


Beyond the Bench 24 - Pre-Conference

The background of the slide features a large, faint, circular seal of the Judicial Council of California. The seal contains the text "JUDICIAL COUNCIL OF CALIFORNIA" around the perimeter and a central emblem depicting a figure holding a scale and a sword, with a bear at the bottom.

**Expert Guidance on  
Responding to  
U-Visa and T-Visa  
Certification Requests**

December 18, 2017  
San Diego, CA

# Faculty

## **Hon. Susan Breall**

Judge, Superior Court of California, San Francisco County

## **Hon. Lora Livingston**

Judge, 261<sup>st</sup> Judicial District Court, Travis County, Texas

## **Leslye E. Orloff**

Director, National Immigrant Women's Advocacy Project,  
American University, Washington College of Law

## **Sally Kinoshita**

Deputy Director, Immigrant Legal Resource Center



JUDICIAL COUNCIL  
OF CALIFORNIA

# Learning Objectives

- Recognize the purpose of the U and T visa programs and the judicial role in U and T visa certification.
- Understand how to access legally correct information from the U.S. Department of Homeland Security on U and T visa certifications.



# Learning Objectives

- Discuss how courts can implement procedures for signing U or T visa certifications in civil and criminal cases that are consistent with federal and state law.
- Issue rulings on discovery motions that are consistent with VAWA confidentiality laws
- Identify persons who may be eligible for and should receive information about immigration relief for immigrant crime victims.



# Large Group Discussion

What questions do you have about U and T Visa certifications that you would like answered by the end of this workshop?



# WHY IS IMMIGRATION STATUS IMPORTANT?



JUDICIAL COUNCIL  
OF CALIFORNIA

# Immigration Status May Impact One's Ability To:

Work legally   Travel freely   Vote   Apply for certain jobs

Have non-citizen family members live with you

Live in the U.S. – temporarily or indefinitely   Obtain housing

Obtain a Social Security Number   Receive Social Security Benefits

Access or Receive Public Benefits   Obtain a Driver's License

Access certain legal services   Get Financial Aid

Open a bank account   Remain in the U.S.



# May Also Impact One's Perception of Ability To:

## Access the State Courts



JUDICIAL COUNCIL  
OF CALIFORNIA



What are some challenges, barriers or concerns of immigrant victims to accessing the courts?



JUDICIAL COUNCIL  
OF CALIFORNIA

# Statement by Victim arrested in El Paso Courthouse

“This is something he always threatened me with,” she said.

“He would tell me that, if I reported him to the police, they would only believe him, because he is a U.S. citizen and not me.”



“Eliminating domestic violence is especially challenging in immigrant communities, since victims often face additional cultural, linguistic, and immigration barriers to their safety. Abusers of immigrants - spouses or children are liable to use threats of deportation to trap them in endless years of violence. Many of us have heard horrific stories of violence in cases where the threat of deportation is used against spouses and children – if you leave me, I’ll report you to immigration authorities, and you will never see your children again.”

**Senator Ted Kennedy,  
VAWA 2005 Congressional Testimony**

NIWAP-American University,  
Washington College of Law



JUDICIAL COUNCIL  
OF CALIFORNIA

# Violence Against Women Act – Purpose

- Federal role in stopping DV, Sexual Assault, and Trafficking in Persons
- Increasing justice system's role in offender accountability
- Victim assistance, protection and services
- Designed to help ALL victims – immigration relief as key component of legislation



# California Law Now Mandates: (Penal Code §§ 679.10 & 679.11)

- Judges to respond to requests for U or T visa certifications within a set amount of time (14 or 90 days)
- Courts to provide annual reports to the Legislature on the number of U and T visa certifications signed and denied



# Large Group Discussion

What is your court doing in response to U and T Visa certification requests in criminal and civil cases?



# Immigrant Crime Victim Protections



JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law

# DHS Victim Protection Role



## Statutory immigration protections for victims

- Domestic violence, child abuse, sexual assault, stalking, human trafficking & other crimes



## VAWA Confidentiality (8 U.S.C. § 1367)

- 384 DHS computer system (VAWA, T visas, U visas)



## Explicit role for state court judges in immigrant crime victim cases

- U and T Visa Certifications; SIJS Findings





# Immigrant Protections for Victims

See Web library [www.niwap.org/go/sji](http://www.niwap.org/go/sji):

- Bench Card: Immigration Rights of Battered Immigrant Spouses, Children and other Immigrant Crime Victims
- DHS Victim Protection Resources
  - VAWA, T and U Visa, SIJS Programs



# Protections for Immigrant Victims

For trafficking victims

**T VISA**

For victims of domestic violence who are married to, or are the child or parent of an abusive U.S. Citizen or Permanent Resident

**VAWA**

For victims of persecution in home country (including domestic violence grounds)

**ASYLUM**

**U VISA**

For victims of domestic violence, sexual assault, stalking, trafficking and other serious crimes

For child victims of abuse, neglect or abandonment by one or both parents

**SIJS**

**CONTINUED PRESENCE**

For victims of trafficking



JUDICIAL COUNCIL OF CALIFORNIA

# Legal Immigration Status Options for Non-citizen Crime Victims and Children

## VAWA Self-Petition

Abused spouses/children of US citizens and lawful permanent residents;  
Abused parents of U.S. citizens over 21 years of age

## VAWA Cancellation of Removal

Abused spouses/children of US citizen and lawful permanent residents' protection from deportation

## Battered Spouse Waiver

Abused spouses of US citizens or LPR with two-year conditional permanent residency

## Special Immigrant Juvenile Status (SIJS)

Children abused, neglected or abandoned by one or both parents

## U Visa

Victims of certain criminal activity who have been, is being, or is likely to be helpful in the detection, investigation, prosecution, conviction, or sentencing, and suffered substantial harm as result of being victim of criminal activity

## T Visa & Continued Presence

Victims of a severe form of human trafficking

## Asylum

Well founded fear of persecution on account of race, religion, nationality, political opinion, social group;  
Domestic violence as gender-based asylum



# Access to Legal Immigration Status:

Provides a path to economic security

- Work authorization
- Drivers licenses
- Financial aid for college
- Access public benefits safety net in CA

Promotes safety and stability

- Removes fear of deportation
- Stable living situation, school environment
- Focus on healing and recovery

Facilitates and increases access to services/ resources

- Access to health care, mental health/ counseling services
- Mentors, role models and community support



# Some Ways Immigration Affects State Courts

- Judicial role in U and T Visa certification, and SIJS findings, created by federal/ state laws
- Federal VAWA confidentiality laws affect rulings on civil/ criminal discovery motions
- Legally correct or incorrect information can influence family court rulings (e.g. custody, protection orders, support etc.)



# Some Ways Immigration Affects State Courts, cont.

- Criminal court orders where defendant's immigration consequences are addressed related to:
  - Bail
  - Protection order enforcement
  - Pleas
  - Sentencing



# Immigrant Children

- May have options for legal immigration status (own application or parent's application)
- Immigrant children's best interests are promoted when state courts:
  - Sign U or T visa certifications
  - Award custody to non-abusive parents, family members, guardians
  - Issue detailed findings for purposes of SIJS application
  - Distribute U.S. DHS legal rights for victims/children brochures
- Update: unaccompanied minors HHS/ ORR placements



# Deference to DHS Regulations and Publications Required Under *Chevron* --

- Legislative history
- U visa regulations and regulatory history (Preamble)
  - DHS policies and training materials
  - Supreme Court Cases on Chevron Deference Apply
  - Many published decisions do not reflect *Chevron* deference to legislative history and DHS Regulations/Publications





# VAWA, T and U Visa

## Legislative History:

House Congressional Record 10/6/2000

- VAWA and the TVPA are “important bipartisan pieces of legislation that together advance the cause of justice for crime victims and truly offer the prospect of improving public safety.” (Rep. Henry Hyde)
- “[G]rant nonimmigrant visas to victims who would face a significant possibility of retribution or other harm if they were forced to leave.” (Rep. Chris Smith)
- “Allow immigrants to safely escape the violence and bring their abusers to justice.” (Rep. Sheila Jackson Lee)



JUDICIAL COUNCIL  
OF CALIFORNIA

# U Visa Legislative History:

Senator Joe Biden, Senate Congressional Record 10/11/2000

- “The single most important provision we add to the Violence Against Women Act is the battered immigrant women provision”
- Abusers “are brought to justice and the battered immigrants also escape abuse without being subject to other penalties.”



JUDICIAL COUNCIL  
OF CALIFORNIA

# Excerpt of Speech by Rep. John Conyers, Jr.

“Threats of deportation are the most potent tool abusers of immigrant victims use to maintain control over and silence their victims to avoid criminal prosecution.”

