

VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy

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March 11, 2017

This publication examines the Violence Against Women Act’s (“VAWA”), VAWA confidentiality protections under U.S. immigration laws contained in the statute at 8 U.S.C. § 1367 and 8 U.S.C. 1229(e). This memo first provides the full text of each of these provisions and goes on to address each of the three major protections that VAWA confidentiality provides. Next, for each protection this memo quotes the statute, provides legislative history, and quotes relevant portions of the Congressionally mandated implementation policies issued by the Department of Homeland Security (“DHS”), Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services and DHS’ predecessor agency the Immigration and Naturalization Service.

This document collects and covers two decades of bi-partisan legislative efforts and federal agency policies that continuously improved VAWA confidentiality protections as key efforts to enhance victim safety and improve the ability of police and prosecutors to hold perpetrators accountable for their crimes. A specific goal of VAWA’s confidentiality protections was to undermine by federal statute the ability of perpetrators to avoid or weaken criminal investigations and prosecutions against them by threatening victims with deportation and successfully gaining assistance from immigration enforcement officials who initiate immigration enforcement actions, detain, or deport the victim. A second, equally important goal is to protect victim safety by precluding perpetrators and their representatives and surrogates from gaining access to information about or contained any VAWA confidentiality protected immigration case. These provisions were included in order to stop perpetrators from using information in the victim’s case file or about the existence of the case to locate, stalk, or retaliate against the victim; to interfere with, affect or undermine the outcome of the victim’s immigration case; or to impede the victims ability receive protections from the civil or criminal justice systems.

In creating VAWA’s confidentiality provisions Congress was explicit about its intent.

“In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings. In 2000, and in this Act, Congress extended these protections to cover victims of trafficking, certain crimes and others who qualify for VAWA immigration relief. These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims’ immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims.”¹

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

¹ Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP’T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 122 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptsshr-3402-09-22-2005/>

This publication was developed under grant SJI-12-E-169 from State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of State Justice Institute.

National Immigrant Women’s Advocacy Project (NIWAP, pronounced *new-app*)

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by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual assault and trafficking, as prohibited by section 384 of IIRIRA.”²

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

“Violations of Section 1367 could give rise to serious, even life-threatening, dangers to victims and their family members. Violations compromise the trust victims have in the efficacy of services that exist to help them and, importantly, may unwittingly aid perpetrators retaliate against, harm or manipulate victims and their family members, and elude or undermine criminal prosecutions.”³

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

“Those employees who work with applicants for victim-based immigration relief or who have access to protected information, such as United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).”⁴

To ensure that DHS officials knew about and complied with VAWA confidentiality requirements, DHS developed and required that all of its officers receive training. The DHS 2013 All DHS Directive required that:

“All DHS employees who, through the course of their work may come into contact with victim applicants or have access to information covered by 8 U.S.C. 1367 complete the VAWA: Confidentiality and Immigration Relief training, which is currently on Component's Learning Management Systems (LMS). The VAWA Training was developed by FLETC in collaboration with subject-matter experts from several DHS Components, including USCIS, ICE and CBP. No later than 180 days after the enactment of this policy, and on an annual basis thereafter, the Component Heads, or his or her delegates, of CIS OMB, CRCL, USCIS, ICE and CBP report to the Review Committee the rate of compliance for this training.”⁵

ICE has had VAWA confidentiality policies in place since 2007.

“The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), which became effective on January 5, 2006, expanded various protections for aliens seeking immigration benefits as crime victims and amended various sections of the Immigration and Nationality Act (INA). As a result, operational units of U.S. Immigration and Customs Enforcement (ICE) will be required to follow new procedures when taking certain actions in cases involving aliens eligible to apply for VAWA benefits or T or U nonimmigrant status. This interim guidance explains how VAWA 2005 affects the current operating procedures of the Office of Investigations (DI) and the Office of Detention and Removal Operations (DRO).”⁶

² Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP'T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 122 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptsr-3402-09-22-2005/>

³ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 15, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁴ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 1, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>

⁵ Department of Homeland Security, “Implementation of Section 1367 Information Provisions,” (Nov. 1, 2013) at p. 3, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-section-1367/>.

⁶ John p. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 1 and 23 available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-va-wa-confidentiality-2007-foia/>.

“For purposes of this interim guidance, if an officer believes there is any credible evidence that the alien may be eligible for VAWA benefits or I or U nonimmigrant status, the requirements of 8 U.S.C. § 1367, described below, must be followed along with standard operating procedure.”⁷

Statutes:

8 U.S.C. § 1376 (Also known as IIRAIRA Section 384)

- (a) **In general**, except as provided in subsection (b), in no case may the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of State (including any bureau or agency of either of such Departments)—
- (1) make an adverse determination of admissibility or deportability of an alien under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.] using information furnished solely by—
 - (A) a spouse or parent who has battered the alien or subjected the alien to extreme cruelty,
 - (B) a member of the spouse’s or parent’s family residing in the same household as the alien who has battered the alien or subjected the alien to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty,
 - (C) a spouse or parent who has battered the alien’s child or subjected the alien’s child to extreme cruelty (without the active participation of the alien in the battery or extreme cruelty),
 - (D) a member of the spouse’s or parent’s family residing in the same household as the alien who has battered the alien’s child or subjected the alien’s child to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty,
 - (E) in the case of an alien applying for status under section 101(a)(15)(U) of the Immigration and Nationality Act [8 U.S.C. 1101(a)(15)(U)], the perpetrator of the substantial physical or mental abuse and the criminal activity,[1]
 - (F) in the case of an alien applying for status under section 101(a)(15)(T) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)), under section 7105(b)(1)(E)(i)(II)(bb) of title 22, under section 244(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1254a(a)(3)), as in effect prior to March 31, 1999, or as a VAWA self-petitioner (as defined in section 101(a)(51) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(51)) [2], the trafficker or perpetrator, unless the alien has been convicted of a crime or crimes listed in section 237(a)(2) of the Immigration and Nationality Act [8 U.S.C. 1227(a)(2)]; or
 - (2) permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief under paragraph (15)(T), (15)(U), or (51) of section 101(a) of the Immigration and Nationality Act [8 U.S.C. 1101(a)(15)(T), (U), (51)] or section 240A(b)(2) of such Act [8 U.S.C. 1229b(b)(2)].

The limitation under paragraph (2) ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted.

⁷ John P. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 2 and 24 available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-va-wa-confidentiality-2007-foia/>.

