victim qualifies for VAWA immigration protections and filing her immigration case can protect her from immigration enforcement and can put her on a path to obtaining legal work authorization. This can mitigate her safety concerns and build her confidence and willingness to pursue spousal and child support. At least thirty-seven jurisdictions authorize the payment of child support as part of their civil protection order remedies,¹⁹ and all other states use catch-all provisions to order child support payments in protection order proceedings. Catch all provisions authorize courts in protection order cases to grant any

¹⁹ See Klein, Catherine F. & Orloff, Leslye E., *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 998 (1993).

relief that the court deems will promote the petitioner's or her children's well-being and safety as part of a protection order.²⁰

In addition to spousal and child support, other economic relief can be included as remedies in civil protection order cases, including rent and mortgage payments, utilities payments, possession of residence or vehicle (for transportation to work), vehicle payments, and child care expenses.²¹ Other creative forms²² of relief include medical bills, lost earnings, repair and replacement of damaged property, alternative housing costs, meals, out-of-pocket expenses for injuries, relocation and travel expenses, replacement

²⁰ The following states have specific provisions for the award of support to the petitioner and/or her minor children (they may also contain catch-all provisions for other forms of financial relief): Ala. Code § 30-5-7(d)(5) (2003); Alaska Stat. Ann. § 18.66.100(c)(12) (West 2003); Ark. Code. Ann. § 9-15-205(a)(4) (West 2003); Cal. Fam. Code § 6341 (West 2003); Del. Code Ann. tit. 10, §1045(a)(6) (West 2010); Ga. Code Ann. § 19-13-4(a)(6) & § 19-13-4(a)(7) (West 2002); Fla. Stat. § 741.30(6)(a)(4) (West 2002); 750 Ill. Comp. Stat. § 60/214(b)(12) (2003); Ind. Code § 34-26-5-9(c)(3)(C) (2010); Iowa Code § 236.5 (2003); Kan. Stat. Ann. § 60-3107(a)(6) (West 2002); Ky. Rev. Stat. Ann. § 403.750(4) (West 2002); La. Rev. Stat. Ann. § 46:2136 (A)(2) (2003); Me. Rev. Stat. Ann. tit. 19-A, § 4007(1)(I) & § 4007(1)(J) (2003); Md. Code Ann., Fam. Law § 4-506(d)(9) (West 2002); Mass. Gen. L. Ann. ch. 209A, § 3(e) (West 2003); Minn. Stat. ann. § 518B.01 subd. 6(5) (West 2003); Miss. Code Ann. § 93-21-15(1)(e) (West 2003); Mo. Rev. Stat. § 455.050 (2003); Nev. Rev. Stat. § 33.030 (2003); N.H. Rev. Stat. Ann. § 173-B:5 (I)(b)(7) (2002); N.J. Stat. 2C:25-29b.(8) (2003); N.M. Stat. Ann. § 40-13-5 (A)(2) (West 2003); N.Y. Fam. Ct. Act § 842 (McKinney 2003); N.C. Gen. Stat. § 50B-3(a)(6) (West 2003); N.D. Cent. Code Ann. § 14.07.1-02 (West 2011); Ohio Rev. Code Ann. § 3113.31(E)(1)(e) (West 2003); Or. Rev. Stat. Ann. § 107.718(1)(h) (West 2001) (allowing emergency monetary assistance); 23 Pa. Cons. Stat. Ann. § 6108 (a)(5) (West 2006); R.I. Gen. Laws Ann. § 15-15-3(a)(4) (West 2002); S.C. Code Ann. § 20-4-60(c)(2) (2002); S.D. Codified Laws § 25-10-5(4) (2003); Tenn. Code Ann. § 36-3-606(a)(7) (West 2003); Tex. Fam. Code Ann. § 85.021(4) (West 2003); Utah Code Ann. § 78B-7-106 (2)(h) (formally cited as 30-6-4.2(2)(h)) (West 2003); Vt. Stat. Ann. Tit. 15, § 1110 (West 2003); W. Va. Code Ann. § 48-27-503(4) & 48-27-503(5) (West 2003); Wis. Stat. Ann. § 813.12 (West 2002); Wyo. Stat. Ann. § 35-21-105(b)(ii) (West 2003). The following states have catch-all provisions that a court could use to award financial relief: Ariz. Rev. Stat. Ann. § 13-3602(G)(6) (West 2003); Conn. Gen. Stat. Ann. § 46b-15 (West 2003); D.C. Code § 16-1005(c)(10) (2003); Haw. Rev. Stat. § 586-5.5 (West 2003); Idaho Code Ann. § 39-6306(1)(e) (West 2003); Mont. Code Ann. § 40-15-201(2)(j) (2002); Neb. Rev. Stat. § 42-924(1)(g) (2002); Va. Code Ann. § 16.1-279.1 (West 2003); Wash. Rev. Code Ann. § 26.50.060 (West 2003). See also *Powell v. Powell*, App. D.C. 547 A.2d 973 (1988); *Mabry v. Demery*, 707 A.2d 49 (D.C. Cir. 1998); *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122 (2001); *Parrish v. Parrish*, 95 Ohio St. 3d 1201 (2002); *Brown v. Brown*, 2000 Ohio App. LEXIS 949 (March 14, 2000).

²¹ Klein, Catherine F. & Orloff, Leslye E. *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 996 (1993) (full discussion of the broad range of economic relief available as part of a protection order see Chapter 5 of this Manual).

²² Other creative economic remedies that counsel for immigrant victims have been able to attain under protection order catch all provisions include: ordering the abuser to pay for any and all costs associated with the filing and completion of victim's immigration case; ordering the respondent to turn over a certain amount of money to be held in trust for payment of the victim's attorney's fees in a subsequent divorce, custody or other family law matter; and ordering the abuser to pay for any and all costs associated with supervised visitation, including any application fee that may be required.

costs for locks, and counseling costs.²³ Any relief provided for in a protection order is only valid for the duration of the protection order.²⁴ Attorneys representing immigrant victims should explore and assist clients in seeking permanent spousal and child support orders as part of another family court action before the date on which the protection order ends.²⁵

Immigration Consequences of Criminal Convictions for Failure to Pay Child Support

There are immigration consequences for a non-citizen who fails to prove to DHS that they have been supporting their children.²⁶ When a lawful permanent resident applies for naturalization to become a U.S. citizen, if they have children, non-citizens must present proof to DHS that they have been supporting their children in order to prove they have *good moral character*. Establishing good moral character is a requirement for several types of immigration relief, including cancellation of removal for non-permanent residents,²⁷ self-petitions for battered spouses²⁸ and children under VAWA, voluntary departure,²⁹ citizenship,³⁰ and registry.³¹ There is generally no waiver available for this requirement, and if an individual is found to lack good moral character,

²³ Klein, Catherine F. & Orloff, Leslye E. *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 994-95 (1993) (citing creative state statutes that allow for these forms of relief).

²⁴ Orloff, Leslye E. & Klein, Catherine F. *Domestic Violence: A Manual for Pro Bono Lawyers* § Remedies 75 (2d ed. Ayuda, 1992).

²⁵ Most state protection orders are of between one and three years duration. Some states have protection orders that last indefinitely. Klein, Catherine F. & Orloff, Leslye E. *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 1085 (1993).

²⁶ See Orloff, Leslye E., Noche, Joyce, Benson, Anne, Martinez, Laura, & Rose, Jennifer, *Ensuring Economic Relief for Immigrant Victims Through Family Law Proceedings: Child Support and Spousal Support*, 21-29, in, *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, NIWAP (2013) (detailed explanation of the ramifications for a non-citizen parent of failure to pay child support), available at http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/economic-relief/6.4_c_FAM_BB_Economic-Relief-for-Victims-Child-Spousal-Support-MANUAL-BB.pdf.

²⁷ Good moral character is a requirement for cancellation under INA § 240A(b)(1), as well as for special rule cancellation for battered spouses and children under VAWA, and for certain nationals of Guatemala, El Salvador, and former Eastern bloc countries under NACARA § 203. Immigration courts can properly exercise their discretion to deport, rather than grant relief to, fathers who paid only limited amounts of child support. See *Satoot v. I.N.S.*, 24 F.3d 249, 1994 WL 192120 (9th Cir. 1994) (unpublished opinion); *In re Halas*, 274 F. Supp. 604 (D.C. Pa. 1967). It is important to note that the parent not paying child support in the *Satoot* case was also abusive.

²⁸ INA § 204(a)(1)(A)(iii)(II)(bb); 8 USC § 1154(a)(1)(A)(iii)(II)(bb) and INA § 204(a)(1)(B)(ii)(II)(bb); 8 U.S.C. 1154(a)(1)(B)(ii)(II)(bb).

²⁹ INA § 244(a); 8 U.S.C. § 1254a(a)(2002).

³⁰ INA § 316(d) – (e); 8 U.S.C. § 1427(d) – (e) (2002). For decisions related to failure to pay child support and good moral character, see *Matter of S*, 3 I & N Dec. 393 (BIA 1998); *Matter of Pires da Silva*, 10 I&N Dec. 191 (BIA 1983); *Halas*, 274 F. Supp. 604 (E.D. Pa. 1967). See also *Matter of Dobric*, 189 F. Supp. 638 (D. Minn. 1960); *In re* Petition for Naturalization of Spak, 164 F. Supp. 257 (E.D. Pa. 1958).

³¹ INA § 249(c); 8 U.S.C. § 1259(c).

the form of immigration relief the immigrant has requested must be denied.³² These immigration consequences can lead to a lump sum payment to the custodial parent of all court ordered child support unpaid in the past. The child support payment requirements to prove good moral character under immigration law can be a factor that helps encourage non-citizens to pay child support and to agree to child support orders.

Noncompliance with child support payments can have serious legal and immigration consequences. Every state has laws that criminalize failure to support a spouse or child. The penalties range in severity. Both civil and criminal penalties can be imposed for failure to pay child support. Many state child support enforcement statutes provide for a sentence of greater than one year for willful failure to pay child support. The presence of *mens rea*, the “willful” requirement in criminal child support enforcement statutes, could result in a conviction for failure to pay child support being considered a crime of moral turpitude under immigration law.³³ When a batterer is convicted under such a statute, the sentence may mean that the batterer has committed a crime of moral turpitude. Immigrants with a conviction of a crime of moral turpitude can be deported and can be denied lawful permanent residency, **even if** the non-custodial non-paying parent does not actually receive a sentence of greater than one year.³⁴ The key language under federal immigration law is that a crime of moral turpitude is a crime “for which a sentence of one year or longer *may* be imposed.”³⁵ (emphasis added).

There is also a federal remedy for non-payment of child support under the Child Support Recovery Act when implemented in combination with the Deadbeat Parents Punishment Act of 1998. These federal statutes work together to impose criminal sanctions on parents who willfully avoid child support payments for a child in another state, and who owe more than a year’s worth of child support or is greater than five thousand dollars (\$5,000).³⁶ When a parent’s nonpayment of court ordered child support meets any of these criterion, the parent has committed a federal crime punishable by up to two years in prison for certain deadbeat parents.³⁷ Conviction of this federal crime could also constitute a crime of moral turpitude, since the length of sentence that could be imposed under the statute is up to two years in prison. Federal child support enforcement actions could lead to the non-paying non-citizen parent being denied lawful permanent residency and being deported.

³² See *Miller v. INS*, 762 F.2d 21 (3d Cir. 1985). There is an exception under INA § 204(a)(1)(C) for self-petitioners under VAWA with criminal convictions that would otherwise preclude good moral character, if the conviction is connected to the abuse and waivable when determining admissibility under INA § 212(h).

³³ Check your state nonsupport statutes, found in footnotes above, and accompanying statutes (if any) for the actual length of sentence.

³⁴ INA § 237(a)(2)(A)(i); 8 U.S.C. § 1227 (a)(2)(A)(i)(2002).

³⁵ *Id.*

³⁶ 18 U.S.C. 228.

³⁷ 18 U.S.C. § 228 (2002).

It is extremely important to seek and win child custody awards for non-abusive immigrant victims. Should an immigrant victim client not seek custody or lose a custody case resulting in the court awarding sole or joint custody to her abuser, the immigrant victim non-custodial parent could be required to pay child support under state laws. Non-custodial immigrant victims should be encouraged to pay child support. Paying child support will help your client prove that she is of good moral character in her VAWA immigration case as well as in other immigration cases the victim may have in the future. It is important to adequately advise immigrant victims of their rights and responsibilities, and consequences of failure to pay their child support orders.

Calculating Child Support

Seasonal Employment, Self-Employment, and Unreported Income

When a non-custodial parent is employed seasonally or has fluctuating income, child support guidelines generally allow the court to look at the income over a period of time.³⁸ Generally, when calculating the child support order, courts will require full financial disclosure and review financial information including, but not limited to, income tax returns and year-to-date income for a lengthy enough period to account for past or anticipated changes in income.³⁹ For income that is steadily increasing, use of prior year's income is appropriate.⁴⁰

Determining child support can be difficult if the non-custodial parent owns his or her own business, works in a family business, or earns unreported income. Locating and examining the true worth of the non-custodial parent's business is paramount to obtaining an appropriate child support order. If it is safe for the clients to do so, attorneys and advocates should advise clients to copy any information that would be helpful in a child support and/or spousal support case, such as spouse's credit reports, bank statements, canceled checks, deposit slips, monthly credit card statements, loan applications, etc. In addition, if there are specific benefits to the business for the non-custodial spouse, such as a company car, housing, and credit cards; these benefits should be taken into account when determining income and an appropriate child support award.⁴¹ In these cases, the custodial battered immigrant parent may also have to testify as to the non-custodial parent's salary and the lifestyle of the family before they were separated.

³⁸ Morgan, Laura W., *Child Support Guidelines: Interpretation and Application* § 2.03[d] (2001).

³⁹ See *Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993); *Cleveland v. Cleveland*, 249 N.J. Super. Ct. 96, 592 A.2d 20 (App. Div. 1991).

⁴⁰ See *Schaeffer v. Schaeffer*, 717 N.E.2d 915 (Ind. Ct. App. 1999); *Mahoney v. Mahoney*, 567 N.W. 2d 206 (N.D. 1997).

