

CHAPTER 12

Sexual Violence and Immigration Law

I. Introduction

Washington State court judges may not have jurisdiction over immigration cases, but their decisions in a state court matter can make a lasting impact on a noncitizen's immigration status. Where immigration issues may present in state court proceedings, basic knowledge of how cases of sexual violence affect immigration remedies and status for noncitizens can better inform state court judges of pitfalls and unintended barriers to justice. The possibility of encountering noncitizen parties in Washington state court proceedings is far from remote—roughly one in seven residents of Washington State is an immigrant, while one in eight residents is a native-born U.S. citizen with at least one immigrant parent.¹

Sexual violence includes a continuum of sexualized coercive conduct that includes rape, abuse, assault, harassment, stalking and trafficking.² Sexual violence can be encompassed in domestic violence but can also present itself in non-intimate partner relationships as well, such as between classmates, with an employer, or neighbors. A perpetrator³ may use a survivor's immigration status, cultural taboos, or fears about the United States legal system to further intimidate or prevent reporting. State courts' understanding this dynamic of coercion and intimidation, and in response, providing clarity about the state legal process can ensure immigrant survivors have greater access to justice.

Issues related to immigration law may arise in a variety of sexual violence-related court proceedings, including criminal cases, protection order cases, family law cases, employment discrimination cases, and civil lawsuits. This chapter discusses those immigration issues that may arise for judges within the context of proceedings in state court. The topics covered include:

- 1) barriers to reporting;
- 2) limitations on evidence of immigration status;
- 3) immigration status and court proceedings;
- 4) VAWA confidentiality
- 5) protection orders;
- 6)VAWA protections, including U-Visa and T-Visa processes;

¹ Fact Sheet: "Immigrants in Washington", American Immigration Counsel (2017) available at: <https://www.americanimmigrationcouncil.org/research/immigrants-in-washington>

² Kelly, Liz. *Surviving Sexual Violence*. University of Minnesota Press: 1989

³ The terms "perpetrator," "abuser," or "offender" and "survivor" or "victim" used herein, and relative to court proceedings, do not reflect that a person alleging abuse by another, without adjudication, is a survivor or victim and a person accused of abusing another, without adjudication, is an abuser or offender. However, it is recognized that abuse can and does occur without any subsequent court involvement wherein there is a survivor or victim and an abuser or offender. Additionally, adjudicated studies based on domestic violence or other abuse, may justifiably use such terms as "survivor" and "abuser" and the reader is encouraged and entitled to exercise independent thought and judgment as to the meaning of the term used given the context of the study and the data involved. The content of this chapter should be read with those caveats in mind.

- 7) asylum; and
- 8) Special Immigrant Juvenile Status.

II. Barriers to Reporting Sexual Assault for Immigrant Victims

Noncitizen litigants can have inaccurate perceptions about the legal system in the United States that prevent them from accessing the courts. These misconceptions may stem from differences between the United States legal system and those from their home countries, misrepresentations by a perpetrator, or ignorance of resources.⁴ The court has an obligation to be aware of these barriers and to have practices in place that do not deter noncitizen litigants from accessing the legal system.

The U.S. Department of Justice estimates that only about one-third of all sexual assaults are reported to the police,⁵ and additional barriers to reporting for immigrant victims could skew that number even further. Even before entering the United States, migrants are at an increased risk for sexual victimization. Another consideration is that some noncitizens may have entered the United States as a result of sex trafficking.⁶ Noncitizen survivors of sexual violence face a variety of barriers that lead to them reporting these crimes at an even lower rate than victims who are citizens.⁷

A. Fear of Deportation

Distrust and fear of law enforcement officials, the criminal justice system, and removal often keep noncitizen victims from reporting sexual violence or seeking legal protections, especially among undocumented immigrants.⁸ This fear has increased with the advent of the “Secure Communities” program, which sends the fingerprints of arrestees to United States Immigration and Customs Enforcement (ICE), who can then place an immigration hold on anyone it believes to be undocumented.⁹ Migrant workers, often within the agriculture¹⁰ and service¹¹ industries, also fear employment consequences when reporting assaults by supervisors

⁴ Mindlin, Jessica et. al., “Dynamics of Sexual Assault and Implications for Immigrant Women” (2013) <http://library.niwap.org/wp-content/uploads/2015/CULT-Man-Ch1-DyanimcsSexualAssaultImplications-07.10.13.pdf>

⁵ Truman, Jennifer L., Ph.D, and Rachel Morgan, Ph.D., “Criminal Victimization”, Bureau of Justice Statistics (2015) <https://www.bjs.gov/content/pub/pdf/cv15.pdf>

⁶ “Trafficking in Persons Report”, Department of State (2015) <https://www.state.gov/documents/organization/245365.pdf>

⁷ Mindlin, Jessica et. al., “Dynamics of Sexual Assault and Implications for Immigrant Women” (2013) <http://library.niwap.org/wp-content/uploads/2015/CULT-Man-Ch1-DyanimcsSexualAssaultImplications-07.10.13.pdf>

⁸ Childress, Sarah, “For Shadow Victims of Violence, the “U Visa” Can Help”, Frontline (June 24, 2013) <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/for-shadow-victims-of-violence-the-u-visa-can-help/>

⁹ Yeung, Bernice and Grace Rubenstein, “Female Workers Face Rape, Harassment in U.S. Agriculture Industry”, Frontline (June 25, 2013) <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/female-workers-face-rape-harassment-in-u-s-agriculture-industry/>

¹⁰ Id.