(b) Exceptions⁸

- (1) The Secretary of Homeland Security or the Attorney General may provide, in the Secretary's or the Attorney General's discretion, for the disclosure of information in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of title 13.
- (2) The Secretary of Homeland Security or the Attorney General may provide in the discretion of the Secretary or the Attorney General for the disclosure of information to law enforcement officials to be used solely for a legitimate law enforcement purpose in a manner that protects the confidentiality of such information.
- (3) Subsection (a) shall not be construed as preventing disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information.
- (4) Subsection (a)(2) shall not apply if all the battered individuals in the case are adults and they have all waived the restrictions of such subsection.⁹
- (5) The Secretary of Homeland Security and the Attorney General are authorized to disclose information, to Federal, State, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for benefits pursuant to section 1641(c) of this title.
- (6) Subsection (a) may not be construed to prevent the Attorney General and the Secretary of Homeland Security from disclosing to the chairmen and ranking members of the Committee on the Judiciary of the Senate or the Committee on the Judiciary of the House of Representatives, for the exercise of congressional oversight authority, information on closed cases under this section in a manner that protects the confidentiality of such information and that omits personally identifying information (including locational information about individuals).
- (7) Government entities adjudicating applications for relief under subsection (a)(2), and government personnel carrying out mandated duties under section 101(i)(1) of the Immigration and Nationality Act [8 U.S.C. 1101(i)(1)], may, with the prior written consent of the alien involved, communicate with nonprofit, nongovernmental victims' service providers for the sole purpose of assisting victims in obtaining victim services from programs with expertise working with immigrant victims. Agencies receiving referrals are bound by the provisions of this section. Nothing in this paragraph shall be construed as affecting the ability of an applicant to designate a safe organization through whom governmental agencies may communicate with the applicant.
- (8) Notwithstanding subsection (a)(2), the Secretary of Homeland Security, the Secretary of State, or the Attorney General may provide in the discretion of either such Secretary or the Attorney General for the disclosure of information to national security officials to be used solely for a national security purpose in a manner that protects the confidentiality of such information.

(c) Penalties for violations

Anyone who willfully uses, publishes, or permits information to be disclosed in violation of this section or who knowingly makes a false certification under section 239(e) of the Immigration and Nationality Act [8 U.S.C. 1229(e)] shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more than \$5,000 for each such violation.

(d) Guidance

The Attorney General, Secretary of State, and the Secretary of Homeland Security shall provide

⁸ 8 C.F.R. 214.14(e)(2) requires that "Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367"

⁹ Paul Virtue, Immigration and Naturalization Service, Non-Disclosure and Other Prohibitions Related to Battered Aliens: IIRARA Section 384 (May 5, 1997) at 2 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-gov-insconfvawamemo-05-05-1997/>

guidance to officers and employees of the Department of Justice, Department of State, or the Department of Homeland Security who have access to information covered by this section regarding the provisions of this section, including the provisions to protect victims of domestic violence and severe forms of trafficking in persons or criminal activity listed in section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(u)) from harm that could result from the inappropriate disclosure of covered information.

8 U.S.C. § 1229(e)

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of [section 1367 of this title](#) have been complied with.

(2) Locations – The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of [section 1101\(a\)\(15\) of this title](#).¹⁰

Bar on Relying on Perpetrator-Provided Information

Statutory Provisions

(a) **In general**, except as provided in subsection (b), in no case may the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of State (including any bureau or agency of either of such Departments)—

(1) make an adverse determination of admissibility or deportability of an alien under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.] using information furnished solely by—

- (A) a spouse or parent who has battered the alien or subjected the alien to extreme cruelty,
- (B) a member of the spouse’s or parent’s family residing in the same household as the alien who has battered the alien or subjected the alien to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty,
- (C) a spouse or parent who has battered the alien’s child or subjected the alien’s child to extreme cruelty (without the active participation of the alien in the battery or extreme cruelty),
- (D) a member of the spouse’s or parent’s family residing in the same household as the alien who has battered the alien’s child or subjected the alien’s child to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty,

¹⁰ 8 U.S.C. § 1229.

- (E) in the case of an alien applying for status under section 101(a)(15)(U) of the Immigration and Nationality Act [8 U.S.C. 1101(a)(15)(U)], the perpetrator of the substantial physical or mental abuse and the criminal activity,[1]
- (F) in the case of an alien applying for status under section 101(a)(15)(T) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)), under section 7105(b)(1)(E)(i)(II)(bb) of title 22, under section 244(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1254a(a)(3)), as in effect prior to March 31, 1999, or as a VAWA self-petitioner (as defined in section 101(a)(51) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(51)) [2], the trafficker or perpetrator, unless the alien has been convicted of a crime or crimes listed in section 237(a)(2) of the Immigration and Nationality Act [8 U.S.C. 1227(a)(2)];

Legislative History

“This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual as- sult and trafficking, as prohibited by section 384 of IIRIRA. In determining whether a person furnishing information is a prohibited source, primary evidence should include, but not be limited to, court records, government databases, affidavits from law enforcement officials, and previous decisions by DHS or Department of Justice personnel. Other credible evidence must also be considered. Government officials are encouraged to consult with the specially trained VAWA unit in making determinations under the special “any credible evidence” standard.”¹¹

“(T)he Secretary of Homeland Security and the Attorney General and other Federal officials may not use information furnished by, or derived from information provided solely by, an abuser, crime perpetrator or trafficker to make an adverse determination of admissibility or removal of an alien. However, information in the public record and government data bases can be relied upon, even if government officials first became aware of it through an abuser.”¹²

Department of Homeland Security Implementing Policies

“Section 1367(a) of Title 8 of the United States Code, as amended by VAWA 2005, prevents ICE employees from making an adverse determination of admissibility or deportability of an alien using information furnished solely by certain people associated¹³ with the battery or extreme cruelty, such as the abuser or a member of the abuser's family living in the same household as the victim. For purposes of this interim guidance, an adverse determination of admissibility or deportability would include placing an alien in removal proceedings or making civil arrests relating to an alien's violation of the immigration laws. Section 1367(a) also generally prohibits ICE employees from disclosing any information about a VAWA, T, or U beneficiary to anyone, especially those who might use the

¹¹ Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP'T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 122 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptsshr-3402-09-22-2005/>

¹² Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP'T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 122 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptsshr-3402-09-22-2005/>

