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VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections[12]

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Introduction

VAWA Confidentiality protections emerged from a critical need to prevent abusive partners from using government tools to perpetuate abuse. In particular, the three major provisions now known collectively as "VAWA Confidentiality"[3] remove critical barriers that may otherwise cause a chilling effect for immigrant survivors accessing legal and social service protections. It recognizes that information about a victim provided to the Department of Homeland Security often comes from the batterer or the crime perpetrator as part of ongoing efforts

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[2] In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (United States v. Windsor, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

[3] 1)Protections against disclosure of information the government has on the victim, 2) Reliance upon information provided by the abuser, crime perpetrator, or his family members in a case against or for the benefit of the victim, 3) Prohibitions against enforcement actions being taken at protected locations (e.g., shelters, courthouses, rape crisis centers.

to control the victim, or to keep her from disclosing or redressing the abuse, or from holding him accountable for the abuse.

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History

There are a variety of federal and state laws designed to protect the confidentiality of information relating to victims of domestic violence and sexual assault. These provisions generally restrict the disclosure of information collected by victim service providers and state and federal agencies.[4] Under the 1984 Family Violence Prevention and Services Act (FVPSA), as amended, and the 1994 Violence Against Women Act (VAWA), as amended, any shelter, rape crisis center, domestic violence program, or other victim service program that receives either VAWA or FVPSA funding is barred from disclosing to anyone any information about a victim receiving services, including any locational information.[5] Disclosure of the very fact that a victim is now receiving or has ever received services is prohibited. State funding of domestic violence and rape crisis victim services have similar confidentiality requirements.[6] Programs that violate the confidentiality requirements, risk losing federal or state funding.[7] When the Violence Against Women Act was created in 1994 it commissioned a study on the means by which abusers might obtain information revealing the present *location* of their victims, and on the feasibility of creating effective

[4] For information on state victim-advocate confidentiality laws and steps that can be taken to promote victim safety when domestic violence or sexual assault victim advocacy program is assisting an immigrant victim in collecting the documentation the victim will need to file for immigration relief as a VAWA self-petitioner, a U-visa or a T-visa applicant, *see*: Leslye Orloff and Laurie DePalo, Collaboration, Confidentiality and Expanding Advocacy, in Kathleen Sullivan Ed., Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants (2004) available at: http://iwp.legalmomentum.org/reference/manuals/domestic-violence-family-violence

[5] *See* Family Violence Prevention and Services Act ("FVPSA") Pub. L. No. 98-457, § 303(a)(2)(E), 42 U.S.C. § 10402(a)(2)(E) (1984) (mandating that the Federal government may make grants to States only if the States "provide documentation that procedures have been developed, and implemented including copies of the policies and procedure, to assure the confidentiality of records pertaining to any individual provided family violence prevention or treatment services by any program assisted under this chapter and provide assurances that the address or location of any shelter-facility assisted under this chapter will, except with written authorization of the person or persons responsible for the operation of such shelter, not be made public"); *See also* ACF Grant Opportunities, Family Violence Prevention and Services/Grants to State Domestic Violence Coalitions, *available at:* http://www.acf.hhs.gov/grants/open/HHS-2007-ACF-ACYF-SDVC-0122.html#part_3_1.

[6] *See e.g.* Arizona Revised Statutes ARS 36-3005 "Shelter requirements for eligibility" (stating that a shelter receiving state funding must "Require persons employed by or volunteering services to the shelter to maintain the confidentiality of any information that would identify persons served by the shelter"); ARS 36-3009 "Disclosing location of shelters; prohibition; civil penalty" (stating that "Information that may disclose the location or address of a shelter for victims of domestic violence is confidential and is not subject to public disclosure by a person or by a public or private agency in a manner that identifies the location or address as a shelter and threatens the safety of the inhabitants"); *See also e.g.* Virginia Code § 63.2-104.1 (stating that "Programs and individuals providing services to victims of sexual and domestic violence are prohibited from: (a) Disclosing any personally identifying information or individual information collected in connection with services requested, utilized, or denied through sexual or domestic violence programs, or; (b) Revealing individual client information without the informed, written, reasonably time-limited consent of the person (or in the case of an unemancipated minor, the minor and the parent or guardian; or in the case of an incapacitated person as defined in § 37.2-1000, the guardian) about whom information is sought, whether for this program or any other Federal, State, tribal, or territorial grant program, except that consent for release may not be given by the abuser of the minor, incapacitated person, or the abuser of the other parent of the minor.

[7] *See* 28 C.F.R. § 70.61 "Department of Justice Uniform Administrative Requirements for Grants: Termination" (stating that awards may be terminated if a recipient materially fails to comply with the terms and conditions of an award); 42 U.S.C. §13925(b)(2) "Violent Crime Control and Law Enforcement: Violence Against Women: Definitions and Grant Provisions: Nondisclosure of confidential or private information."

regulations to protect confidentiality of both location and address. It also instructed the Attorney General to study and evaluate the need for additional confidentiality protections.[8]

VAWA, FVPSA and state confidentiality protections were specifically designed to prevent crime perpetrators from being able to track their victims and further harm them.[9] However, there remained gaps in victim protection. Additional protections were needed to prevent the abuser from manipulating the system in order to track the victim and get the victim arrested or deported. Recognizing these gaps, Congress made improvements first in Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[10] and then in both the 2000[11] and 2005[12] VAWA reauthorization acts.

VAWA Confidentiality[13] and Victim Safety Provisions provide three types of protection to immigrant victims of violence, including battered immigrants and immigrant victims of sexual assault, trafficking and other U-visa-listed crimes.[14] Specifically, VAWA:

- Protects the confidentiality of information provided to the Department of Homeland Security, the Department of Justice or the Department of State by an immigrant victim in order to prevent abusers, traffickers and crime perpetrators from using the information to harm the victim or locate her (hereinafter called "nondisclosure provisions");[15]
- Stops immigration enforcement agencies from using information provided solely by an abuser, trafficker or U visa crime perpetrator, a relative, or a member of their family,[16] to take an adverse action regarding admissibility or deportability against an immigrant victim, without regard to whether a victim has ever filed or qualifies to file for VAWA related immigration relief (hereinafter referred to as "source limitations").[17]
- Prohibits enforcement actions at any of the following locations: domestic violence shelter; victim services program; family justice center; supervised visitation center; or courthouse if the victim is appearing in connection with a protection order case, a child custody case or other civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking. If any part of an enforcement action took place at any of these locations, DHS must disclose this fact in the Notice to Appear and in immigration court proceedings, and must certify that such action did not violate section 384 of IIRIRA (hereinafter referred to as "enforcement limitations").[18]

In its discussion of VAWA 2005, Congress not only clarified its intention to recommend that removal proceedings filed in violation of VAWA Confidentiality provisions be dismissed,[19] but also included enforcement provisions

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[8] *See* Violent Crime Control and Law Enforcement Act ("VAWA 1994"), Pub. L. No. 103-322, 108 Stat. 1796 (1994) §40153 (Confidentiality of Communications between Sexual Assault or Domestic Violence Victims and their Counselors); §40281, (Confidentiality of Abused Person's Address); and §40508, (Report on Confidentiality of Addresses for Victims of Domestic Violence).

[9] *See* VAWA 1994 supra note 1 at Sec. 40508, "Report on Confidentiality of Addresses for Victims of Domestic Violence" at (a)(2) (stating that the feasibility study on protecting victim address confidentiality will consider "feasibility of creating effective means of protecting the confidentiality of information concerning the addresses and locations of abused spouses *to protect such persons from exposure to further abuse* while preserving access to such information for legitimate purposes." (emphasis added))

[10] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, §384; codified at 8 U.S.C. § 1367 (1996).

[11] *See* Victims of Trafficking and Violence Protection Act of 2000 ("VAWA 2000"), Pub. L. No. 106-386, Div B, Title V, §1513(d) (2000).

[12] *See* Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title VIII, Subtitle B, §817 (2006).

[13] Throughout the course of this chapter, the author uses the term *VAWA confidentiality* to describe a broad scope of protections including the protections of non-disclosure, limitations of abuser provided information, and limitations on enforcement actions in protected locations.

[14] IIRIRA § 384, supra note 6.

[15] IIRIRA Section 384 (a)(2); 8 U.S.C. 1367(a)(2).

[16] *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384.* May 5, 1997, Office of Programs, /s/ Paul W. Virtue, Acting Executive Associate Commissioner. ("Virtue memo").

[17] IIRIRA Section 384 (a)(1); 8 U.S.C. 1367(a)(1). DHS has not come out with an official interpretation of what constitutes an adverse determination of admissibility or deportability.

[18] Immigration and Nationality Act ("INA") § 239(e); codified at 8 U.S.C. §1229(e) "Initiation of Removal Proceedings: Certification of compliance with restrictions on disclosure."

[19] *See* "Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402" H.R. Rep. No. 109-233, at 123 (2005); *see also* 151 Cong. Rec. E2606-07 (2005) (statement of Rep. Conyers) ("Conyers remarks").

designed to deter individual officers from violating these provisions. Section 8 U.S.C. 1367(c) provides that each violation of any of the three types of VAWA Confidentiality or Victim Safety Protections described above is punishable by a $5,000 fine as well as disciplinary action.[20]

Evolution of VAWA Confidentiality and Safety Protections for Immigrant Victims

Confidentiality protections for immigrant victims were originally developed within the context of family based immigration petitions. The Immigration Marriage Fraud Amendments of 1986[21] allowed U.S. citizens and lawful permanent residents to sponsor their spouse and spouse's children for conditional permanent residence in the United States. In order to remove the conditions on immigration status and obtain permanent residence in the United States, the law required both spouses to file a joint petition to remove the conditions. A battered spouse hardship waiver[22] of this joint petitioning requirement was created as part of the immigration reforms that became law in 1990.[23] The hardship waiver offered protection to spouses and children who had been battered or subjected to extreme cruelty by a U.S. citizen or lawful permanent resident by allowing the immigrant spouse and child to file the petition to remove conditions on their own behalf and without the involvement of the abuser. This limits the abuser's ability to exert control over the victim's immigration status. By providing immigration relief, the law significantly reduced the hold that abusive citizen and lawful permanent resident spouses and parents had on their spouses and children.[24]

As part of the Immigration Act of 1990 ("IMMACT 90")[25] hardship waiver for battered spouses and children, Congress imposed the following requirement:

> The Attorney General shall, by regulation, establish measures to protect the confidentiality of information concerning any abused alien spouse or child, including information regarding the whereabouts of such spouse or child.[26]

The INS published regulations implementing these IMMACT provisions in 1991.[27] The regulation stated:

> As directed by the statute, the information contained in the application and supporting documents shall not be released without a court order or the written consent of the applicant; or, in the case of a child, the written consent of the parent or legal guardian who filed the waiver application on the child's behalf. Information may be released only to the applicant, his or her authorized representative, an officer of the Department of Justice, or any federal or State law enforcement agency. Any information provided under this part may be used for the purposes of enforcement of the Act or in any criminal proceeding.