¹¹ Yeung, Bernice, “Rape on the Night Shift”, Frontline (June 23, 2015) <http://stories.frontline.org/night-shift-english>

or co-workers. Loss of a job could mean loss of an employment-based visa, which could lead to removal and separation of families.¹² The fear of deportation can also be instilled by the perpetrator of the sexually offensive conduct and used as a weapon to intimidate or coerce a victim during the sexual assault and prevent the reporting or disclosure after the perpetration.

B. Cultural Issues

The stigma surrounding sexual assault may subject the victim to more dire social consequences than their assailant, particularly in tight-knit immigrant communities.¹³ Immigrant survivors often face community pressure to remain silent about their victimization for complex reasons, ranging from cultural norms about the role of women or children in the community or the importance of resolving conflicts internally within the community, to the perpetrator's higher status in that particular community. Where cultural traditions may differ from dominant American cultural customs, noncitizen survivors may fear ostracism by members of their community if they seek assistance from outside their community, which may include all of their friends or family members in the United States.¹⁴ Additionally, the disclosure of a sexual assault, abuse, or rape often requires the sharing and detailed explanation of intimate, humiliating specifics that many survivors have been told should never be spoken of publicly or may not have the language to describe, such as terminology for genitalia or specific sexual conduct, or may implicate partners or family members, on whom the survivor may rely on for support.

C. Unfamiliarity with the Legal System

Sexual assault as an aspect of domestic abuse is also a significant concern in immigrant communities, and barriers to reporting, especially fear of immigration status change and cultural differences, may be amplified in this context.¹⁵ Some victims, especially those from countries where marital rape is not prohibited or punished, may not know that such acts are illegal in the United States.¹⁶ Additionally, many noncitizen victims may seek sexual violence as a “private” matter where courts have no role and that should be dealt with individually or within the immigrant community.

Depending on a noncitizen's background, they may be more familiar with the systems of their country of origin where the courts serve as an arm of a repressive government and where the prevailing party is the person with the most money or the strongest connections to the government.¹⁷ Many refugees who have fled their native countries have associated any contact with the legal system with persecution and terror.

¹² Mindlin, Jessica et. al., “Dynamics of Sexual Assault and Implications for Immigrant Women” (2013) <http://library.niwap.org/wp-content/uploads/2015/CULT-Man-Ch1-DyanimcsSexualAssaultImplications-07.10.13.pdf>

¹³ Id.

¹⁴ Raj, Anita, and Jay Silverman, “Violence Against Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence,” (March 2002)

¹⁵ Id.

¹⁶ Id.

¹⁷ Orloff, Leslye E. et. al., “Battered Immigrant Women's Willingness to Call for Help and Police Response” (2003)

Many noncitizens distrust the United States legal system because of misinformation from the perpetrator or the larger community. Abusers may tell victims that they will never be believed in court or that they will be deported if they call the police or go to court.¹⁸ These allegations may be exacerbated by court personnel who believe that non-citizens are not entitled to protections under state law or lack of interpretation services for limited English-speaking litigants.

D. Language Barriers

Language barriers and cultural differences may also significantly discourage victims from reporting sexual violence.¹⁹ An inability to communicate may prevent a battered immigrant from seeking necessary legal, shelter, or emergency services. For example, the immigrant may be unable to communicate with law-enforcement officers responding to an emergency call. Even if a victim does call law enforcement, they may not be able to make a report without access to an interpreter.²⁰ However, use of an interpreter may seem to a victim like a further invasion of privacy, first because they must disclose their assault to an additional person, but also because, in small or close immigrant communities, the interpreter may know one or both of the parties involved.²¹

Furthermore, the lack of ability to read or understand English impacts every part of a noncitizen survivor's encounter with the legal system. Forms must be translated. Hearings become meaningless where a litigant is unable to prepare and present evidence in support of their case because of language barriers, unless an interpreter or translator is available. The presence of well-trained interpreters and culturally competent court staff can break down many of the cultural and linguistic barriers a noncitizen may be facing when accessing the legal system.

Washington has adopted rigorous rules concerning the ethical responsibilities of interpreters. (GR 11, 11.1, 11.2, 11.3) Judges should carefully qualify each interpreter serving in the courts in accordance with these requirements.