⁴¹ Morgan, Laura W., *Child Support Guidelines: Interpretation and Application* § 2.03[d] (2001); see Richman, Bruce L., *Eye on the Business*, *Family Advocate*, Vol. 23, No. 2 American Bar Association Fall 2000.

If the non-custodial parent is hiding or manipulating income, courts can consider the earning capacity of the parent when awarding child support.⁴² This issue arises in cases in which the non-custodial parent is claiming less income than he actually earns, has voluntarily reduced work hours, or quit his job to evade his child support obligations. All state child support guidelines examine the income and earning capacity of a non-custodial and custodial parent in the process of calculating each parent's income share or percent of income to determine the amount of child support that will be awarded.⁴³ Past employment records of the non-custodial parent can be introduced to show that he is voluntarily reducing his income.⁴⁴ The custodial parent's testimony about the non-custodial parent's work schedule, earnings and extravagant spending patterns when the parties resided together can also provide evidence of the non-custodial parent's earning capacity.⁴⁵ In cases in which the abuser has voluntarily left a well-paying job to avoid child support payments, the courts can impute former income to the non-custodial parent.⁴⁶ Finally, lack of immigration status of the non-custodial parent is not a valid defense in a child support case.⁴⁷

Proving the Abuser's Income and Ability to Pay

Attorneys representing immigrant victims have been successful in using Employer's Statements to prove income in a child support case in lieu of the employer's testimony. The Employer's Statement and Employer's affidavit⁴⁸ can be admitted into evidence under court rules that deem these documents

⁴² See Becker, Lewis, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 Conn. L. Rev. 647 (1997). For a discussion of the child support obligations of incarcerated parents, see Cavanaugh, Karen & Pollack, Daniel, *Child Support Obligations of Incarcerated Parents*, 7 Cornell J. L. & Pub. Pol'y 531 (1998).

⁴³ See American Bar Association, Child Support Guidelines, 498 *Family Law Quarterly*, Volume 45, Number 4, Winter 2012, available at: http://www.americanbar.org/content/dam/aba/publications/family_law_quarterly/vol45/4win12_chart3_childsupport.authcheckdam.pdf.

⁴⁴ Some courts impute income to the non-custodial parent regardless of the reason of voluntarily being unemployed or underemployed. Others use a "good faith test" to determine if the reason for under- or unemployment is valid. See Morgan, Laura W., *Child Support Guidelines: Interpretation and Application* § 2.04[b] (2001).

⁴⁵ Testimony on earning capacity need not be limited to testimony provided by the custodial parent. In cases of self-employed abusers, attorneys representing battered immigrants have successfully presented testimony on income generated through employment from investigators and from witnesses employed in a similar line of work (e.g. street vendor, waiter, construction worker).

⁴⁶ See *Lascaibar v. Lascaibar*, 658 So. 2d 170, 171 (Fla. Dist. Ct. App. 1995); *Hutto v. Kneipp*, 627 So. 2d 802, 805-806 (La. Ct. App. 1993); *In re Marriage of Gable*, 750 P.2d 534, 535-36 (Or. Ct. App. 1988); see also Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 Conn. L. Rev. 647 (1997). Some courts will also order a non-custodial parent to undertake a job search and report to the court every two weeks on the progress of that job search until the non-custodial parent has secured employment.

⁴⁷ *Asal v. Asal*, 960 P.2d 849, 850 – 851 (Okla. 1998).

⁴⁸ For a sample Employer's Statement and Employer's Affidavit, go to: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/economic-relief/FAM_Employers-Financial-Statement-DC.pdf/view?searchterm=employer%20statement.

prima facie evidence of income.⁴⁹ In other jurisdictions Employer's Statements and Employer's affidavits are generally admitted under the State's equivalent to the Federal Rule of Evidence Rule 902 Self-Authentication.⁵⁰ Under these circumstances, these statements are obtained through a subpoena duces tecum, but the Employer is not "excused" from having to testify. If the opposing counsel objects to the admission of the Employer's Statement, the person who signed the Employer's Statement and Employer's affidavit would need to be available to testify to the fact that the Employer's Statement contains information that is kept in regular course of business. In practice, by keeping the employer on call and providing opposing counsel copies of the Employer's Statement and Employer's Affidavit, opposing counsel usually agrees to stipulate that the figures contained in the Employer's Statement shall be used by the court in calculating the child support amounts.

Some employers may refuse to comply with the subpoena duces tecum. When this occurs, the subpoena can be enforced against the employer. Uncooperative employers may be working to help the non-custodial parent avoid issuance and enforcement of child support orders. If the employer fails to comply with a subpoena, the subpoena can be enforced against him. When an employer fails to comply with a wage withholding order, the employer may be sanctioned under state law for non-compliance. Attorneys for immigrant victims have won damage awards from employers for failure to comply with court wage withholding orders.⁵¹

Wage Withholding

Wage withholding requires the non-custodial parent's employer to withhold child support from the non-custodial parent's paycheck. For victims of

⁴⁹ See e.g. District of Columbia SCR General Family Rule J.; Alabama, ARJA Rule 32(F); Louisiana, LSA-R.S. 9:315.2 (A); Maryland, Md. Code Ann. Fam. Law § 12-203; Maine, 19-A.M.R.S.A. § 2004 1A.

⁵⁰ See e.g. Texas Rule of Evidence, 902 Self Authentication. The Texas rule requires that the Employer's State be on file for 14 days prior to the hearing, the federal rule does not have this requirement. Attorneys should check State rules in the appropriate jurisdiction.

⁵¹ Tex. Fam. Code Ann. § 158.210; See, e.g., *Belcher v. Terry*, 420 S.E.2d 909 (W. Va. 1992) (Holding that W.Va. Code Sections 48A-5-3(n) and 48 A5-3(f)(b) (Supp. 1991) clearly provides a right of action against employers who failed to withhold child support payments from salary in accordance with a receipt of notice to do so from the state's Child Advocacy Office. The court also said that punitive damages could be obtained after a showing that the failure to withhold was willful on the part of the employer.); *Child Support Recovery Svcs., Inc. ex rel S.C. v. Inn at the Waterfront, Inc.*, 7 P.3d 63 (Alaska 2000) (Affirming summary judgment against an employer for failure to withhold income from an employee who had child support obligations . . . the court's finding relied on Alaska Stat. § 25.27.260(a) and (b)). *Casino Magic Corp. v. King*, 43 S.W.3d 14 (Tex. App. 2001) (Awarding mother \$36,951.85 in delinquent child support plus attorney fees and court costs after mother filed motion to enforce child support wage withholding order against father's employer where employer purportedly failed to comply with previous order.); See also, *State v. Filipino*, Conn. Super. Ct. LEXIS 266 (2000) (Suing on behalf of respondent's former wife, the Connecticut Support Enforcement Division prevailed when the court held employer to be in contempt for willfully violating a valid withholding order, and found employer liable to mother in the sum of \$29,259 for the full amount of income not withheld since receipt of the notice to withhold.)

domestic violence, wage withholding should be a part of every child support order preferable because it minimizes any contact between the abuser and victim, and provides an objective method to prove whether child support has been paid. Wage withholding is available when child support is ordered as part of a protection order, child support order, or divorce order.⁵² In negotiating with counsel for non-citizen perpetrators, emphasize that wage withholding provides the non-citizen parent solid evidence of payment of child support that can be used to prove good moral character to immigration officials in an event of a removal hearing or in a naturalization application.

Retroactive Child Support Awards and Prior Child Support Orders

When issuing a child support award, the court can award retroactive child support back to the date of birth of the minor child.⁵³ Some states have presumptions for limiting retroactive child support to a lesser period of time. Attorneys for battered women have been successful in overcoming this presumption and winning retroactive support awards for longer periods of time. This can be done by showing the relationship the non-custodial parent has had with the child to date or by arguing that the non-custodial parent knew or should have known about the minor child.⁵⁴ In making determinations about retroactive child support,⁵⁵ courts will consider not only the support that the non-custodial parent would have provided the child but also the amount of support paid by the custodial parent in the meantime.⁵⁶ If the non-custodial parent is a non-citizen, payment of retroactive child support back to the date

⁵² Depending on your jurisdiction's rules, a wage withholding order may be issued automatically with a court order that includes spousal and/or child support. If wage withholding orders are not automatically issued, you must request that the court issue the order. See Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105, § 453(g)(1) (1996) (codified, as amended, in scattered sections of 42 U.S.C.).

⁵³ See Sample Retroactive Child Support Order, available at http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/economic-relief/FAM_Retroactive-Child-Support-Order.pdf/view.

⁵⁴ See e.g. Tex. Fam. Code Ann. § 154.131(d) (presumption that retroactive child support awards are limited to 4 years can be overcome by proof that the obligor knew or should have known that he was the father of the child or that he sought to avoid establishment of child support).

⁵⁵ It is important to determine whether prior child support orders have been entered for the client's child by other courts or through State Child Support IV-D agencies. When these cases exist it is important for counsel to give proper notice to both the non-custodial parent and the IV agency of any child support case being filed. Counsel may need to file motions to intervene in the prior child support case and motions to consolidate the prior case or cases with the current case and ask that the court reduce the prior orders to judgments. It is also important to include, in any new child support order, received arrearage language from prior court orders and retroactive judgments. In seeking a retroactive judgment, it is important that the client provide you with a detailed timeline of when they were living with the abuser and when they were not. Many times, there will have been previous separations and nonsupport periods that qualify for retroactive support. It is also important that all initial pleadings include requests for both retroactive and arrearage amounts so that the court can address these issues if they come up at trial. Some judges will not award arrearages amounts or retroactive support if requests for these forms of relief were not included in the pleadings.

⁵⁶ See e.g. *In Re Valdez*, 980 S.W.2d 910, 913 (Tex. App. 1998).

of the child's birth will provide evidence of good moral character for immigration purposes, including naturalization.

SPOUSAL SUPPORT

Spousal support orders can be an important contributor to an immigrant victim's self-sufficiency and stability for herself and her children.⁵⁷ For immigrant victims who qualify to attain legal immigration status either through a VAWA or a U visa case, spousal support orders provide victims with an important source of income while awaiting approval of their immigration case and receipt of work authorization. The wait from filing to receipt of work authorization for immigrant victims can be between six months and two years or longer, depending on the type of immigration case the victim qualifies for. Spousal support orders can also provide critical support for immigrant victims who are transitioning to self-sufficiency and obtaining the skills, training, and education needed in order to become self-supporting.

Spousal and child support orders differ in that courts are given broad discretion to determine whether a spousal support order is appropriate in a particular case. Courts also have the discretion to determine the amount and duration of the spousal support order.⁵⁸ Some states have statutes that list general factors that courts may consider in determining a spousal support order.⁵⁹ Many states approach spousal support as 'rehabilitative' and direct that the amount of support should be enough to allow a spouse to obtain the necessary job skills, education, or training to enable him or her to become fully self-supporting.⁶⁰

The following are the factors most courts consider in determining spousal support awards. Generally, the courts will look at all the factors and then apply the factors to the facts of a particular case:

- **Standard of Living Established During Marriage:** The court will look at the parties' standard of living during the marriage and, to the extent possible, fashion an award that would maintain this standard for both parties. Marriages of long duration are generally given significant weight in the duration and amount of a spousal support award.⁶¹ In representing an immigrant victim in a marriage of a long duration to a citizen or lawful permanent resident spouse who never filed immigration papers for the non-citizen spouse,

⁵⁷ As in child support, an assessment on the risks in pursuing spousal support should be evaluated carefully with the immigrant victim.

⁵⁸ Rutkin, Arnold H., 3-33 Family Law and Practice at § 35.03 (Rutkin, Arnold H., ed., Bender, Matthew 2004). See, e.g., *In re Marriage of Cheriton*, 92 Cal. App. 4th 269 (Cal. Ct. App. 2001).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Rutkin, Arnold H., 3-33 Family Law and Practice § 33.02 (Rutkin, Arnold H. ed., Bender, Matthew 2004); see e.g., *In re Hasabnis*, 322 Ill. App. 3d 582 (Ill. App. Ct. 2001) (Outlining the factors courts consider, including duration of marriage, in deciding support amount).

consider arguing that the long duration of the marriage combined with the perpetrator's failure to file or follow through on immigration relief for the victim should be a basis for both spousal support and a disproportionate share of family assets.

- **Income and Financial Resources of Each Party:** The spouse seeking spousal support must prove that he or she needs the support. If the U.S. citizen or lawful permanent resident spouse did not file a petition asking immigration authorities to grant legal immigration status to the immigrant victim, counsel should inform the court and present evidence that this *immigration-related abuse* by the abuser is the reason the immigrant spouse does not have legal work authorization. The immigrant spouse needs spousal support at least until she is able to receive work authorization and becomes self-supporting.⁶²
- **Duration of the Marriage:** Although court practice in some jurisdictions is to award spousal support as part of the temporary orders in divorce cases, with regard to final orders of maintenance, alimony or spousal support, it can be difficult to obtain spousal support awards in marriages of less than five years duration absent extraordinary circumstances.⁶³ In seeking spousal support awards for immigrant victims with shorter marriages, since immigration status and the ability to obtain legal work authorization are linked, it can be relevant to present evidence demonstrating how the abuser used immigration-related abuse, including failure to file papers, threats to withdraw the immigration case and threats to have the victim deported, to keep the victim in the abusive relationship and to maintain economic control over her. This evidence helps persuade the court of the need for a rehabilitative alimony or temporary order of support to allow the immigrant victim to attain legal work authorization through her immigration case and become self-supporting.⁶⁴
- **Age and Physical and Emotional Health of Parties:** The courts will examine the age and physical and emotional health of the

⁶² See *Stone v. Stone*, 2004 Ohio 671 (2004); *Watson v. Watson*, 724 So.2d 350 (Miss. 1998); *Korn v. Korn*, 867 So. 2d 338 (Ala. Civ. App. 2003).

⁶³ Rutkin, Arnold H., 3-33 Family Law and Practice § 33.02 (Rutkin, Arnold H., ed., Bender, Matthew 2004); see e.g., *Harrelson v. Harrelson*, 932 P.2d 247 (Alaska 1997); *Hann v. Hann*, 629 So. 2d 918 (Fla. Dist. Ct. App. 1994).