¹³ These prohibitions since 1997 have bared reliance on adverse information provided by the perpetrator or the perpetrator's relatives. Family members living in the home with the victim and/or the perpetrator are included among those from whom adverse information is precluded, but the bar is not limited to this group. Paul Virtue, Immigration and Naturalization Service, Non-Disclosure and Other Prohibitions Related to Battered Aliens: IIRARA Section 384 (May 5, 1997) at 3 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-gov-insconfvawamemo-05-05-1997/>

information to the alien's detriment, i.e. an abuser who may wish to have the victim removed from the United States.”¹⁴

When the Immigration and Naturalization Service (INS) first implemented VAWA confidentiality protections in 1997, INS recognized that :

“These provisions, and the Congressional and public scrutiny which accompany them, warrant particular care whenever an INS office or employee suspects that an alien with whom they are dealing might have been subject to domestic violence.”¹⁵

DHS policies are designed to ensure that:

“Adverse determinations of admissibility or deportability against an alien are not made using information furnished solely by prohibited sources associated with the battery or extreme cruelty, sexual assault, human trafficking or substantial physical or mental abuse, regardless of whether the alien has applied for VAWA benefits, or a T or U visa.”¹⁶

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

- i. A spouse or parent who battered the alien or subjected the alien to extreme cruelty,
- ii. A member of the spouse’s or parent’s family residing in the same household as the abusive spouse or parent,
- iii. A spouse or parent who battered the alien's child or subjected the alien's child to extreme cruelty (unless the alien actively participated in the battery or extreme cruelty),
- iv. A member of the spouse’s or parent’s family residing in the same household as the alien who has battered the alien’s child or subjected the alien’s child to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty,
- v. In the case of an alien who is applying for a U visa, the perpetrator of the substantial physical or mental abuse and the criminal activity, and
- vi. In the case of an alien who is applying for a T visa, Continued Presence, or immigration relief as a VAWA self-petitioner, the trafficker or perpetrator.”¹⁷

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

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

¹⁴ John P. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 2 and 24 *available at* <http://niwaplibrary.wcl.american.edu/pubs/iceopla-va-wa-confidentiality-2007-foia/>.

¹⁵ Paul Virtue, Immigration and Naturalization Service, Non-Disclosure and Other Prohibitions Related to Battered Aliens: IIRARA Section 384 (May 5, 1997) at 3 *available at* <http://niwaplibrary.wcl.american.edu/pubs/conf-va-wa-gov-insconfyavawamemo-05-05-1997/>.

¹⁶ Department of Homeland Security, “Implementation of Section 1367 Information Provisions,” (Nov. 1, 2013) at p. 2, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-section-1367/>. See also, Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 9, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/> (“Section 1367 also prohibits DHS officers and employees from making an adverse determination of admissibility or deportability against an alien using information furnished solely by a prohibited source associated with the battery or extreme cruelty, sexual assault, human trafficking or substantial physical or mental abuse, regardless of whether the alien has applied for VAWA benefits, or a T or U nonimmigrant status.”)

¹⁷ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 9, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

domestic violence, sexual assault, human trafficking or an enumerated crime from a prohibited source, DHS employees treat the information as inherently suspect.”¹⁸

“An assertion of fraud by the prohibited source, such as an accusation that the marriage is fraudulent, ordinarily will not serve as the sole basis for adverse action. Abusers often claim their marriage is fraudulent in order to exact revenge or exert further control over the victim.”¹⁹

“Information provided solely by prohibited sources must be independently corroborated. Examples of prohibited sources include: the abuser in the case of a VAWA petitioner, the human trafficker in the case of a T status applicant, or the perpetrator of substantial physical or mental abuse in the case of a U status applicant. In such cases. ICE employees cannot rely solely on these sources when making an adverse determination of admissibility or deportability "This prohibition is important to note because ICE officers sometimes receive information from upset or disgruntled spouses, abusers, traffickers, or family members. An arrest based on such information would not violate § 1367 if, according to existing standard operating procedures, the ICE officer independently verifies the information (e.g., through an immigration database) prior to making the arrest. To avoid a possible violation of § 1367, ICE officers must verify the information provided from these prohibited sources. For example, if the abuser husband calls ICE and states that his alien wife is in the United States after being ordered removed. ICE must independently verify the prior removal and note such corroboration on Form I-213 (Record of Inadmissible/Deportable Alien).”²⁰

DHS also confirmed that the prohibited source requirements of VAWA confidentiality extend based on the text of the 8 U.S.C. 1367(a)(1) to—

- Family violence victims who were battered or subjected to extreme cruelty by their
 - Spouse²¹
 - Parent²²
 - Family member living in the same household²³
 - **Note:** For these domestic violence cases the prohibited source bars apply whether or not the victim has filed, or is in the process of filing a VAWA confidentiality protected immigration case.²⁴
- Victims in the process of applying for status
 - As a victim of criminal activity²⁵ under the U visa

¹⁸ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 10, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

¹⁹ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 11, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

²⁰ John P. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 2 and 24 *available at* <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

²¹ Includes former spouses INA Section 240(a)(1)(A)(iii)(II)(aa)(CC) and INA Section 240(a)(2)(B)(ii)(II)(aa)(CC)

²² The immigration law definitions apply in VAWA confidentiality cases. The definition in the Immigration and Nationality Act Section 101(b)(1) and (2) cover abuse by step-parents of step-children even when state family laws would not recognize a parent child relationship based on the facts of the case.

²³ Includes abuse of parents by over 21 year old citizen sons or daughters. INA Section 240(a)(1)(A)(vi)

²⁴ Paul Virtue, Immigration and Naturalization Service, Non-Disclosure and Other Prohibitions Related to Battered Aliens: IIRARA Section 384 (May 5, 1997) at 3 *available at* <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-gov-insconfvawamemo-05-05-1997/> (“While the first category of potential abusers enumerated above -- spouse or parent -- parallels the category which can give rise to a claim of immigration status under the VAWA provisions, the other three categories reflect an expansion of protection to battered aliens who are not eligible for status under VAWA. Such expansion to include those who have suffered abuser at the hands of another family member in the same household is similar to IIRAIRA section 384 which makes individuals abused by other member of the spouse or parent’s family ‘qualified aliens’ for purposes of public benefits.”)

²⁵ U Visa criminal activities include: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, fraud in foreign labor contracting, hostage taking, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, and attempt conspiracy or solicitation to commit any of these crimes and any similar activity where the elements of the crime are substantially similar.