This regulation offered little meaningful confidentiality protection for immigrant victims and was much broader than that intended by Congress. While the statute stated that the information in the victim's immigration case *may* be used for the purposes of enforcement of the Act or in any criminal proceeding, it did not say that it *must* be used for

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[20] VAWA 2005, supra note 8 at § 817; VAWA 2005, supra note 8 at § 825(c); 8 U.S.C. 1229; INA Section 239(e).
[21] Pub. L. No. 99-639
[22] Immigration and Nationality Act, § 216(c)(4), codified at 8 U.S.C. §1186a
[23] Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649 (1990), codified as amended at 8 U.S.C. 1186a(c)(4).
[24] The Protections for Battered Immigrant Women and Children section of VAWA 1994 significantly expanded the scope of protections for immigrant spouses by permitting abused spouses and children to directly file their own petition for family based immigration status with the INS without the abuser's involvement. The battered spouse waiver contained in Section 701(a)(4)(c) of IMMACT 90 was the first piece of legislation in the United States offering special immigration relief to immigrant family violence victims. In IMMACT §701(a)(4)(c) and INA §216(c)(4), Congress enacted legislation that recognized the need to amend U.S. immigration laws to prevent abusive citizen spouses and parents from using them as a power and control tool. This was also the first piece of federal domestic violence legislation in the United States, predating VAWA by four years. The battered spouse waiver, however, only helped immigrant victims of spouse abuse whose abusers had initiated an immigration case on the victim's behalf. Most victims who benefit from battered spouse waivers are immigrant spouses and their children abused by U.S. citizens. Ignatius Bau and William R. Tamayo, *Immigration Marriage Fraud Amendments of 1986 and Other Related Issues*, in Domestic Violence in Immigrant and Refugee Communities: Asserting the Rights of Battered Women, manual produced by the Family Violence Prevention Fund, Coalition for Immigrant & Refugee Rights & Services Immigrant Women Task Force, and the National Immigration Project of the National Lawyer's Guild, Inc. (1999).
[25] Immigration Act of 1990, Pub. L. No. 101-649 §701(a)(5) (1990).
[26] *Id.*
[27] 8 C.F.R. §216.5(e)(3)(viii), 56 FR 22635 (1991).

these purposes. In effect the regulation allowed for free access to and use of the information by INS, immigration courts, and law enforcement agencies. Following the issuance of these regulations many groups commented about the danger these 1991 INS regulations posed for battered immigrant spouses and children.[28] However, INS made no changes in the regulations. Abusers of immigrant victims were able to, and, in a number of cases actually did, track the location of immigrant victims through information that was made publicly available by INS and by state and local law enforcement agencies. Ultimately Congress agreed and revised the law in 1996. When Congress designed the VAWA Confidentiality and Immigrant Victim Safety protections in 1996 as Section 384 of IIRIRA, Congress replaced both the INS regulation and the immigration law confidentiality protections written into the 1990 IMMACT, with statutory requirements that significantly limited disclosure of information and barred immigration officials from using abuser-provided information against the victim.[29] It limited the release of information to law enforcement to "disclosure of information to law enforcement officials to be used solely for legitimate law enforcement purposes."[30]

1994 Violence Against Women Act (VAWA)

Summary of relevant VAWA 1994 Confidentiality provisions:

- *Protected the address of domestic violence victims and domestic violence shelter programs;*[31]
- *Requested studies on confidentiality of communications between domestic violence victims and counselors, victim address information, and recordkeeping;*[32]
- *Allowed the immigrant parent of a child abused by the child's other parent who was a citizen or lawful permanent resident to file for VAWA suspension of deportation.*[33]

History and Purpose—Violence Against Women Act Confidentiality Provisions

From its inception, the purpose of the first Violence Against Women Act ("VAWA 1994") was "to deter and punish violent crimes against women," both by providing law enforcement with additional tools to combat domestic violence, and by making it easier for victims to come forward. The Surgeon General and the Department of Justice issued reports identifying the need for this legislation. From the outset, the Act was conceived to protect immigrants, as Congress found that "[m]any immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave." VAWA 1994 sought to resolve this problem by "permitting battered immigrant women to leave their batterers without fearing deportation."[34] Specifically VAWA 1994 created a visa category of VAWA self-petitioners to enable battered immigrant women and children abused by citizen and lawful permanent resident spouses and parents to file for legal immigration status and lawful permanent residency independent of their abuser,[35] and creating VAWA suspension of deportation relief to assist battered immigrant women and children in deportation proceedings.[36]

Additionally, the VAWA 1994 recognized that a number of confidentiality issues might affect the safety of battered women – including the confidentiality of communications between abused women and their counselors,

[28] See e.g. 68 *Interpreter Releases* 669-70 (1991).
[29] See IIRIRA Section 384(b) that will be discussed further below.
[30] See IIRIRA Section 384(b)(2).
[31] Section 40281 of the Violence Against Women Act contained in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).
[32] Section 40153 of the Violence Against Women Act of 1994 contained in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).
[33] INA Section 244(c)(3)(as in effect before March 31, 1997).
[34] Violence Against Women Act of 1993: Summary and Purpose, H.R. Rep. No. 103-395, at 25 (1993).
[35] VAWA 1994, supra note 1, at subtitle G, §40701 "Protections for Battered Immigrant Women and Children: Alien Petitioning Rights for Immediate Relative or Second Preference Status," currently INA §101(a)(51)
[36] *Id.* at §40703 "Suspension of Deportation," Immigration and Nationality Act (INA) §244(a)(3) as in effect prior to March 31, 1997; renumbered 240A(a)(3) by Pub. L. No. 104-208 (1996).

confidentiality of abused women's address information, and recordkeeping related to domestic violence – and commissioned studies of each area.[37]

1995-96, Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)

Summary of relevant VAWA Confidentiality provisions:

- Prohibits reliance on information provided solely by the abuser or people associated with the abuser including but not limited to the abuser's family members regardless of whether or not the victim has ever filed a specific VAWA-related case:[38]
- Bars the use by or disclosure to anyone of any information relating to:
  - VAWA self-petitioners and their children;[39]
  - VAWA applicants for battered spouse waivers of conditional permanent resident status;[40]

History and Purpose—VAWA Confidentiality[41] Amendments:

Though Congress included some confidentiality protections for immigrant family violence victims in IMMACT 90, these provisions and their implementing regulations did not provide meaningful protections for battered immigrants.

In 1995, as the House Judiciary Committee discussed what was to become the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Representative Pat Schroeder introduced an amendment that would ultimately become IIRIRA §384 – *VAWA Confidentiality*.[42] In presenting the amendment, Representative Schroeder explained:

> [This amendment] deals with the very essential issue of confidentiality vis-à-vis battered women and children. I think we all know confidentiality is a matter of life and death whether or not they are citizens or whether they are immigrants. And that we must make sure that if there's some kind of battering going on, that the INS is not breaching confidentiality. As you know abusers can be anyone and basically what we're doing here is making sure that decisions affecting a battered woman's immigration couldn't be based on statements of the abuser. That giving the abuser the ability to influence the INS would give the abuser control over the victim's status. If you could imagine if you had an abuser being tried in court for abuse, he could get the victim deported so she could not testify if we didn't do this.

In the debate that followed, Representative Schroeder made it clear that information provided by an abuser or his family was tainted not only when it touched on immigration status, but when it alleged any wrongdoing by the victim whatsoever.

> [The proposed amendment] says information furnished by an abusive sponsor, family member … abusive being the operative word. And the fear would be that if someone is … abusive, then any information might be tainted. They might accuse the other person of crimes, they might accuse the other person of all sorts of things.

Congresswoman Schroeder explains that the taint is effective "because the INS has got so much authority," and goes on to say:

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[37] *Id.* at §§ 40153, 40281, 40508, and 40509.
[38] Section 384(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); 8 U.S. C. 1367(a)(1); John P. Torres, Immigration and Customs Enforcement, Interiim Guildance Related to Officer Procedure Following Enactment of VAWA 2005, p. 2 (January 22, 2007) available at: http://iwp.legalmomentum.org/vawa-confidentiality/government-memoranda-and-factsheets/VAWA%20CONF_Torres%20ICE%20VAWA%20Confidentiality%20Memo_1.22.07.pdf.
[39] Section 384(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); 8 U.S. C. 1367(a)(2).
[40] Id.
[41] While Confidentiality protections for battered women came out of several different immigration acts, the term VAWA Confidentiality is typically used to describe the cornerstone provisions enacted in IIRIRA section 384.
[42] *See* Full Committee Mark Up: Hearing on H.R. 2202 Before the House Judiciary Committee, 104th Cong. (September 19, 1995).