⁶⁴ See *In Re Marriage of Shirilla*, 89 P.3d 1 (Mont. 2004)(court found that rehabilitative maintenance award was necessary to allow the immigrant spouse to work on her English proficiency). In some cases, an abuser may have helped the immigration victim attain legal immigration status. If he filed an immigration case for her, he may have completed an affidavit of support. For a full discussion of how the affidavit of support might be useful as evidence of ability to pay in spousal support proceedings, see Orloff, Leslye, Olavarria, Cecilia, Martinez, Laura, Rose, Jenifer & Noche, Joyce, *Battered Immigrants and Civil Protection Orders, in Breaking Barriers* at 29-31 (2013), available at: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/protective-orders/5.1_BB_Family_ProtectionOrders_Battered_Immigrants_Civil_Protection-MANUAL-BB.pdf.

parties. Evidence of physical, sexual, emotional, economic, and immigration related abuses are important. If either spouse suffers from a medical or emotional condition that will affect earning capacity or the present or future need for treatment, this may also be a factor in the amount and duration of support.⁶⁵ Presenting evidence about the abuse and related trauma may be helpful in securing more support, particularly if the immigrant victim must seek mental health services as a result.

- **Time Necessary for Either Party to Acquire Sufficient Education or Training in Order to Find Appropriate Employment:** Courts often approach spousal support as a temporary mechanism to assure the financial self-sufficiency for both parties. Factors that attorneys working with battered immigrants should raise include:
 - Actions the perpetrator took to keep the victim from learning English and provide sufficient alimony to support the victim as she takes English and other job training classes she needs to gain economic self-sufficiency;
 - Whether the perpetrator failed to file immigration papers for the victim delaying her access to legal work authorization;
 - The immigrant victim's eligibility for VAWA immigration relief, or other possible routes to immigration status;⁶⁶
 - The time it will take for the victim's immigration case to be approved, to obtain legal work authorization, to seek and to obtain employment;
 - Any plans that the victim has to further her educational or career development to enhance the immigrant survivor's ability to become self-supporting; and
 - Any education or training she would need or has had in the past which was delayed because of domestic violence and/or family obligations;
 - Whether the perpetrator filed an affidavit of support in an immigration case filed on her behalf.
- **Needs of Recipient Spouse and Financial Resources of Payor Spouse:** The needs and resources of the recipient spouse will be

⁶⁵ See Cal. Fam. Code § 4325, which creates a rebuttable presumption where there is a criminal conviction for an act of domestic violence entered by the court within five years of the filing of the dissolution proceeding, or at any time thereafter for any award of temporary or permanent spousal support to the abusive spouse otherwise awardable.

⁶⁶ There may be other routes to immigration status besides VAWA relief, e.g., family-based sponsorship, employment-based petition, and education-related visas. Attorneys and advocates should consult with an experienced immigration attorney for assistance in pursuing these other routes.

balanced against the financial resources of the payor spouse.⁶⁷ The award of support must not be disproportionate to the payor's ability to pay, nor should it be in excess of the payee spouse's financial needs.⁶⁸ In the case of an immigrant victim married to a spouse who delayed or did not file an immigration case on the immigrant spouse's behalf, this failure to timely file for immigration relief that would have provided the immigrant spouse legal immigration status and work authorization should be considered as part of this analysis. When the citizen or lawful permanent resident spouse created circumstances causing the non-citizen spouse to be in greater need of financial assistance, this factor needs to be part of the court's determination of the payor's ability to pay. In addition, it should include amounts necessary to avoid loss of community assets pending finalization of the divorce (i.e. marital home, insurance, vehicles, etc.).⁶⁹

- **Contributions of Each Spouse During Marriage:** Virtually all states recognize the nonmonetary contributions of each spouse during the marriage, which usually takes the form of homemaking or child-care services.⁷⁰ Examples of other contributions to the marriage or sacrifices for the marriage an immigrant victim may have made⁷¹ include:
 - contributions to the success of a family business;
 - contributions to the other spouse's pursuit of a graduate, or professional degree;

⁶⁷ Rutkin, Arnold H., 3-33 Family Law and Practice § 33.02 (Rutkin, Arnold H. ed., Bender, Matthew 2004); see, e.g. *In re Marriage of Mathews*, 70 Wash. App. 116 (1993) (reversing the order for maintenance fees awarded to the wife because it did not leave the husband with the ability to meet needs and financial obligations, as statutorily required, and would force him to pay maintenance fees out of his disability and retirement income).

⁶⁸ *Id.*

⁶⁹ Counsel for immigrant victims should explore with clients the possibility of being awarded the marital home as part of a divorce decree. Home ownership is very important to people and many immigrant victims would not be able to qualify for a home loan after the divorce on their own. There are pros and cons to homeownership that need to be explored with clients. Home ownership is not always financially feasible. The abuser can be ordered to pay or help pay the mortgage pending the finalization of the divorce in community property states. The client may also explore the possibility of identifying persons with whom she can share the residence whose rent payment can be used to help pay the costs of a mortgage that is higher than the amount the court orders the abuser to pay. If the home is awarded to the client, the abuser will be required to sign a Special Warranty Deed and client will sign the Deed of Trust to Secure Assumption.

⁷⁰ Rutkin, Arnold H., 3-33 Family Law and Practice § 33.02 (Rutkin, Arnold H. ed., Bender, Matthew 2004); see e.g., *Hammer v. Hammer*, 991 P.2d 195 (Alaska 1999) (court factored in wife's homemaking for nearly 19 years out of the 23 year marriage, to conclude that more monetary support is necessary from husband when considering that wife is not likely to obtain employment that will adequately satiate basic needs).

⁷¹ Rutkin, Arnold H. 3-33 Family Law and Practice § 33.02 (Rutkin, Arnold H. ed., Bender, Matthew 2004); see e.g., *Watson v. Watson*, 724 So. 2d 350 (Miss. 1998) (court noted the wife's contributions as a spouse and that her age and lack of work experience warranted a periodic alimony payment in the amount of \$1,000.00 per month); *Ahmad v. Ahmad*, 2001 Ohio App. LEXIS 5303 (Ohio Ct. App. 2001); *In re Marriage of Ganghar*, 2000 Minn. App. LEXIS 405 (2000).

- sacrificing career or educational opportunities in victim's home country;
- sacrificing access to family members in the home country; and/or
- loss of home country ties that she might have made for the marriage.⁷²
- **Retroactive Nature of the Spousal Support Award:** In most jurisdictions, the final support award of the court will be retroactive to the date of the commencement of the action, or the date upon which the request for support was filed.⁷³

IMMIGRATION AFFIDAVITS OF SUPPORT AS EVIDENCE OF THE ABILITY TO PAY CHILD SUPPORT AND/OR SPOUSAL SUPPORT

The IIRIRA added provisions in 1996 that mandate that each person, or sponsor, who files a petition for a relative to come to the United States, sign a legally enforceable affidavit of support.⁷⁴ As part of the petition process, the intending immigrant must show that she is admissible.⁷⁵ While there are a number of inadmissibility grounds, the affidavit of support serves to overcome the ground that the intending immigrant is not going to be “likely at any time to become a public charge.”⁷⁶ In the affidavit of support, the U.S. citizen or lawful permanent resident sponsor signs a sworn statement promising to financially support the intending immigrant. This obligation to support the intending immigrant ends in very specific circumstances.⁷⁷ However, it is important to note that divorce **does not** terminate the obligation.⁷⁸

The financial information submitted with the affidavits of support can be helpful in family court cases in obtaining child and spousal support awards. It can be used as evidence of income and the ability to pay child and/or spousal

⁷² See *In re Marriage of Gangahar*, *supra* note 72 (court noted that respondent-wife gave up everything when she left India and was completely dependent on petitioner when she arrived in the United States); *In re Marriage of Hanson*, 378 N.W.2d 28 (Minn. Ct. App. 1985) (holding that trial court award of temporary maintenance was proper as respondent left Taiwan to marry petitioner and is now unable to speak English or to support herself, further, respondent would be unable to return to her native country without personal disgrace).

⁷³ Rutkin, Arnold H., 3-33 Family Law and Practice § 33.02 (Rutkin, Arnold H. ed., Bender, Matthew 2004); see e.g., *Gotten v. Gotten*, 748 S.W.2d 430 (1987) (Stating that the court's support decision was retroactive, and therefore the wife was entitled to reimbursement for mortgage payments made prior to the entering of the court's decision).

⁷⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. §1182(a)(4)(C)(ii); Department of Homeland Security U.S. Citizenship and Immigration Services I-864, Affidavit of Support Under Section 213A of the Act (07/02/15), Part 8, *available at* <http://www.uscis.gov/files/form/i-864.pdf>.

⁷⁵ See generally 8 U.S.C. §1182 (establishing numerous grounds of inadmissibility based on issues ranging from criminal history to ideology to health).

⁷⁶ See 8 U.S.C. § 1182(a)(4)(A).

⁷⁷ See 8 U.S.C. §1183a(3)(A)(i).

⁷⁸ Form I-864, Part 8.

support and as evidence of the abusive spouse's or parent's obligation to support his family.⁷⁹ Among the many requirements to qualify as a "sponsor," the petitioner must demonstrate an annual income of at least 125 percent of the federal poverty line.⁸⁰ As part of the process, the sponsor must submit the following documents:

- a copy of the sponsor's income tax returns for the last three years, if he or she had a legal duty to file;⁸¹
- evidence of current employment or self-employment (normally recent pay stubs and a statement from the sponsor's employer on business stationery);⁸²
- If the income is below 125% of the poverty level for the family size,⁸³ the sponsor may also submit other proof of his ability to support his immigrant spouse and/or child, including evidence of the sponsor's assets.

Obtaining information that was submitted in conjunction with the affidavit can be useful in cases where proving the abuser's income and ability to pay would otherwise be difficult.⁸⁴ This evidence is particularly helpful when the abusive sponsor is self-employed or works for a family member, or is hiding or manipulating income. To determine that the affidavit has been filed, counsel for an immigrant victim in a protection order, child support, divorce or other family court proceeding should:

⁷⁹ See *Sinojia v. Sinojia*, No. 113953, 1994 Conn. Super. LEXIS 2485 (Conn. Super. Ct. Sept. 27, 1994) (spousal support); *Stein v. Stein*, 831 S.W.2d 684 (Mo. Ct. App. 1992) (affidavit of support admitted as evidence); *K.S. v. I.G.S.*, Index No. 313910/00 (N.Y. Sup. Ct. July 16, 2001) (spousal support); *Walsh v. Walsh*, 764 N.E.2d 1103 (Ohio Ct. App. 2001) (as evidence); *Dao v. Nguyen*, No. 2071-95-4, 1995 WL 653322 (Va. Cir. Ct. Nov. 7, 1995) (spousal support); *Moody v. Sorokina*, 830 N.Y.S.2d 399, 402 (N.Y. App. Div. 2007) (holding that Affidavit of Support can be enforced as a contract by the immigrant spouse of the affiant); *Schwartz v. Schwartz*, CIV-04-770-M, 2005 WL 1242171, at *2 (W.D. Okla. May 10, 2005) (dismissing motion for summary judgment holding ". . . plaintiff, a sponsored immigrant, can maintain an action against defendant, a sponsor, to enforce defendant's obligations under the Affidavit of Support regardless of whether means-tested public benefits have been provided. The Court further finds that an Affidavit of Support is a legally enforceable contract. Finally, the Court finds that a sponsor and sponsored immigrant's divorce does not automatically terminate the sponsor's obligations under the Affidavit of Support.").

⁸⁰ See Immigration and Nationality Act, 8 U.S.C. § 1183a(f). In addition to the income requirement, the sponsor must be a U.S. citizen or a lawful permanent resident, be at least eighteen years old, and domiciled in the United States.

⁸¹ 8 C.F.R. § 213a.2(c)(2)(i) (2011).

⁸² 8 C.F.R. § 213a.2(c)(2)(ii) (2011).

⁸³ See 8 C.F.R. § 213a.1 (2011). In determining whether the household income is sufficient, household size is calculated to include the sponsor, all persons related to the sponsor by birth, marriage, or adoption living in the sponsor's residence, the sponsor's dependents, the sponsored immigrant(s), and any immigrants the sponsor has previously sponsored for immigration status when that support obligation has not terminated.

⁸⁴ For a thorough analysis of the affidavit of support and its helpfulness in family related proceedings, see generally, Thronson, Veronica T., *'Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, 50 Fam. Ct. Rev. 594 (2012).

- Require the perpetrator turn over to the court and the victim a copy of the affidavit of support he filed together with copies of the underlying required documents including copies of the tax returns filed with DHS;
- Require that the perpetrator sign in open court and turn over to the victim a Freedom of Information Act (FOIA) request to obtain copies of the battered immigrant's immigration file;
- Use discovery in the family court case to obtain copies of the affidavit of support and tax returns that the abusive spouse filed with his Affidavit of Support and pay stubs attesting to current income;
- If the perpetrator states to the court that he does not have and cannot turn over copies of the affidavit of support and/or copies of his tax returns, the abuser can be ordered to obtain an IRS transcript of tax returns filed for the past three years.⁸⁵ Tax returns covering the past three years exist because they were required to be obtained and submitted to DHS as part of the application process.

⁸⁵ To obtain a transcript of tax returns, an individual can submit IRS Form 4506-T by mail, fax, or in person at a local IRS office or order by calling 1-800-829-1040. If an attorney or individual other than the taxpayer is requesting the transcript or other document, IRS Form 2848, Power of Attorney and Declaration of Representative, must be signed by the taxpayer and submitted with the request. For more information and to obtain these forms, see the IRS official website: <http://www.irs.gov/formspubs/>.

Protecting Parental Rights When the Immigrant Parent Is Detained or Deported

TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

Termination of parental rights cases are governed by the Adoption Assistance and Child Welfare Act of 1980 (AACW)¹, the Indian Child Welfare Law of 1978² and the Adoption and Safe Families Act (ASFA) of 1997.³ The Adoption Assistance and Child Welfare Act of 1980 required each state to develop a plan for child welfare services and required states to use the “federal reasonable efforts standard.”⁴ This standard was designed to prevent removal of children from their homes or to return children to homes with their parents as soon as could be accomplished safely.⁵ The AACW, however, caused unintended consequences for non-abusive parents and children in families plagued by domestic violence. The reasonable efforts standard outlined in the AACW posed a danger to children and non-abusive parents who were forced to attempt unification involving the abusive parent.⁶

To remedy this problem, the Adoption and Safe Families Act (ASFA) was passed in 1997. ASFA sought to prevent children from remaining in or being returned to homes that were clearly dangerous or abusive and to encourage adoptions of children into non-abusive homes.⁷ The ASFA limits, and in certain circumstances even removes, “the reasonable efforts requirement” of 42 U.S.C.A. §671(a)(15)(B) with the goal of encouraging swift adoption and

¹ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 99-401, 100 Stat. 903 (1986).

² Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 93 Stat. 3071 (1978) (codified at 25 U.S.C. §1901-1963).

³ Adoption & Safe Families Act of 1997, Pub. L. No. 105-89 (1997) (codified at 42 U.S.C. § 620-679).

⁴ 42 U.S.C. §13021(a)(3)(A).

⁵ Child Welfare Information Gateway, *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children: Summary of State Laws*, U.S. Department of Health and Human Services, Administration for Children and Families, (2009), available at: http://www.childwelfare.gov/systemwide/laws_policies/statutes/reunify.cfm.

⁶ Bean, Kathleen S. *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. Third World L.J. 223 (2009), available at: <http://lawdigitalcommons.bc.edu/twlj/vol29/iss2/1>.

⁷ *Id.*

permanent and stable conditions for children.⁸ As a result state courts now vary greatly as to whether and to what extent, states are obligated in a particular case to provide reasonable efforts to:

- reunify parents with children in foster care, and/or
- require permanency hearings within 12 months after a child enters foster care.

States also differ as to when the state will file or join in a petition to terminate parental rights in circumstances when such proceedings are not statutorily required.⁹ Most state statutes require the state to file or join in a petition to terminate parental rights when:

- a child has been in foster care for 15 of the most recent 22 months,¹⁰ or
- a parent has committed certain serious crimes.¹¹

State termination of parental rights laws pose special problems for immigrant parents who are undocumented, detained and/or deported. As discussed earlier, as immigration enforcement has increased, greater numbers of immigrant parents have been detained by immigration enforcement officials. In cases of immigrant crime victims, this often occurs when the crime perpetrator calls DHS to report the crime victim in retaliation for the victim's actions to leave a relationship with an abuser or employment and to report crimes to law enforcement officials. By having the victim detained, the perpetrator also succeeds in separating the victim from her children. Threats of deportation and separation from children are very powerful methods of coercive control over immigrant crime victims.¹² Detention and/or deportation can have a devastating impact on families, especially when immigrant parents are separated

⁸ Applied Research Center & Colorlines.com, *Shattered Families: The Perilous Intersection of Immigrant Enforcement and the Child Welfare System*, 15, (November 2011) (on file with author), available at: <http://www.arc.org/shatteredfamilies>.

⁹ Child Welfare Information Gateway, *Grounds for Involuntary Termination of Parental Rights*, U.S. Department of Health and Human Services, Administration for Children and Families, (2010), available at: http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.cfm.

¹⁰ 42 U.S.C. § 675(5)(E).

¹¹ 42 U.S.C. § 671(15)(D)(ii).

¹² Ammar, Nawal et al., *Calls to Police and Police Response: A Case Study From the Latina Immigrant Women*, 7 U.S. J. of Int'l Police Sci. & Mgm't 230, 239 (2005); Mangai Natarajan, *Domestic Violence Among Immigrants From India: What We Need to Know – and What We Should Do*, 26 Int'l J. of Comparative & Applied Criminal 301, 310 (Fall 2002); Ramos, Maria, M.D. & Runner, Michael, M.W., *Cultural Considerations in Domestic Violence Cases: A National Judges Benchbook*, San Francisco: State Justice Inst. & Family Violence Prevention Fund (1999); Anita Raj et al., *Immigration Policies Increase South Asian Immigrant Women's Vulnerability to Intimate Partner Violence*, 60 J. of the American Medical Women's Ass'n, 26-32 (2005); Dutton, Mary Ann et al., *Characteristics of Help-Seeking Behaviors, Resources, and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Geo. J. on Poverty L. & Pol'y 245, 259, 302, Table 12 (2000), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/Characterisc_tics%20of%20Help-Seeking%20Immigrant%20Battered%20WomenOVW%2010.23.01.pdf.

for short or extended periods of time or even permanently from their children. The consequences of even relatively short separations on children of immigrant parents can be significant. Separation stemming from a mother's detention pose serious risks to children's immediate safety, economic security, wellbeing, and long-term development; it can cause eating and sleeping disorders, anxiety, withdrawal, aggression, as well as academic and behavioral problems.¹³

When undocumented immigrant parents are detained and/or deported, and there are children involved, state departments of social services often step in to ensure the safety of the child. Sometimes the children are placed with relatives, other times in foster care. When children of immigrant parents are placed in foster care, there is a disturbing emerging trend in which "temporary" foster care placement have led to abuse, neglect and termination of parental rights actions in court and later to an adoption by foster parents. Such actions have been found to violate the undocumented immigrant parent's constitutional right to custody, care and control of their children.¹⁴

According to a report by the Inspector General's Office of DHS, at least 108,434 undocumented parents of U.S. citizen children were removed from the U.S. between 1998 and 2007.¹⁵ This number is likely to be underreported but is an issue that DHS has recognized to be a problem. To address it, DHS has issued policies for humanitarian release from detention of immigrant parents caring for children¹⁶ and the exercise of prosecutorial discretion not to initiate enforcement actions against immigrant parents who do not fall within priority categories for immigration enforcement.¹⁷ Once children are separated from their immigrant parents, it can be difficult for undocumented, detained and deported immigrant parents to get their children back.

¹³ Chaudry, *supra* note 50; Capps, Randolph et al., *Paying the Price: The Impact of Immigration Raids on America's Children*, 50-53 (Urban Institute for the National Council of La Raza, 2007), available at http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf; Cervantes Wendy, & Lincroft, Yali *The Impact of Immigration Enforcement on Child Welfare, Caught Between Systems: The Intersection of Immigration and Child Welfare Policies*, at 3 (First Focus and Migration and Child Welfare National Network, March 2010), available at: <http://www.firstfocus.net/Download/Enforcement4.7.pdf>.

¹⁴ *In re Interest of Angelica L.*, 277 Neb. 984 (2009).

¹⁵ Office of the Inspector General, Department of Homeland Security, *Removals Involving Illegal Alien Parents of United States Citizen Children* (January 2009), available at: http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/IMM_EDCJ_Removals_Involving_Alien_Parents.pdf.

¹⁶ Press Release, Department of Homeland Security, *Kennedy, Delahunt Announce New Guidelines for Immigration Raids* (Nov. 16, 2007) (on file with author), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Humanitarian-release-provisions-2007.pdf>.

¹⁷ Johnson, Jeh, Sec., Dep't of Homeland Sec., to ICE, CBP, USCIS, Ass. Sec. for Policy, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, 1, 5 (Nov. 20, 2014), available at <http://niwaplibrary.wcl.american.edu/pubs/dhs/policiesforapprehensiondetentionandremoval112014/>.

Detained immigrant parents, including immigrant victim parents, need swift assistance from attorneys to secure their release from detention and, if they remain detained, to ensure their participation in any child abuse and neglect proceedings initiated against them. As of October 2010, DHS agreed to apply its procedures for “Nonmedical Emergency Escorted Trips for Detainees” to escort detained parents to court to participate in family court proceedings¹⁸ and in 2013 ICE issued a parental interests directive that sets out procedures that ensure that detained immigrant parents are able to participate in court proceedings involving their children.¹⁹

Immigration status of a parent should not be heavily relied upon or an independent factor in child abuse and neglect and termination of parental rights proceedings. Immigrant parents, both documented and undocumented, including those in detention, in deportation proceedings, and those deported have a constitutional right to raise, nurture and determine the custody of their children.²⁰ The parent-child relationship is a fundamental right protected by the United States Constitution. A parent, or child’s immigration or citizenship status is not an appropriate factor in a termination of parental rights case.²¹

As discussed earlier in the language access section of this chapter, failure to provide meaningful language access for limited English proficient parents is one of the biggest issues that contribute to parent-child separations and impede meaningful participation by immigrant parents in abuse, neglect and termination of parental rights proceedings. Lack of language access to facilitate communication with state child protection staff exacerbates this problem. Ensuring meaningful language access in all aspects of child protection and termination of parental rights proceedings is essential to an immigrant parent’s ability to fully participate in child abuse, neglect and abandonment cases, and eventually, termination of parental rights proceeding.

¹⁸ This agreement was not widely publicized See INS Detention Standard, Non-Medical Emergency Escorted Trips, Sept. 20, 2000, available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/family-law-for-immigrants/parental-rights-of-detained-immigrants/NonMedical-Escorted-Trips-DHS.pdf/view> (In October 2010 DHS Immigration and Customs Enforcement agreed to use this section from the National Detention Standards to take detainees to court to attend family court proceedings); Letter from Coven, Phyllis, Acting Assistant Director, U.S. Immigration and Customs Enforcement to Ms. Brané, Michelle, Director, Detention and Asylum Program, Women’s Refugee Commission, (Oct. 6, 2010) (on file with author), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/ICE-family-court-access-ocr.pdf/view> (explaining that DHS policy to bring detained parents to court to participate in family court proceedings is part of the Performance Based National Detention Standard on Escorted Trips for Non-Medical Emergencies).

¹⁹ Immigration and Customs Enforcement, Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (August 23, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/ice-parental-interests/>.

²⁰ *In re Interest of Angelica L.*, 277 Neb. 984 (2009). See also NIWAP, *Fact Sheet on State v. Maria L. Unanimous Nebraska Supreme Court Decision on the Legal Rights of Immigrant Parents*, (November 2009), available at: <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/parental-rights-of-detained-immigrants/Fact-Sheet-on-Maria-L.-case.pdf>.

²¹ *Id.*

Representation of immigrant victims must include taking steps to ensure that immigration authorities, child protection workers and the courts comply with federal law requirements to provide your client meaningful language access. This includes proper interpretation of all interactions with child protective services and a reunification plan provided in the parent's native language. When parents are detained or deported, those plans must be designed so that parents can reasonably comply and remain involved with their children and in communication with them.

PRACTICAL ISSUES WHEN THE IMMIGRANT PARENTS IS DETAINED

If attorneys are working with a detained immigrant parent, they will need to know how to correctly navigate the system in order to protect the parental rights of the detainee. The following topics are issues to address in your representation.²²

Locating a Detained Parent

DHS initiated the use of an online detainee locator system designed to help family members locate their detained family members. Locating a parent in detention and keeping them informed about court proceedings affecting the custody of their children is an essential role of the attorney representing the immigrant victim in child abuse, neglect and termination of parental rights proceedings.²³ DHS has developed a brochure describing how detainees can call counsel and family members from DHS detention. Family members and detainees' attorneys can locate immigrants in the immigration detention system by using an online detainee locator system.²⁴

If attorneys are working with an immigrant victim who does not want to risk being stalked by using the online detainee locator system, the victim can ask DHS to opt out of the detainee locator system. Victims who do this will need to also contact their attorney, and call a trusted friend to inform both of the parties of her current location. Attorneys representing detained parents will need to obtain the client's immigration case number ("A" number) to be able to locate, visit, correspond by mail, and communicate with the client's detention officer or detention center about the client.

²² For more detailed information, see Florence Immigrant and Refugee Rights Project, *Help! I can't find the Parent(s): A Guide to the Immigration Detention System and Immigration Court in Arizona for People Working in the Juvenile Dependency Court*, (March 2009).

²³ Department of Homeland Security, *Detainees Call Home Brochure*, available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/tools/DCH->.

²⁴ To access the Online Detainee Locator System go to <https://locator.ice.gov/odls/homePage.do>. To search for a detainee you will need either: The detainee's immigration file number ("A" number) + country of birth OR the detainees first and last name + country of birth + date of birth.

Visitation Procedures in Detention²⁵

Only children and family members who have legal immigration status or citizenship and who have government issued identification can visit someone in an immigration detention facility. Children and family members who are undocumented or who have a criminal record should *never* visit a parent or family member at a detention center. DHS will check the immigration status and criminal history of all visitors. This can lead to detention and initiation of removal proceedings against undocumented children and family members. The detained parent must complete a form authorizing the visit that includes information about the names and social security numbers of the children. It is important to call the facility to ascertain the set times for family visitation. Family members who arrive for visits at other times will be turned away. Attorney visitation times may be different than family visitation times. Some detention centers require 24 hour notice from an attorney and must grant permission before the attorney can visit a client in detention. The Parental Interest Directive sets out procedures that DHS officials will follow to facilitate visitation when a state family court or a judge in a child welfare proceeding issues a court order requiring visitation between a detained parent or legal guardian and a minor child.²⁶

Detainee Attendance of Family Court Hearings

It is important to ask the family court to issue a writ or other court order requiring a client's attendance at a family court hearing.²⁷ With this court order attorneys can request that the District Director of the detention center where the immigrant parent is being held to grant the client a non-medical emergency escorted trip to the family court hearing.²⁸ It is helpful to provide documentation, which can include official court documents as well as a copy of the DHS letter stating the policy used to secure release to attend the court hearing and a copy of the DHS Detention

²⁵ Florence Immigrant and Refugee Rights Project, *Help! I can't find the Parent(s): A Guide to the Immigration Detention System and Immigration Court in Arizona for People Working in the Juvenile Dependency Court*, (March 2009).

²⁶ Immigration and Customs Enforcement, *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities* (August 23, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/ice-parental-interests/>.

²⁷ Appleseed, *Protecting Assets and Child Custody in the Face of Deportation: A Guide for Practitioners Assisting Immigrant Families* (May 2012), available at: <http://appleseednetwork.org/wp-content/uploads/2012/05/Protecting-Assets-And-child-Custody-In-The-Face-Of-Deportation-A-Guide-for-Practitioners-Assisting-Immigrant-Families-2012.pdf>.