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

“The lack of a pending or approved VAWA self-petition does not necessarily mean that the prohibited source provisions do not apply and that the alien is not a victim of battery or extreme cruelty. Similarly, although the prohibited source prohibition with respect to T or U nonimmigrant status applies only to applicants for such relief, the victim might be in the process of preparing an application. Accordingly, whenever a DHS officer or employee receives adverse information from a spouse, family member of a spouse, or unknown private individual, the employee will check the Central Index System (CIS) for the COA “384” flag. Employees will be sensitive to the fact that the alien at issue may be a victim and that a victim-abuser dynamic may be at play.”²⁶

“Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), commonly referred to as “384 provisions,” protects the confidentiality of victims of domestic violence, trafficking, and other crimes who have filed for or have been granted immigration relief. Anyone who willfully uses, publishes, or permits any information pertaining to such victims to be disclosed in violation of section 384 of IIRIRA will face disciplinary action and may be subject to a civil money penalty of up to \$5,000 for each violation. Therefore, in order to fully comply with and prevent violations of these confidentiality provisions, U.S. Citizenship and Immigration Services (USCIS) has developed a quick and reliable method for DHS components to verify whether an individual has a pending or an approved Violence Against Women Act (VAWA) self-petition or T or U nonimmigrant status petition/application.”²⁷

Thus, the All DHS Directive requires of all DHS component agencies that:

“[A]ny Component with access to Section 1367 information creates ways to identify those individuals protected by Section 1367 confidentiality, such as through a Central Index System (CIS) database check, and develops safeguards to protect this information in the relevant systems.”²⁸

DHS requires of each component agency of DHS

“[E]stablish, to the fullest extent reasonably practicable, means of identifying individuals protected by Section 1367 confidentiality and will take steps to develop safeguards to protect this information in the relevant systems. One such way to help identify most, though not all, of those protected is through a Central Index System (CIS) database check.

- a. CIS database check: For any cases where it is suspected that an alien is an applicant for a benefit protected by section 1367, a DHS employee consults the Central Index System (CIS)

²⁶ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 10, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

²⁷ Department of Homeland Security, “Broadcast Message on New 384 Class of Admission Code,” *available at* <http://niwaplibrary.wcl.american.edu/pubs/dhs-broadcast-class-admission-code/>.

²⁸ Department of Homeland Security, “Implementation of Section 1367 Information Provisions,” (Nov. 1, 2013) at p. 3, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-section-1367/>.

database to verify whether an alien has a pending or approved application or petition covered by section 1367.

- b. CIS contains a class of admission (COA) code “384” (signifying section 384 of IIRIRA) that was created to alert DHS personnel that the individual is protected by section 1367. Information about the location, status, or other identifying information of any individual with the code “384” may not be released outside of DHS, DOJ, or DOS unless one or more of the exceptions applies or the individual has been denied relief and has exhausted all opportunities for appeal.”²⁹

Prohibited Locations

Statutory Provisions

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations – The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title.³⁰

Legislative History

“Section 921(f) establishes a system to verify that removal proceedings are not based on information prohibited by section 384 of IIRIRA. DHS must certify that:

- (1) no enforcement action was taken leading to such proceedings against an alien at certain places including a domestic violence shelter, a rape crisis center, and a court- house if the alien is appearing in connection with a protection order or child custody case, or that
- (2) such an enforcement action was taken, but that there was no violation of the aforementioned provisions. Persons who knowingly make a false certification shall be subject to penalties.”³¹

The legislative history further requires that:

²⁹ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 14, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

³⁰ 8 U.S.C. § 1229.

³¹ Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP’T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 123 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptsshr-3402-09-22-2005/>

“Removal proceedings filed in violation of section 384 of IIRIRA shall be dismissed. However, further proceedings can be brought if not in violation of section 384.”³²

Implementing Policies

In implementing the Violence Against Women Act 2005 amendments to VAWA confidentiality that created a list of locations at which victims of crime seek help and protection from the community based service providers and the justice system, DHS affirmed the statutes goals of assuring that the VAWA confidentiality enforcement location prohibitions and limitations were equally applicable to all victims. These protections apply to victims who have not filed VAWA confidentiality protected cases.

“Aliens encountered at sensitive locations may be beneficiaries of pending or approved applications for benefits. DHS officers encountering individuals at such locations and considering an enforcement action verify, to the fullest extent reasonably practicable, whether a particular alien is a victim who falls within the protection of the section 1367 provisions.

- a. While INA 239(e) does not prohibit arrests of aliens at sensitive locations, it is clear that Congress intended that arrests of aliens at such locations to be handled properly given that they may ultimately benefit from VAWA’s provisions.
- b. DHS officers and employees are strongly encouraged to exercise prosecutorial discretion favorably in cases of aliens encountered at the sensitive locations, unless other exigent circumstances exist, including terrorism or other extraordinary reasons for arresting aliens at a sensitive location.”³³

“DHS officers and employees comply with the section 239(e) certification requirement even if the alien has not applied for or does not intend to apply for a victim-based application or petition.”³⁴

“Locations requiring certification in accordance with INA section 239(e) are:

- i. A domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services provider, or a community-based organization.³⁵
- ii. A courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, human trafficking, or stalking in which the alien has been battered or subject to extreme cruelty, or if the alien may be eligible for T or U nonimmigrant status.”³⁶

“ICE officers are discouraged from making arrests at these sensitive locations absent clear evidence that the alien is not entitled to victim-based benefits. Aliens encountered at rape crisis centers, domestic violence centers, or any of the sensitive locations noted in INA § 239(e) are likely to be genuine VAWA self-petitioners. While INA § 239(e) does not prohibit arrests of aliens at sensitive locations, it is clear that Congress intended that cases of aliens arrested at such locations be handled properly given that they

³² Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP’T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 123 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptsshr-3402-09-22-2005/>

³³ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 13, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

³⁴ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 12, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

³⁵ As defined by VAWA See 42 U.S.C. Section 13925(a)(3).