Re: VAWA 2005 (12/18/2005)



JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law

# U Visa Bi-Partisan Legislative History: VAWA 2000 Section 1513(a)

- “Immigrant women and children are often targeted to be victims of crimes committed against them in the United States.”
- Victims of criminal activities “committed against them in the United States must be able to report ... to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.”
- “Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.”



# Tools on the Web for Judges on U and T Visa Certification

- Legislative History of VAWA (94, 00, 05), T and U Visas, Battered Spouse Waiver, and VAWA Confidentiality
- Judges U Visa Certification Toolkit
- DHS Resource Guide on U and T Visa Certification



# New California Law on Certifications

## PC 679.10

### U Visa Certifications

- Certifying “helpfulness” of victim of qualifying criminal activity
- Effective January 1, 2016

## PC 679.11

### T Visa Certifications

- Certifying “cooperation” of victim of severe form of human trafficking
- Effective January 1, 2017



# PC 679.10 & 679.11

- Addresses inconsistencies in the state (access)
- Requires certifiers to respond to certification requests within set amount of time
- Creates rebuttable presumption of helpfulness or cooperation
- Prohibits disclosure of immigration status of victim or person requesting certification
- Mandates annual reporting to the state



# Certifying Entities

- State or local law enforcement agencies
- Prosecutors
- **Judges**
  - Any other authority (civil, criminal or administrative) with responsibility for detection, investigation, prosecution, conviction or sentencing of --
    - Criminal activities OR civil/administrative violations
  - Including, but not limited to, CPS, DFEH, and Department of Industrial Relations





# Who Can Sign a Certification Form?

- Head of the certifying entity
- Person in a supervisory role who has been specifically designated
- **A judge**
- Any other certifying official defined under 8 CFR 214.14(a)(2)



**“Judge” includes “any official with delegated authority from a federal, state, local, tribal or territorial court to decide cases” (DHS)**

- Judges
- Magistrates
- Commissioners
- Judicial Referees
- Masters
- Alderman
- Administrative Law Judges
- Surrogates
- Chancellors
- Assigned Judges



JUDICIAL COUNCIL  
OF CALIFORNIA

# Why might a victim come to a judge for certification?



JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law

# Why victims seek certification from courts

- Only justice system contact was a protection order, custody, or civil case
- No language access when called police for help
- Police did not investigate and case never sent to the prosecutor



# Role Language Access Plays in Requests for Judicial Certification – In some cases courts will be the only option

- When police at crime scenes do not use qualified interpreters to provide language access when responding to calls from LEP victims
  - Police used qualified interpreters = 29.4%
  - Police identified language spoken = 42.6%
  - Prosecutors use unqualified interpreters = 25.1%
  - Police spoke only to perpetrator
    - 10.7% of sexual assault cases
    - 8.1% of domestic violence cases
    - 4.8% of human trafficking cases



# Certification that victim has been, is being, or is likely to be helpful with criminal activity:

- Detection, OR
- Investigation, OR
- Prosecution, OR?
- Conviction, OR
- Sentencing



JUDICIAL COUNCIL  
OF CALIFORNIA

# Certification By Judges Based On

- *Detecting* criminal activity or human trafficking based on e.g.
  - Probable cause – criminal/civil case
  - Issuance of a protection order
  - Findings in a custody or divorce case
  - Evidence of helpfulness that is part of a court record (e.g. calling 911, testifying, appearances)
- *Conviction or sentencing* of criminal activity or human trafficking
- Can certify old, closed or pending cases



JUDICIAL COUNCIL  
OF CALIFORNIA

# When Does the Clock Start Ticking?

- Upon the request of the victim or victim's family member
- A certifying entity shall process a certification request
  - within 90 days of request
  - unless requestor is in removal proceedings, in which case the certification shall be processed within 14 days of request





# Rebuttable Presumption of Helpfulness or Cooperation

- Rebuttable presumption that victim:
  - Is, has been, or is likely to be helpful to the detection, investigation or prosecution of criminal activity
  - Is, has been, or is likely to be cooperative to the detection, investigation or prosecution of human trafficking
- If victim has not refused or failed to provide information and assistance reasonably requested by law enforcement



# What is Required of the Certifying Official?

- Shall fully complete and sign the certification
- Shall include specific details regarding victim helpfulness/ cooperation, including
  - ✓ details about nature of the crime detected, investigated or prosecuted
  - ✓ detailed description of the victim's helpfulness/ cooperation or likely helpfulness/ cooperation to the detection or investigation or prosecution or conviction or sentencing of the criminal activity



# What is Not Required?

Victim may request & receive certification despite lack of:

- ❖ A current investigation
- ❖ The filing of charges
- ❖ A prosecution
- ❖ A conviction



# Confidentiality

- A certifying entity is prohibited from disclosing the immigration status of a victim or person requesting the certification
  - except to comply with federal law or legal process, or
  - if authorized by the victim or person requesting the certification



# Reporting

- A certifying entity that receives a request for certification shall report to the Legislature,
  - on or before January 1, 2017, and
  - annually thereafter
  - the number of victims that request certifications from the entity
  - the number of those certification forms that were signed, and
  - the number that were denied



The background of the slide features a large, faint, blue-tinted seal of the Judicial Council of California. The seal is circular and contains the text "JUDICIAL COUNCIL OF CALIFORNIA" around the top edge and "1926" at the bottom. In the center, there is a figure of a woman in classical attire holding a spear, with the word "EUREKA" above her. The seal also depicts a landscape with mountains, a ship, and a bear.

# U Visa and T Visa Application Process

The background features a large, faint, blue-tinted seal of the Judicial Council of California. The seal is circular and contains the text "JUDICIAL COUNCIL OF CALIFORNIA" around the top and "1926" at the bottom. In the center, there is a figure holding a spear, with the word "EUREKA" above it, and various symbols representing California's history and industry.

# **U Visa: Nuts and Bolts**

# U Visa Eligibility

- A victim of qualifying criminal activity is eligible for a U Visa when:
  - The criminal activity occurred in the U.S. **or** violated U.S. law;
  - The victim possesses information about the crime;
  - The victim has been, is being, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing of the offense; and
  - The victim has suffered substantial physical or mental abuse as a result of the victimization





# U Visa Regulations Definitions

(Terms are often used interchangeably)

- “investigation or prosecution” always means
  - “Detection, investigation, prosecution, conviction, or sentencing”
- “crime” always means
  - “criminal activity”
- “criminal activity” chosen to offer early access to justice system protection
  - Improving stability for crime victims



JUDICIAL COUNCIL  
OF CALIFORNIA

# U Visa Certification Mandatory

- Department of Homeland Security U visa regulations require a certification
- Eligible immigrant victim cannot file a U visa case without a certification
- Certification provides required evidence
  - Is not dispositive
  - Certification does not contain all the evidence a victim must present to win approval from DHS of a U visa



# “Helpfulness” in the Regulations

- DHS determines whether a victim:
  - has been helpful,
  - is being helpful or
  - is likely to be helpful
  - In the Detection, or Investigation, or Prosecution, or Conviction, or Sentencing
- Certification provides required evidence



# “Qualifying Criminal Activity”

- Abduction
- Abusive Sexual Contact
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Female Genital Mutilation
- Felonious Assault
- Fraud in Foreign Labor Contracting
- Hostage
- 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
- Other Related Crimes

➤ Includes attempt, conspiracy, or solicitation to commit any of the above/ related crimes



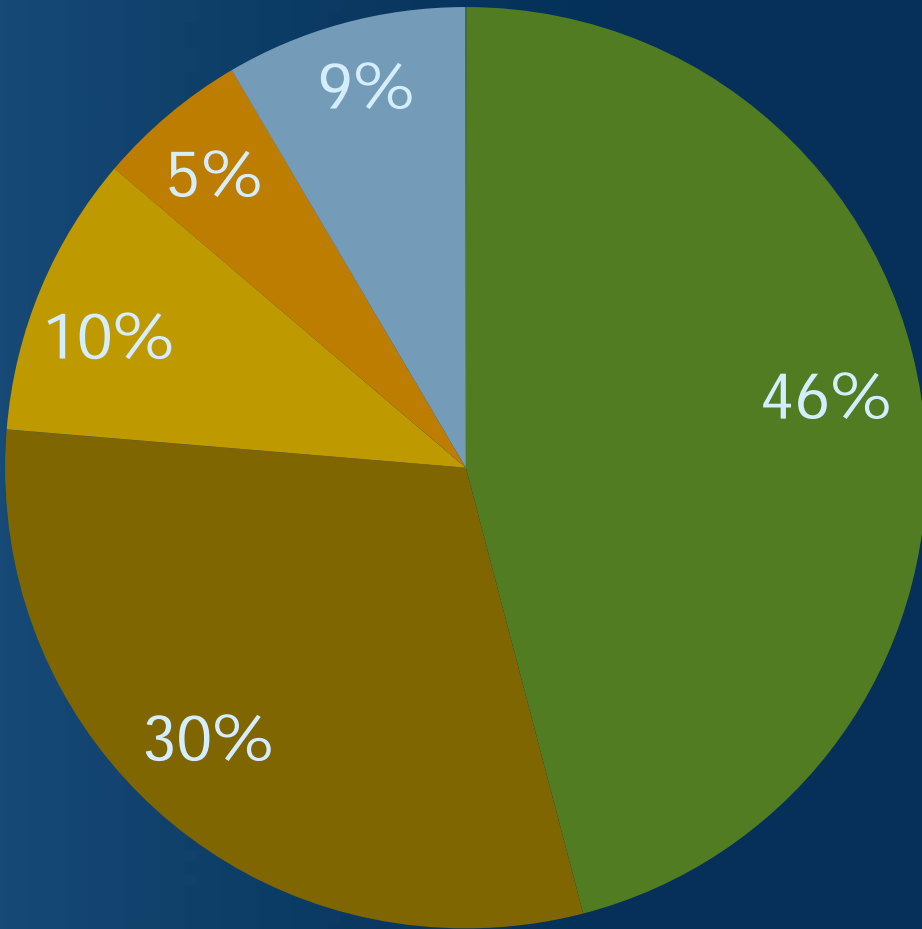
# What are the CA Crimes and Qualifying Criminal Activity?