> [T]he … problem is [that] the abusive thing so taints it, it might be some kind of retaliation appearing to be in another field….here [it] is the abusive sponsor or family member [that] is the operative word and the idea being that once a person has been determined to be abusive, anything that they turn in could be a retaliation, it could be whatever. It couldn't just be on that specific item.[43]

As the IIRIRA debate continued, the late Senator Paul Wellstone echoed:

> It would be unconscionable for our immigration laws to facilitate an abuser's control over his victim. It would be unconscionable for our immigration laws to abet criminal perpetrators of domestic violence. It would be unconscionable for our immigration laws to perpetuate violence against women and children."[44] The final VAWA confidentiality provisions of IIRIRA §384[45] furthered these purposes of the VAWA legislation in two ways: (1)[46] by restricting access to officially filed documents in order to prevent abusers from obtaining information about even the existence of a case, and (2) by preventing immigration authorities from relying solely on information furnished by abusers to make determinations such as denying victims' applications for immigration benefits and making deportation decisions.[47]

The immigrant victim safety protections articulated in IIRIRA section 384(a)(1) were explicitly applicable to all immigrant victims of battery or extreme cruelty and their children without regard to whether or not they qualified for or had filed for any form of immigration relief. The VAWA confidentiality non-disclosure protections covered all forms of VAWA related immigration relief that existed at the time that IIRIRA 384 became law,[48] including VAWA self-petitioners,[49] applicants for battered spouse waivers,[50] and VAWA suspension of deportation applicants.[51]

Immigration and Naturalization Service memoranda implementing VAWA confidentiality protections recognized that some immigration officials, prior to enactment of VAWA confidentiality protections, had released information about the fact of a pending VAWA immigration case and information about the whereabouts of self-petitioners to abusers.[52] INS stated, "[t]he VAWA provisions … were created by Congress so that the battered alien can seek status independent of the abuse. Thus, disclosure of information to the alleged abuser or any other family member was inappropriate even prior to the new law. With enactment of section 384, however, such inappropriate conduct is now also grounds for disciplinary action or fine, or both."[53] INS policies also clarify that adverse information received from an immigrant's abusive spouse, parent and any of the abuser's relatives or family members cannot be the sole information relied upon by an immigration judge, or any immigration enforcement personnel or adjudicator to make an adverse determination against an alien.[54]

In subsequent legislation, VAWA's confidentiality provisions have been repeatedly amended, strengthening protections and expanding coverage to immigrant domestic violence, sexual assault, trafficking, or crime victims may access. IIRIRA's victim safety protections now cover a wider range of immigrant victims and their children or, in the case of victimized children, their parents.[55]

VAWA 2000

Summary of relevant VAWA Confidentiality provisions:

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[43] *Id.*
[44] 142 Cong. Rec. S4306 (1996) (Statement of Sen. Wellstone).
[45] IIRIRA § 384, supra note 6.
[46] *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384.* May 5, 1997, Office of Programs, /s/ Paul W. Virtue, Acting Executive Associate Commissioner.
[47] *Id.* at (a)(1) and (2).
[48] Enumerated in *id.*, at (2).
[49] *As defined in* VAWA 1994, supra note 1 at § 40701.
[50] INA § 216(c)(4)(C); 8 U.S.C. 1186a(c)(4)(C), "Conditional Permanent Resident Status for Certain Alien Spouses and Sons and Daughters: Requirements… for removal of condition: Hardship waiver."
[51] *As defined in* VAWA 1994 at § 40703, supra note 18.
[52] *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384.* May 5, 1997, Office of Programs, /s/ Paul W. Virtue, Acting Executive Associate Commissioner.
[53] Id.
[54] Id.
[55] *See, e.g.* Balanced Budget Act of 1997, Pub. L. No. 105-33 § 5572 (adding para. (b)(5) to 8 U.S.C. 1367); VAWA 2000, supra note 7; and VAWA 2005, supra note 8.

- Extended VAWA Immigrant Victim Safety Protections to U-visa applicants;[56]
- Extended VAWA Confidentiality Protections to U-visa applicants.[57]

History and Purpose—VAWA Confidentiality Amendments

In deliberating over the 2000 Battered Immigrant Women Protection Act (Title V of VAWA 2000), Congress found that "providing battered immigrant women and children… with protection against deportation… frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration benefit under the abuser's control."[58] The Senate explicitly stated that "[VAWA 2000] immigration relief is designed to improve on efforts made in VAWA 1994 to prevent immigration law from being used by an abusive citizen or lawful permanent resident spouse as a tool to prevent an abused immigrant spouse from reporting abuse or leaving the abusive relationship."[59]

Although VAWA 1994 contained several provisions that limited the ability of an abusive citizen or lawful permanent resident to use the immigration laws to perpetuate the abuse and control and to commit violence against a spouse or child, Congress found preexisting VAWA immigration relief to be insufficient. In VAWA 2000, Congress created the U-visa, a "new nonimmigrant visa for victims of certain serious crimes that tend to target vulnerable foreign individuals without immigration status."[60] The U-visa was designed to provide temporary immigration benefits, leading to permanent resident status, to victims of certain statutorily enumerated crimes if the victim suffered substantial physical or mental abuse as a result of the crime, the victim has information about the crime, and a law enforcement official or a judge certifies that the victim has been helpful, is being helpful, or is likely to be helpful in investigating or prosecuting the crime.[61] In creating a centralized process for adjudicating U-visa applications, the Department of Homeland Security's policy directive confirmed that "U nonimmigrant status, a new nonimmigrant classification for victims of crimes…was created to strengthen the ability of law enforcement to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking or persons, and other criminal activity of which aliens are victims, while offering protection to victims of such offenses."[62]

While creating the U-visa, Congress explicitly expanded the 1996 VAWA confidentiality and safety protections in Section 384 of IIRIRA (8 U.S.C. 1367) to include U-visa-eligible victims of domestic violence, sexual assault, and other serious crimes.[63]

VAWA 2005

Summary of relevant VAWA Confidentiality provisions:

- Extended VAWA Confidentiality and Immigrant Victim Safety Protections to eligible T-visa applicants;[64]
- Expanded definition of VAWA self-petitioners (thereby extending VAWA confidentiality and safety protections) to include:[65]
    - Victims of elder abuse
    - VAWA Cuban adjustment applicants
    - VAWA HRIFA

[56] VAWA 2000, supra note 7 at Section 1513(d)(3) amending IIRIRA Section 384(a)(1); 8 U.S.C. 1367(a)(1).
[57] VAWA 2000, supra note 7 at Section 1513(d)(4) amending IIRIRA Section 384(a)(2); 8 U.S.C. 1367(a)(2).
[58] VAWA 2000, supra note 7 at § 1502 (a)(2).
[59] 146 Cong. Rec. S10195 (2000), "Title V, the Battered Immigrant Women Protection Act of 2000 - Section-by-section summary."
[60] Congressional Record, Vol.146, No.126 Trafficking Victims Protection Act Of 2000--Conference Report -- (Senate - October 11, 2000) page S10196.
[61] Id.
[62] *Centralization of Interim Relief for U Nonimmigrant Status Applicants.* October 8, 2003, Office of Associate Director of Operations, /s/ William R. Yates, Associate Director of Operations.
[63] *See* VAWA 2000, supra note 7 at § 1513(d).
[64] Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title VIII, Subtitle B, §817 (2006).
[65] Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title VIII, Subtitle B, (2006), Sections 817, 811; INA Section 101(a)(51); 204(a)(1)(A)(vii).

  - VAWA NACARA
- Imposed restrictions on immigration enforcement actions at specified locations (e.g. shelters, victim services, courthouses) and required that there must be a certification that IIRIRA §384 was not violated when such actions are taken;[66]
- Allowed DHS to make referrals to victims' advocates;[67]
- Added penalties for violations of mandatory certifications;[68]
- Added a requirement that DHS develop policies, protocols, and training for DHS employees on VAWA confidentiality.[69]

History and Purpose—VAWA Confidentiality Amendments

In reauthorizing the Violence Against Women Act, it sought to improve confidentiality, privacy and safety of victims of violence against women.[70] VAWA 2005 substantially expanded confidentiality protections for all persons served by entities receiving Violence Against Women Act grants including governmental (e.g. police, prosecutors, courts) and non-governmental grantees (e.g. shelters, rape crisis centers, legal services programs).[71] In addition to enhancing confidentiality protections as a prerequisite for receiving funding under the Violence Against Women Act,[72] VAWA 2005 enhances victim privacy and confidentiality for programs that include, law enforcement,[73] health care,[74] housing[75] and immigration related benefits.[76]

The legislative history of VAWA 2005 includes an extensive discussion of the importance of the VAWA nondisclosure, source limitation, and enforcement action limitations. Of particular interest is the bipartisan statement authored by Chairman James Sensenbrenner and Representative (Current Chairman) John Conyers of the House Judiciary Committee that states as follows:

"Prohibition of Adverse Determinations of Admissibility or Deportability Based on Protected Information"