³⁶ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 12, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

may ultimately benefit from VAWA's provisions. ICE officers should consider prosecutorial discretion in cases of aliens encountered at sensitive locations unless exigent circumstances exist. Examples of exigent circumstances include criminal activity, fraud, terrorism, or where there are extraordinary reasons for arresting aliens at sensitive locations.”³⁷

“Simply stated, ICE officers must independently verify inhumation and cheek databases at their disposal to determine the existence of any pending victim-based applications for immigration benefits. ICE officers are also reminded to consider the sources of their information and be aware that there is a possibility that the caller may be involved in an abusive or violent relationship with the alien who is the subject of the call. Accordingly, if the source of the independently verifiable information is likely an abuser or someone acting in the abuser's capacity, the ICE officer should consider using prosecutorial discretion.”³⁸

“If an officer is unsure whether a particular personal encounter or apprehension requires a certification of compliance under INA § 239(e), the officer should consult the local Office of Chief Counsel (OCC). If time does not permit, the officer should consult his or her immediate supervisor for assistance.”³⁹

“Locations specified in INA § 239(e)(2), where if an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified below, the Notice to Appear (NTA) includes a statement that the provisions of 8 U.S.C. 1367 have been complied with. The locations specified include: domestic violence shelter, rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization. Sensitive locations can also include a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 101(a)(15) [8 U.S.C. § 1101(a)(15)].”⁴⁰

“DHS employees complete a certification of compliance in cases where enforcement actions leading to a removal proceeding are taken at sensitive locations, as required by INA 239(e) (8 U.S.C. 1229(e)).”⁴¹

“The file must bear information adequately alerting the officer or agent who is preparing the NTA that the INA 239(e) certification requirement could be implicated. Moreover, in complying with 8 U.S.C. § 1367, the file must bear sufficient information to permit the issuing officer or agent to make a reliable assessment that, in fact, the prohibited source and nondisclosure provisions of § 1367 have been complied with.”⁴²

“Section 239(e) requires the relevant DHS agency to certify that the agency has independently verified the inadmissibility or deportability of an alien who was encountered at these sensitive locations. Accordingly, before issuing an Notice to Appear (NTA) (with the requisite section 239(e) certification

³⁷ John p. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 4 and 27 available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-va-wa-confidentiality-2007-foia/>.

³⁸ John p. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 3 and 26 available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-va-wa-confidentiality-2007-foia/>.

³⁹ John p. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 4 and 27 available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-va-wa-confidentiality-2007-foia/>.

⁴⁰ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 3, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁴¹ Department of Homeland Security, “Implementation of Section 1367 Information Provisions,” (Nov. 1, 2013) at p. 3, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-section-1367/>.

⁴² John P. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 4 and 26 available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-va-wa-confidentiality-2007-foia/>.

of compliance with 8 U.S.C. section 1367) to an alien against whom an enforcement action leading to a removal proceeding was taken at a sensitive location, DHS employees record on the Form I-213: (1) the sensitive location at which the enforcement action was taken; (2) whether information related to the alien’s admissibility or deportability was supplied by a prohibited source; (3) whether and to what extent such information was independently verified; and (4) an acknowledgement of compliance with the nondisclosure requirements.”⁴³

“The certificate of compliance requirements reflects congressional intent that ICE proceed cautiously when making an arrest or otherwise physically encountering an alien at one of the sensitive locations without objective evidence that the alien is in the United States in violation of the immigration laws and that victims of battery, abuse, trafficking, and extreme cruelty be protected. In this regard, ICE officers encountering such individuals are to verify information through use of all databases at their disposal, including CLAIMS.”⁴⁴

VAWA Confidentiality’s Non-Disclosure Protections

Statutory Provisions

8 U.S.C. § 1376 (Also known as IIRAIRA Section 384)

(b) In general Except as provided in subsection (b), in no case may the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of State (including any bureau or agency of either of such Departments)—

(1) permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief under paragraph (15)(T), (15)(U), or (51) of section 101(a) of the Immigration and Nationality Act [8 U.S.C. 1101(a)(15)(T), (U), (51)] or section 240A(b)(2) of such Act [8 U.S.C. 1229b(b)(2)].

The limitation under paragraph (2) ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted.

Legislative History

“In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings. In 2000, and in this Act, Congress extended these protections to cover victims of trafficking, certain crimes and others who qualify for VAWA immigration relief. These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims’ immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims.”⁴⁵

⁴³ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 12, *available at* <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁴⁴ John P. Torres and Marcy Forman, Interim Guidance Relating to Officer Procedure Following the Enactment of VAWA 2005 (January 22, 2007), at p. 4 and 26 *available at* <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

⁴⁵ Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP’T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 122 *available at* <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptsshr-3402-09-22-2005/>

“Section 921(c) provides that this provision shall not apply to prevent information from being disclosed, in a manner that protects victim confidentiality and safety, to the chairs and Ranking Members of the House and Senate Judiciary Committees, including the Immigration Subcommittees, in the exercise of their oversight authority.”⁴⁶

Regulations:

The U visa regulations provisions regarding VAWA confidentiality protections:

*(e) Restrictions on use and disclosure of information relating to petitioners for U nonimmigrant classification—*⁴⁷

(1) *General.* The use or disclosure (other than to a sworn officer or employee of DHS, the Department of Justice, the Department of State, or a bureau or agency of any of those departments, for legitimate department, bureau, or agency purposes) of any information relating to the beneficiary of a pending or approved petition for U nonimmigrant status is prohibited unless the disclosure is made:

- (i) By the Secretary of Homeland Security, at his discretion, in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under 13 U.S.C. 8;
- (ii) By the Secretary of Homeland Security, at his discretion, to law enforcement officials to be used solely for a legitimate law enforcement purpose;⁴⁸
- (iii) In conjunction with judicial review of a determination in a manner that protects the confidentiality of such information;
- (iv) After adult petitioners for U nonimmigrant status or U nonimmigrant status holders have provided written consent to waive the restrictions prohibiting the release of information;
- (v) To Federal, State, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for benefits pursuant to 8 U.S.C. 1641(c);
- (vi) After a petition for U nonimmigrant status has been denied in a final decision;
- (vii) To the chairmen and ranking members of the Committee on the Judiciary of the Senate or the Committee on the Judiciary of the House of Representatives, for the exercise of congressional oversight authority, provided the disclosure relates to information about a closed case and is made in a manner that protects the confidentiality of the information and omits personally identifying information (including locational information about individuals);
- (viii) With prior written consent from the petitioner or derivative family, to nonprofit, nongovernmental victims’ service providers for the sole purpose of assisting the victim in obtaining victim services from programs with expertise working with immigrant victims; or
- (ix) To federal prosecutors to comply with constitutional obligations to provide statements by witnesses and certain other documents to defendants in pending federal criminal proceedings.

(2) Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367.

(3) Officials of the Department of Homeland Security are prohibited from making adverse determinations of admissibility or deportability based on information obtained solely from the perpetrator of substantial physical or mental abuse and the criminal activity.

