

The Criminal Justice System and Immigrant Victims¹²

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The information provided in this chapter is intended to serve as an introduction and provides a basic overview of how criminal matters can affect immigrant victims. It is essential to contact an expert on immigration law and the possible consequences of a criminal conviction, and who has experience working with immigrant victims before proceeding with a criminal case involving immigrants. Immigrant victims of sexual assault or domestic violence who become involved in the criminal judicial system as defendants should be advised not to enter into any plea agreement until the victim and her defense attorney have consulted an immigration attorney with expertise on criminal immigration issues and on the legal rights of immigrant survivors.³

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² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ A list of references is provided at the end of this chapter.

The Criminal Justice System and Immigrant Victims

Immigrant victims who have not committed crimes, but rather were acting in self-defense can be charged with crimes of violence or assault. This could be particularly true when immigrant victims are limited English proficient, when police who are not fluent in the victim's language do not secure assistance of qualified interpreters, and police who cannot effectively communicate with immigrant victims rely on information provided by others including the perpetrator. When an immigrant victim has been arrested and/or has had criminal charges brought against her, the victim's advocate and attorney and victim's attorneys should work with both prosecutors and defense attorneys to have the charges dropped and should inform victims about the potential immigration consequences of the conviction for the crimes of violence or assault.

I. Introduction

This chapter is designed to help advocates and attorneys assist immigrant victims **of sexual assault and domestic violence** avoid the harmful immigration consequences of criminal convictions and/or findings that an immigrant has violated a protection order. Such convictions and findings can lead to loss of legal immigration status and potentially deportation for persons who are not citizens of the United States. For non-citizen sexual assault or domestic violence victims, criminal issues can have serious immigration consequences, including the following:

- A non-citizen immigrant victim can be deported if she commits any of a wide variety of crimes;
- Her VAWA self-petition, application for VAWA cancellation of removal or application for naturalization can be denied if she cannot show good moral character because of a criminal history;
- Even if she has an approved VAWA self-petition, she may be barred from obtaining lawful permanent residence (a green card) if she falls within one of the criminal grounds of inadmissibility;
- A U-visa or T-visa applicant may hinder the ability of a victim to obtain an inadmissibility waiver and pursue T or U visa immigration relief;
- Her application for adjustment of status (permanent residence) or VAWA cancellation of removal can be denied if immigration authorities decide not to exercise discretion in her favor because of her criminal history.

Advocates and attorneys should screen all immigrant victim clients using the "Red Flags" list⁴ and the information in this chapter to identify issues that require immediate attention before the victim files any petition or application for immigration relief. This screening should occur as early in the case as possible because as more time passes, particularly if the victim begins to use the legal system to seek protection, it is more likely that abusers will report victims to the Department of Homeland Security (DHS), which has been increasing its enforcement operations.⁵ Those who cooperate in a criminal prosecution of the abuser and file for a protection order or custody may prompt the abuser to contact DHS about the victim's immigration status, triggering an enforcement action against the victim. If screening for criminal issues and assessment of victim eligibility for immigration relief occur prior to the initiation of family court actions, then these issues can be taken into account in developing case strategy and timing.

Though it is critical that any immigrant who becomes involved as a defendant with the criminal legal system seek counsel from an attorney, there are several situations in which this is absolutely critical. Consult with an immigration attorney with expertise on immigration law and crimes and immigrant victim's legal rights⁶ if any of the following has happened to an immigrant victim client:

1. Arrest
2. Dual Arrest
3. Criminal conviction
4. Entering into a plea agreement in any criminal case⁷

⁴ See Chapter 1 for the Appendix of this Manual

⁵ Jennifer Brooks, *Records show surge in immigration prosecutions*, Gannett News Service, August 24, 2005; Patrick McGhee, *Deportations of immigrants have spiked over decade*, September 17, 2006 available at <http://educate-yourself.org/cn/undocumentedimmigrants01may06.shtml>; Robert Boyer, *Immigration enforcement plan stirs concerns: Commissioner likes idea; Advocates doubt its effectiveness*, Times-News (Burlington, North Carolina), October 8, 2006.

⁶ See the More Resources section at the end of the chapter for technical assistance and referral information.

⁷ This includes a plea of *nolo contendere*.

The Criminal Justice System and Immigrant Victims

5. Any contempt or protection order enforcement action filed against the victim
6. Arrest or detention by DHS of a victim to whom any of the above (1-5) have occurred.

This will enable the victim and her defense attorney to assess the potential effects of the criminal case on her immigration status when deciding how to proceed.⁸

II. Criminal Convictions and Immigration Status of Victims

Criminal conduct can jeopardize the immigration status of all non-citizens living in the United States. Even lawful permanent residents who have lived in the U.S. for years and have close family ties, such as U.S. citizen spouses and children, can be affected. Such consequences include deportation, permanent bars to returning to the U.S., and mandatory detention by immigration authorities, as well as difficulties in obtaining permanent residence or becoming citizens through naturalization.⁹

Immigrant victims of sexual assault or domestic violence, even if otherwise eligible for permanent residence through the Violence Against Women Act (VAWA), a U-visa or a T-visa can be rendered ineligible because of a criminal conviction and be subject to removal.¹⁰ Often non-citizen victims who have not committed crimes, but were acting in self defense or whose conduct was directly related to their victimization are incorrectly counseled to plead guilty without being advised as to the immigration consequences associated with their plea. To avoid these consequences, advocates and attorneys should work with defense attorneys and prosecutors to inform them of the potential immigration consequences and get criminal charges dismissed or reduced when possible to a crime or convictions that will not cut the victim off from the relief she would otherwise be entitled to receive.

It is not unusual for non-citizen victims of sexual assault in the context of family violence themselves to be arrested on domestic violence charges, when assaulted by their spouse, intimate or cohabiting partner. This can occur because of language barriers. The police may speak to an intimate partner or his family members but not to the victim, because she does not speak English. A perpetrator may assault the victim, causing her to fight back in self-defense, and then call the police and claim that she assaulted him. If the victim speaks little or no English, she will not be able to explain what really happened and could herself be arrested. A conviction for domestic violence is grounds for deportability and can render an immigrant victim ineligible for certain relief under VAWA.¹¹

It is important to understand that the relationship between criminal law and immigration law is complex, and that immigration laws are constantly changing. A misunderstanding of these legal complexities can render an immigrant ineligible for permanent resident status and may result in deportation.

A. Effects of Criminal Convictions On Immigration Status – An Overview For Non Citizen Victims

There are numerous ways in which a criminal history can negatively affect an immigrant victim's immigration case:

- Regardless of her immigration status, criminal convictions and conduct can make an immigrant survivor subject to "removal proceedings" (formerly known as deportation proceedings) by triggering one of the crime-related legal grounds of inadmissibility or deportation.¹²

⁸ For information on how to obtain a client's criminal records, see Appendix 2.

⁹ See ANN BENSON ET AL., WASHINGTON DEFENDER ASS'N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS IN WASHINGTON STATE, 1 (2005). See also <http://www.defensenet.org/immigration-project/immigration-resources>. (last visited August 2009).

¹⁰ "Removal" is the term in immigration law also known as deportation.

¹¹ INA §237(a)(2)(E); 8 U.S.C. 1227 (1996); INA §240A(b)(2); 8 U.S.C. 1229b (1996). (For immigrant victims with criminal convictions who qualify for both VAWA and U visas, they will have to decide which to pursue. They will need to consult an expert on the immigration consequences of criminal convictions before proceeding.)

¹² See INA §101(a)(43); §212(a)(2); §237(a)(2); 8 USC 1101(a)(43); §1181(a)(2); §1227(a)(2).

The Criminal Justice System and Immigrant Victims

- Criminal convictions can trigger legal barriers that will prevent immigrant survivors from getting lawful immigration status and benefits that they would otherwise be entitled to receive. VAWA self-petitions, VAWA cancellation, U and T visa provisions, asylum and citizenship all contain legal bars relating to criminal convictions and conduct.¹³
- Even where a criminal conviction does not trigger a legal bar preventing the immigrant survivor from filing for immigration status or citizenship, it will constitute a negative discretionary factor in deciding her case. Immigration authorities can deny an otherwise eligible applicant if they determine that she does not deserve a favorable exercise of discretion.
- If the immigrant survivor has been deported and returns illegally to the U.S., she is at risk of federal criminal prosecution for illegal reentry after deportation. If she has a criminal conviction, it will increase her sentence possibly by years.¹⁴

Advocates and attorneys should be aware of common issues of criminal law that affect immigrant victims. The following sections describe some possible scenarios that victims may face in the criminal justice system and the effects on their immigration cases. **This chapter is not intended to be a comprehensive guide to the immigration scenarios of criminal convictions. Instead, it is meant to address some of the more common situations in which criminal matters affect the immigration status of immigrant victims of sexual assault or domestic violence.**

1. Definitions – Convictions and Sentences Under Immigration Law

Convictions under immigration law

It is important for advocates and attorneys to understand that the definition of “conviction” in the criminal justice system differs from the legal definition of “conviction” in the immigration context. The Immigration and Nationality Act (INA) defines the term “criminal conviction” for immigration purposes.¹⁵ A judgment that might not be considered a conviction under the criminal law of the relevant jurisdiction may be one for immigration purposes.

The immigration law defines a conviction as follows:

The term “conviction” means, a formal judgment of guilt of the non-citizen or lawful permanent resident entered by a court or, if adjudication of guilt has been withheld, where

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.¹⁶

Many states have a variety of “deferred adjudication procedures” that allow a criminal case to be continued at some stage of the proceedings in order to give the defendant an opportunity to comply with certain conditions. The specifics of each procedure vary, but they are generally designed to result in the dismissal of charges if the

¹³ Some of these provisions contain special “waivers” of certain criminal convictions. See INA §212(a)(2)(A)(ii)(I); INA§212(h); INA §204(c). However, many convictions cannot be “waived” and having to apply for crime-related waivers makes these cases much more difficult and susceptible to denial.

¹⁴ See 8 USC 1326. The maximum possible sentence in these cases is either 10 or 20 years. Illegal reentry after deportation is one of the most prosecuted federal crimes and accounts for over 25% of all federal cases in some jurisdictions. See <http://articles.latimes.com/2008/mar/16/local/me-crackdown16>, and <http://www.ice.gov/pi/news/newsreleases/articles/071003losangeles.htm>

¹⁵ INA §101(a)(48)(A); 8 U.S.C. 1101(a)(48)(A) (1996).

¹⁶ *Id.*

The Criminal Justice System and Immigrant Victims

defendant complies with these conditions.¹⁷ Often, the defendant agrees to the admissibility of the police report or certain facts, with the understanding that, if she violates the conditions, the judge will rely on the police report or those facts to determine the defendant's guilt. Even if these admissions do not constitute a conviction, the admissions, particularly when they include a stipulation as to the sufficiency of the facts, can still have serious consequences for non-citizen defendants. Immigration officials may find there is an admission to facts "sufficient to warrant a finding of guilt," and find the non-citizen inadmissible for having admitted to committing a crime, whether or not there is a conviction.¹⁸

A conviction with a pending appeal is not final and therefore is not considered a conviction under immigration law,¹⁹ and juvenile dispositions are not considered convictions for immigration purposes (unless the juvenile was transferred to and convicted as an adult in adult criminal court).²⁰ However, some other dispositions that are not considered convictions under state and federal criminal law, such as pretrial diversion, withholding of adjudication, or probation before judgment, may be considered convictions for immigration purposes.²¹

An advocate or attorney working with an immigrant victim of sexual assault who has been accused of a crime should consult with the victim's defense attorney and prosecutors when possible and inform them of potential immigration consequences of a conviction. If a victim is charged with assault, domestic violence, or aggravated assault or other crime, the advocate or attorney should assist the defense attorney in determining the circumstances of the arrest. Questions that should be asked include the following:

- Was the victim acting in self-defense
- Does the victim speak English fluently?
- Does her perpetrator speak English?
- Did the police speak the victim's language or have a qualified interpreter?
- Who served as the interpreter?
- Did the police arrive and only speak with her perpetrator or his family members?
- Was this a case of dual arrest?
- Is the abuser the predominant perpetrator of abuse in the relationship?

If the victim was wrongly arrested, the advocate or attorney should work with the police and prosecutors to have the case dismissed. If efforts to have the case dismissed are unsuccessful, the advocate or attorney must educate the prosecutor and defense attorney about the immigration consequences of a guilty plea and deferred adjudication agreements that contain admissions that could warrant a finding of guilt. **Immigrant victims should be advised not to enter into any plea agreement until the victim and her defense attorney have consulted an immigration attorney who has expertise on immigration status and crimes for advice.**

Criminal Sentences

The sentence a non-citizen receives is often a critical factor in determining the immigration consequences that will result. A sentence for immigration purposes includes not only time served in jail, but any period of incarceration ordered by a court regardless of whether some or the entire sentence is suspended.²² Many crimes, such as misdemeanor assault, can have drastic immigration consequences if the non-citizen is sentenced to one year or more in prison, even if the entire sentence is suspended. If an immigrant victim of sexual assault or domestic violence is convicted of one of these crimes and receives a 365-day sentence with 364 days of it suspended, she will be considered to have a 365-day sentence for immigration purposes.

¹⁷ See e.g. ANN BENSON, WASHINGTON DEFENDER ASS'N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, 14 (2002).