[66] Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title VIII, Subtitle B, (2006), Section 825(c); INA Section 239(e).
[67] Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title VIII, Subtitle B, §817 (2006).
[68] 8 U.S.C. 1367(c); Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title VIII, Subtitle B, §817 (2006).
[69] 8 U.S.C. 1367(d); Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title VIII, Subtitle B, §817 (2006). The bipartisan report authored by Chairman James Sensenbrenner and Representative John Conyers *See* "Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402" H.R. Rep. No. 109-233, at 123 (2005) ("This Committee encourages the Secretary of DHS to (a) develop a training program for trial attorneys and other DHS staff who regularly encounter alien victims of crimes, and (b) craft and implement policies and protocols on appropriate handling by DHS officers of cases under VAWA 1994, the Acts subsequently reauthorizing VAWA, and IIRIRA.") *see also* 151 Cong. Rec. E2607 (2005) (statement of Rep. Conyers on Section 817).
[70] Bipartisan Section by Section description of the Violence Against Women Act of 2005, Senator Joseph Biden, Congressional Record DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009 -- (Senate - December 16, 2005) Page: S13749-13765.
[71] Adding new Section 40002(b) to the Violence Against Women Act of 1994, *See* Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title VIII, Subtitle B, §817 (2006). 42 U.S.C. 13925. (Required to protect confidentiality and privacy of persons receiving services; non-disclosure of personal identifying information mandated; release only when compelled by specific court order or statute and if any release required grantee must take action to notify the victim and take steps to protect the safety and privacy of the victim affected by the release of information.)
[72] In VAWA 2005 Congress enhanced victim confidentiality in each of the following sections of the Act including Section 102 (Grants to Encourage Arrest); Section 107 (Privacy Protections for Victims of Domestic Violence, Dating Violence, Sexual Assault and Stalking grants); Section 303 (Grants to Combat Domestic Violence, Dating Violence, Sexual Assault, and Stalking in Middle and High Schools).
[73] VAWA 2005 Section 1115 (Improving confidentiality of victim information in national criminal record databases).
[74] VAWA 2005 Section 503 (Training and Education for Health Professionals in Domestic and Sexual Violence. These grants also address confidentiality for victims in rural communities).
[75] VAWA 2005 Sections 602 and 607 (victim confidentiality in public and assisted housing, including in rural communities); Section 605 (Victim confidentiality under the McKinney-Vento Homelessness Act); Section 606 (Victim confidentiality under the Low-income housing assistance program).
[76] VAWA 2005 immigration confidentiality related sections are: Section 817 (VAWA Confidentiality for immigrant victims of domestic violence, sexual assault, trafficking and other crime victims); Section 827 (Corrections to Real ID to require confidentiality protections for domestic violence, sexual assault, trafficking, stalking, dating violence, and crime victims in the implementation of the Real ID program including protections for immigrant victims consistent with IIRIRA Section 384); Section 833 (Confidentiality of prior victim information in connection with the International Marriage Broker Regulation Act).

> "In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings. In 2000, and in this Act, Congress extended these protections to cover victims of trafficking, certain crimes and others who qualify for VAWA immigration relief. These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims' immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims. This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual assault and trafficking, as prohibited by section 384 of IIRIRA. In determining whether a person furnishing information is a prohibited source, primary evidence should include, but not be limited to, court records, government databases, affidavits from law enforcement officials, and previous decisions by DHS or Department of Justice personnel. Other credible evidence must also be considered. Government officials are encouraged to consult with the specially trained VAWA unit in making determinations under the special ''any credible evidence'' standard…. [I]nformation in the public record and government data bases can be relied upon, even if government officials first became aware of it through an abuser."[77]

In a statement issued along with the passage of VAWA 2005, Representative Conyers reiterated this congressional intention regarding the importance of all three prongs of VAWA confidentiality protections. [78] He indicated that Congress intended to:

1) Direct DHS and other government agencies to refrain from seeking out or relying upon information provided by abusers and relatives or family members of the abuser to take any adverse action against an immigrant victim of domestic violence, battering extreme cruelty, child abuse, trafficking, sexual assault or other U visa listed crime;

2) Prohibit the disclosure of any information related to the existence of or content of a VAWA, T or U visa case[79]; and

3) Discourage DHS from taking enforcement actions at specified protected locations by requiring cases brought in immigration court to include a certification that such an enforcement action was performed in compliance with the Section 384 protection mandates.

As noted above, in addition to expanding protections relating to confidentiality and source limitations, VAWA 2005 also imposed new safeguards on DHS enforcement actions so as to assure that immigrant victims of domestic violence sexual assault, trafficking and U visa crimes can safely seek help from police, prosecutors, courts, shelters, and other victims' services without fear of deportation. The statute identifies certain protected locations in which DHS enforcement actions are to be limited. The locations protected from enforcement actions are: [80]

- Domestic violence shelters
- Rape crisis centers
- Supervised visitation centers
- Family justice centers
- Victim's services or victim's services providers or community based-organizations

[77] "Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402" H.R. Rep. No. 109-233, at 122 (2005).
[78] Conyers Extension of Remarks, supra note 14 at E2606-07. These remarks quoted substantially from and reiterated the legislative history and intent contained in the bi-partisan Sensenbrenner – Conyers House Report, H.R. Rep. No. 109-233, supra note 14.
[79] *See Hawke v. Dep't of Homeland Sec.*, No. C-07-03456 RMW, 2008 WL 4460241. at *7 (N.D. Cal. Sept. 29, 2008) (holding that the policy behind the statute compels the court to prohibit the disclosure of a mooted petition compared to a petition "denied *on the merits*").
[80] INA Section 239.

- Courthouses (or in connection with that appearance of the immigrant at a courthouse) if the immigrant is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the immigrant has been battered or subject to extreme cruelty or if the immigrant is a victim of trafficking or one of the crimes listed under U visa (crime victim) visa protections.

When a DHS enforcement action takes place in a protected location DHS is required to disclose that fact in the Notice to Appear and is required to certify that the action did not violate the prohibition against reliance upon abuser-provided information and was in this and in all other ways compliant with section 384.[81]

In explaining the kinds of practices these location-based enforcement provisions were designed to protect against Congress noted that:

> "[I]t is very important that the system of services we provide to domestic violence victims, rape victims and trafficking victims and our protection order courtrooms and family courts are places to which victims can safely turn for help without worrying that their abuser may have sent immigration enforcement officers after them when they are seeking service and protection. Section 825(c) establishes a system to verify that removal proceedings are not based on information prohibited by section 384 of IIRIRA. When any part of an enforcement action was taken leading to such proceedings against an alien at certain places, DHS must disclose these facts in the Notice to Appear issued against the alien. DHS must certify that such an enforcement action was taken but that DHS did not violate the requirements of Section 384 of IIRIRA. The list of locations includes: a domestic violence shelter, a rape crisis center, and a courthouse if the alien is appearing in connection with a protection order or child custody case." [82]

Congress expressed its views both in statute and legislative history that violations of VAWA confidentiality provisions were to carry sanctions. In addition to disciplinary actions, section 384 imposes a penalty of up to $5,000 for each violation for anyone who "willfully uses, publishes, or permits information to be disclosed in violation of [these provisions]."[83] VAWA 2005 added failure to comply with INA section 239 certification requirements when any part of an enforcement action took place at a protected location to the list of IIRIRA 384 VAWA confidentiality violations that could result in employment penalties and/or a fine of $5000 for each violation.[84] "Persons who knowingly make a false certification shall be subject to penalties."[85] In addition to penalties against the DHS employees, Congress also sought to provide a remedy to victims when VAWA confidentiality was violated. "Removal proceedings filed in violation of section 384 of IIRIRA shall be dismissed by immigration judges. However, further proceedings can be brought if not in violation of Section 384."[86]

To help assure that DHS officials were made aware of VAWA confidentiality requirements so that they could carry out their duties without violating these important provisions, VAWA 2005 required that DHS issue guidance on these provisions.[87] Congress explained these statutory requirements as follows:

> "This section requires that the Department of Homeland Security and the Department of Justice provide guidance to their officers and employees who have access to information protected by Section 384 of IIRIRA, including protecting victims of domestic violence, sexual assault, trafficking and other crimes from the harm that could result from inappropriate disclosure of information. Congress encourages the DHS's specially trained VAWA unit and CIS VAWA policy personnel: (1) to develop a training program that can be used to train DHS staff, trial attorneys, immigration judges, and other DOJ and DOS staff who

[81] Immigration and Nationality Act ("INA") § 239(e); codified at 8 U.S.C. §1229(e) "Initiation of Removal Proceedings: Certification of compliance with restrictions on disclosure."
[82] Conyers Extension of Remarks, supra note 14 at E2606-07. These remarks quoted substantially from and reiterated the legislative history and intent contained in the bi-partisan Sensenbrenner – Conyers House Report, H.R. Rep. No. 109-233, supra note 14.
[83] 8 U.S.C. 1367(c).
[84] Id.
[85] Conyers Extension of Remarks, supra note 14 at E2606-07. These remarks quoted substantially from and reiterated the legislative history and intent contained in the bi-partisan Sensenbrenner – Conyers House Report, H.R. Rep. No. 109-233, supra note 14.
[86] Id.; INA Section 239(e), codified at 8 U.S.C. §1229a.
[87] Section 817(d) of the Violence Against Women Act of 2005, 8 USC §1367 (2005).

regularly encounter alien victims of crimes, and (2) to craft and implement policies and protocols on appropriate handling by DHS, DOJ and DOS officers of cases under VAWA 1994, the Acts subsequently reauthorizing VAWA, and IIRIRA."[88]

Department of Homeland Security Victim Protection Policies 2010 and 2011

In 2010 and 2011 the Department of Homeland Security issued a range of policy directives and initiated a number of projects designed to significantly increase the DHS role in identifying immigrant crime victims, including victims of human trafficking, domestic violence, sexual assault and other U-visa listed crimes, and helping them secure immigration protections under the Violence Against Women Act and the Trafficking Victims Protection Act. DHS launched agency-wide initiatives, such as the DHS Blue Campaign, to combat human trafficking and assist immigrant victims of violence against women and sexual assault.[89]

DHS policies issued in 2010 and 2011 that improve protections for immigrant victims covered by VAWA confidentiality include:

- **Computerized VAWA Confidentiality "384" Flag**: In 2010 DHS established a new "384" code in the Central Index System database that allows DHS employees to "verify quickly whether an individual is covered by the confidentiality provisions."[90] This alerts DHS employees that an individual is protected by the VAWA Confidentiality provisions, that immigration enforcement, detention or removal actions are generally not to be taken against these individuals, and that information about victims may not be released.[91] When an individual files for a VAWA self-petition or T or U status, the code in the database will be updated to 384. The code 384 will be maintained on that file indefinitely unless the case is denied on its merits and all final appeal rights are exhausted.[92] This method seeks to allow DHS to "fully comply with and prevent violations" of VAWA Confidentiality.[93] ICE has since encouraged employees who see the code 384 to contact the local ICE Office of Chief Counsel.[94]

- **Training of DHS Employees on VAWA Confidentiality:** DHS and the Federal Law Enforcement Training Center are working together on the development of computer-based training curricula. Training on the confidentiality protections afforded victims of trafficking, domestic violence and other crimes will be required of all DHS personnel.[95]

- **DHS Enforcement Priorities Urge Identification and Protection of Crime Victims:** In June 2011, DHS has decided to focus the use of its enforcement resources on national and border security, public safety, and the integrity of the immigration system.[96] In furtherance of this mission and the DHS role in victim protection and the prosecution of traffickers, abusers and crime perpetrators, DHS issued policy guidance

[88] Conyers Extension of Remarks, supra note 14 at E2606-07. These remarks quoted substantially from and reiterated the legislative history and intent contained in the bi-partisan Sensenbrenner – Conyers House Report, H.R. Rep. No. 109-233, supra note 14

[89] *See*, Department of Homeland Security, Fact Sheet DHS Blue Campaign (April 2011) available at: http://www.dhs.gov/ynews/gc_1279809595502.shtm (hereinafter "Blue Campaign Fact Sheet").