²⁸ U.S. Department of Immigration and Customs Enforcement, U.S. Department of Homeland Security, *11064.1: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities 4* (August 23, 2013), available at: <http://niwaplibrary.wcl.american.edu/immigration/enforcement-detention-and-criminal-justice/government-documents/parental-interest-directive.pdf>

Standard on Non-Medical Emergency Escorted Trips for an in person appearance.²⁹ The DHS Parental Interest Directive also allows for participation in critical family court or child welfare proceedings via video or standard teleconferencing if it is “impracticable to transport the detained alien parent or legal guardian to appear in-person . . . due to distance or security concerns.”³⁰

This directive is designed to assist detained immigrants who are primary caretakers of minor children and parents and legal guardians who have direct interests in family court cases involving a minor including child welfare proceedings.³¹ Involvement of parents and guardians in family court cases is promoted without regard to the immigration status of the child.³² Under the directive ICE is required promote parent involvement in family court and child welfare proceedings.³³ In addition to assisting with regard to court proceedings, the directive address other important issues. The directive establishes procedures for identifying immigrant parents in detention and in immigration enforcement actions, encourages prosecutorial discretion for the release of primary caretaking parents from detention, takes the fact that an immigrant has children in making detention placement and transfer decisions, promotes visitation with parents in detention, and helps parents coordinate the care of their minor children while they are detained.³⁴ If the immigrant parents will be leaving the U.S. the directive requires that DHS officials assist parents on obtaining passports and travel documents for their U.S. citizen children who will accompany them abroad.³⁵ Additionally, the directive contains procedures for assisting a parent who have been removed from the United States in returning to the U.S. to participate in court proceedings involving their children.³⁶

²⁹ *Id.*

³⁰ *Id.* at 4-5.

³¹ For step by step procedures for attorneys and courts to use under the Parental Interests Directive to secure attendance of a detained immigrant parent in a court proceeding involving their child see Anver, Benish, and Orloff, Leslye E. How to Get a Detained Person to Court for Family Court Cases Involving Children and/or Criminal Proceedings (June 23, 2014) available at <http://niwaplibrary.wcl.american.edu/pubs/detained-parent-to-court/>.

³² Immigration and Customs Enforcement, Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (August 23, 2013) available at <http://niwaplibrary.wcl.american.edu/pubs/ice-parental-interests/>.

³³ *Id.* at 2 (“Family Court or Child Welfare Proceeding. A proceeding in which a family or dependency court or child welfare agency adjudicates or enforces the rights of parents or minor children through determination or modification of parenting plans, child custody, visitation, or support, or the distribution of property or other legal obligations in the context of parental rights.”)

³⁴ *Id.* at 3-5.

³⁵ *Id.* at 6.

³⁶ *Id.* at 6-7.

Requesting Release from Detention Based on Primary Caretaker Status

Parents who are primary caretakers of children should tell DHS officials who interrogate them that they have children whose care and custody is their responsibility.³⁷ DHS currently has a policy that ensures that “immigration enforcement activities do not unnecessarily disrupt the parental rights of both alien parents or legal guardians of minor children.”³⁸ DHS’s policy calls for special attention to enforcement situations that involve³⁹:

1. Parents or legal guardians who are primary caretakers;
2. Parents or legal guardians who have a direct interest in family court or child welfare proceedings; and/or
3. Parents or legal guardians whose minor children are physically present in the United States and are U.S. citizens or lawful permanent residents.

DHS has given prosecutorial discretion authority to Field Office Directors so they may consider the fact that the immigrant is a parent or legal guardian of a minor child in an enforcement situation.⁴⁰ This discretion can be exercised by the Field Office Director at any stage of enforcement.⁴¹ An attorney can provide Immigration and Customs Enforcement with information that identifies the client as a parent or legal guardian that falls within the three categories listed above⁴² and advocate for their client’s release from detention. Generally, this policy holds that parents and legal guardians that meet the criteria stated should no longer be detained in order to maintain the parent-child relationship. The use of this policy to advocate for the release of a detained client is particularly true for immigrant victims that have applied for a VAWA Self-Petition, and a T or U visa and for those immigrant victims who have not applied for relief.

Immigrant parents with no criminal history or history of egregious immigration offenses⁴³ should request release on their own recognizance. Alternatively,

³⁷ When you first meet with your client it is very important to explain to all immigrant clients with children, that if they are stopped and questioned by immigration officials that it is important that they tell the immigration officials that they are a parent who is primarily responsible for the care and custody of children. See NIWAP, Brochure, (July 2011), *Immigrant Victim’s Rights & Protections*, available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/cultural-competency/safety-planning/Immigrant-Victims-Rights_7-20-11.pdf/at_download/file (brochure for immigrant victim parents explaining their legal rights with regard to immigration enforcement).

³⁸ U.S. Department of Immigration and Customs Enforcement, U.S. Department of Homeland Security, *11064.1: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities 1* (August 23, 2013), available at: <http://niwaplibrary.wcl.american.edu/immigration/enforcement-detention-and-criminal-justice/government-documents/parental-interest-directive.pdf>.

³⁹ *Id.*

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 3.

⁴² *Id.* at 3.

⁴³ Examples of egregious offenses include immigration fraud, multiple unlawful reentries, particularly those after a deportation or removal was issued against the client.

if an immigrant parent fails to receive release on her own recognizance, she may be able to secure agreement from an immigration judge to release her on bond for the duration of her immigration case, so long as she complies with the terms of the release. Bond may not be available to immigrant parents with certain criminal convictions (e.g. drugs, firearms, assault, theft, or using false documents). Parents who cannot secure release on their own recognizance or on bond may be able to receive “supervised” release. This is release from detention with an ankle monitoring device. Unless the immigrant victim or immigrant parent has a criminal record release should not involve an ankle monitoring device.

Child Protective Services can initiate a case against an immigrant parent alleging abuse, neglect, or abandonment. There are strict time frames in child protective services cases imposed by the courts that immigrant parents often have difficulty following, for a variety of valid reasons. These include cases in which:

- the immigrant parent is in immigration detention and does not obtain a DHS escort to attend family court proceedings;
- the immigrant parent cannot be located;
- no notice is provided in a language the parent could read or understand.

When immigrant parents are not present at child abuse or neglect proceedings, action may be taken that harms or significantly delays the parent’s ability to reunite with their child. It is extremely important that any detained immigrant parent, particularly one who is an immigrant victim, has both a family law and immigration attorney representing them. For immigrant victims these attorneys need to also understand immigrant victims’ legal rights. As the detained immigrant parent’s counsel one of the most important first steps attorneys should take is to contact the consulate of your client’s country to assist attorneys in helping your client. The consulate can help in many ways. Consular officials can join an attorney in seeking a client’s release from detention. It is important to obtain a passport for children who may have to accompany a deported parent to the parent’s home country. For clients who will reunite with their children and travel with their children to their home country the consulate can obtain a U.S. passport for a client’s U.S. born children.⁴⁴

⁴⁴ Consulates can help parents of children who are dual nationals and children who are solely U.S. citizens obtain U.S. passports, which provide proof of the child’s U.S. citizenship. If the child’s parent is deported they can take their U.S. citizen children with them and raise them in the parent’s home country and the child will have the proof they need of U.S. citizenship to be able to return to live in the United States should they choose to do so.

PREPARING FOR THE CHILDREN'S CARE SHOULD THE IMMIGRANT PARENTS BE DETAINED OR DEPORTED

Finding the Best Placement for the Children

When children and parents are non-citizens, their immigration status will affect different components of the case plan for reunification between the immigrant parent and the children. It can affect the child's placement options.⁴⁵ This is particularly true when the best person with whom to place the child is undocumented or has temporary legal status in the United States. Other impediments that immigrant families may encounter in securing reunification with their children or placement of immigrant children with family members include extended family living arrangements that do not meet minimum per person space requirements or insufficient family income to meet minimum income requirements.

Appointing a Temporary Legal Guardian:⁴⁶

Undocumented immigrant parents can appoint a trusted friend or family member who has citizenship or legal immigration status in the United States to be the legal guardian of their children, should the immigrant parent be detained by immigration officials. No court process is needed for a parent to complete a "Statement of Guardianship."⁴⁷ Having a Statement of Guardianship can prevent placement of the detained parent's children in foster care.

Court Appointed Guardian:⁴⁸

When a parent is in detention, counsel for the detained parent can petition the court to appoint a legal guardian for the children. It is best to have a sworn affidavit from both parents stating the wishes of each to have a specified individual appointed to be the child's legal guardian. If only one parent is listed on the birth certificate then only one statement is required, unless paternity has been established or courts have entered custody orders.

⁴⁵ See Casey Family Programs, *How Children Move Through the Child Welfare System*, (June 2009), available at <http://www.casey.org/Resources/Publications/pdf/HowChildren-MoveThroughCW.pdf> (overview of how immigration status of the child and close family members or friends being considered as placements for the child).

⁴⁶ Appleseed, *Protecting Assets and Child Custody in the Face of Deportation: A Guide for Practitioners Assisting Immigrant Families* (May 2012), available at: <http://appleseednetwork.org/wp-content/uploads/2012/05/Protecting-Assets-And-child-Custody-In-The-Face-Of-Deportation-A-Guide-for-Practitioners-Assisting-Immigrant-Families-2012.pdf>; Florence Immigrant and Refugee Rights Project, *Help! I can't find the Parent(s): A Guide to the Immigration Detention System and Immigration Court in Arizona for People Working in the Juvenile Dependency Court* (March 2009).

⁴⁷ Sample Form, Power of Attorney and Designation of Temporary Guardian for Minor Child, NIWAP, available at: <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/parental-rights-of-detained-immigrants/Temporary-Guardian-1-parent.pdf>.

⁴⁸ Appleseed, *Protecting Assets and Child Custody in the Face of Deportation: A Guide for Practitioners Assisting Immigrant Families* (May 2012), available at: <http://appleseednetwork.org/wp-content/uploads/2012/05/Protecting-Assets-And-child-Custody-In-The-Face-Of-Deportation-A-Guide-for-Practitioners-Assisting-Immigrant-Families-2012.pdf>.

Gather Important Legal Documents and Store in a Safe Location:

It is important to gather the following documents and store in a safe place:

- Child's birth certificate,
- Child's social security number and passport;
- Current custody orders and agreements;
- Current and past protection orders that help prove past abuse and prevent placement with the abuser if the victim is detained;
- Child support orders;
- Immigration and identity documents for the victim parent and the child;
- The Designation of Temporary Guardian; and
- The client's last will and testament with a provision naming the child's guardian.

Screen Clients for Facts That Can Help Avoid Placing the Children in Foster Care If Parent Is Detained⁴⁹

- What could be appropriate placements for the children both temporary and longer term?
 - Family members in the U.S. and abroad
 - Any family members who are U.S. citizens or lawful permanent residents
 - Any family members with other forms of legal status or legal presence in the United States
 - Who are trusted non-relative extended family members (e.g. godmothers) in the U.S. and abroad and what is their legal status in the United States
- Identify the client's country of origin and locate in advance the phone number for the embassy to call should the client be detained.

The Fostering Connections to Success and Increasing Adoptions Act of 2008 provides attorneys working with immigrant parents the ability to secure placements with relatives without requiring that they be licensed.⁵⁰ Determinations are made on a case-by-case basis. The Act also requires that if children are placed in foster care, the children's relatives be notified of that placement within 30 days.⁵¹ Notification of relatives must be made and may

⁴⁹ Migration and Child Welfare National Network, *A Social Worker's Tool Kit for Working with Immigrant Families: Immigration Status and Relief Options* (June 2009), available at: http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/Social%20Workers%20Tool-kit_Immigration%20Status%20and%20Relief%20Options.pdf.

⁵⁰ *Id.*

⁵¹ Fostering Connection to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351 122 Stat. 3949 (codified at 42 USCA § 671(a)(29)).

include notification of relatives living both within and outside of the United States. If the family members who must be notified are limited English proficient, providing parents meaningful language access to proceedings includes notification in the parent's native language.⁵²

There may be family members whom a client believes would provide a good placement for their children.⁵³ Attorneys for immigrant victim parents can play an important role in assuring that placements can be made with suitable relatives without regard to that family members' immigration status. Work with an undocumented immigrant client early in her case to identify family members or other trusted individuals who would be safe caretakers for the client's children should she be detained by immigration officials.⁵⁴ This is particularly important for immigrant crime victims whose perpetrators have been threatening deportation. Ideally, although children can be placed by the court with trusted relatives or friends without regard to the individual's immigration status, it is safest to include persons who have citizenship and lawful permanent residence or a legal work visa on the list of persons who could be potential placements for children, should the client be detained. It can be easier to secure placements with individuals who are legal immigration status or citizenship. However, particularly in domestic violence cases, the placements that are the safest for the children could be trusted friends or relatives who do not have legal immigration status. Work with clients to identify trusted extended family members in the U.S. and abroad as well as non-relative extended family members (e.g. godmothers) in the U.S.

Under federal law, there is no requirement that child protective services workers or courts inquire into the immigration status of family members who would be potential placements for children. However, either child protective services workers and/or courts may mistakenly believe that such inquiries are appropriate or required by federal law.⁵⁵ Child protective services workers

⁵² Letter from Perez, Thomas E., Assistant Attorney General, Civil Rights Division of the United States Justice Department to Justice & State Court Administrators, (April 16, 2010) (on file with author), available at: http://www.lep.gov/final_courts_ltr_081610.pdf.

⁵³ Migration and Child Welfare National Network, *A Social Worker's Tool Kit for Working with Immigrant Families: Immigration Status and Relief Options* (June 2009), available at: http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/Social%20Workers%20Toolkit_Immigration%20Status%20and%20Relief%20Options.pdf (If you are working in a state that has passed state or local laws or ordinances involving state officials in immigration enforcement, we recommend you call for technical assistance to help you determine risks to family members in facilitating communication with child protective services workers). To request technical assistance please visit: <http://niwaplibrary.wcl.american.edu/ovw-grantee-technical-assistance/about-technical-assistance>. Technical assistance requests can be submitted by phone at 202-274-4457 and via email at niwap@wcl.american.edu.

⁵⁴ Migration and Child Welfare National Network, *A Social Worker's Tool Kit for Working with Immigrant Families: Immigration Status and Relief Options* (June 2009), available at: http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/Social%20Workers%20Toolkit_Immigration%20Status%20and%20Relief%20Options.pdf.