¹⁸ See INA §212(a)(2)(A)(i); 8 U.S.C. 1182(a)(2)(A)(i) (1990), which states that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of – (I) a crime involving moral turpitude..., or (II) a violation of... any law or regulation of a State... is inadmissible."

¹⁹ See *Pino v. Landon*, 349 U.S. 901 (1955).

²⁰ *Matter of Devison*, Int. Dec. 3435 (BIA 2000); See also Daniel Levy, Under the Auspices of the National Immigration Project of the National Lawyers Guild, *U.S. Citizenship and Naturalization Handbook*, §7:28.

²¹ *Id.*

²² INA § 101 (a)(48)(B); 8 U.S.C. 1101(a)(48)(B) (1996).

Sexual Assault by a non-intimate or intimate partner

Domestic sexual assault refers to sexual assault committed by a former or current intimate or cohabiting partner or spouse.²³ An immigrant convicted of these crimes can be deported under various provisions of the Immigration and Nationality Act.²⁴

B. Domestic Violence Crimes:

An immigrant convicted of domestic violence, stalking, child abuse, child neglect, or child abandonment can also be deported.²⁵ An immigrant can be deported for violating a protection order as well.²⁶ These provisions are grounds of deportability and will apply to all non-citizens including undocumented immigrants and immigrants who have been lawfully admitted to the U.S. or who have obtained lawful permanent resident status or conditional permanent resident status.²⁷

The definition of “crime of violence” under Section 16 of Title 18 U.S.C. includes:²⁸

- An offense that has as an element of use, attempted use, or threatened use of physical force against the person or property of another; or
- Any felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Domestic violence is defined as any crime of violence that is directed against a person listed in Section 327 of the Immigration & Nationality Act. This section defines domestic violence related deportable offenses and relationships to be any 8 U.S.C. §16 crime of violence that is directed against a person by:²⁹

- A current or former spouse of the person;
- An individual with whom the person shares a child in common;
- An individual who is cohabitating with or has cohabitated with the person as a spouse;
- An individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs³⁰; or

²³ Marital or spousal rape is “any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent. Most studies of marital rape have included couples who are legally married, separated, divorced or cohabiting with the understanding that the dynamics of sexual violence in a long-term cohabiting relationship are similar to those of a married couple (Mahoney & Williams, 1998).” Raquel Kennedy Bergen, Elizabeth Barnhill *Marital Rape: New Research and Directions* Applied Research Forum of the National Network on Violence Against Women (February 2006).
http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_MaritalRapeRevised.php

²⁴ INA § 237(a)(2)(E); 8 U.S.C. 1227(a)(2)(E)(1996).

²⁵ INA § 237(a)(2)(E)(i); 8 U.S.C. 1227(a)(2)(E)(i) (1996).

²⁶ INA § 237(a)(2)(E)(ii); 8 U.S.C. 1227(a)(2)(E)(ii) (1996).

²⁷ ²⁷ INA § 237(a)(2)(E); 8 U.S.C. 1227(a)(2)(E)(1996). It is important to understand that crimes of domestic violence, stalking, violations of protection orders and crimes against children are grounds for deportability and removal from the United States. When a person applies for admission to the United States they must prove admissibility. The grounds of inadmissibility are defined by INA § 212 and do not explicitly make a perpetrator inadmissible if convicted of domestic violence, stalking, violations of protection orders and crimes against children. However these crimes are considered for purposes of the exercise of discretion to find that the applicant has good moral character and because these crimes may be considered crimes of moral turpitude under the INA §212(a)(2)(A)(i).

²⁸ 18 U.S.C §16. Cases interpreting 18 U.S.C. § 16 have found that sexual assault and sexual battery are crimes of violence. In *Sutherland v. Reno*, the Second Circuit held that the defendant was convicted of a crime of violence and eligible for removal because he was convicted of a crime of domestic violence based upon his conviction under state law for indecent assault and battery. *Sutherland v. Reno*, 228 F.3d 171 (2d Cir. 2000).

²⁹ INA § 237(a)(2)(E)(i); 8 U.S.C. 1227(a)(2)(E)(i) (1996).

³⁰ Depending on the state, relationships may include spouses and former spouses, parents, siblings, aunts, uncles, grandparents, in-laws, step-siblings, step-parents, children, parents of a child in common, unmarried individuals living together as spouses, intimate partners, those in dating relationships, the current spouse of an ex-spouse those offering refuge, someone formerly living together as a spouse, and unrelated household members. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 814-841 (1993).

The Criminal Justice System and Immigrant Victims

- Anyone protected from the perpetrator by state domestic violence laws.

Domestic violence is typically a crime committed by an intimate or cohabiting partner.³¹ Moreover, domestic violence is also considered a crime of violence. Immigrant victims of sexual assault may also be arrested if police officers see that their intimate partner or perpetrator has visible wounds—even if those wounds were inflicted while the victim was defending herself. Police officers may have a difficult time determining who the aggressor is, particularly if the victim does not speak English and the police fail to obtain a qualified interpreter to assist them in communicating with the victim. When this happens the victim could then be charged with domestic violence or various forms of assault.³² Thus, an immigrant victim of domestic violence or sexual assault could potentially fall under one or both of the aforementioned categories of crime if, for example, she acted in self-defense and police charged her with assault or aggravated assault. A conviction for domestic violence or even simple assault involving the above listed relationships may trigger deportation.³³

When police are not properly trained, mandatory arrest laws can result in dual arrest (arresting both parties), instead determining which party is the principle aggressor. This confusion is heightened when an immigrant victim has limited English skills and the perpetrator speaks English. Immigrant victims of domestic violence can be arrested for various forms of assault or domestic violence offences when police officers mistakenly believe them to be the perpetrators when they actually acted in self-defense. It is essential for advocates or attorneys to intervene to help immigrant victims get charges against them dismissed.³⁴

Convictions whether by plea or after trial can lead to a victim's removal from the United States, even when the victim served no time in jail. Additionally, an immigrant can become deportable for violating a protection order if the court has determined that the immigrant's conduct violated the part of the protection order that involves protection against:

- credible threats of violence;
- repeated harassment; or
- bodily injury to the person or persons protected under the order.³⁵

Since violating a protection order is a deportable offense, immigrant victims should not agree to, and should contest to the issuance of, any civil protection order against them.³⁶ Perpetrators sometimes claim at protection order hearings that they had been abused as well, and judges may issue mutual protection orders against both parties in such cases. Such mutual protection orders violate Due Process and are unenforceable under the Full Faith and Credit Provisions of the Violence Against Women Act.³⁷ In other cases, after the victim has filed for a protection order, the perpetrator may file his own civil protection order against the victim to retaliate. In other instances, abusers may preemptively file a protection order against immigrant victims, to be the first to file such an order.

Many immigrant women who could benefit from protection orders do not file for them because they do not know protection orders exist.³⁸ When immigrant women learn about protection orders, they may choose to seek them, particularly when they are working with victim advocates or attorneys and when the abuse has been severe.³⁹ Immigrant women, like other battered women considering seeking a protection order, fear retaliation

³¹ <http://www.ojp.usdoj.gov/ovc/assist/nvaa99/chap8.htm>

³² For more information, please contact the National Clearinghouse for the Defense of Battered Women, 125 South Ninth Street, Suite 302, Philadelphia, PA 19107, T: (215) 351-0010, F: (215) 351-0779. The police have an obligation under Title VI and Executive Order 13166] to provide an interpreter to communicate with the victim in the victim's native language. For a further discussion of the laws government language access for limited English proficient individuals see chapter 2 of this manual and visit www.lep.gov.

³³ INA §237(a)(2)(E)(i) (1996).

³⁴ See Leslye Orloff, et. al., Battered Immigrant Women's Willingness to Call for Help and Police Response, 13 UCLA Women's L.J. 43 (2003).

³⁵ INA § 237(a)(2)(E); 8 U.S.C. 1227(a)(2)(E).

³⁶ See Chapter 5 of the Breaking Barriers Manual, "Protection Orders"

³⁷ 18 U.S.C.A. §2265(c) (2000).

³⁸ Protection orders are available to victims of domestic violence and sexual assault, regardless of their immigration status. See Legal Momentum, Immigrant Women Program, *Use and Outcome of Civil Protection Orders by Battered Immigrant Women in the U.S.* http://www.legalmomentum.org/site/PageServer?pagename=iwp_Montreal

³⁹ *Id.*

The Criminal Justice System and Immigrant Victims

through escalated violence (40%) and possible death or severe injury (11.5%).⁴⁰ However, immigrant women's fears are exacerbated by concerns that seeking a protection order will lead to the victim's deportation (16%) and that her children will be taken from her (5%).⁴¹

Unfortunately when the perpetrator files first and perpetuates the control by asserting that he is the victim, the true victim is placed in a position where she has to explain to the court that she was scared of the perpetrator yet chose not to file for a protection order until she herself was served with one against her. This argument although quite realistic, makes the victim appear less credible. It is critical that immigrant victims who fear retaliation from abusers and file for protection orders consult with attorneys who practice family and immigration law so that they can fully understand whether or not these fears may be alleviated by legal or social service protections they are entitled to receive under immigration and family laws.⁴² An immigrant victim who has not committed a domestic violence offense, or who acted in self-defense, should not consent to the issuance of a protection order against her and instead request a hearing on the protection order. The hearing will make the abuser have to prove his case.

C. Crimes of Moral Turpitude

A non-citizen who is convicted of a crime of moral turpitude committed within five years of admission for which a sentence of one year or longer may be imposed, or who has two or more convictions of crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, is deportable.⁴³ Crimes of moral turpitude are also a ground of inadmissibility and, thus, can render an immigrant survivor ineligible to reenter the U.S. or to obtain immigration benefits such as self-petitioning, adjustment of status, VAWA cancellation of removal, and citizenship.⁴⁴

1. *Definition and Examples of Crimes Involving Moral Turpitude*

When working with domestic violence or sexual assault victims, it is not always easy to determine if a conviction amounts to a crime involving moral turpitude. Courts have found that a number of different crimes involve moral turpitude, and an attorney will often have to compare the exact criminal statute to the case law. Crimes such as murder, rape, voluntary manslaughter, robbery, burglary, theft, arson, aggravated assault, forgery, prostitution, and shoplifting have consistently been held to involve moral turpitude.⁴⁵ In general, the following types of crimes have also been held to involve moral turpitude:

- Crimes that involve an intent to defraud or intent to steal⁴⁶
- Crimes which have as an element an intentional or reckless infliction of harm to persons or property⁴⁷
- Felonies and some misdemeanors that involve malice⁴⁸

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See, Nawal Ammar, Leslye Orloff and Mary Ann Dutton, "Use and Outcome of Civil Protection Orders By Immigrant Women in the United States," presentation at the 2008 Law and Society Association Conference, Montreal, Quebec, Canada May 31, 2008 and Dutton MA, Ammar N, Orloff L, Terrell D. Use and outcomes of protection orders by battered immigrant women (2003-WG-BX-1004). Washington, DC: National Institute of Justice, 2006.

⁴³ INA § 237(a)(2)(A); 8 U.S.C. 1227(a)(2)(A) (1996).

⁴⁴ INA § 212(a)(2)(A)(i)(I); 8 U.S.C. 1182(a)(2)(A)(i)(I); INA §101(f); 8 U.S.C. 1101(f).

⁴⁵ See generally, Ann Benson and Jonathan Moore, Practice Advisory on Representing Noncitizens Accused of Misdemeanor Assault Offenses – Both DV and Non-DV Cases- Under RCW 9A.36.041 (Washington Defenders Association, (February 2007); Washington Defender Association Immigration Project, An RCW Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses http://www.defensenet.org/immigration-project/immigration-resources/RCW_Immigration_Chart-1.pdf/view, (last visited August 2009); Ann Benson, Overview of Immigration Consequences of Criminal Conduct for Immigrant Survivors of Domestic Violence, In Breaking Barriers, A Complete Guide to Legal Rights and Resources for Battered Immigrants). (Legal Momentum 2004).

⁴⁶ INA § 212(a)(2)(A)(i)(I); 8 U.S.C. 1182(a)(2)(A)(i)(I); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

⁴⁷ INA § 212(a)(2)(A)(i)(I); 8 U.S.C. 1182(a)(2)(A)(i)(I)

⁴⁸ INA § 212(a)(2)(A)(i)(I); 8 U.S.C. 1182(a)(2)(A)(i)(I); See e.g. *Matter of Adcock*, 12 Immigr. Rep. B1-175 (BIA 1994) (unpublished), in which the Board of Immigration Appeals held that a willful act or omission causing injury to a child is an offense involving moral turpitude. However, criminally negligent child abuse is not considered a crime of moral turpitude. *Matter of Sweetser*, 22 I. & N. Dec. 709 (BIA 1999).

The Criminal Justice System and Immigrant Victims

- Sex offenses that involve some “lewd” intent.⁴⁹

Sexual assault is generally defined as any unwanted sexual attention or sexual contact committed by force, manipulation, bribes, threats, pressure, tricks, or violence without consent.⁵⁰ This includes child molestation, rape and attempted rape, sexual harassment, and incest. Crimes that do not involve the above elements have generally been held not to involve moral turpitude.⁵¹ These include involuntary manslaughter, simple assault, breaking and entering, criminal trespass, malicious mischief, and various weapons possession offenses.⁵² Victims need to avoid convictions as much as possible so that they will not have to use the waivers available under VAWA and the U visa.