⁴⁶ Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP’T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISCAL YEARS 2006-2009, H.R. REP. NO. 109-233, at 122 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptsr-3402-09-22-2005/>.

⁴⁷ 8 C.F.R. Section 214.14(e)

⁴⁸ This provision was statutorily amended in VAWA 2013 adding the requirement that any information disclosed to law enforcement officers, prosecutors and for national security purposes the information disclosed must continue to be treated “in a manner that protects the confidentiality of such information.” 8 U.S.C. 1367(b)(2) and (b)(8).

In the preamble to these regulations DHS adds the following additional explanatory information.⁴⁹

“Finally, the BIWPA added a new paragraph (1)(E) to 8 U.S.C. 1367(a) to prohibit adverse determinations of admissibility or deportability and disclosure of information pertaining to an alien seeking U nonimmigrant status, except in certain circumstances. BIWPA sec. 1513(d) (amending section 384(a) of the Illegal Immigration and Immigrant Reform Act (IIRIRA), div. C of then Omnibus Appropriations Act of 1996, Pub. L. 104–208, 110 Stat. 3009 (1996)). Following passage of the BIWPA in October 2000, USCIS implemented procedures to ensure that those aliens who appeared to be eligible for U nonimmigrant status under the BIWPA would not be removed from the United States until they had an opportunity to apply for such status. See *e.g.*, Memorandum from Michael D. Cronin, Acting Executive Associate Commissioner, Office of Field Operations, Immigration and Naturalization Service (Aug. 30, 2001); Memorandum from William R. Yates, Associate Director of Operations, USCIS, Centralization of Interim Relief for U Nonimmigrant Status Applicants (Oct. 8, 2003) (<http://www.uscis.gov/graphics/services/tempbenefits/antitraf.htm>); Memorandum from William R. Yates, Associate Director of Operations, USCIS, Assessment of Deferred Action in Requests for Interim Relief from U Nonimmigrant Status Eligible Aliens in Removal Proceedings (May 6, 2004) (<http://www.uscis.gov/graphics/services/tempbenefits/antitraf.htm>).” ...

“2. Prohibitions on Disclosure of Information”⁵⁰

“Information concerning U nonimmigrant petitioners is protected against disclosure in two ways. See 8 U.S.C. 1367. First, adverse determinations of admissibility or deportability cannot be made based on information obtained solely from the perpetrator of substantial physical or mental abuse and the criminal activity. 8 U.S.C. 1367(a)(1)(E). Second, the disclosure of information relating to the beneficiary of a pending or approved petition for U nonimmigrant status is prohibited except in certain circumstances. 8 U.S.C. 1367(a)(2). The statute allows information to be released to a sworn officer or employee of DHS, the Department of Justice, the Department of State, or a bureau or agency of either of those Departments, for legitimate Department, bureau, or agency purposes. *Id.* There are eight specific exemptions from the general nondisclosure rule:

- (1) At the discretion of the Secretary of Homeland Security or Attorney General, officials may disclose information in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under 13 U.S.C. 8.
- (2) At the discretion of the Secretary of Homeland Security or Attorney General, officials may provide for the disclosure of information to law enforcement officials to be used solely for a legitimate law enforcement purpose.⁵¹
- (3) In connection with judicial review of a determination, information may be disclosed in a manner that protects the confidentiality of such information.
- (4) Information may be disclosed if all the crime victims in the case are adults, and they have waived the general restrictions on disclosure of information provided by 8 U.S.C. 1367(a)(2).

⁴⁹ Department of Homeland Security, New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status 72 Fed. Reg. 53,015 (September 17, 2007).

⁵⁰ Department of Homeland Security, New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status 72 Fed. Reg. 53,026–53,027 (September 17, 2007).

⁵¹ This provision was statutorily amended in VAWA 2013 adding the requirement that any information disclosed to law enforcement officers, prosecutors and for national security purposes the information disclosed must continue to be treated “in a manner that protects the confidentiality of such information.” 8 U.S.C. 1367(b)(2) and (b)(8).

(5) Information may be disclosed to Federal, State, and local public and private agencies providing benefits, to be used solely to make determinations of eligibility for benefits pursuant to 8 U.S.C. 1641(c).

(6) Information may be disclosed after a petition for U nonimmigrant status has been finally denied.

(7) Information may be disclosed on closed cases to the chairmen and ranking members of the Committee on the Judiciary of the Senate, or the Committee on the Judiciary of the House of Representatives, for the exercise of congressional oversight authority, provided the disclosure is made in a manner that protects the confidentiality of the information and omits personally identifying information (including locational information about individuals).

(8) With prior written consent from the principal petitioner or derivative family member, information may be disclosed to nonprofit, nongovernmental victims' service providers for the sole purpose of assisting the victim in obtaining victim services from programs with expertise working with immigrant victims. 8 U.S.C. 1367(b)."

"Appropriate disciplinary action must be taken and a monetary penalty of up to \$5,000 may be imposed on anyone who willfully uses, publishes, or permits information to be disclosed in violation of the nondisclosure provisions. 8 U.S.C. 1367(c). This rule incorporates the prohibitions and restrictions on information relating to U nonimmigrant petitions into new 8 CFR 214.14(e).

Within the bounds of the statutory prohibitions and restrictions against disclosure of information relating to a U nonimmigrant petitioner, USCIS may provide information taken from the petition about any Federal, State or local crimes to investigative agencies that have a reason to know based on a legitimate law enforcement purpose.⁵² Possible agencies or bureaus to which information may be disclosed include: The Federal Bureau of Investigation (FBI); the U.S. Attorney's Office or the Civil Rights or Criminal Divisions of the Department of Justice; or U.S. Immigration and Customs Enforcement (ICE). As part of the adjudication process, USCIS also may contact the certifying agency for the purpose of assessing whether the petitioner is, has been, or is likely to be helpful to the investigation or prosecution of the qualifying criminal activity. Because the certifying agency has submitted a certification on behalf of the petitioner and, therefore, has already been informed about the fact of the petition as well as the facts upon which the petition is based, USCIS has determined that contacting the certifying agency would not violate the statutory prohibitions and restrictions against disclosure. USCIS recognizes the sensitive nature of application information and takes seriously its obligation to protect confidentiality. USCIS will make any disclosure to an investigative agency in a manner that provides the maximum confidentiality under the circumstances.