[90] Executive Summary, Blue Campaign Stakeholder Meeting with Senior Counselor Alice Hill, at 2 (Dec. 10, 2010), available at: http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Stakeholder%20Meeting%20Executive%20Summary%20Dec%2010%202010.pdf/at_download/file (hereinafter "Blue Campaign Memo").

[91] U.S. Citizenship and Immigration Servicess, DHS Broadcast Message on New 384 Class of Admission Code (Dec. 21, 2010), available at: http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message%20to%20DHS%20384%20COA%20Final%2012.21.10.pdf/at_download/file.

[92] *Id.*

[93] *Id.*

[94] John Morton, Director, U.S. Immigration and Customs Enforcement, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, at 3 (June 17, 2011) (hereinafter "Crime Victims and Witnesses Memo"), available at: http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-Prosecutorial-Discretion-Memo-06-17-2011.pdf

[95] Blue Campaign Fact Sheet, supra note 89.

[96] John Morton, Director, U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency, at 2 (June 17, 2011), available at: http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton%206.17.11prosecutorial-discretion-memo.pdf (hereinafter "Prosecutorial Discretion Memo").

designed to minimize the effect that immigration enforcement has on the willingness and ability of victims, witnesses, and plaintiffs in non-frivolous civil rights lawsuits[97] to call the police and pursue justice.[98]

- **Exercise of Prosecutorial Discretion Favorably in Cases of Immigrant Crime Victims and Witnesses:** DHS issued policies in June 2011 that established factors for immigration officers to weigh in the exercise of prosecutorial discretion. Factors that weigh in favor of immigration enforcement include: risk to national security, public safety risk, repeated criminal offenses, known gang activity, and an egregious record of immigration violations.[99] Factors that may lead to the favorable exercise of prosecutorial discretion include but are not limited to: crime victimization or witness in a criminal case (domestic violence, human trafficking, and other serious crimes);[100] the likelihood of being granted a U-visa, T-visa, or VAWA self-petition; age and circumstances of arrival; length of time in the United States; a U.S. citizen or lawful permanent resident parent, spouse, or child; age (minor or elderly); person suffers or is the caretaker for a person with a serious mental or physical disability or health condition; pursuit of high school or college education; and person or spouse is pregnant or nursing .[101]

- **Release From Detention and Dismissal of Removal Proceedings Involving Crime Victims:** In August of 2010 DHS implemented a policy to release from detention immigrants with filed, pending, or approved applications for U-visas, T-visas, VAWA self-petitions, and VAWA Cancellation of Removal.[102] DHS will dismiss removal actions without prejudice if DHS believes the applicant is likely to receive an immigration benefit, unless the applicant has criminal convictions or misconduct, the applicant is a threat to public safety or national security, or there is evidence of fraud.[103]

- **Expedited Adjudication of VAWA Self-Petitions, T and U-Visa Cases Within 30 or 45 Days:** Immigration and Customs Enforcement (ICE) is required to notify the VAWA Unit at the DHS Vermont Service Center when an immigrant in removal proceedings or in immigration detention has a pending application for immigration benefits, including VAWA, T or U-visa applications.[104] ICE in cases of immigrant victims is also directed to send the victim's "A" file, the immigration case file, to the VAWA Unit.[105] DHS policies further direct the VAWA Unit to endeavor to adjudicate the victim's application for VAWA, T or U visa immigration relief within 30 days if the victim is detained and within 45 days in the cases of non-detained victims.[106] However, the VAWA Unit has discretion in its collaboration with ICE that affects the extent to which the VAWA Unit will meet these adjudication targets.[107] The VAWA Unit will require that advocates and attorneys working with immigrant victims in detention and in removal proceedings request expedited adjudication based on the following additional factors: severe financial loss to company or individual; extreme emergent situation; humanitarian situation; Department of Defense or national interest situation; USCIS error; and compelling USCIS interest.[108]

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[97] This includes cases brought for sexual violence, sexual harassment and discrimination in the workplace, to individuals engaged in a protected activity related to civil rights, such as union organizing or landlord-tenant disputes. Crime Victims and Witnesses Memo, supra note 94.
[98] *Id.*, at 3.
[99] Prosecutorial Discretion Memo, supra note 96, at 5.
[100] It is important to note that the exercise of prosecutorial discretion is not limited to crimes and victims eligible for immigration relief through VAWA, T or U-Visas. This policy guidance provides DHS officials greater latitude to exercise this discretion in favor of immigrants who are victims *or* witnesses and extends to any crime, including crimes not listed in the U-visa.
[101] *See* Prosecutorial Discretion Memo, at 4.
[102] John Morton, Assistant Secretary, U.S. Customs and Immigration Enforcement, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (August 20, 2010). available at http://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf (hereinafter "Pending Applications Memo").
[103] *Id.*, at 2.
[104] Pending Applications Memo (This memorandum extends to all approved and pending but likely to be approved immigration cases in which the applicant has an immediate basis for immigration relief and includes VAWA, T and U visa cases).
[105] *Id.*
[106] U.S. Citizenship and Immigration Services, Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11-16 (PM-602-0029) (February 4, 2011), available at: http://www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/coordination-adjud-removal-proceedings.pdf;
[107] *Id.*
[108] U.S. Citizenship and Immigration Services, Expedite Criteria (June 17, 2011), available at: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=16a6b1be1ce85210VgnVCM100000082ca60aRCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD. Expedite requests made in VAWA

Violations of VAWA Confidentiality, Victim Safety Protections and Locational Enforcement Limitations

The VAWA confidentiality provisions were created to prevent batterers, rapists, traffickers and other crime perpetrators from using the immigration system as a tool of power, coercive control,[109] abuse, or to retaliate against, their victims.[110] In the past, perpetrators of criminal acts have used threats to turn immigrant victims (both documented and undocumented) in to immigration authorities for deportation in order to coerce victims and secure their silence. Abusers, traffickers and crime perpetrators have also used information provided by DHS to locate and harm their spouses, children, and other crime victims to stop them from providing information and testimony to law enforcement officers, prosecutors and courts.

Abusers and crime perpetrators contact DHS officials and seek to enlist their support to secure initiation of an immigration enforcement action against their victim or seek to provide DHS information that will lead or contribute to DHS denying the victim's pending immigration case or taking a negative enforcement action against a victim. Harmful actions might include disclosure of the fact that the victim has filed for immigration relief in a VAWA self-petition, VAWA cancellation of removal or suspension of deportation case, a battered spouse waiver or a T- or U-visa case. Other actions include triggering an interview, investigation or issuance of a notice to appear against a victim, filing of a removal case against a victim, or using abuser-provided information to contribute to an unfavorable ruling denying a victim's application for an immigration benefit.

VAWA confidentiality rules strengthen criminal prosecutions by eliminating the abuser's ability to influence the adjudication of the victim's immigration case including deportation. At the same time VAWA confidentiality rules enhance protection for immigrant victims of domestic violence, sexual assault and trafficking, freeing them to safely seek victim services and justice system protection without fearing the deportation that their abusers have told them will occur if they seek help. VAWA's immigration confidentiality protections are an essential part of the Violence Against Women Act's increasing protection of the confidentiality, privacy and safety of victims of violence against women and their children. Without the VAWA immigration relief and the VAWA confidentiality, abusers of immigrant victims cannot be held accountable for their crimes, victims will be forced into silence and abusers will continue perpetrating crimes in our communities.

Violations of VAWA confidentiality non-disclosure rules create serious, even life-threatening dangers to individual crime victims – men, women and children. Violations compromise the trust that immigrant victims have in the efficacy of services that exist to help them. They lead federal government officials to unknowingly help crime perpetrators to retaliate, harm and manipulate victims and elude or undermine criminal prosecutions.[111]

Advocates, attorneys, and justice system and immigration system professionals need to be aware of the various activities that constitute violations of VAWA confidentiality. The violations can be grouped into the following categories:

- Violations for releasing protected information:[112] Release of information contained in a protected VAWA immigration file to the abuser or others (including the existence of or the facts of a VAWA immigration case; locational information, or information about victimization contained in an immigration case (VAWA self-petition, VAWA cancellation or suspension, T visa, U visa or battered spouse waiver or any other family-based visa or removal case involving such victim). These rules apply to information victims file with the Department of Homeland Security, the Department of State and the Department of Justice. DHS authorities have also taken

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confidentiality protected cases are made directly to the VAWA Unit of the Vermont Service Center. E-mail to Leslye Orloff from Lynn A. Boudreau, Assistant Center Director, Vermont Service Center VAWA Unit (March 4, 2011).

[109] Mary Ann Dutton & Lisa Goodman, Coercion in Intimate Partner Violence: Towards A New Conceptualization, 52 Sex Roles: A J. of Res. 743 (June 2005).

[110] *See Hawke*, 2008 WL 4460241, at *7 (N.D. Cal. Sept. 29, 2008) ("[O]ne of the primary purposes of the VAWA confidentiality provision, namely, to prohibit disclosure of confidential application materials to the accused batterer.") (citing 151 Cong. Rec. E2607-07 (2005)).