John and Jane have been separated for 2 years. During a custody exchange, John threatens Jane that he will call ICE on her if she doesn't give him full custody of the children. When she tries to leave with their child, he blocks the door and pushes her to the ground. She fell into their 5 year-old child who also got knocked to the ground. Jane tries to call 9-11 with her phone, but John grabs her neck and tries to strangle her, while taking her phone and smashing it.



# U-Visa Criminal Activities (11/2011 data)

- Domestic violence- 45.9%
- Rape, Sexual Assault, Incest, Trafficking- 30.4%
- Felonious Assault, Murder, Manslaughter- 9.9%
- Blackmail, extortion, perjury, obstruction of justice, attempts, conspiracy, solicitation- 8.47%
- Kidnapping, being held hostage, unlawful criminal restraint, torture- 5.3%



# The U-visa Application Process

**Certification**

**Application &  
Supporting  
Documentation**

**Decision by  
DHS**



# The U Visa Application Process

Receive Wait-List Approval  
(at 28 Months)

Clear Wait List Receive U Visa  
(7 Years Post Filing)

After 3 years as a U visa holder can apply for lawful permanent residency





# According to DHS, a U Visa Certification Tells DHS 3 Things:

- Certifier has seen evidence of a qualifying criminal activity
- Victim had knowledge of the criminal activity
- Victim was, is, or is likely to be helpful
- Can also provide evidence of harm



# How Long is a Signed Certification Valid?

- 6 months from date of signature
- May be asked to certify in same case more than once
  - Expired certification
  - At U Visa application phase
  - At Adjustment of Status (green card) application phase



# Large Group Discussion

In what types of cases or contexts might a judge detect criminal activity?



JUDICIAL COUNCIL  
OF CALIFORNIA

# Cases in Which A Judge Could Certify

- Family

- ✓ Civil Protection Order
- ✓ Custody Case
- ✓ Child Abuse, Neglect, or Termination of Parental Rights
- ✓ Divorce Case
- ✓ Paternity Case

- Juvenile

- Criminal

- Probate

- ✓ Elder / Dependent Adult Abuse
- ✓ Guardianship
- ✓ Conservatorship

- Civil

- ✓ Employment
- ✓ Tort damages against a perpetrator



# U Visa Certification in Proceedings Involving Children in Immigrant Families

- Child or non-abusive parent seeking U visa
- Proceedings
  - Protection order
  - Custody
  - Criminal case
  - Child abuse case
- Other civil case where the court is provided evidence and making findings of abuse



# Small Group Exercise

Provide examples of helpfulness that court could detect in a

- Civil or Family court case
- Criminal case



# Evidence of Helpfulness: Some Examples in Criminal Case

- Evidence in case that the victim:
  - Called 911
  - Participated in a criminal investigation
  - Identified perpetrator at line up
  - Testified before a grant jury or at trial
  - Appearance in a case
  - Attended criminal court hearings in the case
  - Victim witness statement
  - Testimony at sentencing



# Evidence of Helpfulness: Some Examples in Family/ Civil Case

- Filed and/ or appeared at hearing for full protection order
- Plead and or testified about abuse or sexual assault in a court case (e.g. protection order, divorce, custody, small claims, housing, employment)
- Evidence in case that victim called the police, made a police report, cooperated in a criminal investigation
- Serving the perpetrator with notice of case with underlying abuse facts





The background of the slide features a large, faint, blue-tinted seal of the Judicial Council of California. The seal is circular and contains the text "JUDICIAL COUNCIL OF CALIFORNIA" around the top edge and "1926" at the bottom. In the center of the seal is a figure holding a scale of justice, with the word "EUREKA" above it. The seal also depicts a bear, a ship, and other symbols of California's history and industry.

# T Visa: Nuts and Bolts

# Human Trafficking

- Use of force, fraud, or coercion to obtain a person's labor or services, including sex.
- Federal statute: TVPA 2000
- California law: Penal Code § 236.1



# T Visa Eligibility

1. Victim of a severe form of trafficking in persons
2. Present in U.S. on account of trafficking
3. Complied with reasonable requests for assistance in investigation or prosecution of acts of trafficking (if over 18 - adult)\*\*
4. Would suffer extreme hardship involving unusual and severe harm if removed from U.S.

\*\* Exception under VAWA 2005 for physical or psychological trauma impeding ability to cooperate



# Federal Definition

22 U.S.C. 7102

Defines “severe form of trafficking” as:

- **Labor trafficking** is the recruitment, harboring, transportation, provision or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude or debt bondage.
- **Sex trafficking** is a commercial sex act induced by force, fraud or coercion or in which the person has not yet obtained 18 years of age.



JUDICIAL COUNCIL  
OF CALIFORNIA

# PC 236.1 (g)

The Legislature finds that the definition of human trafficking in this section is equivalent to the federal definition of a severe form of trafficking found in Section 7102(8) of Title 22 of the United States Code.



# T Visa Certification Not Required for T Visa Application

- Certification provides helpful evidence
- Victim can file for a T visa without a certification



# The T Visa Application Process

Identification

**\*\* Continuous Presence**  
**\* Certification/ Endorsement**

**Application & Supporting Documentation**

**Decision by DHS**



# The T Visa Application Process

Receive Approval and  
T visa  
(at 4-8 Months)



When T criminal case  
completed or after 3  
years as a T visa  
holder can apply for  
lawful permanent  
residency





# "Modern Day Slavery"



- Physical force not required.
- Psychological coercion is sufficient
- Includes threats of harm or deportation; destroy or control of visa/ passport
- Fraud includes false offers of employment, marriage, or a better life