Aggravated assault, on the other hand, is considered a crime of moral turpitude. It is defined as an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury.⁵³ It is usually accompanied by the use of a weapon or through means likely to produce death or serious bodily injury.⁵⁴ Actual injury, however, is not a requirement of the crime of aggravated assault.⁵⁵

Victims who defend themselves and are later charged with simple assault are not considered to have committed a crime of moral turpitude. Yet if the victim uses force, depending on the severity of force, the victim’s defensive actions may qualify as aggravated assault, which is a crime of moral turpitude that renders the victim potentially deportable. Advocates and attorneys should be aware that the determination of whether a crime constitutes an act of moral turpitude is determined by closely examining the statute under which your client is accused and relevant court decisions, and requires expert analysis by an attorney with experience in immigration and crimes.⁵⁶ Advocates should work with the prosecutor to provide evidence of a history of abuse in these cases, and urge dismissal of cases where the immigrant acted in self-defense.

When assisting immigrant victims of sexual assault with criminal records, advocates and attorneys should always consult with an expert in immigration law and crimes to determine whether one of the exceptions or waivers applies to the facts of an immigrant client’s case.

D. Aggravated Felonies

An immigrant victim of domestic violence or sexual assault convicted of an aggravated felony while in the United States is deportable.⁵⁷ An aggravated felony is defined by immigration law, not state criminal law, and includes twenty-one sections of the Immigration and Nationality Act that encompass hundreds of offenses.⁵⁸ Some examples include: murder, rape, child sexual abuse, trafficking in controlled substances, firearms offenses, child pornography, obstruction of justice or perjury with a sentence of one year or more, fraud or deceit if the loss exceeds \$10,000, crimes of violence with a sentence of one year or more, and theft or burglary offenses (including receipt of stolen property) with a sentence of one year or more.⁵⁹

⁴⁹ Ann BENSON, WASHINGTON DEFENDER ASS’N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, 51 (2005).

⁵⁰ The Pennsylvania Coalition Against Rape defines sexual violence as violence that “violates a person’s trust and feeling of safety. It occurs any time a person is forced, coerced, and/or manipulated into any unwanted sexual activity. The continuum of sexual violence includes rape, incest, child sexual assault, ritual abuse, date and acquaintance rape, statutory rape, marital or partner rape, sexual exploitation, sexual contact, sexual harassment, exposure, and voyeurism.” Available at http://www.pcar.org/about_sa/index.html

⁵¹ Ann Benson & Jonathan Moore with Katherine Brady, Immigration and Washington State Criminal Law 57 (Washington Defenders Association, 2005) <http://www.defensenet.org/immigration-project/immigration-resources/Immigration%20Crimes%20FINAL%2001-06-09.pdf/view>

⁵² Ann BENSON, WASHINGTON DEFENDER ASS’N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, 51 (2005).

⁵³ Model Penal Code § 211.1(2) defines a person as guilty of aggravated assault if he: a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon

⁵⁴ http://www.fbi.gov/ucr/05cius/offenses/violent_crime/aggravated_assault.html

⁵⁵ <http://www.oregon.gov/CJC/county.shtml>

⁵⁶ *Id.* at 287.

⁵⁷ INA § 237(a)(2)(A)(iii); 8 U.S.C. 1227(a)(2)(A)(iii) (1996).

⁵⁸ INA § 101(a)(43); 8 U.S.C. 1101(a)(43) (1996).

⁵⁹ *Id.*

The Criminal Justice System and Immigrant Victims

Any offense that falls within the aggravated felony definition triggers drastic immigration consequences. An immigrant victim of sexual assault or domestic violence convicted of an aggravated felony will not be eligible for VAWA self-petition or cancellation of removal because she will be barred from establishing good moral character. She will generally be subject to deportation despite many years of residence in the U.S. or what family ties she might have here.⁶⁰ She also will be ineligible for most forms of relief from deportation.⁶¹ Immigrant victims with convictions that are considered under immigration law to be aggravated felonies, may be able to qualify for T-visa or U-visa immigration relief. The T-visa⁶² and U-visa⁶³ statutes granted discretion to DHS to waive many inadmissibility grounds based on convictions considered an aggravated felony.⁶⁴

1. *Helping Victims Accused of Self Defense/Assault*

Crimes of violence: A conviction for a crime of violence with a sentence of one year or more is an aggravated felony.⁶⁵ If an immigrant victim is convicted of domestic violence, assault, or an aggravated felony and sentenced to one year or more, even if all or part of her sentence is suspended, her conviction will be treated as an aggravated felony under immigration law.

Self-Defense/Assault: Self-defense generally refers to the use of force to protect oneself, one's family or one's property from a real or threatened attack. Generally, an individual is justified in using reasonable force, or force that is proportionate to the force or threat received or reasonably perceived. If the force used, however, is greater than that which was received, the force will not be considered self-defense and may be considered an assault.

An assault is defined as the intentional unlawful touching of another; intentionally placing another in understandable fear of receiving a physical injury; or intentionally, knowingly, or recklessly causing physical injury to another.⁶⁶ While a simple assault is not considered a crime of moral turpitude,⁶⁷ an aggravated assault,⁶⁸ or an assault with a sentence of one year or more would be considered an aggravated felony, thus triggering the immigration consequences described above.

Immigrant victims who have not committed crimes, but rather were acting in self-defense can be charged with crimes of violence or assault. This is particularly true for victims of domestic violence perpetrated by a family

⁶⁰ If she is a lawful permanent resident, or was admitted as a refugee, she will be entitled to a hearing before an immigration judge, but otherwise, she can be subject to an administrative order of removal with virtually no right to appeal.

⁶¹ Katherine Brady & Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility Related to Crimes*, (2003), at http://www.fdo.org/pdf/lib/GroundsofDeport_Inadmiss.pdf.

⁶² INA § 212(d)(13); 8 U.S.C. 1182(d)(13) (1996); "A principle or derivative applicant, who is or becomes inadmissible under section 212(a) of the INA, will not be eligible for a T-nonimmigrant status unless the ground of inadmissibility is waived by the service." An alien should apply for a waiver on form I-192 *Application for Advance Permission to Enter as a Nonimmigrant*. The Service has authority to waive many grounds of inadmissibility under INA § 212(d)(3)(B); however, these waivers are discretionary not automatic. See T-visa Inadmissibility Waiver, 67 Fed. Reg. 4789 (Jan. 31, 2002) (to be codified at 8 C.F.R. 214.11).

⁶³ INA § 212(d)(14); 8 U.S.C. 1182(d)(14) (1996); "(INA § 212(d), 8 U.S.C. 1182(d) is amended), to provide for a waiver of inadmissibility if the Secretary of Homeland Security determines that such a waiver is in the public or national interest." See U-visa Inadmissibility Waiver, 72 Fed. Reg. 53,015 (Sept. 17, 2007) (to be codified at 8 C.F.R. pt. 214(1)(a)(3)).

⁶⁴ It is important to note that aggravated felony convictions can make a victim inadmissible and lead DHS to decide that she does not have "good moral character." Immigrant victims applying as VAWA self-petitioners, VAWA cancellation and VAWA suspension applicants and as T-visa applicants must prove good moral character. Aggravated felony convictions can severely limit an immigrant victim's ability to attain VAWA, T or U-visa immigration relief. It is best to help immigrant victims avoid such convictions. However, immigrant victims may seek help from advocates and attorneys who in the past before seeking your help entered pleas to convictions that are considered aggravated felonies.

⁶⁵ A crime of violence includes any offense that has the use, attempted use, or threatened use of force as an element of the offense, as well as any felony that by its nature presents a substantial risk that force will be used against a person or property in the commission of the offense. 18 U.S.C. § 16.

⁶⁶ Model Penal Code § 211.1(1)

⁶⁷ Model Penal Code § 211.1(1) defines a person as guilty of simple assault if he: "a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or b) negligently causes bodily injury to another with a deadly weapon; or c) attempts by physical menace to put another in fear of imminent serious bodily injury"

⁶⁸ Model Penal Code § 211.1(2) defines a person as guilty of aggravated assault if he: "a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon"

The Criminal Justice System and Immigrant Victims

member or intimate partner. It can also occur when an immigrant victim acted in self-defense to try to stop the sexual assault. Thus, advocates and attorneys should work with both prosecutors and defense attorneys to have the charges dropped and should inform them about the potential immigration consequences of a conviction for the crimes of violence or assault.

E. General Exceptions and Waivers for Criminal Convictions

The crime of moral turpitude ground of inadmissibility that applies to most immigrants seeking lawful status (such as VAWA self-petitions, U and T Visas holders, and applicants for lawful permanent residency through adjustment of status) provides two exceptions and a waiver. These exceptions and waivers can remove a crime of moral turpitude as a legal bar to obtaining lawful status.

1. *Examples of Exceptions and Waivers*

The Petty Offense Exception

The petty offense exception applies to immigrants (including immigrant victims of domestic violence and sexual assault) who committed only one crime, as long as the maximum penalty for the crime does not exceed one year, and the immigrant victim was not sentenced to a term of imprisonment of more than six months (including time suspended).⁶⁹

The Juvenile Exception

The juvenile exception applies to immigrants (including immigrant victims of domestic violence and sexual assault) if the immigrant committed the crime when the immigrant was under 18 years old and was released from confinement more than five years before filing for an immigration benefit or admission to the United States.⁷⁰

The Extreme Hardship Waiver

Immigrants with convictions for crimes involving moral turpitude, prostitution, or one conviction of simple possession of 30 grams or less of marijuana (but not other drug crimes) may qualify for a waiver of inadmissibility under INA § 212(h). Normally the applicant must establish extreme hardship to a U.S. citizen or permanent resident spouse, parent, or child to qualify. Battered immigrant VAWA self-petitioners are eligible for the waiver if they can establish extreme hardship to themselves.⁷¹

F. Waivers Specific to Immigrant Victim Relief

1. *Violence Against Women Act Immigration Relief Cases*

Congress recognized that battered immigrant can have a criminal conviction despite being a victim of abuse. Congress in the legislative history of VAWA 200 stated their intent:

“The legislation also grants the Attorney General the discretion to waive certain bars to immigration relief for qualified applicants. For example, battered immigrant women acting in self-defense are often convicted of domestic violence crimes. Under the 1996 immigration law, they became deportable and are denied relief under the Violence Against Women Act. The Attorney General will be able to use the waiver authority to help battered immigrants who otherwise qualify for relief.”⁷²

Congress also stated:

“[Sec. 1505. Offering Equal Access to Immigration Protections of the Violence Against Women Act of 1994 for All Qualified Battered Immigrant Self-Petitioners] Grants the Attorney General the authority to waive certain bars to admissibility or grounds of deportability with respect to battered

⁶⁹ INA § 212(a)(2)(A)(ii)(II); 8 U.S.C. 1182(a)(2)(A)(ii)(II) (1990).

⁷⁰ INA § 212(a)(2)(A)(ii)(I); 8 U.S.C. 1182(a)(2)(A)(ii)(I) (1990).

⁷¹ No waivers are available for the crimes of murder or torture, INA §212(h); 8 U.S.C. 1182(h) (2000).

⁷² Vol. 146, No. 126 Congressional Record. Trafficking Victims Protection Act of 2000—Conference Report, Page S10169, S10170, (Senate-October 11, 2000)

The Criminal Justice System and Immigrant Victims

spouses and children. New Attorney General waiver authority granted (1) for crimes of domestic violence or stalking where the spouse or child was not the primary perpetrator of violence in the relationship, the crime did not result in serious bodily injury, and there was a connection between the crime and the abuse suffered by the spouse or child; (2) for misrepresentations connected with seeking an immigration benefit in cases of extreme hardship to the alien (paralleling the AG's waiver authority for spouses and children petitioned for by their citizen or lawful permanent resident spouse or parent in cases of extreme hardship to the spouse or parent); (3) for crimes of moral turpitude not constituting aggravated felonies where the crime was connected to the abuse (similarly paralleling the AG's waiver authority for spouses and children petitioned for by their spouse or parents); (4) for health related grounds of inadmissibility (also paralleling the AG's waiver authority for spouses and children petitioned for by their spouse or parent)⁷³

To help reduce the impact of criminal convictions, victims who are not the principal perpetrators of violence may be eligible for a waiver of deportation⁷⁴ for domestic violence or stalking crimes, if:

- the alien was acting [in] self-defense;
- the alien was found to have violated a protection order⁷⁵ intended to protect the alien; or
- the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime –
 - that did not result in serious bodily injury; and
 - where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty⁷⁶

These waivers are only available to victims, when the victim and the perpetrator have one of the following relationships:

- current or former spouse;
- parties who share a child in common;
- parties who are cohabiting or have cohabited as intimate partners;
- relationships covered by the state domestic violence or family violence laws of the jurisdiction in which the offense occurs; or
- any other relationship covered by the domestic or family violence laws of the United States, any state, an Indian tribal government or a unit of local government.⁷⁷

Victims of many, but not all, forms of non-intimate partner sexual assault may be able to qualify for this domestic violence victim waiver if they have been arrested or convicted of domestic violence, stalking, or violation of a protection order. Examples of the types of victims who could avail themselves of this waiver include victims whose relationship with their sexual assault perpetrator⁷⁸ is:

- father-in-law or mother-in-law
- uncle or aunt;
- cousin;

⁷³ Vol. 146, No. 126 Congressional Record. Trafficking Victims Protection Act of 2000—Conference Report, Page, S10195, (Senate-October 11, 2000)

⁷⁴ Crimes of domestic violence, stalking, child abuse, or a violation of a protection order may be waived as grounds of removability. See INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E) (*crimes*) and INA § 237(a)(7), 8 U.S.C. § 1227(a)(7) (*waiver*).