[111] *See, e.g.* Rep. Schroeder's comments, Hearing on H.R. 2202 (1995), supra note 24.

[112] IIRIRA Section 384 (a)(2); 8 U.S.C. 1367(a)(2).

the position that this protected information should not be released through family courts, criminal courts and law enforcement.[113] The goal of this provision is to prevent disclosure of information that a perpetrator could use to harm or locate a victim.

- Victim Safety-Endangerment Violations—Prohibition on Reliance on Abuser Provided Information: Gathering and/or use of information provided solely[114] by an abuser, trafficker, crime perpetrator, or family member of any victim to initiate or undertake any part of an enforcement action, or to make any other adverse determination, in any immigration case against the crime victim is prohibited. These protections apply to reliance on information provided by an abuser or perpetrator without regard to whether the victim has filed a VAWA, T or U visa immigration case and are not limited to victims who have filed cases for immigration relief. These protections stop immigration enforcement agencies from using information provided solely by an abuser, trafficker or U visa crime perpetrator, a relative, or a member of their family,[115] to take an adverse action regarding admissibility or deportability against an immigrant victim, without regard to whether a victim has ever filed or qualifies to file for VAWA related immigration relief.[116]
- Prohibited Location Violations: Enforcement actions are not to be taken against victims at shelters, rape crisis centers, victim services programs, community based organizations, courthouses, supervised visitation center or family justice centers.[117] The fact that immigration officials have shown up at shelters (e.g. New Mexico and Alaska) and at courthouses (e.g. California, New York, New Mexico, , and North Carolina) was of grave concern to members of Congress. These VAWA confidentiality violations led Congress to strengthen the law to better deter these practices both in VAWA 2000[118] and again in VAWA 2005.[119] If any part of an enforcement action took place at any of the prohibited locations, Department of Homeland Security (DHS) must disclose this fact in the Notice to Appear, and to the immigration court, and must certify that such action did not violate VAWA confidentiality provisions.[120] DHS must certify and, if necessary, prove[121] to the immigration judge that VAWA confidentiality was not violated by, for example, relying upon abuser-provided information.[122]

Section 8 U.S.C. 1367(c) provides that violations of any of the three types of VAWA Confidentiality or Victim Safety Protections described above are punishable by a $5,000 fine as well as disciplinary action.[123] VAWA 2005 required guidance and training for Department of Homeland Security officials including trial attorneys and enforcement officers on all of VAWA confidentiality's protections.[124]

Adverse Decisions

[113] U.S. Immigration and Customs Enforcement "Violence Against Women Act (VAWA 2005)." Online training 2007. p. 15. *See Hawke*, 2008 WL 4460241, at *6 (holding that disclosure is allowed only in judicial review of a government determination of the status of the immigration petition, not in other civil and criminal proceedings).
[114] The policy of USCIS is that if the information can be independently corroborated by an unrelated source, the information may use used. *See* Virtue, INS Office of Programs, "Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA § 384," (May 5, 1997). Advocates and attorneys working with immigrant victims need to know that DHS officials may rely upon information in the public record and government databases, even if government officials first became aware of it through an abuser. "Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402" H.R. Rep. No. 109-233, at 122 (2005).
[115] *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384.* May 5, 1997, Office of Programs, /s/ Paul W. Virtue, Acting Executive Associate Commissioner. ("Virtue memo").
[116] IIRIRA Section 384 (a)(1); 8 U.S.C. 1367(a)(1).
[117] Memorandum from the U.S. Customs Enforcement, Office of Detention and Removal Operations Director John P. Torres to Field Office Directors and Special Agents in Charge (January 22, 2007) (on file with the U.S. Department of Homeland Security). The memorandum offers interim guidance on operating procedures, including VAWA confidentiality requirements, prohibitions against relying on abuser-provided information, and enforcement actions taken at prohibited locations.
[118] VAWA 2000, supra note 7.
[119] VAWA 2005, supra note 8.
[120] Immigration and Nationality Act ("INA") § 239(e); codified at 8 U.S.C. §1229(e) "Initiation of Removal Proceedings: Certification of compliance with restrictions on disclosure."
[121] Conyers Extension of Remarks, supra note 14 at E2606-07 (removal proceedings in violation of Section 384 of IIRIRA shall be dismissed); Department of Justice Appropriations Authorization Act, Fiscal Years 2006 though 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402 (2005).
[122] Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representations, to accompany H.R. Re. No. 109-233, at 122 (2005).
[123] Violence Against Women Act of 2005 ("VAWA 2005") in the Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title VIII, Subtitle B, § 825(c) (2006)., 8 U.S.C. 1229; INA Section 239(e).
[124] VAWA 2005 Section 817(d); Conyers Extension of Remarks, at E2606-07.

An alien cannot be deemed inadmissible or deported based solely[125] upon information from her batterer or, under certain circumstances, his family members. Furthermore, the DHS cannot deny a VAWA self-petition, U visa, or cancellation of removal application or a family-sponsored immigrant visa petition based on information provided solely by the batterer.[126] This prohibition applies specifically to information provided by:

- a spouse or parent who has battered or subjected the applicant to extreme cruelty;
- a member of the spouse's or parent's family residing in the same household as the applicant who has battered the applicant or subjected her to extreme cruelty, if the spouse or parent consented to, or acquiesced in, such battery or cruelty;
- a spouse or parent who has battered or subjected the applicant's child to extreme cruelty;
- a member of the spouse's or parent's family residing in the same household as the applicant who has battered the applicant's child or subjected the child to extreme cruelty, if the spouse or parent consented to or acquiesced in such battery or cruelty; or
- the perpetrator of the substantial physical or mental abuse and the criminal activity against a U visa applicant, unless the applicant has been convicted of specific crimes.[127]

If the Department of Homeland Security initiates removal proceedings against a battered immigrant based solely on statements by her abuser or another individual listed in IIRIRA Section 384(a)(1), her attorney[128] should move to terminate removal proceedings. The motion should include relevant facts about the abusive relationship, what steps the battered immigrant is taking to remove herself from the abuse, and what information the batterer has supplied that the Department of Homeland Security has acted upon. Examples of relevant factual information include:

- dates of any police reports filed;
- the existence of any civil protection order;
- the battered immigrant's application for VAWA relief;
- the battered immigrant's actions to seek help from a shelter;
- what information the batterer has given to the Department of Homeland Security employee;
- the name and position of the Department of Homeland Security employee; and
- what action that employee took.

The relevant portions of IIRIRA § 384 should be cited and attached for the judge's reference. Providing the immigration judge with a summary of the law's purpose can also strengthen the motion. The law was created so that abusers could not use the immigration system as a weapon against domestic violence victims.[129] When the immigration authorities take action based on information provided by the batterer, they violate the law and contravene the purposes behind VAWA. A 1997 INS memorandum concerning disclosure of information in VAWA cases provides language about the purpose of the law.[130] The memo, in relevant part, states:

> …this provision appears to have been enacted in response to concerns from the advocacy community that INS officers have provided information on the whereabouts of self-petitioners or on their pending applications for relief to the allegedly abusive spouse or parent. The VAWA provisions …were created by Congress so that the battered alien can seek status independent of the abuser. Thus,

[125] This requirement reduces the batterer's ability to retaliate against the victim, typically by attempting to jeopardize the victim's immigration status.
[126] *See generally* IIRIRA § 384(a)(1); 8 U.S.C. § 1367(a)(1).
[127] *See* IIRIRA § 384(a)(1)(E); 8 U.S.C. § 1367(a)(1)(E). For a list of the applicable crimes, *see* Immigration and Nationality Act (INA) § 241(a)(2); 8 U.S.C. § 1251(a)(2).
[128] Generally only an attorney or accredited representative recognized by the Board of Immigration Appeals may represent an immigrant before the immigration authorities or in removal proceedings.
[129] *See Hawke,* 2008 WL 4460241, at *7 (stating that the VAWA confidentiality provisions were intended to ensure that "abusers…cannot use the immigration system against their victims") (internal quotations omitted).
[130] Memorandum from INS Acting Executive Associate Commissioner Paul Virtue, "Non-Disclosure and Other Prohibitions Relation to Battered Immigrants: IIRIRA § 384," May 5, 1997.

> disclosure of information to the alleged abuser or any other family member was inappropriate even prior to the new law. With enactment of section 384, however, such inappropriate conduct is now also grounds for disciplinary action or fine, or both.

The brief supporting a motion to terminate removal proceedings should include a demand that DHS prove it obtained independent corroborative information before it acted. The 1997 memorandum states: "If an INS employee receives information adverse to an alien from the alien's U.S. citizen or lawful permanent resident spouse or parent, or from relatives of that spouse or parent, the INS employee must obtain independent corroborative information from an unrelated person before taking any action based on that information."[131]

Attorneys should also consider moving to suppress evidence that comes from the abuser or his family members and should ask the court to require that the Department of Homeland Security prove that any corroborative sources the government wishes to use do not relate back to the abuser. In deciding whether information was obtained about the victim is allowed the court should carefully examine whether there is a connection between DHS learning about the information and the abuser or crime perpetrator that DHS would not have sought or obtained otherwise. If the information would have been obtained when DHS conducted a criminal background check of the victim in connections with her application for immigration benefits, an immigration judge could reasonably conclude that the information was independently corroborated. If, on the other hand, DHS was highly unlikely to obtain the information other than from the abuser, such as information that the victim was undocumented and was living at a women's shelter, in such cases the court should be encouraged to dismiss the immigration court proceeding brought against the victim when the tip as to the victim's whereabouts or the victim's undocumented status was provided to DHS by the perpetrator.

Violations of VAWA Confidentiality and Victim Safety Protections: Case Examples

The following are examples of VAWA confidentiality violations taken from actual cases occurring in a variety of jurisdictions across the country. These stories are being shared to improve knowledge among government agency personnel, victim advocates, legal services lawyers, and immigration attorneys about the three different types of protections included in VAWA confidentiality. These stories illustrate steps advocates and attorneys working with immigrant victims took to help their clients when VAWA confidentiality was violated. The names of the victims have been changed and locational information removed to protect victim safety and consistent with VAWA confidentiality.