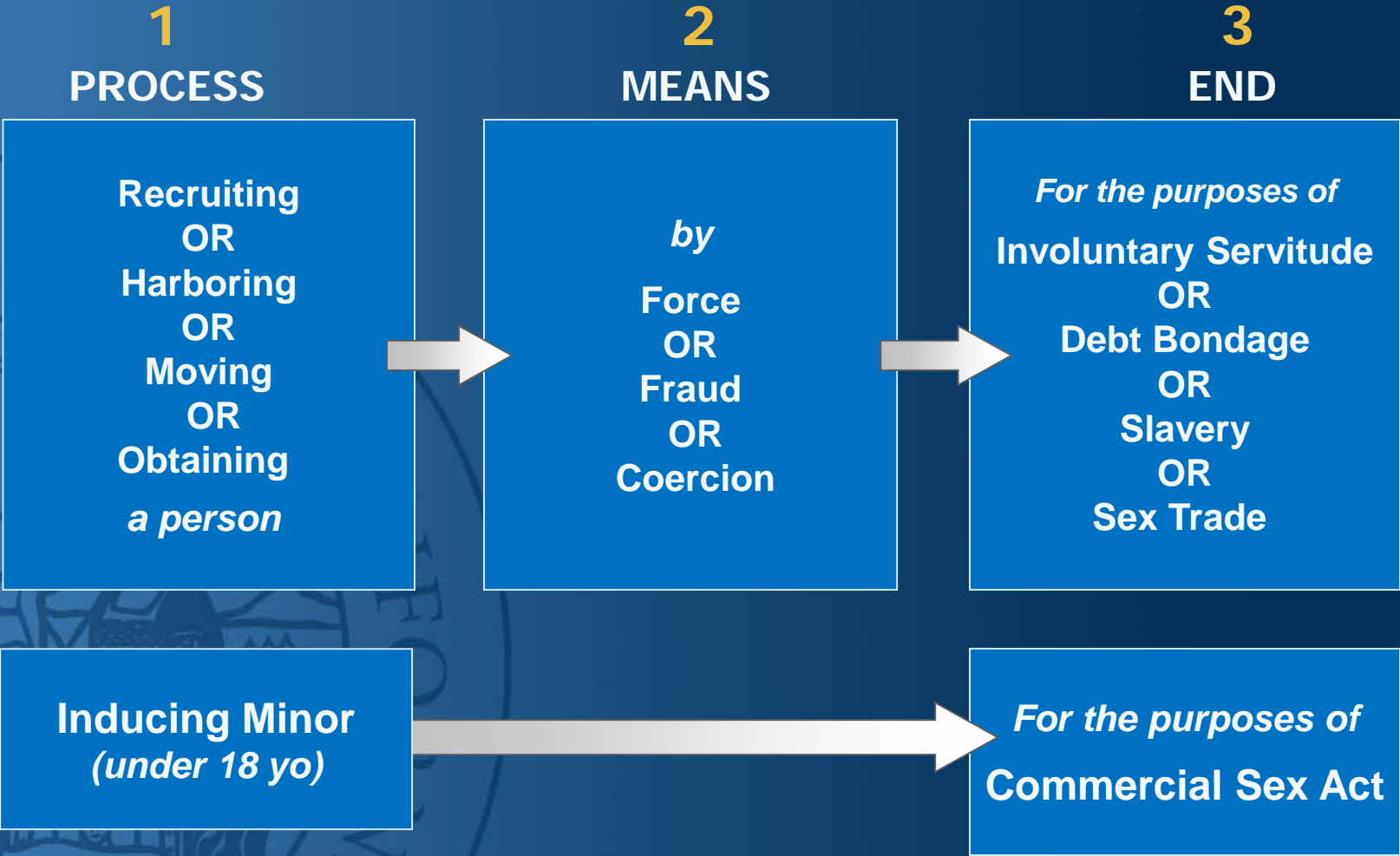


# Common Misconceptions

- Does not require movement of any kind
- Victims can be of any immigration status
- Smuggling ≠ Trafficking
- Prostitution ≠ Trafficking
- Perpetrators can be family members (not just organized crime)
- Victims may be coerced into illegal activity
- Victims can be paid for work



# Elements of Trafficking



# PC §236.1: Trafficked Adults and Labor Trafficked Minors

## Process

Deprive  
or  
Violate the  
personal  
liberty of  
another



## Means

Through:

- Force
- Fear
- Fraud
- Deceit
- Coercion
- Violence
- Duress
- Menace, *OR*
- Threat of Unlawful Injury



## End

With intent to:

- 266: Entice a female under 18 for prostitution
- 266h: pimping
- 266i: Pandering
- 267: Abduction of minor for purposes of prostitution
- 311: Employee minor to distribute/produce pornography, or
- 518: Extortion
- **Labor or Services**

# People are trafficked into:

- Sex Work (commercial & non-commercial)
- Domestic Service/ Au Pairs
- Restaurant Work
- Hair/ Nail Salons
- Magazine crews
- Selling/ cultivating/ smuggling drugs
- Fishing
- Criminal Activity
- Manufacturing
- Home care/ Elder care
- Construction
- Hotel/ Hospitality
- Housekeeping
- Daycare teacher
- Forced peddling
- Agricultural work
- Marriage
- Landscaping

# Low Risk: Hidden in Plain Sight Where Traffickers Exploit Victims in California

## TOP VENUES/INDUSTRIES FOR LABOR TRAFFICKING



Source: NHTRC, 2015 Statistics for California, based on the phone calls, emails, and webforms received.

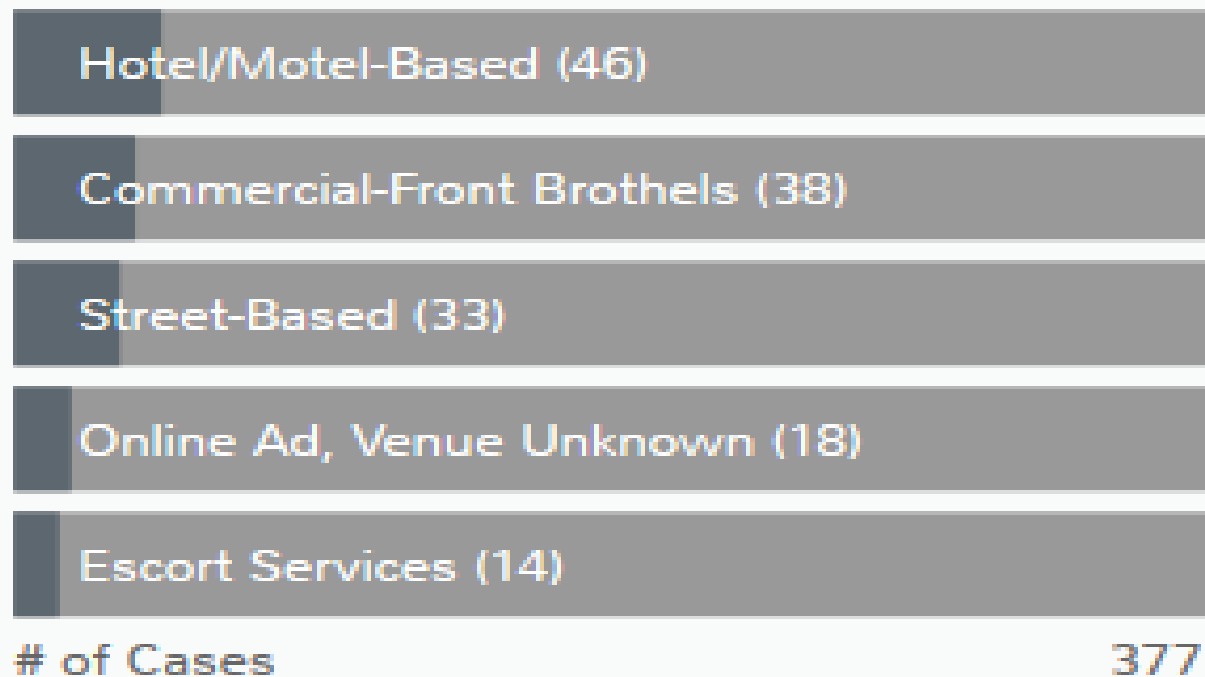
Credit to: Coalition to Abolish Slavery & Trafficking (CAST)



JUDICIAL  
BRANCH OF CALIFORNIA

# Low Risk: Hidden in Plain Sight Where Traffickers Exploit Victims in California

## TOP VENUES/INDUSTRIES FOR SEX TRAFFICKING



Source: NHTRC, 2015 Statistics for California, based on the phone calls, emails, and webforms received.

Credit to: Coalition to Abolish Slavery & Trafficking (CAST)

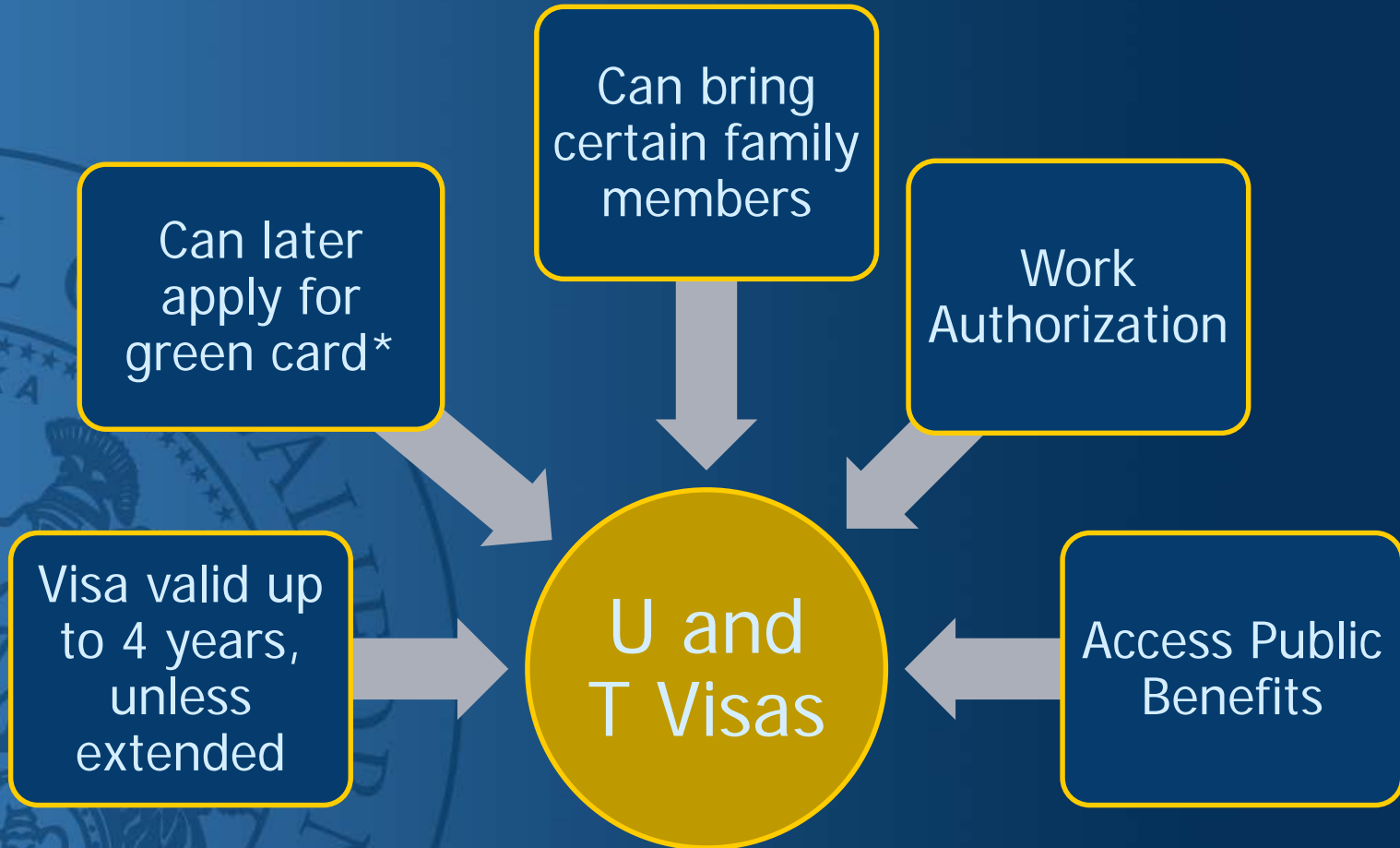
# What forms of immigration relief might Zara qualify for?