⁷⁵ Statutes and case law in virtually every jurisdiction that has addressed the issue state that the protection order is between the court and the abuser. Victims cannot be convicted of violating a protection order issued to protect them. See e.g. Ohio v. Lucas 795 N.E.2d 642, 647 (OH 2003); Cole v. Cole, 556 N.Y.S.2d 217, 219 (Fam. Ct. 1990); See also Catherine E. Klein and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1114-17 (1993). Under 18 U.S.C. § 2262 (2000), an interstate violation of any protective order risking threats of violence or harassment would also qualify. See also Chapter 14 of this Manual "Protection Orders for Immigrant Victims of Sexual Assault."

⁷⁶ INA § 237(a)(7)(A); 8 U.S.C. 1227(a)(7)(A) (2000).

⁷⁷ INA § 237(a)(2)(E)(i); 8 U.S.C. 1227(a)(2)(E)(i) (2000).

⁷⁸ For a more complete discussion of the relationships covered by state protection order statutes see Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women*, 21 HOFSTRA L. REV. 801, 814-842 (1993) (describing the range of relationships covered by state protection order statutes). ABA Commission on Domestic Violence, Domestic Violence Civil Protection Orders by State, http://www.abanet.org/domviol/docs/DV_CPO_Chart_8_2007.pdf

The Criminal Justice System and Immigrant Victims

- parent or step-parent;
- sibling or step-sibling;
- same sex intimate partners;
- grandparents;
- dating relationships; and
- former unrelated household members.
- relationships covered by the state domestic violence or family violence laws of the jurisdiction in which the offense occurs; or
- relationships that are covered by the state protection order statute.

Victims of non-intimate partner sexual assault are eligible for these waivers only to the extent that the relationship with the perpetrator fits into one of these categories.

VAWA applicants may also be eligible for a specified range of inadmissibility waivers.⁷⁹ DHS has the discretion to grant waivers for VAWA self-petitioners who are inadmissible because of a criminal conviction that qualifies as a crime of moral turpitude, multiple convictions, or a prostitution conviction.⁸⁰ Waivers are also available to those who have been granted immunity through a criminal prosecution and those who have certain drug convictions.⁸¹ In addition to obtaining an inadmissibility waiver, VAWA self-petitioners must also demonstrate good moral character.⁸² DHS generally adjudicates good moral character in a particular case in line with whether or not the self-petitioner qualifies for a waiver, with the decision on inadmissibility generally guiding the good moral character adjudication. However, DHS has the discretion to make adverse determinations of good moral character independent of the waiver qualification.⁸³ As such since many VAWA self-petitioners will also qualify to file U-visa application, VAWA self-petitioners who could have problems proving good moral character should consider filing a U-visa application and seek an inadmissibility waiver as part of her U-visa case so that they may be granted lawful immigration status without having to prove good moral character.

2. *Assisting Immigrant Victims Who Have Pending Criminal Cases Filed Against Them*

Advocates and attorneys should work with the immigrant victim and her defense attorney to ensure that the defense attorney consults with an immigration expert on immigration law and crimes. A list of resources is provided at the end of this chapter. Advocates and attorneys should also work with the local prosecutor's office to try to convince the prosecutor to drop or reduce charges where appropriate. **The advocate or attorney should provide the following type of information and evidence:**

- **For sexual assault by a non-intimate partner:** Advocates and attorneys should provide evidence that an immigrant victim's crimes were in response to violence by the perpetrator, related to efforts to escape, or otherwise connected to the sexual assault. Such evidence may convince a prosecutor that prosecuting an immigrant victim for crimes connected to the sexual assault she has suffered may not be in the interests of justice.
- **For assault by an intimate partner:** Provide the prosecutor with information about the relationship between the perpetrator and victim, including any documented evidence of assault the victim can obtain (medical records, witness statements, photographs, protection orders) to establish the history of domestic violence in the relationship. This will help demonstrate that any offense the victim may

⁷⁹ See *wavers and exceptions* at INA § 204(a)(1)(C), 8 U.S.C. § 1154(a)(1)(C) (good moral character as a discretionary matter); INA § 212(h), 8 U.S.C. § 1182(h) (discretionary waiver for marijuana possession); INA §§ 212(d)(13) & (14), 8 U.S.C. §§ 1182(d)(13) & (14) (discretionary waiver if in the national or public interest); INA § 237(a)(7), 8 U.S.C. § 1227(a)(7) (waiver for acts of self-defense and acts resulting from extreme cruelty); INA § 237(a)(2)(A)(V); 8 U.S.C. § (a)(2)(A)(V) (may deport for failure to register as a sex offender).

⁸⁰ INA § 212(h), 8 U.S.C. § 1182(h); INA § 237(a)(7); 8 U.S.C. § 1227(a)(7).

⁸¹ INA § 212(h), 8 U.S.C. § 1182(h)

⁸² INA § 101(f), 8 U.S.C. § 1101(f).

⁸³ Yates, William. Determinations of Good Moral Character in VAWA-Based Self-Petitions. United States Citizenship and Immigration Services, January 19, 2005.

The Criminal Justice System and Immigrant Victims

have committed occurred under duress or in self-defense, and thus she should not be charged. These offenses need not be limited to violent crimes, and could include non-violent offenses like shoplifting, which the victim may have been coerced to do by the perpetrator, or merely to survive.

If the prosecutor does not agree to drop the charges, the defense attorney and advocate should try to convince him/her to continue the criminal case for a specific period of time without any finding or admission. If there are no new criminal acts by your client after that time period has passed, request the prosecutor dismiss the case. If the victim will pursue this approach it is very important that this be structured as a continuance, rather than as a pre or post-trial diversion program which may require a victim to stipulate to a finding or an admission that will be used against her should another violent incident occur during the one year period. Any pretrial agreement that requires a finding or admission is considered a conviction for immigration law purposes and can form the basis for DHS initiating a removal action against the victim either now or at sometime in the future.⁸⁴

If none of the above suggestions are effective, work with the immigrant client to convince her defense attorney to take the case to trial rather than enter a plea.⁸⁵ **A defense attorney who is not aware of the immigration consequences of entering a plea may advise the client that this is the best option for her because she may avoid going to jail by doing so. In many cases, however a guilty or no-contest plea may make the immigrant victim deportable or otherwise have negative ramifications in her U visa or VAWA case, as well as her accessibility to lawful permanent residency.** It is important that the defense attorney understand the immigration consequences before advising an immigrant to enter a plea.

The defense attorney may still decide that going to trial is not a good option due to the circumstances of the case and that the immigrant should enter a plea. If a plea agreement is the best option, the defense attorney should consult an attorney with expertise in immigration law and crimes for assistance in deciding on a plea to a charge that will not have immigration consequences, or to a charge for which an immigration waiver or exception is available, if these alternatives are possible.

3. Use of Interpreters⁸⁶

Advocates, attorneys, police, prosecutors, courts and health care professionals should use qualified interpreters and ensure that systems that encounter limited English proficient victims and witnesses employ the qualified interpreters in collecting evidence. Many immigrant victims of sexual assault and domestic violence who cannot speak English encounter justice, health care and social services personnel who do not have the capacity to effectively communicate with them in their native language. Police officers who do not employ qualified interpreters often communicate at the crime scene with those who do speak English. This can include the victim's abuser, crime perpetrator, or the abuser or perpetrator's friends and family members. In a survey conducted among battered immigrant Latinas in Washington, D.C., 31% of the victims who called the police for help stated that when the police officers arrived on scene, they spoke to other individuals rather than the victim herself.⁸⁷ Additionally, 11% stated that police officers only spoke to the abusers.⁸⁸

When law enforcement officials take detailed statements from limited English proficient victims without the assistance of a qualified interpreter they can undermine the success of any criminal prosecution based upon those statements. Although the victim in her native language relates exactly the same story factually about a rape to the police who arrive at the scene and to court on the witness stand, the two accounts may appear to be inconsistent because the police failed to use a qualified interpreter when taking the victim's statement. Differences in the victim's statements that were the result of failure to use qualified interpreters may be used

⁸⁴ Ann Benson and Jonathan Moore, Practice Advisory on Representing Noncitizens Accused of Misdemeanor Assault Offenses – Both DV and Non-DV Cases- Under RCW 9A.36.041, 24, 27(Washington Defenders Association, February 2007).

⁸⁵ However, it is important to note that for some undocumented immigrants, staying out of jail may be the most paramount concern, as this is where they are most likely to risk apprehension by immigration authorities. Thus, this factor should be taken into account if trial is likely to result in jail time.

⁸⁶ See Chapter 2 of this manual and www.lep.gov for more information.

⁸⁷ Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 71 (2003) (citing the Ayuda Inc. research project).

⁸⁸ *Id.*

The Criminal Justice System and Immigrant Victims

by the perpetrator's defense attorney during cross-examination of the victim to undermine the credibility of the victim's testimony and can create difficulties for the prosecution to obtain a conviction of the perpetrator.

Any criminal prosecution must be based upon witness statements taken using qualified interpreters that assure the accuracy of the statements made from the initial evidence collected to all later testimony. Qualified interpreters assure that evidence presented by limited English proficient victims and witnesses is given the same value and the same opportunity to be judged as credible and to avoid bias as evidence presented by English speakers. When a victim advocate is present⁸⁹ law enforcement officials may request that the advocate interpret the communication between the law enforcement agent and the victim. Advocates must **not** interpret for police and should urge police to secure the assistance of a qualified and unbiased interpreter. Advocates, friends, witnesses or family members who interpret instead of trained qualified interpreters can create significant problems that can undermine the victim's credibility and the government's ability to prosecute the perpetrator.⁹⁰

An advocate or attorney should recognize that he or she is the immigrant victim's most important ally during any criminal prosecution. It is important for the immigrant victim to stay in close contact with her defense attorney, victim-witness advocate, and the prosecutor handling her case. The advocate or attorney should provide her with support by accompanying her to all hearings. It is not easy to protect an immigrant victim from the immigration consequences of a criminal charge, but the likelihood of deportation is minimized when knowledgeable and sympathetic advocates and attorneys become involved.

4. U-Visa Cases

For inadmissibility based on criminal convictions and most grounds of inadmissibility, a waiver is available for U-visa applicants if DHS determines that granting the applicant the waiver is in the public or national interest.⁹¹ Waivers are not available for those who have committed Nazi persecution, genocide, or an act of torture or extra judicial killing.⁹² Those who have committed violent or dangerous crimes and security-related crimes will only be granted waivers for extraordinary circumstances.⁹³ When preparing to file a U-visa, the applicant must request the waiver and submit documents to support the grant of such waiver.⁹⁴

5. T-Visa Cases

T visa applicants are also eligible for waivers of inadmissibility based on criminal convictions.⁹⁵ Given the nature of human trafficking, it is likely that a trafficking victim has been forced or coerced into an activity that led to a criminal conviction. It is also extremely likely that if she were under her trafficker's control, she would not have been able to access a criminal defense attorney unaffiliated with her trafficker. Waivers are available for T-visa applicants with most criminal convictions if it is in the national interest to do so and the facts leading to inadmissibility were caused by or incident to the trafficking.⁹⁶

III. Law Enforcement Response: What is the Likelihood That Immigrant Victims of Sexual Assault Who Call the Police Will Be Reported to Immigration Authorities?

A. Working with Law Enforcement

⁸⁹ This can happen, for example, in trafficking cases with a large number of victims.

⁹⁰ Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 76 (2003)

⁹¹ INA § 212(d)(14), 8 U.S.C. § 1182(d)(14)

⁹² INA § 212(d)(14), 8 U.S.C. § 1182(d)(14).

⁹³ 8 C.F.R. § 212.17(b)(2).

⁹⁴ 8 C.F.R. § 212.17 (a) and 8 C.F.R. § 214.14 (c)(2)(iv)

⁹⁵ INA § 212(d)(13), 8 U.S.C. § 1182(d)(13).

⁹⁶ INA § 212(d)(13), 8 U.S.C. § 1182(d)(13).

The Criminal Justice System and Immigrant Victims

Immigrant victims of sexual assault face multiple barriers when trying to access services after a sexual assault or domestic violence incident.⁹⁷ Immigrant victims are often afraid to call the police for many reasons: fear of deportation; fear of retribution from their partners or victimizers; fear of being arrested themselves; fear of being separated from their children; fear that police will report them to immigration authorities; fear of future economic, social, cultural, or employment-related repercussions of having publicly exposed the facts of their having been sexually assaulted; and negative experiences with the police in their home countries.⁹⁸ These barriers preclude many immigrant victims of sexual assault from seeking the help they need to escape from an abusive intimate partner or report a sexual assault by a non-intimate partner. The barriers become even more pronounced when the perpetrator is a U.S. citizen or permanent resident, and the victim does not have permanent immigration status.⁹⁹

In many cases, the most difficult hurdle for immigrant victims is the fear of being reported to immigration officials by police.¹⁰⁰ Local police officers may inquire into the immigration statuses of immigrant victims of crimes.¹⁰¹ The Supreme Court has held that an individual's immigration status can be inquired into without first establishing some independent reasonable suspicion.¹⁰² There is no exception for those who are victims.

