

### Court decision interprets VAWA Confidentiality Provisions

On September 29, 2008, the United States District Court for the District of Northern California issued a decision in *Hawke v. Department of Homeland Security*, a case of first impression on the issue of VAWA Confidentiality. Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) initially set forth VAWA Confidentiality protections, which subsequent laws have continued to expand.

In *Hawke*, the law firm Morgan Lewis & Bockius LLP represented Legal Momentum as amicus. The amicus brief elaborates on the Congressional intent behind this provision to prevent abusers and other crime perpetrators from using immigration as a method of control against immigrant victims. United States District Court Judge Whyte, in his opinion, interpreted VAWA confidentiality protections in two very important ways. First, the opinion clarified that that VAWA confidentiality provisions extend to those whose qualifying immigration application cases were denied when such denials were not based on the merits.<sup>1</sup> Procedural denials or withdrawals of applications continue to receive the full scope of VAWA Confidentiality protection. This approach is consistent with VAWA Confidentiality’s limitations on relying upon information against a victim that was supplied by an abuser, trafficker or crime perpetrator. VAWA confidentiality protections were designed to protect victims without regard to whether the victim qualifies or is applying for immigration benefits.<sup>2</sup>

Second, the *Hawke* opinion specified that the exception to VAWA confidentiality for a “judicial review of a determination” extended only to immigration reviews and not to civil or criminal court proceedings.<sup>3</sup> This clarification will help stop perpetrators from using the civil and criminal court systems to obtain VAWA confidentiality protected information (including information contained in any VAWA confidentiality protected case and information about the existence of any such case) that legally could not be released to them by a federal government official. This ruling provides clear direction to the judiciary to deny discovery requests, cross-examination, and motions seeking release of information protected under VAWA confidentiality. Judges should also grant motions that preclude introduction, discovery or use of information protected by VAWA confidentiality in court proceedings.

VAWA Confidentiality provides three types of protection to immigrant victims of violence, including battered immigrants and immigrant victims of sexual assault, trafficking and other U-visa-listed crimes. Specifically, VAWA:

- Protects the confidentiality of information provided to the Department of Homeland

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1 *Hawke v. United States Dep't of Homeland Sec.*, No. C-07-03456 RMW, 2008 U.S. Dist. LEXIS 87603, at \*19 (N.D. Cal. Sept. 29, 2008)

2 IIRIRA Section 384 (a)(1); 8 U.S.C. 1367(a)(1).

3 *Hawke v. United States Dep't of Homeland Sec.*, No. C-07-03456 RMW, 2008 U.S. Dist. LEXIS 87603, at \*16 (N.D. Cal. Sept. 29, 2008)

Security, the Department of Justice or the Department of State by an immigrant victim in order to prevent abusers, traffickers and crime perpetrators from using the information to harm the victim or locate her (“nondisclosure provisions”);<sup>4</sup>

- Stops immigration enforcement agencies from using information provided solely by an abuser, trafficker or U visa crime perpetrator, a relative, or a member of their family,<sup>5</sup> to take an adverse action regarding admissibility or deportability against an immigrant victim. This protection extends to those immigrant victims of battery or extreme cruelty without regard to whether a victim has ever filed or qualifies to file for VAWA related immigration relief (“source limitations”).<sup>6</sup>
- Limits enforcement actions at any of the following locations: domestic violence shelter; victim services program; family justice center; supervised visitation center; or courthouse or in connection with the appearance at a courthouse in connection with a protection order case, a child custody case or other civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking. If any part of an enforcement action took place at any of these locations, DHS must certify in the Notice to Appear that such action did not violate section 384 of IIRIRA (“enforcement limitations”).<sup>7</sup>

## **How to utilize the protections of VAWA Confidentiality:**

### **Family Law Attorneys:**

Utilize this opinion as well as other tools and sample motions to keep all VAWA confidentiality protected information from being introduced in family court or criminal court proceedings. No information about the case can be disclosed, including the fact that any immigration case filed by the victim exists as well as any and all information about the case or contained in the case file. Work with immigration attorneys and advocates to coordinate such efforts.

### **Immigration Attorneys:**

Work with family law attorneys and victim advocates to obtain documentation about the VAWA Confidentiality qualifying victimization. Because this extends beyond those who have already filed, family law attorneys will need alternative documentation about the victimization for those who have not yet filed. The documents include immigration receipt notices, criminal case documentation, protection orders and other documents collected for a victim’s immigration case. Obtain copies of VAWA confidentiality statutes and the ICE VAWA Confidentiality memo<sup>8</sup>. In particular, provide copies of the statute and the ICE memo<sup>9</sup> and work with your clients and all of those who support your client and instruct them about what to do if officials enforcing immigration laws (immigration enforcement agents or police) arrive at protected locations. Be particularly vigilant when abusers or perpetrators threaten to or have retaliated against the victim by calling ICE. Educate family and criminal law attorneys who may not be aware of these legal

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<sup>4</sup> IIRIRA Section 384 (a)(2); 8 U.S.C. 1367(a)(2).

<sup>5</sup> *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRAIRA Section 384*. May 5, 1997, Office of Programs, /s/ Paul W. Virtue, Acting Executive Associate Commissioner. (“Virtue memo”).

<sup>6</sup> IIRIRA Section 384 (a)(1)(A); 8 U.S.C. 1367(a)(1)(A).

<sup>7</sup> Immigration and Nationality Act (“INA”) § 239(e)(1); codified at 8 U.S.C. §1229(e)(1) “Initiation of Removal Proceedings: Certification of compliance with restrictions on disclosure.”

<sup>8</sup> Torres, John P. *Interim Guidance Relating to Office Procedure Following the Enactment of VAWA 2005*. January 22, 2007, U.S. Department of Homeland Security.

<sup>9</sup> *Id.*

protections for immigrants so they can use the statute, the opinion in the *Hawke* case, and additional evidence to prevent immigration information from being introduced in court.

**Violations:**

File complaints of any DHS violations with the DHS Office of Civil Rights and Civil Liberties.<sup>10</sup>

*For technical assistance on VAWA Confidentiality, please contact Legal Momentum at 202/326.0040 or [iwp@legalmomentum.org](mailto:iwp@legalmomentum.org)*

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<sup>10</sup> See complaint protocol issued by the DHS Office of Civil Rights and Civil Liberties. “Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security”, The Department of Homeland Security, undated on file at [www.legalmomentum.org](http://www.legalmomentum.org).