Case #1 Release of protected information

ICE officer disclosed protected information by giving the abuser the victim's "A" number and allowing him to make copies of the victim's U visa case file

Location of ICE's arrest of victim:	Victim's workplace
Date of ICE's arrest of victim:	Fall of 2005
Victim's immigration case:	U interim relief
Violation of 8 U.S.C. 1367(a)(2):	ICE officer directly gave to the abuser the victim's "A" file and allowed him to make copies of the victim's U interim relief application
Victim:	Phuong Nguyen

Phuong Nguyen was arrested and detained by ICE in fall of 2005, a few weeks after having filed an application for U interim relief. Unbeknownst to her, she had a final removal order that her prior counsel had never told her about. Phuong's new immigration attorney eventually got her released from ICE custody, and Phuong was granted U

[131] *Id.* It is also possible to move to suppress evidence that was obtained as a result of a violation of Section 384. This argument is similar to the "fruit of the poisonous tree" doctrine in criminal law, which precludes the introduction of evidence discovered due to information found through an illegal search or other unconstitutional means

interim relief in the beginning of 2006, after her attorney made numerous requests for CIS to expedite the U visa application.

The abuser was arrested and detained by ICE in December 2005. In January 2006 the abuser called Phuong's mobile telephone from the ICE detention center, repeatedly harassing her and threatening to take their child from her. The abuser told Phuong that he knew she had applied for U interim relief because an ICE officer had shown him her "A" file and allowed him to make copies of all documents in the file including her declaration in support of the U interim relief application. The abuser made copies of these documents and mailed them to their mutual friends and acquaintances.

Phuong's immigration attorney made many inquiries to the deportation unit (via telephone, email, fax), to the individual officer, the deportation unit supervisor, and the ICE Field Office Director to determine why VAWA non-disclosure rules had not been followed in this case. After receiving a voicemail from a deportation officer saying that it was an ICE trial attorney who provided Phuong's "A" file to the abuser, Phuong's attorney sought an explanation from the ICE Chief Counsel. ICE Chief Counsel was responsive and joined a motion to reopen for the victim, and an ICE officer agreed to put a block on Phuong's mobile telephone so that her abuser could no longer call her from the ICE detention center.

The violation of VAWA non-disclosure rules (8 U.S.C. 1367(a)(2)) in this case led to an internal ICE investigation in the office. This case illustrates how the prohibited actions of an individual ICE employee - directly handing over the victim's "A" file to the abuser and allowing him to make copies of her U interim relief application – enabled the abuser to inflict additional harm and cruelty on the victim and her child through repeated telephone harassment and threats. The responsiveness of the ICE Chief Counsel and officers who tracked down the responsible employee and blocked the abuser from contacting the victim reflect the willingness of ICE to work to rectify such occurrences – but indicates the need for DHS (ICE, CBP, and CIS) to put in place a system for monitoring files, controlling access to them, to ensure that such a situation is prevented before it ever occurs. The quick response of ICE supervisors in this case promotes victim safety. When abusers can obtain information about a victim or the existence of a victim's case it can increase harm and risk of future injury or death of the victim.

Case #2- Release of Protected Information

VAWA cancellation case information was given on the immigration court's automated information system allowing a third party to obtain confidential information about the victim at court. Tapes from victims' VAWA cancellation case were released to abuser's attorney

Location of Violation:	Immigration court proceedings
Date of incident:	Summer 2007
Violation of 8 U.S.C. 1367(a)(2):	Release of information about the existence of and taped transcripts from VAWA cancellation of removal case.
Victim's immigration case:	VAWA Cancellation of Removal
Victim:	Ana Garcia Chessmore

Ana was married to Samuel Chessmore who was a U.S. citizen or lawful permanent resident. During the course of their marriage, Samuel started to become abusive towards Ana. He never filed a family based petition to provide Ana lawful permanent residency based upon marriage. Ana ultimately left Samuel and began dating Miguel who was also undocumented. Ultimately, Ana was placed in removal proceedings where she obtained an attorney and learned that she was eligible for VAWA cancellation of removal based on the abuse perpetrated against her by her husband Samuel. As a battered immigrant, Ana was entitled to the protections of VAWA confidentiality in removal proceedings and her attorney reminded the court of this at their first appearance.

Shortly after this appearance, details of Ana's court information were made available on the automated telephone service for the court. Shortly after, Ana's attorney received a call from an attorney who was representing Miguel. Miguel's attorney had received tapes of Ana's confidential testimony from her individual immigration court hearing. The testimony described the abuse perpetrated by Samuel and included other personal information.

This case illustrates a direct violation of VAWA confidentiality IIRIRA 384(a)(2) protections. In this case once the court and the trial attorney for the government knew that the victim was a battered immigrant, VAWA confidentiality would bar any release of information about the existence of that case in the electronic or telephone information system. The goal of this provision was to protect against abusers finding out about the immigration case and tracking down the victim through that case. The release of copies of the transcript from a VAWA cancellation of removal hearing is a second violation of VAWA confidentiality's explicit prohibitions. In this instance the release to Miguel's attorney was particularly dangerous after Miguel had used DHS information about the hearing to locate Ana. This case illustrates the need for ongoing training of ICE trial attorneys, immigration judges, and immigration court officials on VAWA confidentiality, as well as an enforcement system to deter violations and hold violators accountable.

Case #3- Use of abuser provided information

ICE officer relied upon information provided by a USC batterer and child abuser to issue a Notice to Appear and seek arrest of his alien spouse who was in hiding with their children at a shelter.

Location of incident:	ICE contacted victim's immigration attorney for information
Date of ICE's arrest of victim:	Fall 2005
Victim's immigration case:	Eligible to self-petition under VAWA
Violation of 8 U.S.C. 1367(a)(1):	ICE officer contacted victim's family lawyer and immigration attorney in attempt to serve Notice to Appear on victim and her children
Victim:	Aisha Noori

Aisha Noori left an abusive home with her children and later, with an attorney's assistance, self-petitioned under VAWA. Unable to find his wife and stepchildren, the batterer repeatedly called, faxed, and appeared at the ICE office insisting that his wife had tricked him into marriage and that the marriage was a sham. The abuser told ICE that Aisha had overstayed her fiancée visa. He also told ICE that Aisha had moved twice since leaving him and had failed to file a Form AR-11 (change of address). The abuser fabricated a web page and posted false information to make it look like Aisha was seeking another U.S. citizen spouse. In the fall of 2005 an ICE Officer contacted Aisha's family lawyer saying that a Notice to Appear had been issued. The ICE officer asked for Aisha's location, which the family lawyer refused to furnish.

The ICE officer then contacted Aisha's immigration lawyer, again seeking her location, which the immigration attorney refused to furnish. The ICE officer told the immigration attorney that he had issued the Notice to Appear based on what the abuser had told him. When the immigration attorney raised the VAWA confidentiality protections contained in 8 U.S.C. 1367(a)(1), the ICE officer replied that he had never heard of them. He told the attorney that this case sounded like the typical foreign bride who had defrauded the poor U.S. citizen husband. The attorney then faxed the ICE officer the DFCS finding of child abuse as well as a copy of 8 U.S.C. 1367(a)(1). It was only after he received these documents and had several more conversations with Aisha's attorney that the ICE officer agreed not to arrest Aisha and her children.

This case demonstrates the potential danger posed to victims of well-documented spousal and child abuse by immigration enforcement agents who either have not been trained in – or do not abide by – the VAWA confidentiality rules that prohibit taking removal action based on information provided solely by an abuser. This family benefited from the adherence of their family and pro bono immigration attorneys to VAWA confidentiality rules, and the efforts of their bono immigration attorney to educate the ICE officer on the family violence and VAWA confidentiality guarantees. However, another victim might not be so lucky. A system of accountability in which disciplinary actions and investigation for violations that do in fact occur, with public distribution of information about disciplinary actions taken, will contribute substantially to avoiding such a situation in the future. This will deter agents from undertaking enforcement or removal actions based on prohibited information. The complaints

procedure created by the DHS Office of Civil Rights and Civil Liberties provides an important enforcement mechanism to ensure compliance with VAWA confidentiality by DHS employees.[132]

Case #4- Use of Abuser Provided Information

Abuser repeatedly went to ICE office to report his wife as having overstayed her visa. ICE arrested his abused wife who was ultimately released and granted legal immigration status.

Location of ICE's arrest of victim:	Residence of victim's sister, as furnished by abuser
Date of ICE arrest:	Summer 2003
Violation of 8 U.S.C. 1367(a)(1):	ICE acted on information furnished by abuser to arrest the victim
Victim's immigration case:	Granted asylum Winter 2004
Victim:	Marlene Petersen

Abuser repeatedly showed up at the ICE office to report his wife, Marlene Petersen, as overstaying her visa. He gave ICE the address where Marlene was staying with her sister. The ICE officer acted on this information and arrested Marlene at her sister's residence in the summer of 2003. In this case, the victim was eligible not only for VAWA relief, but for asylum as well, and the abuser nearly succeeded in making ICE an unwitting accomplice to his ongoing abuse of the victim. Marlene was granted asylum in winter of 2004.

This case illustrates how an abuser might attempt to use an immigration enforcement officer to further harm and control his domestic abuse victim, in particular to retaliate for her assertiveness in leaving him. As in the case above, comprehensive training for all immigration enforcement officers and agents, combined with an established system of accountability that includes a transparent complaints procedure that publishes the request of its investigators publicly in a way that protects victim confidentiality could minimize the risk of such a situation arising again in the future.