However, under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) and current federal law, police officers are not required to inquire into or report the immigration status of crime victims who call for help.¹⁰³ However, IIRAIRA does allow the Attorney General to enter into agreements with state or local law enforcement to delegate to specially trained police officers the authority to enforce federal immigration laws.¹⁰⁴ The Anti-Terrorism and Effective Death Penalty Act of 1996 provides state and local police, if authorized by state law, with limited authority to arrest non-citizens in the U.S. when the non-citizen is present illegally and has previously been convicted of a felony and was deported or left the U.S. after such a felony conviction.¹⁰⁵

Advocates and attorneys working with immigrant victims should learn the police practices in their local jurisdiction. Advocates and attorneys should investigate whether or not there is a 287(g)¹⁰⁶ agreement between DHS and their local law enforcement agency. If there is no such agreement, investigate the practices of local

⁹⁷ See generally Sandra D. Pressman, *The Legal Issues Confronting Conditional Resident Aliens Who are Victims of Domestic Violence: Past, Present, and Future Perspectives*, 6 Md. J. Contemp. Legal Issues 129 (1995); Mary Ann Dutton 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, 249-253 (2000); Leslye E. Orloff and Dave Nomi, *Identifying Barriers: Survey of Immigrant Women and Domestic Violence in the DC Metropolitan Area*, Poverty and Race 9-10 (Jul/Aug 1997); Mary Ann Dutton and Giselle Aguilar Hass, *Use of Expert Testimony Concerning Battering and Its Effects on Immigrant Women*, in *Domestic Violence and Immigration: Applying the Immigration Provisions of the Violence Against Women Act: A training Manual for Attorneys and Advocates*, Appendix C (2000); Leslye E. Orloff and Rachel Little, *Somewhere to Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women*, A 'How To' Manual for Battered Women's Advocates and Service Providers 279 (May 1999); Leti Volp, *WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE* 16-20 (1995); Catherine Klein and Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1019 (1993).

⁹⁸ Leslye E. Orloff, et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 55 (2003).

⁹⁹ *Id.* See generally Giselle Aguilar Hass, Nawal Ammar, and Leslye Orloff, *Battered Immigrants and U.S. Citizen Spouses*, 4-7, (April 2006)

¹⁰⁰ *Id.* See also, Mary Ann Dutton, 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, 251-56 (2000).

¹⁰¹ See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 302 (2005-2006).

¹⁰² *Muehler v. Mena*, 544 U.S. 93, 101 (2005).

¹⁰³ INA § 287(g), 8 U.S.C. § 1357(g) (1996). (Allows state/local law enforcement to "perform functions of immigration officer." In performing this function they are required to "[h]ave knowledge of, and adhere to" federal immigration laws. This requires that § 287 appointed officers to enforce, follow and comply with all, not only some, federal immigration laws. Thus, § 287 officers are to comply with the protections offered by VAWA confidentiality in the same manner as all other DHS employees.

¹⁰⁴ INA § 287(g), 8 U.S.C. § 1357(g) (1996). Section 287(g)(10) further states that this section does not require states or municipalities to seek a similar agreement to allow their employees to report undocumented immigrants or otherwise cooperate with the immigration authorities.

¹⁰⁵ The police officer must obtain confirmation from immigration officials of the status of such an individual and may keep the individual in custody only as long as necessary for immigration officials to take the person into federal custody for removal. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 § 439 8 U.S.C. § 1252(c) (1996).

¹⁰⁶ INA § 287(g), 8 U.S.C. § 1357(g) (1996). For a list of which jurisdictions have 287(g) agreements with DHS visit: http://www.ice.gov/partners/287g/Section287_g.htm.

The Criminal Justice System and Immigrant Victims

law enforcement and whether police routinely inquire into and report to DHS the immigrant status of crime victims and/or witnesses. When local police inquire about immigration status of victims, immigrant victims will be unlikely to want to choose to report crime victimization and the potential for reporting needs to be taken into account when safety planning with immigrant victims.

Some police officers, prosecutors, and judges have misinterpreted these sections to justify their voluntary decisions to inquire into the immigration status of crime victims and have reported victims to immigration authorities.¹⁰⁷ When this occurs, it can become very difficult to bring criminals to justice, because victims of crime will be afraid to come forward out of fear of deportation. Furthermore, when police officers inquire into the immigration status of crime victims, the police may also inadvertently affect the community relations between police departments and immigrant communities.

Addressing immigrants' fears about calling the police is essential to the safety of victims, their children and our communities, and is critical to advocate effectively for an immigrant victim of sexual assault who may be eligible for U-visa or VAWA immigration relief. Furthermore, when an immigrant who calls the police for help is turned into the immigration authorities, word spreads quickly in that immigrant community.¹⁰⁸ As a result, immigrant victims of crimes are silenced and will be afraid to call the police and report crimes.

The U visa was created to facilitate investigation and prosecution of criminal activity and to simultaneously expand access to immigration relief and other help for immigrant crime victims.¹⁰⁹ The purpose of this legislation was to:

“create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking and other crimes ... committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.”¹¹⁰

Congress specifically found that the U Visa is:

“for victims of certain serious crimes that tend to target vulnerable foreign individuals without immigration status if the victim has suffered substantial physical or mental abuse as a result of the crime, the victim has information about the crime, and a law enforcement official or a judge certifies that the victim has been helpful, is being helpful, or is likely to be helpful in investigating or prosecuting the crime. The crime must involve rape, torture, trafficking, incest, sexual assault, domestic violence, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, attempt or conspiracy to commit any of the above, or other similar conduct in violation of Federal, State, or local criminal law.”¹¹¹

To qualify for a U visa, the applicant must have information about the crime, and cooperate with law enforcement and the courts to investigate or prosecute the applicant's crime perpetrator.¹¹² The applicant must also obtain a certification from a federal or state official responsible for “detecting, investigating, prosecuting, convicting or sentencing criminal activity.”¹¹³ In the certification the federal or state official attests to the fact that the applicant has been helpful, is being helpful, or is likely to be helpful in the prosecution or investigation

¹⁰⁷ Leslye E. Orloff, et al., *Battered Immigrant Women's Willingness to call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 88 (2003).

¹⁰⁸ Mary Ann Dutton, 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, 251-6 (2000).

¹⁰⁹ H.R. REP. No. 106-939, at 73 (2000) (Conf. Rep.).

¹¹⁰ H.R. REP. No. 106-939, at 73 (2000) (Conf. Rep.).

¹¹¹ Vol. 146, No. 126 Congressional Record. Trafficking Victims Protection Act of 2000—Conference Report, Page S10196, (Senate-October 11, 2000)

¹¹² INA § 101(a)(15)(U)(i)

¹¹³ INA § 214(p)(1); 8 U.S.C. 1184(p)(1)

The Criminal Justice System and Immigrant Victims

of the crime and will state what state or federal law was violated.¹¹⁴ To obtain certification and to be able to file a U-visa case immigrant victims must come forth, report and be willing to help law enforcement in the investigation or prosecution of the perpetrator of criminal activity.

This requirement can be burdensome for sexual assault victims who may have great difficulty reporting rape and sexual assault crimes to law enforcement. Rape is the least reported, least indicted and least convicted felony in U.S. Only 16-32% of rape victims report the crime to law enforcement and only 5% of college victims report.¹¹⁵ When victims have found the courage to come forward and report rape, approximately 25% of the reports result in an indictment.¹¹⁶ This means approximately 75% of the rapes reported to law enforcement are never prosecuted.¹¹⁷

The law enforcement system expects victims to report sexual assault within days of the assault.¹¹⁸ However, trained legal decision-makers view “late” complaints as less credible and are less likely to seek serious sanctions against the assailant.¹¹⁹ Most victims, however, are not prepared emotionally to deal with the requirements of the legal system until months have passed after the assault.¹²⁰ This is particularly true of immigrant crime victims whose access to help and healing after sexual assault can be hampered by language and acculturation issues.

After the initial crisis stage has passed (usually three to six months after the assault), victims are more prepared to think about seeking legal remedies and confronting the assailant. Victims must first find an advocate or attorney to help them. Those who have successfully secured support from victim services providers and others are more able come forward and report sexual assault and rape. Effective communication between the victim, her advocate and attorney, police, and prosecutors often also needs to include the services of a qualified interpreter. Crime victims, particularly those who do not speak English or Spanish may not have been able to report crimes to police because the police fail to obtain language interpreters at the crime scene in contradiction to Title VI of the Federal Civil Rights Act’s requirements.¹²¹

When immigrant victims of sexual assault do report criminal activity, sometimes the prosecutors may choose to prosecute another crime. In these instances an immigrant victim may prefer to cooperate with law enforcement about the other crime and not report the sexual assault to avoid the vulnerability of being exposed to stigma in her community as a sexual assault victim. The U-visa does not require any specific timing of reporting of crime victimization. The statute was designed to consider the time an immigrant victim may need to find the support she needs to report a crime. Prosecutors may alternatively seek the victim’s cooperation on another criminal activity rather than the sexual assault which may also be less retraumatizing.

When an immigrant victim is not ready to take immediate legal action against the perpetrator, it is imperative that she file some type of formal report about the assault as soon as possible. Most police departments, school administrators, and employers recognize this and will prepare a formal incident report, but take no further action without the victim’s consent. Officers taking these police reports should be encouraged to sign certifications verifying that the individual is a crime victim and that the victim has been and is being helpful in a criminal investigation or prosecution.

¹¹⁴ Id.

¹¹⁵ U.S. Department of Justice, National Institute of Justice, *Sexual Victimization of College Women* (2000); U.S. Department of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey* (1994); D.G. Kilpatrick, C.N. Edmunds, & A.K. Seymour, *Rape in America: A Report to the Nation*. Arlington, VA, National Center for Victims of Crime; Charleston SC, Medical University of South Carolina (April 1992).

¹¹⁶ Cassia Spohn & Julie Horney, *Rape Law Reform: A Grassroots Revolution and Its Impact*, at 73, New York, Plenum (1992).

¹¹⁷ Susan H. Vickers, et al. “Beyond the Criminal Justice System, Transforming Our Nation’s Response to Rape” (Victim Rights Law Center, 2003). P. 1-2; p. 1-5 (“Like other kinds of criminal predators, these rapists are also adept at identifying vulnerable women; women who are least likely to fight off an assault, least likely to scream, and least likely to report the crime once it has been committed.”)

¹¹⁸ Susan H. Vickers, et al. “Beyond the Criminal Justice System, Transforming Our Nation’s Response to Rape” (Victim Rights Law Center, 2003). p. 1-15

¹¹⁹ Id at 26.

¹²⁰ Id.

¹²¹ 42 U.S.C. § 2000d (1964); Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000). See also Chapter 2 of this Manual “Ensuring Language Access to Immigrant Victims of Sexual Assault”

The Criminal Justice System and Immigrant Victims

Advocates, attorneys and law enforcement should collaborate to conduct trainings designed to improved police and prosecutors understanding of the role U-visas can play in helping an immigrant victim come forward to report criminal activities. These trainings should highlight how fear that law enforcement and crime perpetrators reporting victims to DHS and fear of deportation silence crime victims and keep them from reporting crimes. This is true even for victims who are eligible for legal immigration status through U-visas, T-visas and VAWA self-petition or cancellation often because victims do not know that they are eligible for immigration relief and protection from deportation. When immigrant victims are afraid to come forward, it can be very difficult to bring criminals to justice. To properly address the fears of immigrant victims of sexual assault, advocates and attorneys should develop good working relationships with the police, prosecutors, and judges in their communities. They should work with the justice system personnel on protections established for immigrant victims. Police, prosecutors, judges and advocates should work together to assure that perpetrators are held accountable for their criminal conduct without regard to the immigration status of the victim.

In some instances sexual assault victims are victims of human trafficking. Trafficking victims face unique challenges in working with law enforcement. Trafficking victims often do not identify themselves as trafficking victims or even understand the concept of human trafficking. Victims also experience extreme coercion and control by their traffickers and consequently distrust law enforcement. They are very unlikely to be forthcoming about their experience of exploitation. Law enforcement may then not identify these individuals as trafficking or crime victims. When a trafficking enforcement action is being undertaken victims are ideally given early access to non-governmental organization¹²² victim advocates to identify potential trafficking victims. It is critical that advocates work closely with law enforcement so that law enforcement and advocates can both effectively screen to identify trafficking victims. It is critical that law enforcement establish protocols for early referrals to service providers who may be more likely to develop trusting relationships with trafficking victims that will support victims in coming forward to cooperate in investigation or prosecution of traffickers. Early identification of trafficking victims is essential because trafficking victims are eligible for alternative release from immigration detention.