Courts may be able to address some of the barriers encountered by non-English speaking persons by making materials from local immigration advocacy programs available at the courthouse, including brochures on VAWA Self-Petitioners and U and T Visas,²² Special Immigrant Juvenile Status,²³ and protections for immigrant victims generally.²⁴ To help remove these barriers, courts can learn more about the dynamics of domestic and sexual violence

¹⁸ Reina, A., Lohman, B., & Maldonado, M. (2014). "He said they'd deport me": Factors influencing domestic violence help-seeking practices among Latina immigrants. *Journal of Interpersonal Violence*, 29(4), 593–615.

¹⁹ Mindlin, Jessica et. al., "Dynamics of Sexual Assault and Implications for Immigrant Women" (2013).

²⁰ Id.

²¹ Id.

²² See e.g. <http://library.niwap.org/wp-content/uploads/2015/CULT-Bro-DHSEnglishImmOptionsVictimsofCrime.pdf>.

²³ See e.g.

http://library.niwap.org/wp-content/uploads/PED.SIJ_.1015_Brochure_M-1114B_Revised_05.19.16.pdf.

²⁴ See e.g. <http://library.niwap.org/wp-content/uploads/DHS-Protections1.6-links-121516.pdf>.

experienced by immigrants. In addition, courts can work to develop strategies for instituting culturally-appropriate policies and procedures. For example, courts can work on adopting culturally competent assumptions including:²⁵

- All cultures are contradictory in that there are both widespread acceptance of domestic violence as part of society and traditions of resistance.
- Each victim is not only a member of her or his community, but also a unique individual with her or his own responses. The complexity of a person’s response to sexual violence is shaped by multiple factors.
- Each individual comes into any encounter with cultural experiences and perspectives that might differ from those present in the system.

All institutions should develop specific policies and procedures to systematically build cultural competence by learning to recognize and reject preexisting beliefs, biases, and prejudices about a particular culture; focusing on understanding information being provided by individual litigants within the context at hand; and foregoing labeling persons by using fixed or generalized information.

III. Immigration Status is Generally Inadmissible

Washington State has recognized immigration status not only as a barrier for noncitizens accessing the courts but also to receiving a fair outcome. “Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder’s duty to engage in reasoned deliberation.”²⁶ As a result, on November 8, 2017, the Washington Supreme Court approved a new evidence rule that makes evidence about a person’s immigration status generally inadmissible in civil and criminal courts statewide, unless a party can establish a compelling reason for admissibility.²⁷

ER 413 limits the introduction of immigration evidence (with some exceptions) to ensure equal and impartial access for noncitizens to Washington’s court system. ER 413 gives the state court discretion to review this evidence when it is directly probative to a particular civil or criminal case. The new evidence rule took effect on September 8, 2018. Cases interpreting ER 413 in criminal matters have allowed for evidence of witness’ immigration status for the purpose of demonstrating bias or motive to provide false testimony.²⁸

Effective since 1983, [RCW 10.40.200](#) (Deportation of aliens upon conviction) provides that a defendant shall be advised of special consequences to a noncitizen that may follow. The statute further provides: “It is further the intent of the legislature that at the time of the plea no

²⁵ Domestic Violence Manual for Judges ([Appendix F-3](#))

²⁶ *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672, 230 P.3d 583 (2010)

²⁷ ER 413

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ER&ruleid=GAER0413.

²⁸ See also, *State v. Bedada*, 13 Wn. App 185, 463 P. 3d 125 (2020); *State v. Carballo*, 17 Wn. App. 2d. 337, 486 P. 3d 142 (2021).

defendant be required to disclose his or her legal status to the court.” The U.S. Supreme Court, in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), also acknowledged the severity of immigration consequences of criminal convictions and the importance of ensuring that defendants are informed of the potential immigration consequences before entering pleas. Therefore, it has long been recommended that judges simply inquire of defense counsel at the time of entry of a plea: “Have you had an opportunity to speak to your client about potential immigration or naturalization consequences of this plea?”

IV. Immigration Status and Court Hearings

A. Courts Open to All (COTA) Act²⁹

In 2020, the Washington State Legislature passed the Courts Open to All (COTA) Act, codified in RCW 2.28.300 – .340 and applicable in all levels of courts. The bill prohibits warrantless civil arrests of people going to or coming from state courthouses; requires courts to collect information on federal law enforcement officers entering courts for purposes other than to participate in proceedings; prohibits judges, court staff, prosecutors, and others from collecting information about immigration or citizenship status unless relevant to a local or state criminal violation, or from sharing other non-public information with federal immigration authorities for the purpose of civil immigration enforcement.

B. General Rule 38 – Open Access to Courts³⁰

Also adopted in 2020, Washington’s General Rule (GR) 38 prohibits warrantless civil arrests while inside a “court of law” in connection with judicial proceedings or conducting other court business. GR 38 also prevents warrantless civil arrest for people traveling to or from a “court of law.”