**Zara** (28 yo), a successful business woman from Dubai, met and married Akbar, a U.S. Citizen. Zara lived with Akbar and his 66 yo mother Lori. Akbar took Zara's gold, money, and passport. Lori had her do all the housework and wash their cars daily. Zara was allowed 1 meal a day, and no breaks. Zara was 3 months pregnant, denied prenatal care and slept in the basement. Akbar raped her and took away her Quran. Akbar and Lori also beat and threatened Zara. When Zara said she would call the police, Akbar laughed, "We are U.S. Citizens! You have no documents! They will put you in jail. We'll say you abused Lori and stole money and jewelry from her."





# Benefits of U and T Visas



\*Duty to be helpful or to cooperate ongoing until obtains green card.



# New PC 236.23 Affirmative Defense for Human Trafficking Victims

- A signed U or T Visa Certification document may be a “certified record” for purpose of establishing an affirmative defense under PC 236.23(c):

“Certified records of a federal, state, tribal or local court or governmental agency documenting a person’s status as a victim of human trafficking at time of the offense, including identification of a victim of human trafficking by a peace officer pursuant to PC 236.2 and certified records of approval notices or enforcement certifications generated from federal immigration proceedings, may be presented to establish an affirmative defense pursuant to this section.”



# U Visa Certification Form Overview



## Supplement B, U Nonimmigrant Status Certification

Department of Homeland Security  
U.S. Citizenship and Immigration Services

USCIS  
Form I-918  
OMB No. 1615-0104  
Expires 02/28/2019

# With Comparison to T Visa Certification Form



## Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons

Department of Homeland Security  
U.S. Citizenship and Immigration Services

USCIS  
Form I-914  
OMB No. 1615-0099  
Expires 01/31/2019



JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law

## Part 1. Victim Information

1. Alien Registration Number (A-Number) (if any)

▶ A-

--	--	--	--	--	--	--	--	--	--

2.a. Family Name  
(Last Name)

2.b. Given Name  
(First Name)

2.c. Middle Name

**Other Names Used** (Include maiden names, nicknames, and aliases, if applicable.)

If you need extra space to provide additional names, use the space provided in **Part 7. Additional Information.**

3.a. Family Name  
(Last Name)

3.b. Given Name  
(First Name)

3.c. Middle Name

4. Date of Birth (mm/dd/yyyy)

5. Gender  Male  Female

This is sometimes filled out by the victim's immigration attorney or advocate. (Certifier Preference)



**T Visa Form similar**



Examples



1. Commissioner/  
Judge Sue Smith

3. Judge, Family  
Division

## Part 2. Agency Information

1. Name of Certifying Agency

Commissioner/ Judge

Name of Certifying Official

2.a. Family Name  
(Last Name)

Smith

2.b. Given Name  
(First Name)

Sue

2.c. Middle Name

3. Title and Division/Office of Certifying Official

Commissioner, Family Division

## T Visa Form similar



Judges will always fill this out with the contact information of the judge signing the certification.

Head of certifying agency not applicable to judicial certifications

**Name of Head of Certifying Agency**

4.a. Family Name (Last Name)

4.b. Given Name (First Name)

4.c. Middle Name

**Agency Address** Judge's contact information here:

5.a. Street Number and Name

5.b.  Apt.  Ste.  Flr.

5.c. City or Town

5.d. State  5.f. ZIP Code

5.g. Province

5.h. Postal Code

5.i. Country



## *Other Agency Information*

**6. Agency Type**

Federal    State    Local

**7. Case Status**

On-going    Completed

Other

**8. Certifying Agency Category**

Judge    Law Enforcement    Prosecutor

Other

**9. Case Number**

**10. FBI Number or SID Number (if applicable)**

**T Visa Form similar**



### Part 3. Criminal Acts

If you need extra space to complete this section, use the space provided in **Part 7. Additional Information**.

1. The petitioner is a victim of criminal activity involving a violation of one of the following Federal, state, or local criminal offenses (or any similar activity). (Select **all applicable** boxes)

- |   |   |
|---|---|
| <input type="checkbox"/> Abduction  | <input type="checkbox"/> Manslaughter                                   |
| <input checked="" type="checkbox"/> Abusive Sexual Contact                    | <input type="checkbox"/> Murder   |
| <input checked="" type="checkbox"/> Attempt to Commit Any of the Named Crimes | <input type="checkbox"/> Obstruction of Justice                         |
| <input type="checkbox"/> Being Held Hostage                                   | <input type="checkbox"/> Peonage  |
| <input type="checkbox"/> Blackmail  | <input type="checkbox"/> Perjury  |
| <input type="checkbox"/> Conspiracy to Commit Any of the Named Crimes         | <input type="checkbox"/> Prostitution                                   |
| <input checked="" type="checkbox"/> Domestic Violence                         | <input checked="" type="checkbox"/> Rape                                |
| <input type="checkbox"/> Extortion  | <input checked="" type="checkbox"/> Sexual Assault                      |
| <input checked="" type="checkbox"/> False Imprisonment                        | <input type="checkbox"/> Sexual Exploitation                            |
| <input checked="" type="checkbox"/> Felonious Assault                         | <input type="checkbox"/> Slave Trade                                    |
| <input type="checkbox"/> Female Genital Mutilation                            | <input type="checkbox"/> Solicitation to Commit Any of the Named Crimes |
| <input type="checkbox"/> Fraud in Foreign Labor Contracting                   | <input checked="" type="checkbox"/> Stalking                            |
| <input type="checkbox"/> Incest   | <input type="checkbox"/> Torture  |
| <input type="checkbox"/> Involuntary Servitude                                | <input type="checkbox"/> Trafficking                                    |
| <input type="checkbox"/> Kidnapping   | <input type="checkbox"/> Unlawful Criminal Restraint                    |
|   | <input checked="" type="checkbox"/> Witness Tampering                   |

Certify all that you can detect from the evidence presented or in court records

No criminal case filing required

Not limited to by the criminal charges if any filed





### Part C. Statement of Claim

1. The applicant is or has been a victim of a severe form of trafficking in persons. Specifically, he or she is a victim of: *(Check all that apply. Base your analysis on the practices to which the victim was subjected rather than on the specific violations charged, the counts on which convictions were obtained, or whether any prosecution resulted in convictions. Note that the definitions that control this analysis are not the elements of criminal offenses, but are those set forth at 8 CFR 214.11(a).)*

- Sex trafficking in which a commercial sex act was induced by force, fraud, or coercion. Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.
- Sex trafficking and the victim is under the age of 18.

### Part C. Statement of Claim *(Continued)*

- The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for subjection to involuntary servitude, peonage, debt bondage, or slavery.
- Not applicable.
- Other, specify on attached additional sheets.



2. Please describe the victimization upon which the applicant's claim is based and identify the relationship between that victimization and the crime under investigation/prosecution. Attach the results of any name or database inquiry performed in the investigation of the case, as well as any relevant reports and findings. Include relevant dates, etc. Attach additional sheets, if necessary.

Describe the trafficking crime/ victimization and victim's fears

3. Has the applicant expressed any fear of retaliation or revenge if removed from the United States? If yes, explain. Attach additional sheets, if necessary.