B. Department of Homeland Security Enforcement Actions

When immigrant victims of rape, sexual assault, and trafficking take steps to leave an abusive family member or employer, the likelihood of further abuse increases significantly.¹²³ Similarly the danger of retaliation from a rapist, trafficker or sexual assault perpetrator is highest when the victim is cooperating with law enforcement official in a criminal investigation or prosecution.¹²⁴ When the crime victim is a non-citizen the abuser or the crime perpetrator has another weapon often effectively used to silence victims-- threats of deportation and calls to DHS seeking arrest and deportation of the victim.¹²⁵

¹²² Non-Governmental Organization

¹²³ Daniel G. Saunders, . Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns 4 (VAWNET, Revised 2007); See generally, Thoennes, N., & Tjaden, P. (2000). *Full report of the prevalence, incidence, and consequences of violence against women: Findings from the National Violence Against Women Survey*. NCJ 183781, November 2000, Research Report. Available at <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm>; Hardesty, J. L., & Chung, G. H. (2006). Intimate partner violence, parental divorce, and child custody: Directions for intervention and future research. *Family Relations*, 55, 200–210; Saunders, D. G., & Browne, A. (2000). Intimate partner homicide. In R. T. Ammerman & M. Hersen (Eds.), *Case studies in family violence* (2nd ed.). New York, NY: Plenum.

¹²⁴ Sarah Buel, *Witness Tampering*, Sexual Assault Family Violence Investigator Course, On the Scene Vol 2 Issue 2 June 2007 page 1; Regarding perpetrators use of the justice system to continue harassment of and contact with victims see, G. Saunders, Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns 5 (VAWNET, Revised 2007); Bancroft, L., & Silverman, J. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. Thousand Oaks, CA: Sage; Hardesty, J. L., & Ganong, L. H. (2006). A grounded theory model of how women make custody decisions and manage co-parenting with abusive former husbands. *Journal of Social and Personal Relationships*, 23, 543-563.

¹²⁵ Immigration related abuse includes threats of deportation, threats report the victim to immigration authorities, threats to withdraw and to refuse to file immigration papers on the victim's behalf. Immigration related abuse is 10 times more likely in a relationship that is sexually and/or physically abusive than in psychologically abusive relationships. It coexists with or predicts escalation to physical or sexual violence. Mary Ann Dutton, Leslye E. Orloff & Giselle Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, Geo J. on Poverty L. & Pol'y, VII No. 2, 1-53 (Summer 2000). National Institute of Justice funded research among immigrant women has found that

The Criminal Justice System and Immigrant Victims

Prior to 2006 when DHS received additional funding to step up immigration enforcement, DHS seldom responded to calls from abusers reporting victims. With greater resources devoted to immigration enforcement DHS officers are able to respond to calls for enforcement in a wider range of cases. This combined with increases in immigration enforcement actions at workplaces and related to transportation (e.g. on buses and during traffic stops) has increased the danger of detention and deportation for VAWA, T and U-visa eligible victims. Additionally, because DHS is technically a law enforcement agency and DHS actions often result in detention, many people cannot differentiate between a criminal action and an immigration enforcement action.¹²⁶ DHS enforcement actions lead to a person being assessed for immigration violations and may ultimately lead to a person's detention and processing for removal (deportation) proceedings in immigration court. A criminal arrest happens for the purpose of investigating and prosecuting a crime. These are two separate and unrelated systems.¹²⁷

The Violence Against Women Act legislation was designed to insulate immigrant victims of sexual assault, domestic violence, trafficking and other crimes from perpetrator coercion related to the victim's immigration status.¹²⁸ With increased resources in immigration enforcement it is essential that advocates and attorneys screen victims as early as possible in the case to determine whether they may be eligible to attain legal immigration status under VAWA and for red flag problems that require representation by an immigration expert.¹²⁹

Victims with red flag problems should be referred to an immigration expert immediately. All eligible victims should find assistance to apply for immigration relief as soon as possible. This will help protect them against deportation should they encounter immigration enforcement officials. Victims considering traveling to a new location within the United States should file at least a basic U-visa or VAWA application and receive a prima facie determination before traveling. Victims with VAWA, T or U-visa cases filed should carry copies of receipt notices, prima facie determinations or approval notices with them and should show these documents to any immigration officials they encounter. Victims should also be provided the name and telephone number of an immigration attorney they can call should they be stopped by immigration officials

An immigrant detained by the DHS official has the following rights under the law to:

- ◆ Be provided to a telephone to call her attorney;
- ◆ Not answer *any* questions or display any documents until her attorney is present;
- ◆ Request a hearing before an immigration judge if a DHS officer tries to deport her;
- ◆ Not sign any forms -- if she signs a form, she could be waiving her right to a hearing before being deported;

perpetrators of violence against immigrant women are reluctant to stop using these threats to intimidate crime victims. When immigrant victims of domestic violence obtain protection order against their abusers, when abusers of immigrant victims violate protection orders 63.8% of those violations are continued immigration related abuse. Nawal Ammar and Leslye Orloff, Use and Outcomes of Civil Protection Orders by Battered Immigrant Women in the U.S., Paper presentation at the 2008 Law and Society Association International Conference, Montreal, Quebec Canada May 31, 20008.

¹²⁶ In communities that have joined the 287(g) program in which local law enforcement officers enter into a memorandum of understanding with the Department of Homeland Security to undertake enforcement of immigration law, victim's ability to distinguish between the law enforcement and DHS related arrests becomes more difficult for immigrant community members and immigrant victims to discern.

¹²⁷ There have also been cases in which immigration enforcement actions lead to federal criminal prosecutions for document fraud. Obtaining VAWA, T or U visa immigration relief can be significantly more difficult for victims who are charged as defendants in these cases. Such victims should be immediately referred to an immigration lawyer with expertise on immigration, crimes and violence against women for assistance.

¹²⁸ Violence Against Women Act OF 1993 140 Cong. Rec. H2645-03 168-169 Page H10370 (House of Representatives - November 20, 1993); See Orloff, Leslye and Kaguyatan, Janice. *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 110-113 (1994)

¹²⁹ See Red Flags list in the appendix to chapter 6 "Introduction to Immigration Relief for Immigrant Victims of Sexual Assault" http://www.legalmomentum.org/site/DocServer/5_VAWARedFlags.pdf?docID=1320

The Criminal Justice System and Immigrant Victims

- ◆ Write down the name of the agency conducting the enforcement action and the name and the badge number of the officer. This information can help provide a factual history of the victim's immigration case;
- ◆ See a warrant if enforcement officers come to her home;
- ◆ Not be arrested by DHS if the victim is a U.S. citizen.

Victims also need to know that they:

- ◆ Must not give false statements and
- ◆ Should be allowed to contact their consulate

If a victim is arrested for a criminal violation and she is found to be undocumented, she will in most cases proceed through the criminal justice process. This will likely include being arraigned, having the judge set an amount for bail, and being appointed an attorney if she cannot afford one.¹³⁰ It is critical that the victim's defense attorney understand the immigration implications of a guilty plea in the case of an immigrant victim. Immigrant victims should be advised that their arrest for committing crimes or using violence¹³¹ could lead to their arrest. If they are detained in jail they can be screened for undocumented immigration status and be referred or transferred to DHS to be processed for removal proceedings. Those who serve criminal sentences and are undocumented are often immediately transferred to DHS upon serving their criminal sentences.

C. Victim as Witness

1. *Assessing the Safety of an Immigrant Victims' Cooperation in the Criminal Prosecution of their Perpetrator*

In most states, prosecutors have adopted "no-drop" policies for domestic violence in criminal cases. This allows prosecutors to proceed with a criminal case regardless of the wishes of the victim. The no-drop policy is intended to prevent perpetrators from coercing victims not to press charges or cooperate in criminal prosecutions. Some prosecutors may subpoena the immigrant victim to testify as a witness for the prosecution, although the practice of subpoenaing victims in criminal cases is not favored. While the "no-drop" policy is intended to protect victims, it poses difficult safety planning problems for victims whose abusive partner or employer is a non-citizen, since criminal convictions for domestic violence, rape, sexual assault and other crimes can lead to a perpetrator's deportation.

For some immigrant victims, deporting an intimate partner or abusive employer or family member may enhance her safety. For others, however, the deportation may increase the danger to her or her family members. Many victims are afraid to cooperate in the criminal prosecution of their partners, employers or family members because of concerns about the victim's own immigration status and economic survival, violating cultural or religious norms, or the potential increase in danger because of retaliation to themselves or their family members in the U.S. and/or abroad. It is important for advocates, prosecutors and defense attorneys to understand how each of these factors affects the safety of an immigrant victim when considering asking them to cooperate in the criminal prosecution of the perpetrator.

For many victims, concerns about her own immigration status and potential deportation drive her decision making after victimization. This is true both for domestic violence victims and for victims of sexual assault committed in the work place by a stranger or an acquaintance. Many immigrant victims of sexual assault are

¹³⁰ The immigrant victim has a right to obtain counsel in immigration proceedings; however, unlike in criminal proceedings, the government is not required to appoint and pay for an attorney for the immigrant if she cannot afford one.

¹³¹ If a victim has acted in self-defense she should tell her defense attorney about these facts and may be able to advocate to have her case dismissed.

The Criminal Justice System and Immigrant Victims

terrified of any involvement in the criminal justice system because they believe their immigration status is fully dependent on their perpetrator's immigration status. When the victim's employer is a non-citizen perpetrator of sexual assault, the perpetrator's deportation could invalidate the work visa she obtained through him. She fears being separated from her U.S. citizen children or having to take the children to a country where neither the mother nor the children can be protected from the abuser's ongoing violence including sexual assault.

Obtaining legal immigration status and work authorization through the U-Visa or VAWA without the intimate partners or employer's cooperation or knowledge removes a significant barrier to her involvement in the prosecution. Advocates and attorneys should work with the immigrant victim to explore options she may have for attaining legal immigration status independent of either her intimate partner or employer.

Victims need assistance from advocates or attorneys with training in safety planning as well as knowledge about the legal rights of immigrant victims. Advocates should understand whether immigrant victims in the community can safely call law enforcement for help without risking deportation and the role they can play to help immigrant victims safely interact with law enforcement and prosecutors and obtain their help including U-visa certification. Knowledgeable advocates and attorneys can work with the victim to answer questions, to dispel misperceptions the victim may have about her legal rights and to provide the victim with the critical support she will need with regard to the criminal prosecution or investigation

Before undertaking any detailed interview advocates and attorneys should assess the victim's language access needs. If the victim does not fluently speak, understand, read or write English, she should be offered assistance from a qualified interpreter in her native language.¹³²

Advocates and attorneys should carefully interview the immigrant victim to determine what her needs, fears, and concerns are with respect to participating in any criminal investigation or prosecution. They should also assess whether her perpetrator's prosecution and potential subsequent deportation will enhance her safety or increase the danger to her. Discuss this with prosecutors to help them decide how to proceed in a manner that will hold the abuser accountable and protect the victim's safety. The role of advocates and attorneys is especially important in this process, as defense attorneys for intimate partners may try to convince your client not to cooperate. An advocate or attorney may be the only independent source of support and information for an immigrant victim in determining how best to protect herself and her children.

If it is determined that the perpetrator's deportation would increase the danger to the victim or her family members, prosecutors need not dismiss the case against the perpetrator. Prosecutors can employ measures to hold the perpetrator accountable without leading to his deportation. In this way the court can monitor his behavior with the goal of preventing future sexual assault and other future crimes. Judges can place perpetrators on probation or compel them to enter treatment programs. First time offenders can be generally treated more leniently than repeat offenders.

2. *Rape Shield Laws*

Rape shield laws are designed to prevent the admittance of a victim's prior sexual history during a criminal prosecution for sexual assault. Since the 1970s, every state has passed Rape Shield Laws to protect sexual assault victims from being re-victimized when they testify in court.¹³³ These laws limit the use of the victim's prior sexual history as a means to undermine the credibility of the victim's testimony. By 1978, Congress enacted Rule 412 of the Federal Rules of Evidence, which states that any evidence regarding the victim's prior sexual behavior or sexual predisposition is generally inadmissible in civil or criminal cases involving alleged sexual misconduct.¹³⁴ However, over time, rape shield laws have become weakened with exceptions that result in a high risk of a victim's sexual history being exposed.¹³⁵

¹³² See Chapter 2 "Language Access, Interviewing and Safety Planning" for a more detailed discussion of victim's legal rights to language accessible assistance from advocates, attorneys, court personnel, police and prosecutors.

¹³³ The National Center for Victims of Crimes, Press Center, FAQ: Rape Shield Laws (2007), http://www.ncvc.org/ncvc/main.aspxdbID=DB_FAQ:RapeShieldLaws927.

¹³⁴ Fed. R. Evid. 412.

¹³⁵ Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51 (2002).

The Criminal Justice System and Immigrant Victims

For any rape victim, disclosing her victimization is very complicated and poses personal ramifications. The victim may have concerns over her loss of privacy or being treated as a witness rather than a victim in the criminal justice system. For some immigrant victims, cultural concerns include being shamed and ostracized by their community and/or family for their sexual activity and/or for having been sexually assaulted. Further, many immigrant victims may be wary of putting the perpetrator of the rape in criminal proceedings when he is a member of their community, and especially when he is also an immigrant who may face deportation if convicted. How an advocate or attorney should counsel the victim depends on the cultural ramifications and the personal support that the victim is receiving as well as an assessment of a victim's eligibility to access legal immigration status through VAWA or the U-Visa. A U-visa applicant is required to be helpful in the investigation or prosecution of the criminal activity. This requirement creates a challenging dilemma for undocumented victims. While providing information to law enforcement may lead to U-visa eligibility, applicants must weigh the benefit against the social stigma, safety concerns, and the potential for the perpetrator's retaliation.¹³⁶

Despite the fact that rape shield laws assist in barring the admission of a rape victims' sexual history, there are exceptions to the rules, and an advocate or attorney should counsel their client to understand those exceptions and the loss of privacy. The advocate or attorney should not only explain the process but also understand the numerous barriers an immigrant victim could face in her in her culture context. If the immigrant victim does choose to proceed with the prosecution, she should be counseled about what she is to expect and what the rape shield laws will mean for her testimony and case. This includes understanding the additional cultural and language barriers that can arise as the case moves forward. Advocates or attorneys should also work with prosecutors, their immigrant clients and trained interpreters to develop thorough pretrial testimony to diminish the potential trauma and distress of cross-examination for the victim.