C. Rules of Professional Conduct (RPC) 4.4 – Respect for Rights of Third Persons³¹

Amended in 2020, Comment 4 to RPC 4.4 includes guidance that a lawyer’s duty to respect the rights of third persons includes a lawyer’s assertion or inquiry about a third person’s immigration status when their purpose is to intimidate, coercive, or obstruct that person from participating in a civil or criminal matter.

²⁹ Chapter 37, Laws of 2020, available at <https://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/2567-S.SL.pdf?q=20230706114914>

³⁰ https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_38_00_00.pdf

³¹ https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_04_04_00.pdf

D. Memos to Immigration Customs Enforcement (ICE) and Customs and Border Protection (CBP)

In April 2021, the U.S. Secretary of Homeland Security issued a memo³² directing Immigration Customs Enforcement (ICE) and Customs and Border Patrol (CBP) in a memo to limit their civil enforcement actions in or near courthouses. Pursuant to this memo, immigration agents may now only take civil immigration enforcement action in or near a courthouse in limited situations:

1. It involves a national security matter, or
2. There is an imminent risk of death, violence, or physical harm to anyone, or
3. It involves hot pursuit of someone who poses a threat to public safety, or
4. There is an imminent risk of destruction of evidence important to a criminal case.

Civil immigration enforcement is permitted against public safety threats in the absence of hot pursuit where needed, and with approval from a supervisory agent beforehand.

In October 2021, the U.S. Secretary of Homeland Security issued a memo³³ directing ICE and CBP to limit their actions at or near “protected areas” which include, but are not limited to the following: schools, medical or mental health care facilities, places of worship or religious study, places where children gather, social services establishments (including victim services centers), disaster and emergency response sites, places where religious or civil ceremonies are taking place, and sites of public demonstration and celebration. Exceptions based on exigent circumstances include:

1. It involves a national security matter, or
2. There is an imminent risk of death, violence, or physical harm to anyone, or
3. It involves the hot pursuit of someone who poses a threat to public safety, or
4. It involves the hot pursuit of a “personally observed border-crosser,” or
5. There is an imminent risk of destruction of evidence material to a criminal case, or
6. There is a situation where a “safe alternative location does not exist.”

Absent an exigent circumstance, this memo allows agents to conduct enforcement actions at or near a protected area if they have prior approval from a supervisory agent.

The memo also adds a reporting requirement for all enforcement actions taken at or near protected areas. Any enforcement action taken in or near a protected area must be fully documented in that agency’s Privacy Act-compliant electronic system of record in a manner that can be searched and validated.

³² <https://www.cbp.gov/sites/default/files/assets/documents/2021-Apr/Enforcement-Actions-in-Courthouses-04-26-21.pdf>

³³

https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf

V. VAWA Confidentiality

Federal law outlines certain confidentiality protections in the immigration statute for non-citizens who have been victimized by not only by their spouses and partners but also non-intimate perpetrators.³⁴ The goals of these protections are both to weaken the ability of perpetrators to threaten victims with removal and use immigration enforcement officials to back up these threats, as well as to protect victims by safeguarding their personal information.³⁵ Abusers' threats of deportation consequences are not hollow—the National Immigrant Women's Advocacy Project found that 25-33% of perpetrators are actively involved in trying to get their victims removed.³⁶ There are three main prongs in the immigration statutes protecting victims' confidentiality:

1. Protection against disclosure or use of confidential information by federal officials;³⁷
2. Prohibition against federal officials seeking or relying on information provided by perpetrators;³⁸ and
3. Restriction of locations where federal immigration enforcement actions can be conducted.³⁹

The covered confidential information includes the existence of an immigration case as well as personal information contained in the case.⁴⁰ Confidentiality extends to VAWA self-petitioners and U or T visa applicants (described further below); however, that information may be subject to disclosure in state cases.⁴¹

Immigration authorities may not seek or rely on information from a perpetrator or his family to make adverse determinations regarding admissibility or deportability of a noncitizen victim.⁴² Finally, there is a location prohibition that prevents immigration enforcement action at

³⁴ Hussain, Alina and Leslye E. Orloff, "VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy" (2017, updated 2022) <https://niwaplibrary.wcl.american.edu/wp-content/uploads/VAWA-Confidentiality-Statutes-Leg-History-Policies-2.23.17.pdf>

³⁵ Id.

³⁶ Szabo, Krisztina and Leslye E. Orloff, "The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending" (2014) <http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-SafetyPlanning-06.18.14.pdf>

³⁷ 8 USC §1367.

³⁸ Id.

³⁹ 8 U.S.C §1229 (e); see also <https://www.cbp.gov/sites/default/files/assets/documents/2021-Apr/Enforcement-Actions-in-Courthouses-04-26-21.pdf>; https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf.

⁴⁰ Id.

⁴¹ See e.g., *State v. Ochoa* 191 Wn.2d 1005, 424 P.3d 1224 (2018). Division II of Washington's Court of Appeals held that excluding evidence in a criminal trial of the victim's U-Visa application violated the defendant's Sixth Amendment rights. The case was appealed to the Washington State Supreme Court, which ruled that any error in prohibiting cross-examination on the U-Visa application was harmless (193 Wn.2d 341, 440 P.3d 994 (2019)).