In addition to disclosures to investigative agencies, DHS may have an obligation to provide portions of petitions for U nonimmigrant status to federal prosecutors for disclosure to defendants in pending criminal proceedings. This obligation stems from constitutional requirements that pertain to the government's duty to disclose information, including exculpatory evidence or impeachment material, to defendants. See U.S. Const. amend. V & VI; *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Accordingly, this rule incorporates this requirement at new 8 CFR 214.14(e)(1)(ix).

Implementing Policies

The Immigration and Naturalization Service in its first memo implementing VAWA Confidentiality protections issued in 1997 recognized that these protections were enacted in part to bar immigration officials from disclosing information about the victims whereabouts and information about the victim's immigration

⁵² Id.

case to the victim’s abusive spouse or parent. It stated that the VAWA confidentiality protections –

“were created by Congress so that the battered alien can seek status independent of the abuser. Thus, disclosure of information to an alleged abuser or any other family member was inappropriate event prior to the new law. With enactment of section 384, however, such inappropriate conduct is not also grounds for disciplinary action or fine, or both.”⁵³

“With the passage of § 384 of IIRIRA. Congress imposed strict confidentiality provisions.... This provision, codified at 8 U.S.C. § 1367(a)(2) but commonly referred to as the § 384 confidentiality provision, prohibits disclosure (other than to a "sworn officer or employee of [DHS])- of "any information- relating loan alien who is an applicant for relief under provisions of the INA relating to domestic violence — § 101 (a)(51), trafficking under 10I(a)(15)(T), or violent crime under 101(a)(I 5)(U) — from the time the application for relief is submitted until such time as "the application for relief is denied and all opportunities for appeal of the denial have been exhausted.- 8 U.S.C. § 1367(a)(2). There are limited exceptions to this broad confidentiality provision set forth in 8 U.S.C. § 1367(6).”⁵⁴

“Section 1367 covers information relating to beneficiaries of applications for a number of immigration benefits, not just the Form I-360 VAWA self-petition. For the purpose of this guidance if an alien is the beneficiary of a pending or approved application for one or more of the victim-based benefits described below, the requirements of 8 U.S.C. 1367 will be followed:

- a. VAWA self-petitioner, which incorporates the following applications or petitions:
 - i. I-360 Self-petition - self-petitioners under INA sec. 204
 - ii. I-751 Hardship waiver - battered spouse or child hardship waiver
 - iii. VAWA CAA - abused Cuban Adjustment Act applicants
 - iv. VAWA HRIFA - abused Haitian Refugee Immigration Fairness Act applicants
 - v. VAWA NACARA - abused Nicaraguan Adjustment and Central American Relief Act applicants
 - vi. VAWA Suspension of Deportation
- b. VAWA Cancellation of Removal applicants under INA 240A(b)(2).
- c. I-914 T Nonimmigrant Status - victim of a severe form of trafficking in persons under INA 101(a)(15)(T).
- d. I-918 U Nonimmigrant Status - victim of qualifying criminal activity under INA 101(a)(15)(U).”⁵⁵
- e. Abused spouses subjected to battering or extreme cruelty by visa holder spouses (A, E(3), G and H)⁵⁶

“This guidance serves as a reminder that all DHS officers and employees are generally prohibited from permitting use by or disclosure to anyone other than a sworn officer or employee of DHS, the Department of State (DOS); or the Department of Justice (DOJ) of any information relating to a

⁵³ Paul Virtue, Immigration and Naturalization Service, Non-Disclosure and Other Prohibitions Related to Battered Aliens: IIRARA Section 384 (May 5, 1997) at 3 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-gov-insconfvawamemo-05-05-1997/>

⁵⁴ Department of Homeland Security, “Memorandum for All OPLA Chief Counsel: VAWA 2005 Amendments to the Immigration Laws and 8 U.S.C. § 1367,” at p. 4, available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

⁵⁵ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 4, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁵⁶ INA Section 106; Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants Revisions to the *Adjudicator’s Field Manual* (AFM); Revision of Chapter 30.13 (AFM Update AD16-01) PM-602-0130 at 3 (March 8, 2016) (“USCIS has also elected to extend the confidentiality provisions of Title 8, United States Code, section 1367 to applicants for employment authorization under INA section 106.”) available at <http://niwaplibrary.wcl.american.edu/pubs/h-visa-765/>

beneficiary of a pending or approved application for victim-based immigration benefits. This includes a battered spouse or child hardship waiver, VAWA self-petition, VAWA cancellation of removal or suspension of deportation case, or T or U nonimmigrant status, including the fact that they have applied for such benefits. Information that cannot be disclosed includes information about an individual contained in a DHS database as well as information that has not yet been included in a database, such as the location of a beneficiary.”⁵⁷

“It is important to emphasize that the prohibition extends to any information relating to the battered spouse or child, which could include verification of status or any other routine information.”⁵⁸

The information that receives VAWA confidentiality protections is –

“Any information relating to aliens who are seeking or have been approved for immigrant status as battered spouses, children and parents under provisions of the Violence Against Women Act (VAWA), as victims of a severe form of human trafficking who generally are cooperating with law enforcement authorities, or as aliens who have suffered substantial physical or mental abuse and are cooperating with law enforcement authorities. This definition includes records or other information that do not specifically identify the individual as an applicant or beneficiary of the T Visa, U Visa, or VAWA protections.”⁵⁹

“All DHS officers and employees are generally prohibited from permitting use by or disclosure to anyone other than a sworn officer or employee of DHS, Department of State (DOS), or Department of Justice (DOJ) of any information relating to a beneficiary of a pending or approved application for victim-based immigration benefits, including a battered spouse or child hardship waiver, VAWA self-petition, VAWA cancellation of removal or suspension of deportation case, or T or U nonimmigrant status, including the fact that they have applied for such benefits.”⁶⁰

“The nondisclosure provision provides protection as soon as a DHS employee has reason to believe that the alien may be the beneficiary of a pending or approved victim-based application or petition, and the limitation ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted.”⁶¹

“If a DHS employee receives adverse information about a victim of domestic violence, sexual assault, human trafficking or an enumerated crime from a prohibited source, DHS employees should treat the information as inherently suspect and exercise all appropriate prosecutorial discretion with respect to pursuing the adverse information. Further, OHS employees receiving information solely from a prohibited source do not take action on that information unless there is an independent source of corroboration.”⁶²

“This interim guidance also reminds ICE employees that they are generally prohibited from "permit[ing] use by or disclosure to anyone (other than a sworn officer or employee of “[DHS])” of any information

⁵⁷ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 5-6, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁵⁸ Paul Virtue, Immigration and Naturalization Service, Non-Disclosure and Other Prohibitions Related to Battered Aliens: IIRARA Section 384 (May 5, 1997) at 2 available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-gov-insconfvawamemo-05-05-1997/>.