3. Safety Planning

Key safety planning steps advocates and attorneys should take to enable victims to obtain immigration status include:

- Refer her to an immigration attorney to assess her eligibility for immigration relief, including relief under VAWA, the crime victim U-visa, the trafficking victim T-visa and any other immigration relief for which she may qualify.¹³⁷ If she was abused by a U.S. citizen or lawful permanent resident intimate partner, she may qualify for immigration status under VAWA.¹³⁸ If she was victimized by a non-intimate partner or an intimate partner who is not a U.S. citizen or lawful permanent resident, she may qualify for a U visa as a victim of violent crime if she is willing to cooperate in the investigation or prosecution of the perpetrator.¹³⁹ She may also qualify for a T visa if she was a victim of a severe form of trafficking and her trafficker sexually assaulted her.¹⁴⁰ If she qualifies for immigration relief, review the red flags list in the Manual¹⁴¹ to assess problems that could arise in her case and consult with an immigration expert to confirm her eligibility.
- Immediately begin preparing and file her immigration case.¹⁴²

¹³⁶ Deported perpetrators can retaliate against victims by harming family members abroad, by harming the victim if she were to travel abroad. For example, she may travel abroad to see an ailing family member, or by reenter the United States after deportation. See Karen Saunders. *Identifying and Helping Immigrant Victims of Violence Against Women*. Training for U.S. Border Patrol Department of Homeland Security San Diego Sector September 20, 2004. Slide..20-21

¹³⁷ Consult with an immigration attorney with expertise working with immigrant victims to determine the range of immigration options your client may have. See resource and TA list at the end of this Chapter.

¹³⁸ See Chapter 7 of this Manual "Preparing the VAWA Self-petition and Applying for Residence" and See also Chapter 9 of this Manual "VAWA Cancellation of Removal".

¹³⁹ For Alternative Forms of Relief for Battered Immigrants and Immigrant Victims of Crime, See also Chapter 10 of this Manual "U Visa Victims of Criminal Activity" and Chapter 12 of this Manual "Sexual Assault Survivors and Gender Based Asylum".

¹⁴⁰ See also Chapter 11 of this Manual, "Human Trafficking and the T Visa"

¹⁴¹ See Red Flags list in the appendix to chapter 6 "Introduction to Immigration Relief for Immigrant Victims of Sexual Assault" http://www.legalmomentum.org/site/DocServer/5_VAWARedFlags.pdf?docID=1320.

¹⁴² See Chapter 3 of this Manual "VAWA Confidentiality: History, Purpose and Violations VAWA Confidentiality Protections" for more information.

The Criminal Justice System and Immigrant Victims

- Identify and discuss helpful information for her immigration case. Consider using the protection order or the criminal bond or release order as a tool to require the perpetrator to provide the immigrant victim with the information she needs for her immigration case, such as proof of his U.S. citizenship or permanent resident status, turning over her passport or copies of any papers her abusive spouse or employer filed with the DHS on her or her children's behalf.
- Know that undocumented victims of sexual assault, domestic violence and many other forms of criminal activity who are willing to cooperate in an investigation or prosecution of the perpetrator's criminal activity may qualify to apply for a U visa. Advocates and attorneys should work closely with law enforcement, prosecutors, the Equal Employment Opportunity Commission personnel, state departments of labor and child abuse investigators who all can help victims by providing certifications needed in her U-visa immigration case. Victim's advocates and attorneys should confirm that these agencies will not inquire into the immigration status of crime victims or report them to immigration authorities.
- To prevent perpetrators from reporting victims to immigration authorities in retaliation for her testimony, ask the prosecutor to include in the perpetrator's pretrial release order an instruction prohibiting the defendant, or any of his agents from contacting immigration authorities.¹⁴³ If his attorney contacts immigration authorities on his behalf, urge the prosecutor to file a case against the defense attorney for witness tampering and consider filing an ethical complaint against the attorney with the appropriate bar authorities and a Rule 11 motion.¹⁴⁴

General safety planning tips for immigrant victims of sexual assault or domestic violence whose perpetrators have pending criminal cases:

Ask that any bond or release order in the criminal case contain at least the following provisions:

- Order perpetrator to stay away from the victim
- Order the perpetrator not contact or communicate with the victim either directly or through third parties
- Order perpetrator to not contact government officers with regard to or obtain information about the victim, including DHS, Internal Revenue Service, etc
- Order the police to patrol the neighborhood where the victim lives
- Order the eviction of the perpetrator if he shares a home with the
- Do not award custody of children to the perpetrator
- Order the perpetrator to pay child support

If the victim continues to reside with her partner, she should obtain a protection order that prohibits future abuse, orders the partner into treatment, and orders him not to communicate with her about the criminal case.

- Help the victim obtain a sexual assault or domestic violence civil protection order containing same provisions¹⁴⁵
- Make sure that the perpetrator is ordered to turn over any weapons in his possession.¹⁴⁶
- Help the immigrant client develop a safety plan to protect herself and her children. If she is still living with her intimate partner, make sure that she has a safe place to which to flee during the prosecution if necessary. If she is in immediate danger, encourage her to go to a shelter.

¹⁴³ See Leslye Orloff and Kathleen Sullivan (Editors), *Breaking Barriers: A Complete guide to Legal Rights and Resources for Battered Immigrants*, Appendix 5.3.

¹⁴⁴ See Chapter 3 of this Manual "VAWA Confidentiality: History, Purpose and Violations VAWA Confidentiality Protections"

¹⁴⁵ See also Chapter 14 of this Manual "Protection Orders for Immigrant Victims of Sexual Assault."

¹⁴⁶ "18 U.S.C. section 922 (g) (8) prohibits some, but not all, abusers from possessing firearms. 18 U.S.C. section 922 (g) (9) only prohibits those who have been convicted of a misdemeanor crime of domestic violence from possessing firearms and ammunition. Because these two federal statutes leave some room for the abuser to still possess a firearm, when writing a protection order it is important to specify that any firearms be turned over and that the abuser is not allowed to obtain or use any firearms for the duration of the protection order. For more information on firearm possession and domestic violence, see Chapter 14 of this Manual "Creating a Jurisdictionally Sound Protection Order".

Economic Concerns

Some immigrant victims of sexual assault hesitate to cooperate in the prosecution of their intimate partner or employer because of economic concerns. Advocates and attorneys should discuss options available to immigrant victims so they can support themselves and their children and safely cooperate in the prosecution. The following issues should be addressed:

Domestic Violence Cases

- Does she qualify for legal immigration status?
- Does she currently receive financial help from her intimate partner, or is there a realistic possibility of such help in the future?
- Help her determine the extent to which she really depends on her partner for financial support.
- Has she actually received child support from him or is she only hoping to receive it in the future?
- Does she receive child support payments directly from the abuser through a court order, or through the partner's wages being garnished? Has her receipt of support been regular or sporadic?
- How would her ability to work legally mitigate her need for support from her partner?
- If she is receiving child or spousal support from her abuser, is she receiving payments through a wage assignment order?¹⁴⁷

Abusive Employer Cases

- If she leaves her current employment, can she work legally elsewhere on another form of legal immigration status?
- Is her work visa tied to her employment?
- Does her employer or coworkers know her family or community members?
- Is the perpetrator known to her family or community members?
- Does she live close to her place of employment?

If her abuser is her employer access to a form of immigration relief independent from her employer can provide her the economic stability she needs.

U visa holders receive work authorization.¹⁴⁸ Applicants for T-visas are eligible for the same access to public benefits as refugees once certified by the Department of Health and Human Services.¹⁴⁹ They also can receive work authorization valid for the duration of their T-visa.¹⁵⁰ A T-Visa applicant has likely experienced significant trauma as a result of the trafficking experience. She may not trust advocates who are working to get her benefits. Access to benefits and work authorization remove only some barriers to economic stability. Many trafficking victims may not be accustomed to working low-wage jobs or encounter stigma in their new place of employment. They may also face too much psychological trauma to work enough hours to sustain employment. It is critical that advocates work closely with trafficking victims so that a victim feels comfortable articulating these barriers or an advocate can find ways to help victims overcome these barriers.

Help her assess her resources and think about how she can survive independently. An immigrant victim who files a VAWA self-petition and receives a prima facie determination of VAWA eligibility may be eligible for public benefits.¹⁵¹ Any U.S. citizen children she has are eligible to receive public benefits.¹⁵² Once her case is

¹⁴⁷ Collecting court ordered support through assignment of wages can be a helpful option for domestic abuse victims because funds due under court order for support are deducted from the abuser's pay check and are sent through the court to the victim. This reduces the need for contact between the abuser and the victim with regard to support payments and can provide a greater potential for receiving support payments, so long as the abuser continues working at that employer.

¹⁴⁸ 8 C.F.R. § 274a.12(a)(19), (20).

¹⁴⁹ Section 107(b)(1)(A) of the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. 106-386 (Oct. 28, 2000); T-visa applicants were also made qualified immigrants by the Trafficking Victims Protection and Reauthorization Act of 2008 § 211(a).

¹⁵⁰ 8 C.F.R. § 274a.12(c)(25).

¹⁵¹ See also Chapter 16, "Access to Programs and Services That Can Help Immigrant Victims: Public Benefits Access for Immigrant Victims of Sexual Assault," to assess the range of federal and state funded assistance she may be eligible to receive.

The Criminal Justice System and Immigrant Victims

approved, she can obtain work authorization.¹⁵³ Advocates and attorneys should brainstorm with an immigrant client about other options for supporting herself and her children without her abuser's assistance. These might include full or part time employment, self-employment that builds upon her existing skills and contacts, public benefits for herself or her children, court-ordered child support paid through wage withholding, temporary support from friends or family members, finding a roommate to share household expenses and seeking first and last month rent on a new apartment from the Red Cross or a faith-based program.

Danger to the Victim and Her Family if Her Partner, Trafficker, or Abusive Employer is Deported

For some immigrant victims, her abuser's deportation may increase danger to the victim, her children, or her family or friends in the United States or her home country. Advocate or attorneys should conduct a lethality assessment to help an immigrant victim determine whether cooperating in the prosecution is safe for her and her family. Factors to consider include:

- Whether the perpetrator is from the victim's home country or will be free to travel there;
- Whether the perpetrator has a history of stalking or is likely to stalk the victim or her children;
- Whether the victim has children or other family members in her home country that her abuser has threatened to or is likely to harm if he is deported;
- The likelihood that the partner will lie in wait for the victim abroad, so that she can never safely return to see family members;
- The likelihood that he will return to the United States after deportation and retaliate against the victim.
- Whether the victim chooses to cooperate in an investigation or prosecution of criminal activity the victim could be U-Visa eligible
- What non U-Visa related immigrant options can the victim realistically pursue?

The victim's safety needs should be paramount in any decision made by advocates and prosecutors about how to proceed in a criminal case to hold a perpetrator accountable.¹⁵⁴

If the deportation of a perpetrator would increase danger to the victim, or her family members (particularly when he is her spouse or intimate partner), prosecutors do not need to dismiss the criminal case against the perpetrator. In these cases, the justice system can employ measures to hold the abuser accountable while monitoring his behavior with the goal of curbing future abuse. Prosecutors can request continuances and charge perpetrators with non-deportable crimes. Judges can place them on probation and compel them to enter a treatment program. First time offenders are generally treated more leniently than repeat offenders. If an offender continues to perpetuate acts of domestic violence after being treated more leniently, he should be prosecuted and sentenced without regard to the immigration consequences rather than prosecute the criminal case against him.

4. Cultural and Religious Concerns

For some immigrant victims of sexual assault or domestic violence, cultural or religious factors may affect her willingness to talk to anyone about the sexual assault or domestic violence. Admitting that she has been a victim of rape may socially ostracize her. In her place of employment, despite existing legal protections, she may feel unsafe or reluctant confiding about a sexual assault and cooperating with law enforcement.

¹⁵² For a full discussion of immigrant victim eligibility for federal and state funded public benefits See Chapter 16 of this manual, *Access To Programs And Services That Can Help Victims of Sexual Assault*.

¹⁵³ 8 CFR 274a.12(c) (14); Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1505(f), 114 Stat. 1464, 1526; INA § 212(p), 8 U.S.C. § 1182(p) (2000).

