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## *VAWA Confidentiality*<sup>1,2</sup>

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In 1994, the Violence Against Women Act was signed into law and has been expanded over the years to include human trafficking and other violent crimes.<sup>3</sup> In 1996, President Clinton signed into law sweeping immigration legislation known as (IIRAIRA).<sup>4</sup> Section 384 of this law provides protection to battered immigrants and has been expanded to protect other immigrant crime victims. Congress created the VAWA confidentiality provisions to prevent abusers and other crime perpetrators from using the immigration system as a tool of power and control over their victims or as a means to track and stalk their victim. Practitioners continue to report instances in which the perpetrator attempts to discredit a victim in order to deport her or deny her access to legal immigration status. In other instances, perpetrators obtain information about a victim's court case or shelter location as a way to stalk and control their victim. VAWA confidentiality violations create serious, even life-threatening dangers to individuals.

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<sup>2</sup> 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.

<sup>3</sup> For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/vawa-confidentiality>.

<sup>4</sup> Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 § 384; 8 U.S.C. § 1367 (2001). In October 2000, Congress amended § 384 to include confidentiality protection for cases filed under INA §101(a)(15)(U), immigrant crime victim cases (U nonimmigrant visas) and T visas.

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They also compromise the trust that immigrant victims place in victim services protections. While these laws are not new, in May 2008 the Department of Homeland Security (DHS) published instructions for filing violations complaints.<sup>5</sup> In 2013, the VAWA Confidentiality Protections were amended to permit the Department of Homeland Security, State Department, and Attorney General to share information about immigration applications made by victims of abuse for “a law enforcement purpose.” The amendments clarify that any release of information under these provisions must be used “solely for a national security purpose in a manner that protects the confidentiality of such information.” The amendments further limit disclosure of information to law enforcement to disclosures that are carried out “in a manner that protects the confidentiality of such information.”<sup>6</sup> Law enforcement officials described in this section includes but are not limited to federal, state or local police, sheriffs, prosecutors and state police.

### The Three Prongs

VAWA Confidentiality prevents the Department of Homeland Security (DHS), the Department of State (DOS) and the Department of Justice (DOJ) from releasing information contained in a protected immigration file to the abuser or others.<sup>7</sup> This information includes the existence of a VAWA confidentiality protected immigration filing, locational information, and information about the victimization. The protected immigration cases include the VAWA self-petition, VAWA cancellation or suspension, battered spouse waiver, T visa, U visa or battered spouse waiver, VAWA Cuban adjustment applicants, VAWA Haitian Refugee Immigration Fairness Act or VAWA Nicaraguan Adjustment and Central American Relief Act Protections.

The second prong prohibits the Department of Homeland Security, the Department of Justice and the Department of State (DOS) from using information provided by perpetrator or family member to make take any action or make any adverse immigration determination against the crime victim.<sup>8</sup> This protection extends to those who do not qualify to file, as well as those who have not yet filed cases for immigration relief as long as they are victims of the enumerated crimes, namely VAWA physical abuse or extreme cruelty, a severe form of trafficking in persons under the T-visa, or any of the U-visa qualifying crimes.<sup>9</sup>

Finally, VAWA Confidentiality prevents enforcement actions at shelters, rape crisis centers, victim services programs, community based organizations, courthouses, supervised visitation center or family justice centers.<sup>10</sup> If DHS undertakes any part of an enforcement action at a protected location, it must disclose this fact in the Notice to Appear and to the immigration court, and must certify that such action did not violate VAWA confidentiality provisions.<sup>11</sup> If the action is not certified, DHS officers face violation penalties.<sup>12</sup>

### Anticipating Violations

Though legal protections exist, DHS is the only federal agency that has developed procedures for receiving and processing VAWA Confidentiality complaints. Immigration attorneys and legal advocates should include a VAWA Confidentiality §384 advisory on every eligible application that is statutorily eligible to receive VAWA confidentiality protection that is filed on behalf of an immigrant victim with DHS, DOJ and DOS. Attorneys can also file a G-28 or EOIR-28 in advance of any filing that advises both DHS and any Immigration Court that the client is eligible for VAWA Confidentiality protections. Notice that the case is covered by VAWA Confidentiality protections should be clearly written on both the envelope and cover letter. Without clearly marking filings with an advisory on VAWA Confidentiality, mailroom clerks could easily miss direct the filing in a manner that could lead

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<sup>5</sup> “Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security”, The Department of Homeland Security, undated.

<sup>6</sup> See Section 810(a) & (b), Violence Against Women Act (VAWA) 2013. See also Section 384(b) & (d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 8 U.S.C. 1367(b) & (d)

<sup>7</sup> IIRAIRA §384 (a)(2); 8 U.S.C. §1367(a)(2).

<sup>8</sup> IIRAIRA §384 (a)(1); 8 U.S.C. §1367(a)(1).