⁵⁵ Letter from Garden, Olivia, Assistant Secretary, Administration for Children and Families, et. al. to State Health & Welfare Officials, *Policy Guidance Regarding Inquiries Into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid*,

and courts can place children with family members who are undocumented. However, if it is the practice of child protective services workers in your community to help persons with whom the courts place children to apply for foster care funding, it is important to note that only immigrants who are considered “qualified immigrants” under federal public benefits laws are eligible to receive foster care payments.⁵⁶

Maintaining Public Benefits for the Children

Some case plans and courts order parents to apply for public benefits to assist with income maintenance. Since 1996, U.S. welfare laws have severely limited access to public benefits by non-citizens. An immigrant victim parent’s ability to obtain public benefits will depend on a range of factors including her immigration status, whether she is eligible for immigration benefits and the state in which she lives.⁵⁷ Since a U.S. citizen child qualifies for benefits independent from his parents, an immigrant victim parent may apply for and receive public benefits for their citizen children. However, if the immigrant parent is deported, intervention will be needed for the child to continue receiving benefits.⁵⁸ It is important to note that there is a wide range of federally

State Children’s Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits, Department of Health and Human Services and Department of Agriculture, (last revised January 21, 2003) (on file with author), available at: <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/origin/policyguidanceregardinginquiriesintocitizenshipimmigrationstatus.html> (State and federal employees administering public benefits programs are required to report to DHS quarterly on immigrants whom they know to be undocumented. However, benefits providers have been directed only to seek immigration status information and social security numbers for the persons on whose behalf benefits are sought. Undocumented parents can seek public benefits for their citizen children and can only be required to provide immigration status information and the social security number of the immigrant child. In abuse and neglect proceedings children can be placed with family members without regard to that family member’s immigration status.).

⁵⁶ The definition of “qualified alien” includes a list of non-citizens who are eligible under federal benefits laws for access to certain state and/or federal public benefits. The list includes categories of immigrants some, but not all, of whom may have legal immigration status. For example, battered immigrant self-petitioners will be legally present, will be qualified aliens, but may not have any form of legal immigration status for many years. As qualified aliens self-petitioners can receive foster care payments. See Department of Health and Human Services, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of “Federal Public Benefit,” 63 Fed. Reg. 41,658, 41, 659 (Aug. 4, 1998)(Foster care payments are considered federal public benefits).

⁵⁷ Letter from Garden, Olivia, Assistant Secretary, Administration for Children and Families, et. al. to State Health & Welfare Officials, *Policy Guidance Regarding Inquiries Into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children’s Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*, Department of Health and Human Services and Department of Agriculture, (last revised January 21, 2003) (on file with author), available at: <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/origin/policyguidanceregardinginquiriesintocitizenshipimmigrationstatus.html>.

⁵⁸ Applesseed, *Protecting Assets and Child Custody in the Face of Deportation: A Guide for Practitioners Assisting Immigrant Families* (May 2012), available at: <http://applesseednetwork.org/wp-content/uploads/2012/05/Protecting-Assets-And-child-Custody-In-The-Face-Of-Deportation-A-Guide-for-Practitioners-Assisting-Immigrant-Families-2012.pdf>.

and state funded services and assistance programs that are open to all persons without regard to a parent's or child's immigration status. This includes health care for lawfully present and citizen children and pregnant women,⁵⁹ access to legal services,⁶⁰ emergency shelter and transitional housing for up to 2 years, soup kitchens, food banks, victim services, and other services necessary to protect life and safety.⁶¹

Attorneys working with immigrant parents who have child support orders and who are detained or deported will need to help ensure that child support continues to be received on the child's behalf. The payment of the child support may need to shift temporarily to the family member with whom the immigrant parent's children have been placed. If the children accompany an immigrant parent who is deported to the parent's home county, court ordered child support payments can continue. Child support orders can remain in effect for children who move abroad. An attorney for the immigrant parent attorneys can inform the court of the parent's new address abroad and the court can send child support payments to the address abroad. Some countries have reciprocal child support agreements with the United States to facilitate ongoing payments of child support payments and U.S. enforcement of child support orders obtained in the country in which the children reside.⁶²

Achieving Reunification If the Parent Is Deported

If the client does not succeed in pursuing immigration options and is ordered deported attorneys should inform the deportation officer and the Immigration

⁵⁹ Leslye Orloff, Amanda Baran & Phoebe Mounts, *Ch. 17 Access to Health Care for Immigrant Victims of Sexual Assault*, in, *In Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* (NIWAP, 2012), available at: http://niwaplibrary.wcl.american.edu/public-benefits/health-care/CH17-Health-Chapter-MANUAL-ES.pdf/at_download/file.

⁶⁰ Leslye E. Orloff, Soraya Fata & Monique Drew, *Ch. 16 Access to Programs and Services that can Help Victims of Sexual Assault*, in, *In Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* (NIWAP, 2013), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/other-public-benefits/16-public-benefits-access-MANUAL-ES.pdf/at_download/file.

⁶¹ Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 Fed. Reg. 3613 (Jan. 16, 2001), available at http://niwaplibrary.wcl.american.edu/public-benefits/unrestricted-benefits/AG_order.protection_life_or_safety.pdf/at_download/file (Attorney General's order outlining unrestricted benefits needed for life and safety); see also Olavarria, Cecilia, Baran, Amanda, Orloff, Leslye & Huang, Grace, *Public Benefits Access for Battered Immigrant Women and Children*, in, *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, NIWAP (2013), available at: http://niwaplibrary.wcl.american.edu/public-benefits/benefits-for-qualified-immigrants/4.2_PB_BB-PublBens_for_Imm_Women_and_Children-MANUAL-BB.pdf/at_download/file.

⁶² *Id.* See also, Orloff, Leslye, Noche, Joyce, Benson, Anne, Martinez, Laura & Rose, Jennifer, *Ensuring Economic Relief for Immigrant Victims Through Family Law Proceedings*, in *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants* (NIWAP 2013) available at http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/economic-relief/6.4_c_FAM_BB_Economic-Relief-for-Victims-Child-Spousal-Support-MANUAL-BB.pdf/view.

Judge if the client's children are in foster care and about the steps the client is taking to take her children with her should she be deported Advocate with the deportation officer for the time needed for the attorney and the client to arrange for the victim's children to be able to travel with her when she is deported. The client's embassy could be particularly helpful with this request. Ask the family court judge to order that the children be reunited with the client so that the children can travel together with the client when she is deported.⁶³ Family court judges can order that your client's children be reunited with their immigrant parent at the airport prior to deportation so that the children can leave with their parent. The family court may also be able, through discovery or court order, to help your client obtain documents that the client needs pertaining to her children. Attorneys for immigrant victims whose children will join the deported parents abroad but who could not travel with their deported parents will need to obtain documentation required by the airlines and the Department of State to allow the client's children to travel abroad unaccompanied or with a non-parent adult.⁶⁴

⁶³ See *Detainees With Minor Children: Frequently Asked Questions*, Florida Immigrant Advocacy Center (on file with author), available at Detention Watch Network, <http://detention-watchnetwork.org/indetention> (follow "English" hyperlink under "Who will take care of my children?") (for more information on advocacy for parents who want to take their children with them should they be deported).

⁶⁴ *Id.* at 3-6 (providing detailed information on travel abroad with children).

Representing Undocumented Children Who Have Been Abused, Neglected, or Abandoned (Special Immigrant Juvenile Status)

Undocumented children who have been abused, neglected or abandoned are among the most vulnerable children in the United States. The Immigration and Nationality Act provides a special path to assist abused, neglected or abandoned children in attaining lawful permanent residency, or a “green card” called Special Immigrant Juvenile Status (SIJS). In 2008, Congress strengthened the protection for undocumented children and expanded SIJS relief as key provisions in the William Wilberforce Trafficking Victims Protection and Reauthorization Act.¹

For undocumented immigrant children who have been abused, neglected or abandoned by at least one of their parents, SIJS may provide the child’s only or most viable option to apply for legal immigration status.² It is important for children eligible for SIJS to be identified and file their immigration application to obtain legal status through SIJS as early as possible at the youngest age possible.³ Once a child becomes a permanent resident, he will have protection from deportation, and the right to live and work in the U.S.

¹ Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, § 235(d), 122 Stat. 5044 (2008).

² Some abused, neglected or abandoned children may also qualify as VAWA self-petitioners or as U-visa applicants either by filing a case on their own or by being included in the application filed by their non-abusive immigrant parent. An immigration attorney familiar with violence against women and special immigrant juvenile cases can assist you in determining which option would be the best for your under 21 year-old client.

³ By filing at a younger age helps assure that the child’s case will be adjudicated before the child turns 21, minimizing complications in the case.

OVERVIEW OF SPECIAL IMMIGRANT JUVENILE STATUS

Special Immigrant Juvenile Status (SIJS) is a form of immigration relief available for undocumented children⁴ which allows them to remain in the United States and put them on a path to obtain lawful permanent residency. To be eligible to apply for SIJS, children must:

1. Be under the jurisdiction of a state juvenile court (as defined broadly by federal law⁵);
2. Demonstrate that reunification with “one or both parents” is not viable due to abuse, neglect, or abandonment or similar basis under state law; and
3. The court finds it is not in the best interest of the child to be returned their country of origin.⁶

For purposes of meeting the criteria for SIJS, a finding that reunification is not viable does not require formal termination of parental rights or a determination that reunification will never be possible.⁷ A showing of a period of separation may be sufficient to show reunification is not viable. In addition, although the absence of a possibility of reunification must be due to specific reasons, the statute does not “require that formal charges of abuse, neglect, or abandonment be levied against the parents. For example, a child for whom the court appoints a guardian can qualify without a separate proceeding against the parents alleging abuse, neglect, or abandonment.”⁸

The October 2016 USCIS Policy Manual confirms that a child may qualify for SIJS while living in the custody of a parent.⁹ In cases where there is a fit parent, that parent is able to obtain the necessary findings by filing custody, divorce, or establishment of paternity actions in family court.

⁴ The Immigration and Nationality Act (INA) definition of child is an unmarried person under 21 years of age. INA § 101(b)(1); 8 U.S.C. 1101(b)(1).

⁵ Juvenile court means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles. 8 C.F.R. § 204.11(a).

⁶ 8 U.S.C.A. § 1255(h).

⁷ See Thronson, David B. & Thronson, Veronica T. *Immigration Issues—Representing Children Who Are Not United States Citizens*, in *Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases* (Duquette, Donald N., Haralambie, Ann M., and Sankaran, Vivek eds., 3d ed. 2016 at 562; *In re D.A.M.*, 2012 Minn. App. Unpub. LEXIS 1158 (Minn. Ct. App. Dec. 10, 2012) (rejecting argument that it must apply “state-law definitions of ‘reunification’ pertinent to child protective proceedings”).

⁸ See Thronson, David B. & Thronson, Veronica T. *Immigration Issues—Representing Children Who Are Not United States Citizens*, in *Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases* (Duquette, Donald N., Haralambie, Ann M., and Sankaran, Vivek, eds., 3d ed. 2016 at 563).

⁹ “A qualifying court-appointed custodial placement could be with one parent, if reunification with the other parent is found to be not viable due to that parent’s abuse, neglect, or abandonment of the petitioner.” See USCIS Policy Manual at <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter2.html#S-A>; See also, Junck, at 54 (noting that “USCIS has approved such applications”).

Some abused immigrant children and their immigrant parents may not qualify for or may be procedurally barred from filing for VAWA based immigration remedies under the VAWA Self-Petition, U¹⁰ or T¹¹ visa programs. SIJS is a great alternative and may be the preferred remedy for a child who for some reason may not be able to be included in his parent's petition for VAWA self-petition or U visa. In fact, we strongly recommend that attorneys screen for eligibility for SIJS for any child client who is not a US citizen who may have been abused, neglected or abandoned. This is particularly important given the long delays on adjudicating U visas delays and the ability of a child to qualify for some state benefits once the SIJS is approved.

Circumstances in which SIJS may be a child's only option include:

- The child has been neglected or abandoned but the facts of the neglect or abandonment in the case do not qualify as criminal activity under the U visa statute;
- The perpetrator of the abuse was not the child's U.S. citizen or lawful permanent resident parent;
- The child qualifies to file a U visa based on child abuse but the child is not able to obtain the required U visa certification because such abuse was never reported; or because the child resides in a jurisdiction in which local law enforcement authorities are not willing to sign U visa certifications;
- A child could file for VAWA cancellation of removal, but he has not been placed in removal proceedings so he is unable to apply.

THE KEY ROLE OF STATE COURTS IN A CHILD'S ACCESS TO SIJS

Courts play a key role in child's ability to petition immigration for SIJS relief. A child may not even apply for SIJS from DHS until specified findings have been made in judicial or state administrative proceedings. The state court order is a prerequisite to filing for the SIJS petition.

The federal statute defines a "juvenile court" as any "court located in the United States having jurisdiction under State law to make judicial determinations about custody and care of juveniles."¹² When a court accepts jurisdiction over the custody and care of a child, that child is dependent upon the court for immigration law purposes.¹³ How the court is specifically referred under

¹⁰ U-Visa is a visa available for those who are victims of substantial physical or mental harm as a result of having been a victim of criminal activity. In order to receive a U-visa, victims must provide a certification from a federal, state, or local law enforcement official, prosecutor, or judge establishing that the victim has been helpful, is being helpful or is likely to be helpful in the investigation or prosecution of criminal activity.

¹¹ T-Visa is a visa is available to individuals who are victims of severe forms of trafficking in persons and who are willing to assist in the investigation and prosecution of their traffickers.

¹² 8 C.F.R. § 204.11(a).

¹³ 8 U.S.C. §1101(a)(27)(J)(i); 8 C.F.R. § 204.11(c)(6).

state and local laws does not control the immigration law determination about whether a specific court is a “juvenile court” for SIJS eligibility. Federal regulations state that a “juvenile court” under immigration law is identified by the court’s function and jurisdiction under state law. If the court’s function includes making judicial determinations regarding the custody and care of juveniles, then that court is authorized under immigration laws to make the findings immigrant children require to access SIJS immigration relief.¹⁴

SIJS findings can be made in a broad range of family court proceedings including but not limited to dependency, probate, delinquency, custody, protection orders, termination of parental rights and guardianship proceedings. It is important for practitioners and judges to become familiar with the full range of family and juvenile court proceedings in which courts can make the appropriate findings for SIJS to ensure non-citizen abused, abandoned and neglected children can apply for this relief designed to protect them.