⁵⁹ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 3, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁶⁰ Department of Homeland Security, “Implementation of Section 1367 Information Provisions,” (Nov. 1, 2013) at p. 2, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-section-1367/>.

⁶¹ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 6, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁶² Department of Homeland Security, “Implementation of Section 1367 Information Provisions,” (Nov. 1, 2013) at p. 2-3, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-section-1367/>.

which relates to an alien who is the beneficiary of an application for relief under victim based benefits (VAWA. T or U nonimmigrant status): If ICE employees know that an alien has sought such victim-based benefits, they are generally prohibited from disclosing any information to a third party.”⁶³

“In enacting this nondisclosure provision, Congress sought to prevent, with limited exceptions, disclosure of any information relating to beneficiaries of applications for VAWA benefits (battered spouses or children) or for T or U nonimmigrant status, including the fact that they have applied for benefits. The disclosure of certain information is permitted in limited circumstances. Those circumstances include disclosure for legitimate law enforcement purposes, statistical purposes, and benefit granting or public benefit purposes. See 8 U.S.C. § 1367(b) (listing exceptions to general nondisclosure rule).⁶⁴

Similarly, release of information in the context of judicial review is limited by statute to contexts where release can be accomplished “in a manner that protects the confidentiality of such information.”⁶⁵ This judicial review exception to VAWA confidentiality applies to judicial review of a victim’s VAWA confidentiality protected immigration case.⁶⁶ DHS policy warns DHS officials that:

“Please note, defense counsel in state cases may sometimes attempt to make the entire A-file discoverable; however, the entire file is not discoverable in its entirety under this exception”⁶⁷

Additionally regulations issued by the U.S. immigration regulations in the context of the U-Visa confirm that:

“Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367”⁶⁸

In short, ICE employees must not reveal any information concerning an alien's T, U, or VAWA application unless an exception to the general nondisclosure requirement applies. The nondisclosure limitation ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted.”⁶⁹

“When cases arise involving aliens known to be applicants for VAWA, T, or U relief, ACCs should take particular care to ensure that the confidentiality provisions are not violated. Once ACCs are made aware that an alien is the beneficiary of a pending or approved VAWA, T, or U petition, they should ensure that the court is aware of any pending VAWA, T, or U issues prior to the hearing, either orally or in writing on the record. If such notification is not possible, the court should be notified as soon as is reasonable after the alien's VAWA, T, or U status is verified. If a case arises in which the applicant's

⁶³ Department of Homeland Security, “Memorandum for All OPLA Chief Counsel: VAWA 2005 Amendments to the Immigration Laws and 8 U.S.C. § 1367,” at p. 25, available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

⁶⁴ Department of Homeland Security, “Memorandum for All OPLA Chief Counsel: VAWA 2005 Amendments to the Immigration Laws and 8 U.S.C. § 1367,” at p. 25, available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

⁶⁵ 8 U.S.C. 136(b)(3); Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 6, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁶⁶ *Hawke v. United States Department of Homeland Security*, 2008 U.S. Dist. LEXIS 87693, at *1 (N.D. Cal. Sept. 29, 2008); No. C-07-03456 RMW, 2008 WL 4460241 at *1 (N.D. Cal. Sept. 29, 2008); *Demaj v. Sakaj*, 2012 U.S. Dist. LEXIS 18159 at *1 (D. Conn. Feb. 14, 2012); No. 3:09CV255(JGM), 2012 WL 476168 at *1 (D. Conn. Feb. 14, 2012). See also, Carly Erickson and Leslye E. Orloff, Court Rulings Confirm Federal VAWA Confidentiality Protections Bar Discovery of VAWA Confidentiality Protected Information in State Family Court Proceedings (June 17, 2014) available at <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-tool-hawkedemajfactsheet/>.

⁶⁷ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 7, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁶⁸ 8 C.F.R. 214.14(e)(2)

⁶⁹ Department of Homeland Security, “Memorandum for All OPLA Chief Counsel: VAWA 2005 Amendments to the Immigration Laws and 8 U.S.C. § 1367,” at p. 25, available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>.

safety would be at risk by disclosing the application to the court or to opposing counsel, please consult your Deputy Chief Counsel for guidance.”⁷⁰

The U.S. Department of Homeland Security requires that each of its component agencies, United States Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Patrol, and their subdivisions, each –

“establish, to the fullest extent reasonably practicable, means of identifying individuals protected by Section 1367 confidentiality and will take steps to develop safeguards to protect this information in the relevant systems. One such way to help identify most, though not all, of those protected is through a Central Index System (CIS) database check.

- a. CIS database check: For any cases where it is suspected that an alien is an applicant for a benefit protected by section 1367, a DHS employee consults the Central Index System (CIS) database to verify whether an alien has a pending or approved application or petition covered by section 1367.
- b. CIS contains a class of admission (COA) code “384” (signifying section 384 of IIRIRA) that was created to alert DHS personnel that the individual is protected by section 1367. Information about the location, status, or other identifying information of any individual with the code “384” may not be released outside of DHS, DOJ, or DOS unless one or more of the exceptions applies or the individual has been denied relief and has exhausted all opportunities for appeal.”⁷¹

“Once the pending VAWA, T, or U petition/application is adjudicated, the COA will be updated to reflect the correct classification, which is unique to each type of immigration relief. However, DHS personnel can continue to identify the individual as covered by the confidentiality provisions of section 384 of IIRIRA via the history screen in CIS because the 384 code will be maintained in CIS. In addition, when the individual applies for subsequent benefits, such as adjustment of status, the COA will be populated accordingly; however, the CIS history screen will continue to include the 384 code, identifying the individual as being covered by the confidentiality provisions. If the petition/application is denied, the confidentiality provisions will continue to apply to the individual until all final appeal rights are exhausted.”⁷²

⁷⁰ Department of Homeland Security, “Memorandum for All OPLA Chief Counsel: VAWA 2005 Amendments to the Immigration Laws and 8 U.S.C. § 1367,” at p. 5, available at <http://niwaplibrary.wcl.american.edu/pubs/iceopla-va-wa-confidentiality-2007-foia/>.

⁷¹ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” at p. 14, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>.

⁷² Department of Homeland Security, “Broadcast Message on New 384 Class of Admission Code,” available at <http://niwaplibrary.wcl.american.edu/pubs/dhs-broadcast-class-admission-code/>.