⁴² Id.

a variety of safe locations for victims, including domestic violence shelters and victim services programs. The Department of Homeland Security (DHS) must disclose the fact that any part of an enforcement action took place at a prohibited location, which is grounds for a dismissal in immigration court.⁴³

A perpetrator may try to assert the limited exceptions to this confidentiality provision to obtain protected information about victims from their immigration files.⁴⁴ The exceptions allow for disclosure for legitimate law enforcement purposes, census information, congressional oversight, national security purposes, or to assist with an immigrant victim's eligibility for certain public benefits.⁴⁵ However, information contained within or regarding the existence of a VAWA, T visa, or U visa application is "absolutely privileged information" that cannot be compelled to be disclosed in a criminal⁴⁶ or civil⁴⁷ case. In a criminal case, this may not cover the law enforcement certification that accompanies a U visa application, which will likely be discoverable.⁴⁸ The remainder of the application will likely remain privileged if police and prosecutors have not had access to it.⁴⁹ In a civil or family court case, the court should deny requests for information about or contained in cases protected by VAWA confidentiality.⁵⁰

VI. Protection Orders

Civil protection orders provide courts with an opportunity to counter immigration-related abuse and order culturally helpful remedies. All persons are eligible to receive civil protection orders without regard to the immigration status of any party or child.⁵¹ The issuance of a protection order has no effect on the restrained person's immigration status,⁵² unless they commit a criminal violation of the order. The order can also provide an immigrant victim with evidence of abuse for use in a VAWA, T visa or U visa application, as described below.⁵³ A conviction or finding of violation of a protection order involving credible threats of violence, repeated harassment, or bodily injury to a protected person is a deportable offense.⁵⁴ Mutual protection

⁴³ Id.

⁴⁴ Id.

⁴⁵ 8 U.S.C. § 1367(b)(2013)

⁴⁶ *Hawke v. U.S. Dep't of Homeland Sec.*, NO. C-07-03455, 2008 WL 4460241 at *7 (N.D. Cal. Sept. 29, 2008) (denying petition for review of DHS denial of request to produce wife's immigration records, including VAWA application, for use in criminal case alleging misdemeanor battery against his wife)

⁴⁷ *Demaj v. Sakaj*, No. 3:09-CV-255, 2012 WL 476168 at *5 (D. Conn. Feb. 14, 2012) (denying motion to compel disclosure of U visa application in child custody case because, though relevant, "disclosure of these documents for this purpose runs contrary to the intent of the protections afforded by 8 U.S.C. § 1367, the purpose of which is to protect the confidentiality of the applications by preventing disclosure of these documents to alleged criminals as disclosure would allow [them] to interfere with or undermine Petitioner's immigration case")

⁴⁸ Orloff, Leslye E. and Benish Anver, "Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality" (2013) <http://library.niwap.org/wp-content/uploads/2015/pdf/CONF-VAWA-BchCrd-FamCtConfidentiality-10.11.2013.pdf>

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Carcamo Cavazos, Andrea and Leslye E. Orloff, "Immigrants and Protection Orders Bench Card" (2013) <http://library.niwap.org/wp-content/uploads/2015/FAM-BchCrd-ImmigrantsCPOs-8.27.13.pdf>

⁵² Id.

⁵³ Id.

⁵⁴ Id.

orders are not permitted under VAWA, and victims cannot be convicted of violating an order than was issued to protect them.⁵⁵

In addition to traditional protection order remedies, immigrant victims of abuse and their children often need creative protection order remedies using the “catch-all” provisions to help curb future abuse and harassment, interfere with abusers’ ability to exert power and/or coercive control over their victims, offer victims remedies or relief for past abuse, and help the victim overcome his or her victimization and build a new life post-abuse.⁵⁶ Such provisions might include requiring that victims’ identity documents are returned, that the abuser does not report the victim to immigration enforcement, or does not attempt to withdraw or hinder their immigration application.⁵⁷

Despite the potential for helpfulness of civil protection orders, this resource is underutilized by the immigrant community. The National Institute for Justice funded a civil protection order study, which found that, with support, immigrant victims will use and benefit from justice system assistance.⁵⁸ At the beginning of the study, 60.9% of those surveyed did not know about the existence of civil protection orders.⁵⁹ When assisted by an advocate⁶⁰ or attorney, 80% obtained a civil protection order, and 96% of them found the order to be helpful.⁶¹ Of those who were able to obtain a civil protection order, 68.3% of respondents reported protection order violations that were immigration-related.⁶² The court’s knowledge of using immigration status as a coercive tool can impede further attempts at victimization and abuse of immigrant survivors.