Findings Required by Federal Statute for Special Juvenile Immigrant Status¹⁵

An eligible child may not apply with the Department of Homeland Security for SIJS until specified findings have been made in judicial or state administrative proceedings.¹⁶

- The court must:
 - declare the child a dependent of the court,
 - place the child under the custody of a state agency or department, or
 - grant custody of the child to an individual or entity because the child cannot be reunified with one or both parents;
- The court must find that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law¹⁷; and
- The court must determine that return to the child’s or parent’s country of nationality or country of last habitual residence is not in the child’s best interest.

These enumerated findings should be set out specifically in an order signed by the state court judge.¹⁸ In many jurisdictions, attorneys may want to

¹⁴ *Id.*

¹⁵ 8 U.S.C.A. § 1101(a)(27)(J) and its implementing regulations (Code of Federal Regulations at 8 C.F.R. § 204.11.29).

¹⁶ 8 U.S.C.A. § 1101(a)(27)(J)(ii). See also *In re Antowa McD.*, 50 A.D.3d 507, 856 N.Y.S.2d (1st Dept. 2008)(reversing trial court that “refused to make the factual findings that would enable appellant to apply for Special Immigrant Juvenile Status.”)

¹⁷ A finding for SIJS purposes that reunification is not viable does not require formal termination of parental rights or a determination that reunification will never be possible.

¹⁸ 8 C.F.R. § 204.11(d)(2).

file a motion with the court early in the case specifying that they are seeking SIJS findings and giving the court sufficient facts to make the determination. The court's signed order is submitted to DHS as part of the child's application for SIJS relief. The signed order is an essential part of the application, but is not sufficient by itself for a child to be granted SIJS status. The child's application for SIJS status will include evidence proving that the child meets all of the eligibility requirements for SIJS status, including proof of age and marital status.

Sample SIJS Findings

Depending on the jurisdiction, some judges will request that attorneys submit proposed orders containing SIJS findings. In a few jurisdictions with high SIJS caseloads, courts have created official court forms to be used for SIJS findings and that is sufficient to submit to USCIS. There is no mention in the statute of SIJS petitioners being required to show the factual basis behind the juvenile courts' orders. Findings can be as simple as the following example:

"The court finds that the child cannot be reunified with one or both parents due to [abuse, neglect, or abandonment or similar basis under state law], the child is dependent on the juvenile court [or the child has been placed by the court in the custody of ____] and it is not in the best interest of the child to be returned to the country of birth."¹⁹

In many states, qualifying courts include delinquency, dependency, custody, probate, family and other courts. Each of the examples below illustrate when courts can and should enter the orders regarding immigrant children needed to support the child's application for Special Immigrant Juvenile Status.

DHS regulations prohibit a juvenile that is granted SIJS from applying for any immigration benefit on behalf of either parent.²⁰

¹⁹ *Id.*

²⁰ 8 C.F.R. § 204.11(c).

Type of State Court Proceedings in Which SIJS Findings Can be Entered²¹

<u>Family Court</u>	<p>Custody Proceedings</p> <p>SIJS findings can be granted in custody actions before the family court in which a parent, family member or any other third party is seeking custody of juvenile due to abuse, neglect or abandonment by one or both parents.</p> <p>Motions for Declaratory Judgment</p> <p>Juveniles over the age of 18, but under 21 years of age, can initiate an action before the family court requesting a declaratory judgment containing the findings required for the immigrant juveniles SIJS application. The abused, neglected, abandoned, or battered immigrant child will provide testimony and introduce supporting evidence to the court sufficient to receive a court order containing SIJS findings. In these cases, immigrant children are not required to serve their parents with notice of the SIJS proceeding.</p>
<u>Dependency Proceedings</u>	<p>In any suit affecting the parent-child relationship Courts make determinations and enter orders regarding the custody and care of children. Such proceedings meet the requirements of dependency under SIJS and Courts should be asked to include SIJS related findings in the court orders issued in these cases.</p>
<u>Termination of Parental Rights</u>	<p>SIJS findings should be included in court orders when one or both parent's parental rights are terminated due to battering, extreme cruelty, abuse, neglect or abandonment, or other any similar basis under that state law.</p>
<u>Probate Court</u>	<p>SIJS findings can be granted when a court is establishing or after it has established a guardianship. When the juvenile who is the subject of the guardianship proceeding has been abused, neglected or abandoned the court should findings regarding these facts and additionally make findings that reunification with one or both parents is not viable.</p>
<u>Adoption Proceedings</u>	<p>SIJS findings can be granted in cases where a court terminates the parental rights or either or both parents or when a birth parent voluntarily gives up parental rights and those rights are transferred to another individual. The immigrant child being adopted has been abused, neglected, or abandoned by one or both parents.</p>

²¹ See Lohman, Eileen and Orloff, Leslye E. *State Proceedings in Which Courts Can Enter Findings and Orders Needed By Children Filing For Special Immigrant Juvenile Status Protections*, NIWAP (Oct 11, 2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts/special-immigrant-juvenile-status/SIJS-Proceedings-Chart.pdf>; see also Lee, Jeanna, Castillo, Katrina, Aver, Benish and Orloff, Leslye E., *Family and Criminal Court Scenarios in Which Courts Will Encounter Immigrants Who are Eligible for Violence Against Women Act (VAWA and U Visa), Trafficking Victims Protection Act (TVPA), Special Immigrant Juvenile (SIJS) and Deferred Action for Childhood Arrival (DACA) Immigration Protections*, NIWAP, available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts/special-immigrant-juvenile-status/Immigrant-Family-Criminal-Court-Scenarios.pdf>. For tools for state courts on immigration relief for SIJS, go to: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts/special-immigrant-juvenile-status>.

<u>Paternity and Child Support Proceedings</u>	The most common circumstances in which SIJS findings may be entered in a paternity and child support cases would be cases brought by a custodial parent against a non-custodial parent who has abandoned the immigrant child. This occurs in a number of circumstances including when the natural parent does not recognize the child as their own or when the child was born as the result of rape or incest. In these proceedings the court issues orders establishing paternity, identifying the custodial parent, and awarding child support to that parent needed for care of the child based on the state's child support guidelines. State courts issuing court orders in paternity and child support cases are making findings about custody and determinations about the care of children and should be explicitly included by DHS as state courts authorized to enter SIJS orders in appropriate cases.
<u>Protection Orders</u>	<p>SIJS findings can be entered as part of a civil or criminal protection order proceeding in which the court includes a custody, visitation, and/or child support orders. The SIJS findings can either be made as a supplemental court order issued by the protection order court or can be added on the face of or as an addendum to the protection order. The circumstances in which it would be appropriate for a protection order to include SIJS findings include but are not limited to the following:</p> <ul style="list-style-type: none"> • The child has been abused by one parent and the protection order gives custody to the non-abusive parent • One of the child's parents has abused the other parent; the abuse occurred in the presence of the immigrant child and the court enters findings that such abuse constitutes abuse or neglect of the child; the protection order includes a custody award to the non-abusive parent and protects both the abused parent and the child from ongoing abuse; • An abused child files a protection order against their abusive parent that orders their abusive parent and include provisions about the care or custody of the child; • An under 21 year old immigrant child files a sexual assault protection order against their sexually abusive parent.
<u>Delinquency Proceedings</u>	Juvenile delinquency proceedings confining juveniles to state juvenile detention centers, boot camps, or other form of supervision in which the state is responsible for the care and custody of the juvenile. Experiencing child abuse, being neglected or being abandoned are traumatic events that have profound effects on child development and contributes to juvenile delinquency. ²² Attorneys representing immigrant children in delinquency proceedings should screen clients to identify SIJS eligibility.
<u>Criminal Proceedings</u>	State criminal courts issue orders, findings, and have jury verdicts returned in a broad range of criminal court cases in which crimes are perpetrated against children. When these crimes are perpetrated by one or both of the child's parents and the child is in an immigrant, courts should be authorized and encouraged to issue SIJS findings.

²² Chaudry, Ajay, Capps, Randolph, Pedroza, Juan, Santos, Roberts, Castaneda, Rosa Maria, Santos, Roberts & Scott, Molly M. *Facing Our Future, Children in the Aftermath of Immigration Enforcement*, The Urban Institute (Feb. 2, 2010), available at: <http://www.urban.org/publications/412020.html>.

Additional Considerations for Proceedings Seeking SIJS Findings

- Ad litem Appointments: A court may require an attorney ad litem for the parents or a guardian ad litem for the child.
- Importance of Child Support: A motion for child support should be requested providing economic support for the care of the child with the court retaining jurisdiction for child support enforcement.²³
- Service of Process: Service must be effectuated in accordance to the state family code, in cases where one or both parents are alive.
 - Under state statutes and procedures, family courts can authorize service of process using a range of approaches designed to provide parents actual notice. Generally, it is best practice to pursue service options that are similar to what is required before courts can issue enforceable custody, adoption or termination of parental rights proceedings. Options include:
 - Service at the last known address of the parent in the United States or outside of the United States;
 - Service at the home of a family member of the parent;
 - Service on the next friend of the parent;
 - Service using the state's long arm statute when the child was conceived by rape in the jurisdiction, when abuse occurred in the jurisdiction or when the absent parent lived or owned property in the jurisdiction;
 - Enlisting the assistance of the embassy of the country in which the parent lives to locate the parent;
 - Appointment of an attorney ad litem for the parent who will be responsible for undertaking efforts to locate the parent and to report to the court on the steps taken and the result; or
 - Lastly, publication particularly when one or both parents has abandoned the juvenile or cannot be located in a foreign country;
- No requirement that formal charges be initiated: Formal charges of abuse, neglect or abandonment are not required to have been initiated against either parent. Any court proceeding in which the court appoints a guardian for the child would qualify for SIJS findings without any requirement that a separate proceeding alleging abuse, neglect or abandonment be initiated.²⁴

²³ See the economic support section of this chapter for a discussion of issues that arise in child support enforcement cases involving non-citizen parents and non-citizen children.

²⁴ Junck, Angie, *Special Immigrant Juvenile Status: Relief for Neglected, Abused and Abandoned Undocumented Children*, Juv. & Fam. L. 53-54 (Winter 2012).

- Issuance of Specific SIJS Orders: At any point in a court proceeding in which the court has jurisdiction regarding the care or custody of an immigrant child, SIJS orders can be issued.
 - SIJS findings can be included as part of the guardianship, adoption, custody, divorce, or protection orders;
 - Most state codes and court practices allow the juvenile to file motion before the court that issued prior orders affecting the child's care or custody separate from and at a later time after other court orders have been issued.
 - Temporary orders may be sufficient to establish the appropriate findings for a juvenile to apply for SIJS. Courts can issue SIJS findings early in the case and need not wait until final adjudication of a contested family court proceeding to issue court orders containing SIJS findings. Providing SIJS findings early in court proceedings promotes the child's best interests by providing stability and the protection against deportation the child needs to heal following abuse, neglect or abandonment. Since an immigrant child must file for SIJS immigration relief before the child turns 21, early access to SIJS court orders is particularly important for older immigrant children.
- Placements with Guardians and Relatives: Guardians or relatives with formal or informal custody arrangements to care for the child are not required to have any particular immigration or citizenship status in order for the child to apply for SIJS.
- Screen for VAWA, T or U visa, Asylum and SIJS Eligibility: It is important to screen immigrant children to determine what immigration remedies they may be eligible to receive.²⁵ Be aware that a child may be eligible for other relief under immigration laws, such as a U visa (for crime victims), a T visa (for trafficking victims), protection under the Violence Against Women Act (VAWA), asylum (with special provisions for unaccompanied alien children), deferred action²⁶

²⁵ For a comparison of immigration relief for immigrant victims of crime, see Orloff, Leslye E., et al, NIWAP (2013), <http://niwaplibrary.wcl.american.edu/immigration/introduction-to-immigration-relief-for-immigrant-victims/Comparing-Forms-of-Immigration-Relief.pdf>.

²⁶ Memorandum from Napolitano, Janet, Secretary of Homeland Security to Aguilar, David V. Acting Commissioner, U.S. Customs and Border Protection; Mayorkas, Alejandro Director U.S. Citizenship and Immigration Services; and Morton, John Director U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children* (June 15, 2012) (On file with author), available at <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf>. This announcement permits certain young people who were brought to the United States as young children, that do not present a risk to national security or public safety, and meet several key criteria will be considered for relief from removal from the country or from entering into removal proceedings. Those who demonstrate that they meet the criteria will be eligible to receive deferred action for a period of two years, subject to renewal, and will be eligible to apply for work authorization.

and/or family-based immigration petitions. Consult with an immigration attorney with expertise on legal rights of immigrant crime victims and children who can assist attorneys in assessing which immigration option a client should pursue and whether there are complexities in that case that would require that the client be represented by an immigration attorney with expertise on immigrant victims cases.²⁷

SPECIAL ISSUES RELATED TO SIJS FINDINGS IN SPECIFIC COURT PROCEEDINGS:

SIJS findings in Probate Court Guardianship or Custody Proceedings

A child for whom a guardianship or custody (custody by a third party or sole custody by one parent) is established may qualify for SIJS even if the state never formally removed the child from a non-abusive parent's custody or placed the child in foster care.²⁸ Both Congress and DHS intended for state courts with jurisdiction over guardianships to make the specific factual findings related to SIJS. In 2008 the U.S. Congress, in the Trafficking Victims Protection Reauthorization Act (TVPRA), amended the definition of a "Special Immigrant Juvenile" at section 101(a)(27)(J) of the INA to include children placed under the custody of an individual appointed by a state or juvenile court.²⁹ DHS has confirmed that placement with a parent, a family member or other individual appointed by the court is sufficient for SIJS findings purposes.³⁰

SIJS Findings in Adoption Proceedings

Under the SIJS regulations, children who have been adopted may apply for SIJS if a juvenile court has found that family reunification is not viable with at least one parent and that the child is in need of long-term foster care, guardianship, or adoption.³¹ SIJS findings can be granted even before the court finalizes an adoption, presuming all other requirements for SIJS are met. Undocumented children who are being adopted may also apply for SIJS as a faster route to legal status, since acquisition of legal status through adoption

²⁷ For a directory of service providers with experience working with immigrant victims of domestic violence, sexual assault, U-visa crimes and human trafficking, by state, go to: <http://niwap.org/directory/>.