¹⁵⁴ If the perpetrator is convicted, immigration authorities can deport him after he serves his full criminal sentence. Individuals who reenter the U.S. after being deported can be criminally prosecuted, and the penalties are enhanced for reentry after deportation for a criminal offense.¹⁵⁴ When law enforcement initiate removal of perpetrators by immigration authorities instead of requiring them to stand trial and serve sentences for their crimes perpetrators are very likely to return to the U.S. emboldened by their success at having avoided prosecution. Deportations prior to or instead of prosecution create a false sense of security for domestic violence victims. Karen Saunders, Customs and Border Parole, Department of Homeland Security, Domestic Violence Immigration and Law Enforcement, power point presentation at Seven State Capacity Building Summit, Miami Florida, May, 2004

The Criminal Justice System and Immigrant Victims

When her abuser is her spouse, culture and religious beliefs can undermine her ability to safely cooperate in her partner's prosecution. She may be blamed for her partner's deportation; stigmatized or ostracized by her family, friends, or community; blamed for breaking up the family or bringing shame upon her family; or held responsible for any reduction in financial support that was sent to family members residing in her home country. Advocates and attorneys should help an immigrant victim access culturally competent services and support that may help her navigate and weigh such considerations.

There are growing numbers of immigrant women's community based groups. These organizations provide woman-to-woman, culturally competent support and build the immigrant victim's self-esteem. Immigrant women groups can play a key role in connecting immigrant victims to service providers who help sexual assault victims. They can also help victims involved in cases before the justice system by providing support that respects the victim's culture rather than pressuring her to abandon it.

Resources and Publications

Maria Baldini-Potermin, Defending Non-Citizens in Minnesota Courts: A Summary of Immigration Law and Client Scenarios. (Distributed by the Minnesota Bar Association (612) 333-1183)

Ann Benson, Immigration Consequences of Criminal Convictions: An Overview for Criminal Defenders, Judges and Prosecutors in Washington State, Washington Defender Association's Immigration Project, (2002). Available at www.defensenet.org or by calling 206-726-3332.

Katherine Brady, with Norton Tooby & Michael Mehr, California Criminal Law and Immigration, Immigrant Legal Resource Center (2004). Available at www.ilrc.org or by calling (415) 255-9499.

S Breall, and D. Adler, Working with Battered Immigrant Women: A Guidebook for Prosecutors, (Volcano Press, 2000). Call (415) 553-1849.

Converse, K. "Criminal Law Reforms: Defending Immigrants in Peril", The Champion, August 1997 (National Association of Criminal Defense Lawyers). Websites: www.criminaljustice.org or www.nacdl.org

Ignatius, S. "Overview on Effects of Criminal Convictions for Immigrant Victims of Domestic Violence", (Political Asylum/ Immigration Representation Project). Call (617) 742-9296.

Indritz, Tova. "Immigration Consequences of Criminal Convictions". Cultural Issues in Criminal Defense. Ed. James G. Connell, III, and Rene L. Valladares. Juris Publishing Inc., 9 East Carver Street, Huntington, NY 11743 (415) 255-9499.

Kesselbrenner & Rosenberg, Immigration Law and Crimes (West Group, 1999). Call (800) 221-9428.

Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005-2006).

Maynard, W. "Deportation: An Immigration Law Primer for the Criminal Defense Lawyer", The Champion, June 1999 (National Association of Criminal Defense Lawyers). Websites: www.criminaljustice.org or www.nacdl.org

Norton Tooby and Katherine Brady, *Criminal Defense of Immigrant*. (Distributed by The Law Offices of Norton Tooby, 516 52nd Street, Oakland, CA 94604/ (510) 601-1300) or www.criminalandimmigrationlaw.com.

Manuel Vargas, *Representing the Noncitizen Criminal Defendant* (NY State Defender's Association, Criminal Defense Immigration Project, 1998). Call (212) 998-6476.

The Criminal Justice System and Immigrant Victims

Internet Resources

Board of Immigration Appeals Precedent decisions <http://www.usdoj.gov/roit/efoia/bia/biaindx.htm>

Immigrant Legal Resource Center <http://www.ilrc.org>

Law Offices of Norton Tooby. <http://www.criminalimmigrationlaw.com>

NACDL Immigration Articles
<http://www.criminaljustice.org/public.nsf/freeform/Immigration?OpenDocument>

National Lawyers Guild/ National Immigration Project <http://www.nationalimmigrationproject.org>

More Resources

For immigration questions regarding criminal convictions, contact Dan Kesselbrenner, National Immigration Project/ National Lawyers Guild- (617) 227-9727.

For immigration questions relating to battered immigrants and referrals to experts on immigration and crimes, contact the ASISTA - questions@asistaonline.org (515) 244-2469, the Washington Defender's Association - jonathan@defensenet.org (206) 623-4321 or the National Immigrant Women's Advocacy Project – niwap@wcl.american.edu (202) 274-4457

To obtain a directory of nonprofit agencies that assist persons in immigration matters, contact the National Immigration Law Center at (213) 938-6452.

To obtain a list of local immigration attorneys, contact the American Immigration Lawyer Association, National Office, 1400 Eye Street, N.W., Suite 1200, Washington, D.C. 20005 (202) 216-2400.

In California, contact the Immigrant Legal Resource Center (415) 255-9499

In Florida, contact the Florida Immigrant Advocacy Center (305) 573-1106

In Washington State, Johnathan Moore at the Washington Defender Association's Immigration Project at jonathan@defensenet.org (206) 623-4321. For further information see: <http://www.defensenet.org/immigration-project>

APPENDIX 1

Intake Questionnaire: Important Questions for Immigrant Victims of Sexual Assault Involved in a Criminal Case

Immigration cases are most successful when advocates or attorneys develop a trusting relationship with a victim that allows them to collect full and complete information about sensitive issues as early in the case as possible. It is essential, when an immigrant victim has a criminal history, to obtain information about that criminal history as soon as possible. In order to personalize an immigration and criminal strategy for an individual immigrant, advocates and attorneys must be aware of the victim's history. Obtaining this information may not be easy, as the victim may be afraid to divulge her immigration status and possible criminal history. Advocates or attorneys should develop a trusting relationship with the victim by explaining that factual information is necessary to protect her. Advocates and attorneys should demonstrate that they are there to help the victim, not harm her.

Advocates and attorneys can play a critical role in highlighting problem areas and quickly introducing immigrant victims to qualified criminal defenders and immigration attorneys. In order to coordinate these relationships, it is essential that advocates and attorneys obtain basic information regarding the victim's immigration status. The next section presents a number of questions that should become routine in any consultation. They are specifically designed to red flag and highlight areas of concern for an immigration attorney and present a basic blueprint for further consultation. These questions can also help immigration practitioners focus in on the nature of criminal conduct in the immigrant's history.

Advocates and attorneys should always ask for the following information, which will be helpful when help the victim consults an immigration attorney.¹⁵⁵

1. What is the criminal charge against the client?
2. What are any possible offenses that she might plea-bargain to?
3. What is the client's criminal history?
4. When did the client first enter the U.S.?
5. What is her visa type? Is her visa status still valid?
6. Any significant departures from the U.S., and if so what are the dates and reason for the departure?
7. Is the client a lawful permanent resident?
 - a. If so, when did she obtain her green card?
8. If not a lawful permanent resident, what other special immigration status might the client have?
9. Did anyone ever file a visa petition for the client? If so, get the details of name and visa number; what kind of visa; date filed; and whether it was granted.
10. Has the client ever been deported or gone before an Immigration Judge?¹⁵⁶
11. Does the client have an Immigration Court date pending? If so, why, and what is the date?
12. Has the client ever before received a waiver of deportability [§ 212(c) relief or cancellation of removal] or suspension of deportation?
13. Where was the client born? Does the client have any relatives who are U.S. citizens? Does the client have a lawful permanent resident spouse or parent?
14. Would the client's employer help her immigrate?
15. For purposes of possible unknown U.S. citizenship, was the client or the client's parent or grandparent born in the U.S. or granted U.S. citizenship? Or, was the client a permanent resident under the age of 18 when a parent naturalized to U.S. citizenship?
16. Has the client been abused by her spouse, parents, or anyone else?
17. Where was the client born?

¹⁵⁵ List adapted from ANN BENSON, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS, PROSECUTORS AND JUDGES IN WASHINGTON STATE 39 - 40 (2005).

¹⁵⁶ The goal of this question is to help determine whether the client has a prior removal order but may be unaware that one has been issued. Attorneys working with immigrant victims should file a Freedom of Information Act Request to learn about prior contact the immigrant victim client may have had with DHS.

The Criminal Justice System and Immigrant Victims

18. Would the client have any fear about returning to her country of origin or habitual residence, and if so, why?

Following are some explanations of why some of these questions are important.

1) WHAT IS YOUR IMMIGRATION STATUS IN THE UNITED STATES?

This question is **important** because there are different rules for different categories of immigrants and waivers for criminal conduct and convictions may be available to one category of immigrants and not to others. For example, a naturalized U.S citizen has greater legal protections and is not subject to deportation or removal for crimes. The exception for naturalized citizens is that their citizenship can be revoked for conduct or crimes which occurred prior to their naturalization and which should have legally barred them from being naturalized. This occurs because the crime was either not revealed to the DHS, or it managed to escape their scrutiny. Crimes that a citizen commits after naturalization will not affect their immigration status.

Advocates and attorneys may not be able to directly ask this question, as immigrant victims may be afraid to admit their immigration status. While this question needs to be asked, advocates and attorneys need to phrase their questions carefully so that victims are not wary of utilizing their services. In addition, many immigrant victims of sexual assault may not have accurate information on their status, as intimate partners or employers may have given them incorrect information regarding their immigration status.

This question should be avoided if the victim's immigration status is not at issue. For example, if the immigrant victim is looking to obtain benefits for her citizen children, questioning her about her immigration status may lead her to be suspicious of the organization's intentions as well. However, if it is a woman who has been victimized by a U.S. citizen or lawful permanent resident, the question of her immigration status will be important to offering her the proper services.

In particular, it is important to obtain accurate immigration status information for immigrant victims accused of crimes. Each remedy will be different depending on the specific immigration status. There are different rules for different categories of immigrants and waivers of criminal conduct or convictions may be available to one category of immigrants and not to others. It is important to structure the legal advocacy according to the particular immigration status and the relevant waivers of criminal conduct and convictions.

2) IF YOU HAVE LAWFUL PERMANENT RESIDENT STATUS, WHEN AND HOW DID YOU GET IT?

It is important to know how an immigrant obtained her status because some lawful permanent residents are subject to different rules for crimes committed within five years of being granted lawful permanent residence. In addition, the length of time that a person has been a lawful permanent resident may be considered by immigration judges when using their discretion to rule in favor of an immigrant despite the existence of criminal convictions (e.g., through a waiver). Many immigrants with lawful permanent resident status obtained that status through family members or employers who got them visas. In the case of a battered immigrant, it is important to understand how her abusive relationship affected her immigration process as well as find out if she obtained lawful permanent residency through a VAWA self-petition or cancellation or a political asylum case.

3) WHEN DID YOU FIRST ARRIVE IN THE UNITED STATES AND HOW MANY TIMES HAVE YOU LEFT AND RETURNED SINCE THEN?

New immigration laws are being applied retroactively. Therefore immigrants who may have committed crimes in the past that were not then disqualifying crimes may now face immigration restrictions and possible deportation. Leaving and reentering the United States may trigger bars to

The Criminal Justice System and Immigrant Victims

reentry and may trigger the application of new and more severe definitions of disqualifying crimes. In addition, the number of illegal entries made by an immigrant may be a factor in the type of charges brought by immigration authorities, and, depending on the circumstances, may itself constitute a crime. It is also important for immigration attorneys to know the length of absences and the reason for the absence because it may affect those immigrants attempting to claim relief by way of cancellation of removal, in which case they must demonstrate a continuous physical presence for 10 years, (or 7 years for those still eligible for suspension of deportation), and 3 years for battered immigrants claiming VAWA cancellation of removal or suspension or VAWA deportation. The length of absences can also affect a legal resident's application for naturalization.

4) CRIMINAL HISTORY: INCLUDING CURRENT CHARGES, ALL ARRESTS, AND DISPOSITIONS (Include Dates or at Least the Year for Each Category)

This is VERY important for advocates and attorneys assisting immigrants with criminal convictions, and essential for any immigrant filing for immigration relief. A complete criminal history can assist an immigration attorney in deciding if a particular crime will have harmful immigration ramifications, if the rule against multiple convictions will have any bearing, and if waivers exist. (For more information on waivers, refer to 'waiver' section in this chapter) In a wide range of cases, immigration authorities require that applicants submit fingerprints (e.g. attaining lawful permanent residence, filing a VAWA self petition). Attorneys and Advocates need to know that at some point in a victim's immigration case her fingerprints will be taken and any criminal record she has will be discovered. It is important for advocates to work with victims and gain their trust so that advocates and attorneys can learn about any arrest, criminal convictions or pleas in her background as early as possible in the case. Attorneys should learn about the criminal history of VAWA-qualified battered immigrants as soon as possible. This allows the immigration attorney assisting in the victim's VAWA case to address criminal history and seek waivers as early as possible in the application process, as well as develop case strategy that takes any criminal history into account. If the battered immigrant fails to provide the advocate or attorney accurate information about her criminal history, DHS could discover it by scanning her fingerprints. This could be detrimental for the immigrant who may have had an opportunity to get a waiver, or could have possibly convinced DHS to use its discretion in her favor.

5) LIST FAMILY MEMBERS (Spouse, Parent or Child) WHO ARE U.S. CITIZENS OR PERMANENT RESIDENTS.

This background is important for advocates and attorneys attempting to get a complete picture of the immigrant's history. In addition, in the context of suspension or cancellation proceedings, the applicant might need to establish hardship to their legal resident or U.S. citizen family members.

The Criminal Justice System and Immigrant Victims

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