Dates do not have to be precise – you can use months, seasons or years.



Provide the dates on which the criminal activity occurred.

2.a. Date (mm/dd/yyyy)

2.b. Date (mm/dd/yyyy)

2.c. Date (mm/dd/yyyy)

2.d. Date (mm/dd/yyyy)

3. List the statutory citations for the criminal activity being investigated or prosecuted, or that was investigated or prosecuted.

---

---

Adds date investigation began and investigation or prosecution ended

**T Visa Form similar**



JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law

4.a. Did the criminal activity occur in the United States (including Indian country and military installations) or the territories or possessions of the United States?  
 Yes  No

4.b. If you answered "Yes," where did the criminal activity occur?  
\_\_\_\_\_  
\_\_\_\_\_

5.a. Did the criminal activity violate a Federal extraterritorial jurisdiction statute?  
 Yes  No

5.b. If you answered "Yes," provide the statutory citation providing the authority for extraterritorial jurisdiction.  
\_\_\_\_\_  
\_\_\_\_\_

6. Briefly describe the criminal activity being investigated and/or prosecuted and the involvement of the petitioner named in **Part 1**. Attach copies of all relevant reports and findings.

Make copies of all court orders, photographs, police reports in court record and attach.

7. Provide a description of any known or documented injury to the victim. Attach copies of all relevant reports and findings.  
Be as specific as possible, highlighting visible injuries observed (even if not photographed).  
If you are aware of mental injury, include as well.

Under Department of Homeland Security Regulations and form instructions

"being investigated and/or prosecuted" here means =

"detection, investigation, prosecution, conviction or sentencing"

Judges: detect, convict and sentence



#### Part 4. Helpfulness Of The Victim

For the following questions, if the victim is under 16 years of age, incompetent or incapacitated, then a parent, guardian, or next friend may act on behalf of the victim.

1. Does the victim possess information concerning the criminal activity listed in **Part 3.**?  Yes  No
2. Has the victim been helpful, is the victim being helpful, or is the victim likely to be helpful in the investigation or prosecution of the criminal activity detailed above?  Yes  No
3. Since the initiation of cooperation, has the victim refused or failed to provide assistance reasonably requested in the investigation or prosecution of the criminal activity detailed above?  Yes  No

If you answer "Yes" to **Item Numbers 1. - 3.**, provide an explanation in the space below. If you need extra space to complete this section, use the space provided in **Part 7. Additional Information.**

- 
4. Other. Include any additional information you would like to provide.

NOTE: This will be discussed in detail in the next section

# U Visa Form



JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law

**Part D. Cooperation of Victim** *(Attach additional sheets, if necessary)*

The applicant:

- Has complied with requests for assistance in the investigation/prosecution of the crime of trafficking. *(Explain below.)*
- Has failed to comply with requests to assist in the investigation/prosecution of the crime of trafficking. *(Explain below.)*
- Has not been requested to assist in the investigation/prosecution of any crime of trafficking.
- Has not yet attained the age of 18.
- Other, specify on attached additional sheets.

# T Visa Form



JUDICIAL COUNCIL  
OF CALIFORNIA

T Visa  
Form  
Similar

**Part 5. Family Members Culpable In Criminal Activity**

1. Are any of the victim's family members culpable or believed to be culpable in the criminal activity of which the petitioner is a victim?  Yes  No

If you answered "Yes," list the family members and their criminal involvement. (If you need extra space to complete this section, use the space provided in **Part 7. Additional Information.**)

2.a. Family Name (Last Name)

2.b. Given Name (First Name)

2.c. Middle Name

2.d. Relationship

2.e. Involvement

The form asks about family member because DHS wants assistance identifying perpetrator family members



## Part 6. Certification

I am the head of the agency listed in **Part 2.** or I am the person in the agency who was specifically designated by the head of the agency to issue a U Nonimmigrant Status Certification on behalf of the agency. Based upon ~~investigation of the facts~~, I certify, under penalty of perjury, that the individual identified in **Part 1.** is or was a victim of one or more of the crimes listed in **Part 3.** I certify that the above information is complete, true, and correct to the best of my knowledge, and that I have made and will make no promises regarding the above victim's ability to obtain a visa from U.S. Citizenship and Immigration Services (USCIS), based upon this certification. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS.

1. Signature of Certifying Official (sign in ink)

➔

2. Date of Signature (mm/dd/yyyy)

3. Daytime Telephone Number

4. Fax Number

Judges can amend the form

Examples: Based upon ...

- My findings of fact
- Probable cause
- My issuance of a protection order
- My sentencing of the defendant
- My having presided over a criminal case

REMEMBER: This is a certification that you believe the applicant was a victim of a crime.

Certification provides evidence to DHS.

DHS adjudicates and decides whether to grant the victim immigration relief.



JUDICIAL COUNCIL  
OF CALIFORNIA

T Visa Form  
Similar

NIWAP-American University,  
Washington College of Law



# Criminal Activity and Helpfulness

## Evidence Standard Sufficient for Certification

- After ruling or entering a finding based on:
  - Preponderance of the evidence; or
  - Clear and convincing evidence; or
  - Beyond a reasonable doubt
  - Evidence in the case that the court finds credible:
    - That the court observed or is in the case file
    - Cases that ended before reaching full adjudication (e.g. settlement, pleas)



# Criminal Activity and Helpfulness

## Evidence Standard Sufficient for Certification

- Before ruling
  - Some credible evidence: trustworthy, believable although not fully fleshed out
    - Not conjecture
  - Probable cause: to believe the criminal activity occurred and victim was helpful, more than bare suspicion
  - Preliminary finding like TRO



**Part 7. Additional Information**

If you need extra space to complete any item within this supplement, use the space below or attach a separate sheet of paper; type or print the agency's name, petitioner's name, and the Alien Registration Number (A-Number) (if any) at the top of each sheet; indicate the **Page Number**, **Part Number**, and **Item Number** to which your answer refers; and sign and date each sheet. If you need more space than what is provided, you may also make copies of this page to complete and file with this supplement.

1. Agency Name

**Petitioner's Name**

2.a. Family Name  
(Last Name)

2.b. Given Name  
(First Name)

2.c. Middle Name

3. A-Number (if any)

▶ A- 

--	--	--	--	--	--	--	--	--	--	--	--

4.a. Page Number

4.b. Part Number

4.c. Item Number

4.d.

---

---

---

5.a. Page Number

5.b. Part Number

5.c. Item Number

5.d.

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

6.a. Page Number

6.b. Part Number

6.c. Item Number

6.d.

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---



# Hypotheticals

## Small Group Activity

- Is this person eligible for a U Visa certification?
- Stories handout



# Aditi

**The evidence in the case before you includes the following:**

One night Aditi who has a student visa was walking home from waiting tables and was raped by a masked assailant. She never got a good look at the perpetrator. He whispered that he knew where she lived and told her he would tell her family back home the “filthy things” she has done if she told anyone. This fear kept Aditi from reporting the rape to the police. Four months later, Aditi realized she was pregnant. When she began to miss late shifts at work and was disciplined by her boss, she finally shared with him what had happened to her. Her boss called the police. Aditi told the police everything she knew, but she was unable to assist police in making a composite. Two years later, police were able to identify the perpetrator and are building a case against him based on evidence from Aditi and several other victims. He is a wealthy business man living in Aditi’s community. Aditi is before the court in a paternity case seeking child support for her son born of the rape. Defendant is denying that the child is his.

**Would you sign a U visa certification for Aditi?**



JUDICIAL COUNCIL  
OF CALIFORNIA

# Maura

## The evidence in the case before you includes the following:

Maura is 17 years old and from Mexico. When Maura was 12 years old, her mother married Jose, a lawful permanent resident abuser. After enduring 4 years in the abusive household and sexual advances from her step-father, Maura left home and moved in with her boyfriend Juan who is an MS -13 gang leader. Juan started battering Maura when she became pregnant with their child. During an incident of abuse after their child was born, the neighbors heard Maura screaming and called the police. When they arrived, Maura described the domestic violence incidents to the police officer. She did this to protect her daughter, despite fears of gang retaliation and deportation. The police refused to charge Juan with domestic violence and instead want to prosecute Juan's gang violence with Maura as a key witness. Maura and her daughter fled to a shelter at an undisclosed location and Maura has filed for a DV restraining order against Juan.

- What forms of immigration relief might Maura qualify for?
- Is Maura eligible for U visa certification?