²⁸ See *In re Menjivar*, 29 Immigr. Rep. B2-37 (AAU Dec. 27, 1994).

²⁹ 8 U.S.C.A. § 1101(a)(27)(J), as amended by the TVPRA, § 235(d).

³⁰ Memorandum from Neufeld, Donald, Acting Assoc. Dir., Domestic Operations and Chang, Pearl, Acting Chief, Office of Policy & Strategy, to Field Leadership at 2 (March 24, 2009) (on file with author), available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf.

³¹ 8 C.F.R. § 204.11(a).

requires a two-year placement period while SIJS applications must be adjudicated within six months.

SIJS Findings in Delinquency Proceedings

The Immigration and Nationality Act allows children in delinquency proceedings to apply for SIJS status³² as long as the court makes a finding that reunification with one or both parents is not viable due to abuse, neglect or abandonment. This would include juveniles who are delinquent and are placed in state custody facilities, under court supervision, or any other type of care ordered in delinquency proceedings. The key factor in making SIJS findings in delinquency or dependency proceedings is whether or not the state has jurisdiction to issue orders relating to the custody and care of a juvenile. If, however, the juvenile has been arrested or committed a crime, these acts may be used by DHS to deny the juvenile's application for lawful permanent residency because the juvenile may be inadmissible.³³ DHS has the discretion to grant humanitarian waivers in SIJS cases.³⁴ Whether a waiver will be granted will depend on various factors, including the seriousness of the offense, the type of criminal activity, and how long ago the crime occurred. Generous waivers are available for children with criminal histories.³⁵

EVIDENCE TO PRESENT IN SUPPORT OF THE REQUEST FOR SIJS FINDINGS

Practitioners seeking SIJS findings from a state court should be prepared to prove the following facts through affidavits, evidence and testimony:

- Proof of abuse, abandonment or neglect including specific instances of abuse or neglect;
- If the basis for the requested SIJS findings is abandonment provide evidence that demonstrates lack of contact with one or both parents for extended periods of time. Temporary separation may be insufficient to show abandonment.
- Proof that reunification with one or both parents is not viable. This could include:
 - Evidence that a parent is not interested or capable of taking care of the child;

³² 8 U.S.C. § 1101(a)(27)(J).

³³ Attorneys should consult with an immigration attorney in cases where juveniles have serious criminal histories; applying for Adjustment of Status ("green card") can in some cases initiate Removal Proceedings for juveniles.

³⁴ INA § 245(h)(2)(B); 8 U.S.C. § 1255(h)(2)(B).

³⁵ When the immigrant child has a criminal record of arrests or convictions it is essential that you consult an immigration attorney with expertise on SIJS cases. The immigration attorney can provide you guidance regarding preparation of waivers that will be needed in the SIJS application and advice regarding whether your client will need representation by an immigration attorney when they apply for lawful permanent residency.

- Proof that a parent is unavailable;
- Proof that the parent has not been in contact with the child and/or cannot be located;
- Proof that the parent has been out of the country for an extended period of time;
- Proof of child abuse and/or neglect and the impact on the child. This should include evidence of the trauma suffered by the child and the effect that reunification could have on the child. Evidence showing it would be detrimental and not in the best interest of the child to reunify with the abusive parent;
- Facts that form a basis for finding that it is in the child's best interest to remain in the United States and not return to their country of origin.
 - Include testimony and evidence regarding the quality of life, the availability of family/friends support, and a description of country conditions in the country of origin.
- Evidence that supports placement of the child by the court with the person who will primarily care for the child.

ADDITIONAL REQUIREMENTS FOR SIJS APPLICANTS

A signed order in itself is not sufficient for a favorable decision; the decision as to whether the child's SIJS application is approved is made not by the court but by DHS.³⁶ In addition to the court order containing the specific findings the child applicant must prove that:³⁷

- the applicant is under 21 years old at the time of filing the application;
- the minor is and remains unmarried until final adjudication of the adjustment of status application;
- the juvenile or family court should continue to maintain jurisdiction until lawful permanent residency is granted, if termination of jurisdiction is due to age or adoption, the juvenile court should specify within a court order the reason for the termination of jurisdiction;³⁸
- if the juvenile is in federal immigration custody, "specific consent" is required from the federal Office of Refugee Resettlement (ORR)³⁹

³⁶ Matter of M.C. 3/4/2010 N.Y.L.J. 25, (col. 3)(March 4, 2010 Fam. Court, Suffolk County) (noting that "the ultimate determination as to an immigrant juvenile's status rests squarely within the purview of the federal government").

³⁷ Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54978 (Sep. 6, 2011).

³⁸ Junck, Angie, *Special Immigrant Juvenile Status: Relief for Neglected, Abused and Abandoned Undocumented Children*, Juv. & Fam. L. 53-54 (Winter 2012).

³⁹ *Id.*

for the juvenile or family court to make a determination changing the custody/placement of that child.

PRACTICE POINTERS FOR ATTORNEYS

- Not all judges are familiar with SIJS; in those cases, consider drafting a bench memo for the court.
- Keep in mind that adjudicators at USCIS are often non-attorneys. It is important to use plain language to describe jurisdiction issues in pleadings and orders. Draft orders that clearly make each of the required SIJS findings.
- Be clear with the judge that the state court does not “find” that the child qualifies for SIJS or should be granted SIJS. The judge simply makes each of the required enumerated findings. DHS ultimately decides the immigration relief upon consideration of the court’s order and the additional evidence submitted by the immigrant child in support of the SIJS application. If the juvenile is in federal custody, collaborate with an immigration attorney regarding how to obtain specific consent from DHS for the court to make findings, if specific consent is necessary. In some cases it may be as simple as obtaining specific consent from the Office of Refugee Resettlement at the U.S. Department of Health and Human Services.
- Collaborate with social workers, child protective service providers, and immigration attorneys to best utilize resources available.
- Consult with organizations and experts that specialize in SIJS who can provide guidance, materials, sample pleadings and sample orders. Some recommended resources include:
 - Immigration Legal Resource Center: <http://ilrc.org/> This website provides information on remedies for immigrant youth, etc: *Living in the United States: A Guide for Youth* (English, Spanish and Korean); *Special Immigrant Juvenile Status (SIJS): Highlighting Changes Implemented by the Trafficking Victims Protection and Reauthorization Act* (March 2009), *Immigration Bench Book for Juvenile and Family Courts* (PDF, 1.7 MB, 2005), *Fact Sheets: Immigration Options for Undocumented Children* (PDF, 118 K)
 - Rachel Settlage, Elizabeth Campbell & Veronica Tobar Thronson, *Immigration Relief: Legal Assistance for Vulnerable Non-citizen Victims of Crime* (American Bar Association Section of Criminal Justice, 2014).
 - David B. Thronson & Veronica T. Thronson, *Immigration Issues—Representing Children Who Are Not United States Citizens*, in *Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases*

(Donald N. Duquette, Ann M. Haralambie, and Vivek Sankaran eds., 3d ed., National Association of Counsel for Children 2016).

- Angie Junck, Sally Kinoshita, & Katherine Brady, *Immigration Bench Book for Juvenile and Family Court Judges: IMMIGRANT LEGAL RESOURCE CENTER* (July 2010), available at http://www.ilrc.org/files/2010_sijs_benchbook.pdf.
- *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*, IMMIGRANT LEGAL RESOURCE CENTER, (Jan. 2010), available at http://www.ilrc.org/files/2010_sijs-chapter_03-sijs_overview.pdf.
- *Special Immigrant Juvenile Status Manual*, PUBLIC COUNSEL LAW CENTER, (Dec. 2010), available at <http://www.public-counsel.org/tools/publications/files/SIJS-Manual.pdf>.
- America Immigration Lawyers Association, webpage <http://www.aiala.org/>
- Kids In Need of Defense, <http://www.supportkind.org/>
- United States Citizenship and Immigration Services (USCIS) Home Page: <http://www.uscis.gov> This website provides all immigration forms, documents, requirements, visas (U and T), refugee and asylum; humanitarian; on the website enter “child welfare” in search engine to find child welfare related memorandums; in particular, enter “TVPRA” for a field guide memorandum to USCIS personnel on Trafficking Victims Protection Reauthorization Act of 2008 and its Policy Manual issued in October 2016.

Conclusion

Attorneys representing immigrant survivors can and do play a central role in assuring that immigrant victims of domestic violence and sexual assault, immigrant parents, and children with one or more immigrant parents are afforded the same legal rights as far as constitutional protections for the parent-child relationship. Attorneys representing immigrant victims must anticipate working with clients that have limited English proficiency and may have to make specific requests to appropriate agencies to address language barriers. With enough knowledge, tools, and support, attorneys can be effective in ensuring that immigrant victims maintain custody of their children, even when immigration issues are raised by an abusive parent, a citizen parent or the state to convince the court to deny custody to an immigrant parent.

The information provided here provides a summary of the collective experience of family attorneys who have represented immigrant survivors of domestic violence in custody proceedings across the country. Too often when immigration issues arise in family court proceedings, both judges and counsel for the immigrant victim are surprised and unsure of how to respond. This is exactly the reaction that perpetrators of domestic violence hope others will have toward immigrant survivors. The material provided here can be used as a tool for preparing a family law case on behalf of an immigrant client. It will enable attorneys to win custody for immigrant clients despite an abuser's efforts to redirect and derail the court's focus in the case.

Early on, attorneys should identify immigration issues that could affect immigrant victims' safety and outcomes at different stages of judicial proceedings. Some clients' immigration issues may need special attention, especially if abusers are retaliating against victims and reporting them to immigration enforcement officials. Screening for immigration issues is also important because an attorney may need to take affirmative steps to file for different forms of relief, such as VAWA, T or U visa, before judicial proceedings commence. In addition, family law attorneys must be aware that a victim's immigration status should have no bearing on whether the victim receives full custody of her children or whether the abuser will need to provide economic relief.

This discussion has also highlighted complex issues that may arise during the representation of immigrant victims who are at risk of immigration enforcement. If an immigrant victim parent is in immigration detention and is unable to care for her children, the state may initiate proceedings to terminate her parental rights. It is essential that the victim's attorney communicate with DHS, family court and the victim's relatives to develop a plan to care for the children. Attorneys should also be aware that if the immigrant victim is a minor who has been abused, neglected or abandoned and is under the custody of the state; the minor may qualify for additional immigration relief, such as Special Immigrant Juvenile Status.

Under the law, all children deserve to receive placements with non-abusive parents without regard to the immigration status of that protective parent. "The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court."¹ When states intervene in immigrant families, the constitution presumes that the best interests of children require reunification with natural parents, unless they are proven unfit. Parental fitness and the nurturing of the parental bond must be the priority and must not be replaced by assumptions about immigrants and immigration status and a comparison of countries or cultures. As attorneys representing immigrant victims in family court cases, it is our responsibility to respond when immigration issues are raised in family court, providing evidence, expert witnesses and research findings that will help the court refocus on the governing laws in custody cases – the best interests of the child. Judges will make better custody decisions, and children will benefit from counsel using the approaches and strategies discussed here.

Although this discussion provided an overview of family law options and strategies for immigrant victims of domestic violence, sexual assault or other violent crimes, it is important that attorneys representing immigrants in family courts consult with immigration attorneys in your state who have experience and training on immigration options for immigrant crime victims. Prepare in advance for representation of immigrant survivors by developing relationships with attorneys and advocates in your state. Screen non-citizen clients early for immigration options and any red flags.

Best practices that result in serving greater numbers of immigrant victims in your state involve collaborations approach between family attorneys, immigration attorneys and victim advocates that avoid duplication and conserve resources. Family attorneys can efficiently and effectively file VAWA self-petitions and U visa cases for their clients, which are critical in cutting off the perpetrator's ability to have DHS detain and deport the victim. Advocates play a crucial role helping immigrant victims write their statements, gathering

¹ *In re Interest of Angelica L.*, 277 Neb. 984 (2009).

evidence to strengthen their immigration case, and fostering relationships with law enforcement and the justice system.²

In order to provide effective assistance to battered immigrant victims it is important for practitioners to understand the intersection between domestic violence dynamics and family and immigration law. This guide has highlighted some of the key issues that arise in the representation of battered immigrants in family court and also provided useful resources for attorneys. The effective representation of vulnerable immigrant victims requires an understanding of legal and social service options available to survivors. Coordinating case strategy among immigration and family attorneys and advocates can be vital in ensuring the best outcomes for immigrant victims and their children.

² For materials that provide useful information for advocates, attorneys, justice, and social services professionals working with and assisting immigrant survivors of violence, see Sullivan, Kathleen and Orloff, Leslye, eds., *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, NIWAP (July 2013), available at: http://niwaplibrary.wcl.american.edu/cultural-competency/Breaking-Barriers-MANUAL-BB.pdf/at_download/file (This Manual provides a detailed overview explanation of immigrant survivors' legal rights under immigration, family, public benefits, and criminal laws and their rights to access a broad range of victim services without regard to immigration status of the immigrant crime victim or their children); Orloff, Leslye, ed., *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault*, NIWAP (July 2013), available at: <http://niwaplibrary.wcl.american.edu/cultural-competency/Empowering-Survivors-MANUAL-SA.pdf>; *VAWA, T and U Visa Tools*, NIWAP, <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/august-20-2013-holistic-representation-wichita-kansas/immigrant-victims2019-legal-rights-to-access-benefits-housing-legal-services-victim-services-and-protections/tools-for-advocates/vawa-t-and-u-visa-benefits-tools>; *Evidence Checklist For Immigrant Victims Applying For The Crime Victim Visa (U Visa)*, NIWAP, http://niwaplibrary.wcl.american.edu/immigration/u-visa/tools/UVISA_Evidence-Check-List.pdf. NIWAP has provided webinars on public benefits, obtaining U visa certification from law enforcement and judges, custody issues, and immigration story writing. For the recordings and materials of these NIWAP webinars please visit: <http://niwaplibrary.wcl.american.edu/reference/webinars>. NIWAP also filmed a two-hour training video that shares techniques (including physical body language communication) to educate attorneys and advocates how to work with survivors in crisis. *Hands On Training for Advocates and Attorneys on Trauma-Informed Work With Immigrant Women Who Are Survivors of Domestic Violence and Sexual Assault*, NIWAP (Feb. 24, 2014), <https://www.youtube.com/watch?v=05Z95q1bkG4>.