VII. VAWA Immigration Protections

In 2021, the acting Director of ICE issued its “Victim Centered Approach” directive, setting forth the U.S. Immigration and Customs Enforcement regarding civil immigration enforcement involving noncitizen crime victims.⁶³ This approach places “equal value on the identification and stabilization of victims and on the deterrence, investigation, and prosecution of

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id. See also *In re the Marriage of Meredith*, 148 Wn. App. 887 (2009) where Division II found that the trial court’s entry of a protection order restraining the respondent from contacting any agency regarding the petitioner’s immigration status, “including but not limited to the Department of Homeland Security (citizenship and Immigration Services, Immigration and Customs Enforcement or Customs and Border Protection), the Executive Office of Immigration Review (the immigration court system), or the Department of State” without court approval was an unconstitutional restraint on free speech.

⁵⁸ Szabo, Krisztina and Leslye E. Orloff, “The Central Role of Victim Advocacy for Victim Safety While Victims’ Immigration Cases Are Pending” (2014) <http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-SafetyPlanning-06.18.14.pdf>

⁵⁹ Id.

⁶⁰ Refer to Appendix A to Chapter 1 of this bench guide for a list of community sexual assault programs in Washington, by county

⁶¹ Szabo, Krisztina and Leslye E. Orloff, “The Central Role of Victim Advocacy for Victim Safety While Victims’ Immigration Cases Are Pending” (2014) <http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-SafetyPlanning-06.18.14.pdf>

⁶² See, <https://www.ojp.gov/pdffiles1/nij/grants/218255.pdf>.

⁶³ ICE Directive 11005.3 “Using a Victim-Centered Approach with Noncitizen Crime Victims” retrieved from <https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf>.

perpetrators. It should be applied to policy making and civil immigration enforcement actions to the greatest extent possible, to the extent consistent with law. The goal of a victim-centered investigation and prosecution is to focus the investigation and prosecution around the victim while minimizing any undue stress, harm, and trauma to the victim.”⁶⁴ Furthermore, absent “exceptional circumstances” this guidance prohibits ICE from taking civil enforcement action against known beneficiaries of victim-based immigration benefits or those known to have a pending application for benefits.⁶⁵ This directive builds on ICE’s 2011 memorandum articulating the agency’s policy of exercising “all appropriate prosecutorial discretion” in removal cases involving victims and witnesses of crime,⁶⁶ which aimed to “minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice.”⁶⁷ While these guidelines do reinforce the purpose of VAWA to protect particularly vulnerable immigrants who are subjected to abuse in the U.S., they are not enforceable. The guidelines also reiterate that there are provisions in the immigration law that afford certain victims immigration relief, as further described below:

A. VAWA Self Petitions

Federal immigration law permits United States citizens (USCs) and lawful permanent residents (LPRs) to petition for lawful status on behalf of certain family members through a “family visa petition.” The Violence Against Women Act (VAWA) allows certain undocumented immigrants who generally would be eligible for immigration status through a family-based visa petition, and who have been victims of domestic or sexual violence by a spouse, parent, or child who is a U.S. citizen or lawful permanent resident to petition for lawful permanent resident status independently.⁶⁸ This ensures that a noncitizen survivor does not continue to remain dependent on their perpetrator for immigration status, which often the perpetrator will continue delaying, or never apply for. Noncitizen victims who are eligible to file a VAWA self-petition are:⁶⁹

1. Abused noncitizen spouses of a USC or a LPR (green card holder);
2. The non-abused spouse of a USC or LPR where the child of the noncitizen is abused;
3. Abused noncitizen children of a USC or LPR; or
4. Abused noncitizen parents of a USC.

To apply for a VAWA self-petition, the applicant must demonstrate that they experienced battery or “extreme cruelty,” that they lived with the abuser, that the marriage or relationship was in “good faith, and that the applicant has “good moral character.” The VAWA self-petition

⁶⁴ Id. at Section 3.9 p. 4.

⁶⁵ Id. at Section 2.1.

⁶⁶ United States Immigration and Customs Enforcement Memorandum re: Prosecutorial Discretion (June 17, 2011) <https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

⁶⁷ Id.

⁶⁸ 8 USC § 1154(a)(1) <https://www.law.cornell.edu/uscode/text/8/1154>

⁶⁹ Id.

process does not require involvement with law enforcement or the criminal legal system, and applicants can demonstrate that they are eligible by filing “any credible evidence” relevant to the petition.⁷⁰

B. T and U Visa

Federal immigration law also provides access to non-immigrant visas for victims of certain crimes and victims of trafficking. If an undocumented victim of a violent crime is before the court, it is likely that he or she is eligible to apply for either a T or U visa. Both applications require a certification from a fact-finding agency, which can include law enforcement, prosecutors, and judges, stating that the victim was helpful or will be helpful in the case.⁷¹

The Safety and Access for Immigrant Victims Act (codified in Chapter 7.98 RCW), which went into effect June 7, 2018, imposes certain requirements on certifying agencies when responding to U and T visa certification requests from noncitizen victims of crimes.