<sup>9</sup> Id.

<sup>10</sup> INA § 239(e); 8 U.S.C. §1229(e)

<sup>11</sup> Id.

<sup>12</sup> IIRAIRA §384 (a)(2); 8 U.S.C. §1367(c).

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to lead to VAWA confidentiality violations. This is particularly important when a victim is filing papers in an immigration court proceeding or in an adjustment case or family based visa petition case that is being adjudicated at a local DHS district office. Immigration Courts and Citizenship and Immigration Services of DHS District Offices are less likely to be familiar with VAWA Confidentiality protections than the specially-trained VAWA unit at Vermont Service Center, which processes the majority of the applications eligible for VAWA Confidentiality protections. Common violations include copying the perpetrator on a DHS interview notice, including confidential hearing information in the court's electronic notification system, or failing to close immigration court proceedings.

It is important to assess a victim's safety under the assumption that confidentiality may be breached. If the victim is working with a social service provider, inform that person of potential safety risks and confidentiality violations. In practice, Vermont Service Center allows VAWA self-petitions, T-visas, and U-visas applications to list only the immigration practitioner's or another safe address on the application. Still, most applicants will require a safety plan which the immigration practitioner should design with the social service provider and the victim. The plan should include all the possible locations where safety could be compromised including an interview at DHS, a biometrics appointment, an immigration court appearance, or any other location identified in the immigration application. Upon violation, practitioners should also request a change in appointment date, time, or even location.

If a victim is undocumented, that individual should be prepared that DHS enforcement actions often triggered by the perpetrator may occur. Therefore, victims should be advised about the fact that they qualify for VAWA confidentiality protection. They should carry materials documenting eligibility with them and provide them should DHS apprehend them. While a victim need not have filed an application to be eligible for VAWA Confidentiality protection, it can be more difficult to counter enforcement actions when the victim has nothing on file with DHS documenting eligibility. Attorneys and advocates working with immigrant victims should adopt a practice of filing applications for immigrant victims as soon as possible, even if the applications are merely skeletal filings, so that the victim has a receipt notice to protect her against any DHS enforcement action. It is critical to work with social service agencies to identify undocumented victims move quickly to initiate applications for VAWA, T or U visa immigration relief.

Victim advocates assisting immigrant victims with applications should screen for VAWA immigration relief eligibility and complex "red flag" immigration issues.<sup>13</sup> While victim advocates may help immigrant victims file VAWA self-petition cases, it is important to identify an attorney with expertise on VAWA, T and U-visa immigration cases who will take cases of immigrant victims with Red Flag issues. Advocates should work with attorneys representing immigrant victims in preparing the victim's statement for the immigration case and in the collection of evidence needed to support the victim's application for VAWA, T or U visa immigration relief. Advocates and attorneys should work together to advise immigrant victims of the danger for undocumented victims of encountering DHS on buses, on trains, at courts, at hospitals and in other public locations. Immigration practitioners should provide all the appropriate social service partners with adequate information about VAWA Confidentiality protections in the event that ICE attempts an enforcement action at a protected location.

Because VAWA Confidentiality protections are less known outside of the DHS VAWA Unit, practitioners should leverage existing relationships with local DHS offices, Service Centers, Immigration Courts, criminal courts, protection order courts and family courts, to incorporate VAWA Confidentiality protections into collaborations, discussions, trainings, and advocacy with these agencies. Each of these agencies should develop protocols to ensure immigrant victim protection. DHS is required to train staff of VAWA Confidentiality but it would also be helpful for other agencies to adopt similar policies.

### Immediate Advocacy Enforcing the Statute

If a victim becomes subject of a DHS enforcement action, VAWA Confidentiality can be used to protect the victim against detention, issuance of a Notice to Appear, or service of the notice to appear on the immigration court. VAWA Confidentiality can be used to convince DHS to exercise prosecutorial discretion in the course of immigration proceedings and to dismiss or not pursue any immigration enforcement action against an immigrant victim. In immigration court, request a DHS certification under INA section 239(e) and establish that DHS has the

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<sup>13</sup> For a Red Flag Screening tool go to: <http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/tools/VAWA-Red-Flags.pdf/view>

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burden to prove that no part of the DHS enforcement action was not in violation of VAWA confidentiality. When VAWA Confidentiality violations exist, counsel for the victim should move to terminate proceedings. Subpoena any relevant witnesses including DHS enforcement agents to testify if the motion is contested. When perpetrators try to obtain information about or contained in an immigration case through discover in a family or criminal court case use the same arguments to oppose the discovery request that you would use the perpetrator were attempting to secure that documentation from DHS. Include arguments related to the Congressional history of this provision and why disclosure of VAWA confidentiality protected information in any context contravenes Congressional intent

### Documenting Violations and Filing Complaints

In order to report VAWA Confidentiality violations, advocates and attorneys should include important facts such as names, dates, locations, and other details of the violation. Details should include the gravity of any violation and the potential lethality to the victim when the abuser, trafficker, or other criminal perpetrator knows how to find his or her victim. Danger to the victim can increase if the perpetrator learns that the victim is in the process of attaining legal immigration status, particularly when the perpetrator has been using deportation threats and power over the victim's immigration status to control her.