# Alex

## The evidence in the case before you includes the following:

Alex had been dating Sam for about 1 month, when Alex decided to end the relationship by texting Sam, "I enjoyed the time we spent together, but I don't think this relationship can last. We should just be friends." Sam responds, "But, I am in love with you, and you told me you loved me too. Please don't do this." Sam continued to repeatedly send texts like: "are you sleeping with someone else?" "You are a liar, you just used me." "Slut, whore. You should be castrated." "I'm going to tell everyone that you're illegal, maybe ICE will come for you." Alex asked Sam to stop the texts, but Sam continued. Two weeks later, Sam went on Facebook to rant and posted nude photos of Alex with captions like "Open for business 24/7" and "liars should die." Sam then posted a drawing of a dead person hanged by a noose and the word "liar" on the person's shirt. Alex filed a TRO against Sam, which was granted, as was the DVRO.

- Would you sign a U visa certification for Alex after the DVRO? TRO?
- What if Alex was able to serve Sam, but does not appear at the hearing?



JUDICIAL COUNCIL  
OF CALIFORNIA

# Helpfulness in the Regulations

- Judges, law enforcement and other certifiers
  - May complete U visa certification if they observe or detect a victim's helpfulness
  - Can be a civil, family, criminal or administrative case
- The investigation, prosecution of case
  - Can still be ongoing
  - Can be closed
  - May have settled
  - Occurred a long time ago
  - May never have been criminally charged or prosecuted
  - May be a government agency investigation (e.g. EEOC, fair housing, labor, CPS, APS)





# Helpfulness in the Regulations

- Victim has been OR is being OR is likely to be helpful
- In the detection OR investigation OR prosecution OR conviction OR sentencing
- There is no degree of helpfulness required
- The certification may be completed once the certifier can access or has evidence of the victim's helpfulness
- The investigation or prosecution can still be ongoing
- Criminal activity detected or investigated may be different from the crime prosecuted



# Helpfulness Requirement Met *Even When:*

- Victim reports a crime and there's no further investigation
- Report is of past crime that the victim did not report at the time
  - Perpetrator cannot be identified
  - Perpetrator absconds or is deported
- Victim is not needed as a witness
- Victim seeks certification for a case that occurred a long time ago



# Helpfulness Requirement Met *Even When:*

- Victim is dead (indirect victim is applying)
- Perpetrator is dead
- The criminal case did not result in a guilty plea or conviction
- Victim is applying for a civil protection order, but domestic violence has not been criminally reported or is not being criminally prosecuted



# Evidence of helpfulness when no criminal case

- Pleadings with criminal activity facts
- Appearances in court
- Service of perpetrator
- Provided sufficient evidence for court order based on or citing abuse (DVRO, Custody, Divorce, Employment, Tort)



# Discussion

- What evidence, records or documents can a judge rely on to complete the certification form?
- Could you sign a certification if all records have been destroyed and all you have is a record relating to the conviction in a case?
- What role might a victim's declaration play?



# Detecting Helpfulness Older and Closed Cases

- Record of conviction
- DVRO/Custody/Divorce order
- Conversation with or any notes presiding judge may have
- Victim's testimony



# Discussion

The DA and police have denied certification to a victim in a case before you. You presided over the criminal case involving the victim and a request for a U Visa Certification comes to you as the presiding criminal court judge.

How might you detect helpfulness?  
What else might you consider?



# Level of Cooperation Required for Visa

## U Visa

- Must demonstrate that they have been, are being or are likely to be helpful in the detection, investigation, prosecution, conviction or sentencing
- Cannot unreasonably refuse to comply with reasonable requests for assistance
- Exception: victims under 18 another person can provide helpfulness

## T Visa

- Has complied with reasonable requests for assistance in the detection, investigation, prosecution, conviction or sentencing of severe forms of human trafficking
- Cannot unreasonably refuse to cooperate with reasonable requests for assistance
- Exception: victims under 18 no cooperation requirement; or for reasons of physical or psychological trauma





# Level of Cooperation Required for Green Card

## U Visa

- Cooperated with reasonable requests; or
- Did not unreasonably refuse to comply with reasonable requests for assistance with the investigation or prosecution

## T Visa

- T visa holders must continue to cooperate with reasonable requests from law enforcement; or
- Demonstrate that they would suffer extreme hardship involving unusual and severe harm upon removal



# Discussion

Why would a victim report a crime and then refuse to participate in the ensuing investigation and/ or trial?



# Some Reasons for Refusing to Cooperate

- Fear of reprisal
- Continued threats or violence
- Pressure from family/ community
- Financial hardship
- Witness intimidation
- Further trauma



## Totality of Circumstances Must be Considered in Deciding if Victim “Unreasonably Refused” and if There Was a “Reasonable Request.”

Defined in 8 C.F.R. 214.11 (T Visa) and 8 C.F.R. 214.14 & 245.24 (U Visa)

- General law enforcement and prosecutorial practices;
- Nature of victimization;
- Age and maturity of the victim
- Specific circumstances of victim including fear;
- Severe traumatization (both mental and physical);
- If victim unable to cooperate due to physical or psychological trauma (T visa only)



# California penal Code PC 679.11

- Provides for a rebuttable presumption of cooperation if victim has not refused or failed to provide information and assistance reasonably requested by law enforcement



# If after considering these factors you believe the victim is unreasonably refusing...

- Note this on the certification, sign, and return to victim or victim's attorney
  - Burden shifts to victim to prove the refusal is not unreasonable
  - DHS makes the ultimate decision



# Withdrawing Certification

- Certifying official may only withdraw the certification if the victim refuses to provide information and assistance when reasonably requested
  - PC 679.10(j), 679.11(j)
- Refusal must not be unreasonable
  - 8 C.F.R. 214.11(s)(iv) and DHS T and U Resource Guide p 7



# Addressing Common Myths and Misinformation About the U Visa



JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law



# True/False

1. DHS adjudicates U visas *de novo* after judicial certification
2. The certification provides initial evidence, DHS adjudicates and approves or denies the U visa
3. Certification attests to the immigrant's helpfulness -- a helpful immigrant may or may not have good moral character



# True/False

4. Judges can only certify within a specified time frame after the case before them has concluded
5. Judges can sign even when criminal case did not go forward
6. A U visa gives an undocumented immigrant “preferential immigration status”



# Best Practices for Signing U Visa Certifications, Consistent With Canons of Judicial Ethics



JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law

# Minnesota Judicial Ethics Opinion U Visa Certification (June 26, 2015)

- Judge may sign certifications when
  - “adequate basis for the averments made in the certification”
- Certification after the criminal or civil case is completed does not raise impartiality issues
  - In open cases should disclose certification to the parties
- Certification describes immigrant victim’s past/ present helpfulness -- Does not vouch for character
- In civil and criminal cases whether to sign a U visa certification is an issue of law that does not implicate judicial ethics codes

Full Opinion Available at: <http://www.bjs.state.mn.us/file/advisory-opinions/opinion-2015-2-final.pdf>  
Hon. Pendleton also published a training update based on the opinion at <http://pendletonupdates.com/>



# How Can Judges Remain Impartial and Avoid the Appearance of Impropriety When Certifying?

(Rule 2.2 and 1.2 ABA Model Code of Judicial Conduct)



- Completing the certification verifies facts and evidence
  - In findings, rulings, or that the court has probable cause to believe. These are:
    - Part of a judge's regular duties
    - Objective judicial determinations
- Similar to signing a search warrant or an arrest warrant
- Explicitly authorized by federal statute, no impropriety in certifying

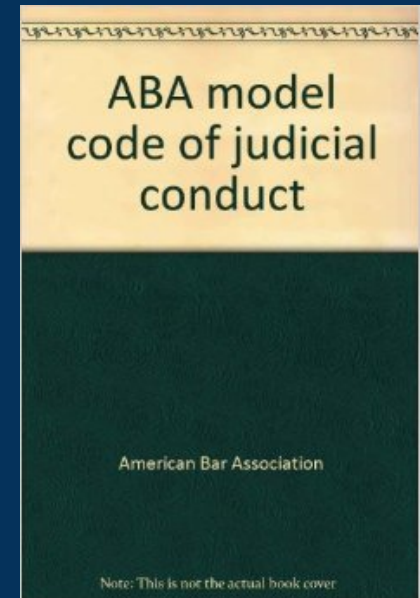


JUDICIAL COUNCIL  
OF CALIFORNIA

# Ex Parte Communications Bar

(Rule 2.9 ABA Model Code of Judicial Conduct)

- Applies to pending and impending matters only
- Bar does NOT apply to closed cases
  - Once the court has issued a ruling
  - If the case has been settled, a plea entered, or otherwise closed and not going forward



JUDICIAL COUNCIL  
OF CALIFORNIA

# Is Notice Required?

- When the case is concluded and there is no longer a possibility of appeal
- Signing U visa certifications without notice to opposing party is consistent with federal VAWA confidentiality laws
- Open cases: ex-parte prohibitions require notice and opportunity to be heard



# Judicial Discretion to Certify in Open Cases

- Not a violation of ethical rules to certify
- Question of law and fact, if appropriate in the particular case before the court for the judge to certify
  - Decided on a case-by-case basis
- Judge may later have to decide on recusal