“The legislature finds that ensuring that all victims of crimes are able to access the protections available to them under law is in the best interest of victims, law enforcement, and the entire community. Immigrants are frequently reluctant to cooperate with or contact law enforcement when they are victims of crimes, and the protections available to immigrants under the law are designed to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of trafficking in persons, domestic violence, sexual assault, and other crimes while offering protection to such victims.”⁷²

[RCW 7.98.020](#) requires certifying agencies (defined as any state or local law enforcement agency, any state or local prosecutor, any state or local administrative judge or hearing officer, any state or local agency that has investigative jurisdiction in its respective area of expertise⁷³) to sign and complete a U visa certification when a crime victim, or their certified representative, requests one; is a victim of a criminal activity; and has been, is being, or is likely to be helpful to the detection, investigation, or prosecution of the qualifying criminal activity. Specifically, [RCW 7.98.020](#) also:

- Requires that the certifying agency processes the certification within ninety (90) days of the request, unless the victim is in federal immigration removal proceedings ([RCW 7.98.020\(3\)](#));
- Requires that if the victim is in federal immigration removal proceedings that the request is processed no later than fourteen (14) days after the request is received ([RCW 7.98.020\(3\)](#));

⁷⁰ 8 USC 1154 (a)(1)(J).

⁷¹ “U and T Visa Law Enforcement Resources”, Department of Homeland Security <https://www.dhs.gov/publication/u-visa-law-enforcement-certification-resource-guide>.

⁷² [RCW 7.98.005 https://app.leg.wa.gov/RCW/default.aspx?cite=7.98.005](#)

⁷³ [RCW 7.90.010 https://app.leg.wa.gov/RCW/default.aspx?cite=7.98.010](#)

- Establishes that certifying agencies shall not withdraw the certification unless the victim unreasonably refuses to provide information and assistance related to the detection, investigation, and prosecution of criminal activity (RCW 7.98.020(5));
- Requires that certifying agencies develop a language access protocol for limited English proficient and deaf and hard of hearing victims of criminal activity (RCW 7.98.020(7); and
- Provides that a current investigation, the filing of charges, and a prosecution or conviction are not required for a victim to request and obtain certification (RCW 7.98.020(4)).

A judge or magistrate in any forum that decides legal matters may sign a certification.⁷⁴ A conviction for the qualifying criminal activity is not required.⁷⁵ However, there is often confusion in the law enforcement community about implications of this certification. Some mistakenly believe that they are making the ultimate decision about whether the applicant receives the visa, while others impose extraneous deadlines or restrictions on types of crimes that are not found in the actual eligibility criteria.⁷⁶ In fact, the criminal activity may have occurred at any time in the past.⁷⁷ Signing the Certification is not a determination of immigration relief. It solely indicates that the noncitizen was a victim and had attempted to assist investigative authorities. Additionally, the victim must still meet all the eligibility criteria for the full application that is submitted to DHS. DHS is responsible for granting the petition, and the victim must work his or her way through the wait list before he or she actually receives his or her visa which solely grants work authorization—the law enforcement certification is by no means the last word and is only the first step in starting a long, complicated immigration application process.

1. T Visa

The T visa allows undocumented victims of human trafficking, who are physically present in the United States on account of trafficking to apply for temporary nonimmigrant status and work authorization. Victims do not have to be trafficked across an international border to qualify. They could have been trafficked within the U.S.⁷⁸ In order to be eligible, the victim must show that he or she complied with any reasonable request from law enforcement to assist in

⁷⁴ U.S. Department of Homeland Security U Visa Law Enforcement Resource Guide, available at https://www.uscis.gov/sites/default/files/document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf and U.S. Department of Homeland Security T Visa Law Enforcement Resource Guide, available at <https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf>.

⁷⁵ U visa resource guide, *supra* note 74, at 9; T Visa resource guide, *supra* note 74, at 6.

⁷⁶ See e.g. <http://www.wnyc.org/story/why-immigrant-victims-may-be-afraid-report-crime-despite-federal-program-help/>; <http://www.usatoday.com/story/news/nation-now/2017/02/08/u-visa-immigrant-police-relationship/97666590/>.

⁷⁷ <http://library.niwap.org/wp-content/uploads/2015/IMM-Tkit-UVisaCertification-02.03.14.pdf>.

⁷⁸ “Victims of Human Trafficking: T Nonimmigrant Status,” United States Citizenship and Immigration Services <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

the investigation or prosecution of human trafficking and that he or she would suffer extreme hardship upon removal to his or her home country.⁷⁹ The T visa is for victims of both labor and sex trafficking. Annually, DHS caps the number of applicants who can receive a T visa to 5,000 per year. If a T visa is granted, the applicant will have temporary work authorization for a period of 4 years. After four years in T visa nonimmigrant status, a victim may apply for permanent residency (green card status).