Documentation that a victim qualifies for VAWA Confidentiality protection may include receipt and approval forms from USCIS and an immigration judge or proof of qualifying victimization. If the violation was DHS arrest in a prohibited location, notes should include conversations with the agent concerning the enforcement action and the VAWA confidentiality violation. If it seems unlikely that DHS would have known about the victim, but for the perpetrator having provided the information, practitioners should note details about any potential communications with the perpetrator, particularly knowledge DHS has that only the perpetrator would have.

In order to make a formal complaint, DHS protocols require practitioners to first speak to supervisors up the chain of command of the officer committing VAWA confidentiality violations. This includes filing a formal complaint letter with accompanying documentation to the supervisor of the local DHS office involved in the VAWA Confidentiality violation to whom the DHS office committing the violation reports. This complaint should also urge that the supervisor to act swiftly to take steps to mitigate any harm to the victim or the victim's family members that has occurred as a result of the VAWA confidentiality violation. These remedies can include but not be limited to cancellation of an notice to appear, release of the victim and her family members from DHS detention, or dismissal of any immigration enforcement action filed against the victim. The letter should also request that the supervisor assess penalties as provided for under the law against the official committing the VAWA Confidentiality violation including a \$5000 fine and disciplinary action.<sup>14</sup> Unanswered complaints should be pursued by filing the same complaint with the District Director or other equivalent head of the office in which the DHS official committing the violation works.

### Make a Formal Complaint

If a practitioner has filed a complaint locally and has not received a timely response or the DHS office in which the VAWA confidentiality violation is unreceptive, practitioners should file a formal complaint. DHS has set up procedures for receiving VAWA confidentiality violation complaints.<sup>15</sup> Complaints are to be filed with the DHS Office of Civil Rights and Civil Liberties. (CRCL) Upon receiving complaints of VAWA confidentiality violations, CRCL assigns the case to a DHS investigator who will be responsible for investigating the complaint, reviewing documentary evidence and interviewing witnesses in connection with the complaint. Providing detailed information to CRCL will facilitate a more effective investigation of the complaint.

Complaints should include appropriate case identifying information including the client's name, date of birth and A number (if the victim has one), information about how the client can be safely contacted, and the practitioner's contact information. The complaint should also briefly outline a procedural history of the case, the facts making the victim eligible for VAWA immigration relief or protection under VAWA confidentiality provisions, a description of the VAWA Confidentiality violation that occurred and the status of any pending family, immigration, or criminal

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<sup>14</sup> Id.

<sup>15</sup> See "Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security", The Department of Homeland Security, undated.

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law cases. Practitioners should include as much detail as possible including name(s) and office of the DHS official(s) or employees involved; the date, time and location of violation; what was said or done and by whom; and the names and contact information of witnesses present.

Documentation supporting the complaint may include: copies of DHS filings, approval notices, and other documentation from DHS, documentation of victimization (e.g., medical records, photos, civil protection orders, witness affidavits), and information documenting the violation including summaries of witnesses statements. Finally, the complaint should document efforts to address the complaint through local channels.

Complaints should be addressed to: The Department of Homeland Security, The Office of Civil Rights and Civil Liberties, Review & Compliance Unit, 245 Murray Lane, SW, Building 410, Mail Stop #0800 Washington, DC 20528 or via email at [civil.liberties@dhs.gov](mailto:civil.liberties@dhs.gov).

For assistance with urgent advocacy to help immigrant victims subjected to VAWA Confidentiality violations, help developing protocols, litigating in family or criminal court, or filing formal complaints, please contact The National Immigrant Women's Advocacy Project (NIWAP) at [info@niwap.org](mailto:info@niwap.org) or (202) 274-4457.<sup>16</sup> NIWAP provides sample briefs and materials, and provides technical assistance on VAWA Confidentiality Violations. In addition, NIWAP acts as the NGO liaison with DHS on formal complaints. Please inform NIWAP of any violations and complaints filed so we can ensure improved enforcement of these protections. Further information regarding VAWA confidentiality is available at: [www.niwaplibrary.wcl.american.edu](http://www.niwaplibrary.wcl.american.edu)

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<sup>16</sup> Assistance regarding VAWA Confidentiality violations can be directed to Rócio Molina, Associate Director, National Immigrant Women's Advocacy Project, ([molina@wcl.american.edu](mailto:molina@wcl.american.edu)).

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