# Why might U visa certification be sought/granted in a pending case?

- The perpetrator is actively seeking to have the victim deported
- The victim has children who will age out of U visa protections
- Danger to the victim is severe
- Criminal case not able or likely to go forward without the U visa



# Similar to a TRO/ Preliminary Injunction

- U visa certification is analogous to a TRO or preliminary injunction
  - Prevents irreparable harm to the victim pending full adjudication of the case
  - Promotes victim's ability to fully participate in the court case
  - Reduces victim's vulnerability to witness tampering, coercion, retaliation, or manipulation by the perpetrator



# VAWA Confidentiality

- Enforcement locational prohibitions
- DHS cannot disclose information about an immigrant victim's case
- DHS barred from relying on information provided by perpetrators (or their family members) to initiate an enforcement action against or deny a victims case
- **Violation can result in dismissal of immigration case against victim**



# Enforcement Prohibited Locations

- A shelter
- Rape crisis center
- Supervised visitation center
- Family justice center
- Victim services program or provider
- Community based organization
- Courthouse in connection with any
  - Protection order case, child custody case, civil or criminal case involving or related to domestic violence, sexual assault, trafficking, stalking



# Prohibition on Disclosure:

- Information about the existence of the case
- Any information contained in the case
- Action taken on the case by DHS



JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law

# Why is VAWA Confidentiality important for state courts?

- Prohibited enforcement locations include courthouses in connection with a case involving a crime victim
- Perpetrators are using state court discovery to obtain federal VAWA confidentiality protected information that
  - DHS will not release
  - Cannot be released under federal law



# VAWA Confidentiality Bars State Court Discovery



JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law

# Courts may be asked to rule on

- Motions *in limine*
- Protective orders
  - Objections to discovery
  - Regarding questioning victims about VAWA confidentiality protected case filings in court
- Rule 11 sanctions
- Case law supporting non-disclosure ...





# *Hawke v. Dep't of Homeland Security*

(N.D. CA, 2008) – VAWA Self-Petition Case

- VAWA Confidentiality Protects cases:
  - All cases unless denied on the merits
  - Judicial exception applies to appeals of victim's immigration case
    - Does not apply to civil or criminal court proceedings
  - 6<sup>th</sup> Amendment right to compulsory process does not permit access to absolutely privileged information
  - “primary purposes of the VAWA confidentiality provision, namely to prohibit disclosure of confidential application materials to the accused batterer”



JUDICIAL COUNCIL  
OF CALIFORNIA

# Demaj v Sakaj (D. Conn, 2012) – U Visa Case

- Although relevant to credibility and impeachment
- Family court discovery barred as contrary VAWA confidentiality purpose --
  - Prevent disclosure of documents & information in a protected case file to alleged criminals
  - Stop perpetrator's actions to interfere with & undermine a victim's immigration case
- Seeking to obtain protected information through discovery in a custody case = interference with the victim's immigration case barred by the federal statute
- VAWA confidentiality applies to protect the case file contents, including in cases when
  - the victim discloses in state court that DHS has approved her protected immigration case



# EEOC v Koch (5<sup>th</sup> Circuit)

- In civil discover court must consider
  - How discovery of U visas might intimidate victims outside of the case before the court
  - Compromising the U visa program and law enforcement investigations and prosecutions more broadly
  - Koch: limited discovery crafted to maintain anonymity may be allowable
- Anonymity is not possible in a family or criminal court case



# Discovery in Criminal Case

- Is it in the prosecutor's control?
- Only in U visa cases would any discovery be permitted
  - U visa certification document only
  - Nothing else contained in or about the federal immigration case file is discoverable
- VAWA self-petition, T visa, Visa holder spouse work authorization not discoverable



# State v. Marroquin-Aldana

2014 ME 47, ¶ 20, 89 A.3d 519, 525

- “insufficient justification” to disclose additional documentation when the defense had the certification form
- Provided defense opportunity to cross-examine victim and call credibility into question
- Court noted the “high level of protection” given to documents filed with immigration



JUDICIAL COUNCIL  
OF CALIFORNIA

# People v. AlvarezAlvarez

No. G047701, 2014 WL 1813302, at \*5 (Cal. Ct. App. May 7, 2014), review denied (July 16, 2014)

- “The visa was a tangential, collateral issue, and allowing evidence about it invited speculation about the legal status ... which was completely irrelevant to this case.”
- The trial court was well within its discretion in excluding reference to the U visa



JUDICIAL COUNCIL  
OF CALIFORNIA

# Does PC 679.10, 679.11 Apply?

- Statutes require that the immigration status of the victim or requestor may not be disclosed
- Do not address discovery of U and T Visa materials



# Discussion

How can Courts/ Judges prevent prohibited disclosures regarding immigration status or immigration application materials that may be protected under California provisions PC 679.10 and 679.11, or federal VAWA confidentiality statutes?





# Resources for Courts

- Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality
  - <http://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-vawa-confidentiality/>
- Court Rulings Confirm Federal VAWA Confidentiality Protections Bar Discovery of VAWA Confidentiality Protected Information in State Family Court Proceedings: Hawke and Demaj
  - <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-tool-hawkedemajfactsheet/>
- Confidentiality under the Violence Against Women Act (VAWA) Brochure
  - <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-bro-3prongsofconfidentiality/>
- VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy
  - <http://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history/>



# Court Procedures for Certification

- Best Practice:
  - Develop policy
  - Policy must be consistent with the statute and DHS regulations, policies, resources



JUDICIAL COUNCIL  
OF CALIFORNIA

# Legally Available options

- One judge assumes certification responsibilities for the court based on
  - Court records
  - Can include conversation with judge who heard the case
- Need approach for older cases where judge no longer available to certify
- Additionally, each judge can certify cases the judge heard or handled



**Court/judge cannot  
choose a court employee  
who is not a judicial  
officer to certify.**



JUDICIAL COUNCIL  
OF CALIFORNIA

# DHS Contact Information

## USCIS Vermont Service Center

802-527-4888 (hotline)

LawEnforcement\_UTVAWA.vsc@uscis.dhs.gov

USCIS—Vermont Service Center

ATTN: Crime Victims Unit

75 Lower Welden Street

St. Albans, VT 05479

## USCIS Policy

Jessica.M.Salsbury@uscis.dhs.gov

202-272-8981

## DHS Blue Campaign

[www.dhs.gov/bluecampaign](http://www.dhs.gov/bluecampaign)

[BlueCampaign@dhs.gov](mailto:BlueCampaign@dhs.gov)



JUDICIAL COUNCIL  
OF CALIFORNIA

# Technical Assistance & Materials

- Power Point presentations and materials for this conference at [www.niwap.org/go/sji](http://www.niwap.org/go/sji)

- **NIWAP Technical Assistance:**

- Call (202) 274-4457
- E-mail [niwap@wcl.american.edu](mailto:niwap@wcl.american.edu)
- Web Library: [www.niwaplibrary.wcl.american.edu](http://www.niwaplibrary.wcl.american.edu)



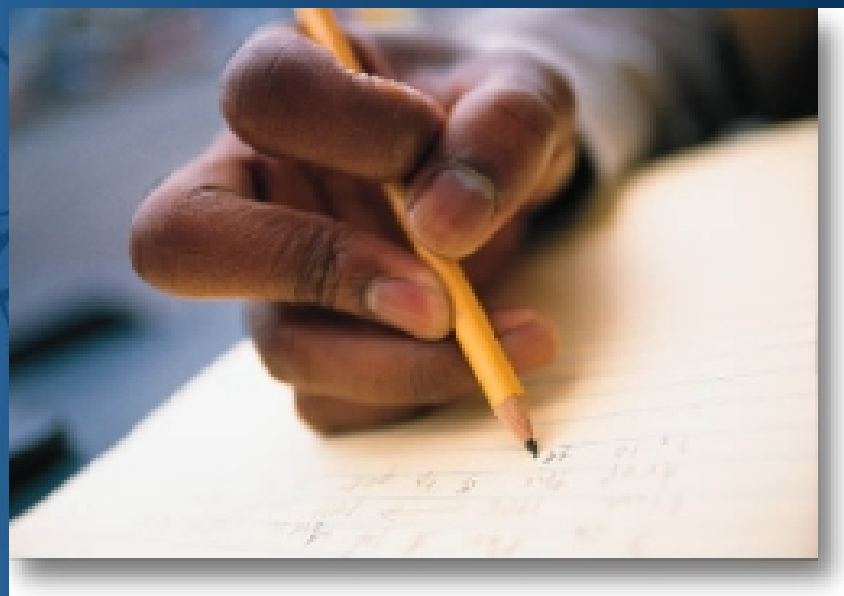
JUDICIAL COUNCIL  
OF CALIFORNIA

NIWAP-American University,  
Washington College of Law

# Questions



# Evaluations







**Thank you!**