2. U Visa

Undocumented victims of a variety of violent crimes who do not have lawful status, who do not have an intimate partner relationship with their perpetrator, or whose abusive partner is not a USC or LPR may be eligible to apply for a U visa.⁸⁰ This can help immigrants, especially those who were victims of sexual assault in conjunction with domestic violence, to secure legal status independent of their abusers. The temporary visa is available to noncitizens who have endured substantial physical or mental abuse as a result of victimization of certain crimes (including sexual assault) and assist with the investigation or prosecution of that crime.⁸¹ The annual cap for U visas is 10,000, which has resulted in a wait time of five years for an initial bona fide determination of eligibility and seven years for a final adjudication.⁸² Similar to the T visa, the U visa allows temporary work authorization for a period of four years. After four years in U visa nonimmigrant status, a victim may apply for permanent residency (green card status).

VIII. Asylum

Asylum is based on a well-founded fear of persecution or torture a noncitizen has based on their experience in their home country and due to their race, nationality, religion, political opinion or social group.⁸³ Asylum, though a familiar term for many, also has strict eligibility requirements that not all noncitizen survivors can meet. Besides being able to show that a noncitizen is within one of the protected classes and has experienced persecution and torture, there is a strict one-year deadline that an application must be received based on the date of entry into the U.S.⁸⁴ There is an exception to the one year filing deadline for noncitizen children under the age of 18 who are deemed “unaccompanied.”⁸⁵ There are also waivers for the one year filing deadline if the noncitizen can show “changed or extraordinary circumstances.”⁸⁶ Asylum eligibility is often based on victimization that occurred in the noncitizen’s home country, but if the victimization has continued for the noncitizen in the U.S., such as stalking, physical, or sexual violence, it can further strengthen a victim’s request for relief.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ 8 USC §§ 1158 <https://www.law.cornell.edu/uscode/text/8/1158>; 8 USC 1231(b) <https://www.law.cornell.edu/uscode/text/8/1231>

⁸⁴ 8 USC § 1158(a)(2)(B)

⁸⁵ 6 USC § 276(g); adopted by TVPRA § 235(g)

⁸⁶ Id.

IX. Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS) provides non-citizen children living in the United States the possibility of permanent residency if the child has experienced maltreatment by one or both parents.⁸⁷ The statutory basis for SIJS is the Immigration and Nationality Act (“INA”) at § 203(b)(4), which allocates a percentage of immigrant visas to individuals considered “special immigrants,” and § 101(a)(27)(J) which defines Special Immigrant Juveniles.

In order to qualify, the applicant must be under 21, unmarried, and present in the United States.⁸⁸ Additionally, a state court must decide that the applicant is a dependent of the court, that it is not in the applicant’s best interest to return to his or her home country, and that he or she cannot be reunited with a parent because of abuse, neglect, or abandonment.⁸⁹ Courts can assist in identifying child victims who may qualify and ensuring that the child submits a timely petition.⁹⁰ Family court judges can streamline the process for potential petitioners by including a reasonable factual basis in their orders on dependency or custody, parental reunification, and best interests.⁹¹ The Administrative Office of the Courts provides greater detail about SIJS proceedings in the state courts with a sample Findings and Order through its [SIJS bench book](#).

In *Custody of A.N.D.M*, 527 P.3d (2023), the Washington Court of Appeals (Div. I) found that if a judge or commissioner is acting “to determine the custody and care of” a child, then they are a “juvenile court” judge and are authorized to make SIJS findings.⁹²

X. Conclusion

Though this chapter identifies specific types of immigration visas and applications for status specifically relevant to individuals who have experienced sexual violence, it is important to recognize that immigration status is fluid. Under the Immigration and Nationality Act (INA), there are all kinds of non-citizens who may temporarily be out of status but may eventually be able to stay in the U.S. This fluid characteristic can change over the course of an immigrant's lifetime owing to personal experiences (such as employment or marriage) and shifting federal policies. An example is the deferred action for childhood arrivals (DACA) program, which has provided temporary legal status to more than a half-million undocumented youth for a renewable period of two years starting as of 2012. Many of these DACA youth may have since gained or are the path to lawful permanent residency through marriage, employment, or other visa programs. Thus, insecure legal status should not be viewed simply as a static or stigmatizing status for a noncitizen.

⁸⁷ 8 U.S.C. § 101(a)(27)(J) <https://www.law.cornell.edu/uscode/text/8/1101>

⁸⁸ “Eligibility Status for SIJ”, United States Department of Citizenship and Immigration Services <https://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij>

⁸⁹ Id.

⁹⁰ http://library.niwap.org/wp-content/uploads/PED.SIJ_.1015_Brochure_M-1114B_Revised_05.19.16.pdf

⁹¹ Id.

⁹² <https://www.courts.wa.gov/opinions/pdf/827791.pdf>.

Although currently, the ability of many individuals to regularize their immigration status is limited and they may face enforcement, statutory forms of relief for noncitizen victims are still in effect. Deferred action for approved VAWA self-petitioners is provided by statute and to those on the U and T Visa waitlists pursuant to regulations. VAWA confidentiality still prohibits enforcement actions against victims in shelters, courthouses, and other sensitive community locations.