Case #5- Use of Abuser Provided Information

Border Patrol officers, at abuser's urging, accompanied police responding to a domestic violence call and arrested the victim:

Date of ICE arrest:	Spring of 2006
Violation of 8 U.S.C. 1367(a)(1):	Abuser called Border Patrol and gave them the victim's home address. When victim called the police after the abuser had threatened her, Border Patrol accompanied police in responding to the call. Border Patrol arrested and detained the victim.
Victim's immigration case:	Skeletal VAWA self-petition filed with CIS
Victim:	Catalina Gilberto

Following a history of domestic violence in this case, the victim, Catalina Gilberto, and the abuser were in the midst of divorce proceedings in which custody of their children was contested. In the spring of 2006 the abuser dropped the children off at Catalina's home, and the abuser and Catalina had an argument during which she called the police for help. As the abuser got into his car, he said, "See, now they are going to take you away, and I will keep the children." When the police arrived, they showed up with a Border Patrol agent. The agent asked the police officer what Catalina's immigration status was. The police officer said he did not know. The agent then asked Catalina what her status was. She said nothing. Instead she showed the Border Patrol agent papers from the local legal services agency stating that she had a pending VAWA self-petition. The agent said that those papers meant nothing, and he threw them on the ground. The agent then asked Catalina how she entered the U.S. The agent then said that

[132] Memorandum from the U.S. Customs Enforcement, Office of Field Operations to Regional Directors and Deputy Executive Associate Commissioner, Immigration Services Division (August 5, 2002) (on file with the U.S. Department of Homeland Security). The memorandum emphasizes that personnel who violate the confidentiality provisions are subject to disciplinary action and civil fines of up to $5,000.

he had to take Catalina in. A neighbor, who was witnessing this unfold, asked if it mattered that Catalina had a pending VAWA case. The agent said that it didn't. He then arrested Catalina and placed her in his car.

Upon arriving at the Border Patrol office, the agent spoke with another officer who said that Catalina had been reported three times by her husband because they were getting a divorce. The agent then said to Catalina, "Do you prefer that I deport you right now, or do you want a hearing with a judge?" Catalina said that she didn't know what to do. He got angry and said in a cruel and mocking tone, "Fine. I'll give you a hearing with a judge, but I don't know what you're going to tell him. That you have two children and don't work, and you don't have documents?" He told her to shut up. He then photographed Catalina and took her fingerprints.

This case illustrates how an abuser, irate over losing his wife and children, put immigration enforcement, via Border Patrol, on the victim's trail. Particularly troubling is how Border Patrol used the local police to arrest and detain the victim. The police, as guardians of public safety, are charged with the protection of all residents, regardless of immigration status. In this case the victim was punished for calling the police for help, when instead of receiving protection, she was arrested by Customs and Border Patrol. This practice created a chilling effect throughout all immigrant communities in the region who, fearing that calling the police will result in their deportation, are reluctant to contact the police. This case illustrates why training policies from DHS headquarters are needed to provide guidelines for interaction with domestic violence victims, and for handling information provided by abusers, across all three immigration enforcement branches of the department – ICE, CIS, and CBP. In the absence of such official guidance, agents in all three organizations are likely to act on their own biases and assumptions about domestic violence.

Case #6- Enforcement action at prohibited location

Immigration and Customs Enforcement (ICE) officer attempted to arrest a victim in family court:

Location of ICE's attempted arrest:	Child custody hearing, family court,
Date of ICE's attempted arrest:	Early 2006
Violation of 8 U.S.C. 1367(a)(1):	ICE acted on information furnished by abuser to show up at child custody hearings to arrest victim.
Victim's immigration case:	Eligible to self-petition under VAWA
Victim:	Rosa Vazquez

In early 2006 Rosa Vasquez sought custody of her child and filed a petition in a family court. In retaliation, the abuser contacted ICE and informed ICE of the location and dates of the child custody hearings. The ICE officer appeared in person at two different child custody hearings seeking to arrest Rosa. Rosa hid in a different part of the courthouse while the ICE officer spoke with Rosa's family lawyer and her child's attorney. The ICE officer told the attorneys that he was pursuing Rosa because she was a "criminal" and had a removal order. The family lawyer told the ICE officer that Rosa was preparing to self-petition under VAWA. The officer responded that she was not eligible for VAWA. Subsequent to ICE's attempted arrest of Rosa, Citizenship and Immigration Services (CIS) approved her VAWA self-petition.

During the above interaction, several other terrified immigrant women and children left the courthouse for fear that ICE would arrest them. This case illustrates how the abuser used ICE to scare and punish the victim for seeking custody of her child, and how the specter of an ICE officer hunting down a victim seeking help in family court scares other non-citizen applicants away from assistance. This type of behavior also places VAWA and U-visa eligible victims at risk of being deported from the US and permanently separated from their children before they can file their VAWA or U-visa cases. This is why Congress specifically prohibited this behavior in VAWA III, amending INA §239 to mandate certification of compliance with non-disclosure rules whenever enforcement actions leading to removal take place at courthouses.[133]

Case #7- Enforcement Action at a Prohibited Location

[133] INA §239(e), added by §825(c)(1) of P.L. 109-162 (1/5/06, effective 2/4/06)

ICE officer acted on information provided by an abuser to attempt to arrest victim at a protection order court hearing:

Location of ICE's attempted arrest:	Restraining order hearing, family courthouse
Date of ICE's attempted arrest:	2003
Violation of 8 U.S.C. 1367(a)(1):	ICE acted on information furnished by abuser re: victim's scheduled appearance at restraining order hearing, and sent several agents to stand watch outside the domestic violence courtroom.
Victim's immigration case:	Conditional permanent resident
Victim:	Aster Kebede

In this case the batterer abused the victim, Aster Kebede, for several years, including repeated threats to get her deported. After a particularly violent episode, Aster left the batterer and stumbled to a bus station with her clothes torn. The bus driver took her to the police who referred her to a domestic violence shelter. With the assistance of a victim advocate, Aster filed for a restraining order. At the second restraining order hearing ICE agents showed up at the family courthouse and waited outside the domestic violence courtroom ready to arrest Aster upon conclusion of her restraining order hearing. While still inside the domestic violence courtroom, the victim advocate called Aster's immigration attorney who came to the family court to intercede with the ICE agents. The attorney told the agents that they were violating the VAWA confidentiality protections contained in 8 U.S.C. 1367(a)(1), which they denied. The ICE agents stated that the husband had informed ICE that the marriage was a sham.

Restraining order hearings are generally open to the public, but, for the protection of victims, the system in which identifying information is kept is not easily accessed, and this information is directly provided only to the victim, her advocate, the abuser, and family court staff. It is unusual for immigration agents to track family court or protection order cases and to appear at such hearings unless they have been directly informed to do so. The attorney in this case negotiated with ICE to allow Aster to go through with her hearing to obtain a restraining order, agreeing to bring Aster to the ICE office later in the week. Ultimately, the ICE agents left the family courthouse. Family court records have no information about immigration status of the parties, and immigration enforcement officers would have to receive information from a party about immigration status from another party or witness to know about any particular protection order proceeding and the parties involved.

This case illustrates how an abuser, angered by being served notice of a domestic violence protection order proceeding, can attempt to use immigration enforcement agents to threaten and retaliate against the victim. It also demonstrates the origins and credibility of victims' fears that seeking a protection order or otherwise availing themselves of the protections offered them through the US courts could put them in jeopardy of removal. News of this incident at the family courthouse – of immigration agents waiting to arrest the victim after her domestic violence restraining order hearing – spread rapidly, and victim advocates in the area are to this day struggling to assure immigrant victims that they can seek protection in the family courts without fear of immigration consequences.

Case #8- Enforcement Action at a Prohibited Location

ICE officer arrested a battered immigrant victim, her daughter and her niece during a hearing in a civil protection order courtroom in violation of 8 U.S.C. 1229 – INA Section 239(e):

Location of Violation:	State protection order courtroom
Date of incident:	Spring 2007
Violation of 8 U.S.C. 1229(e):	ICE officer appeared at a family courtroom at a case in which the victim was seeking a civil protection order against her abuser and arrested the victim, her child and the witness in the courtroom during the protection order hearing.
Victim's immigration case:	U Visa case
Victim:	Louisa Fernandez

In early 2007, Louisa Fernandez filed a Domestic Violence Protective Order against her husband and was granted an Ex Parte Protective Order. The ex-parte order was served on Louisa's husband and he was ordered to appear at the full protection order hearing. Louisa's husband had been threatening to call and turn her in to ICE officials and prior to the protection order hearing Louisa received a call from the wife of one of her husband's friends (a DEA informant) telling her that her husband was going to have ICE pick her up and deport her.

On the day of the hearing, a man who claimed to be an ICE agent entered the courtroom wearing plain clothes. He stomped into the courtroom, motioned to the abuser to confirm the identity of Louisa and insisted on interrupting the court's civil protection order hearing to arrest Louisa, her daughter and a witness (her niece). The ICE officer was physically and verbally confrontational to Louisa and her attorney. He claimed that the 2007 ICE memo instructing agents not to arrest victims in courtrooms or shelters was merely policy without the force of law. The agent also asserted that he was allowed to use tips from abusers (Louisa's husband had a pending criminal case for assault on another female) and that VAWA self-petitions were just ways to "circumvent the law." In the midst of the family court protection hearing, the ICE officer demanded that he take away Louisa, her daughter and her niece at that moment because he had a busy schedule. He was physically aggressive during the entire encounter, especially in handcuffing Louisa and her niece and taking them, and Louisa's minor daughter, to the ICE office.

At the ICE office Notices to Appear were issued and it took Louisa's immigration and family law attorneys six hours to convince ICE officials to release them from custody. Their release was secured by Louisa's attorneys who provided copies of VAWA 2005 and other DHS policy guidance on VAWA confidentiality to ICE officials at the local ICE office. *This case was brought to the attention of ICE officials including the Director of Operations who intervened to swiftly identify the VAWA confidentiality violations that had occurred in this case and to cancel the Notices to Appear that had been issued against Louisa, her daughter and her niece.*

Case # 9- Enforcement Action in a Prohibited Location

ICE arresting a victim in a domestic violence shelter:

Location of ICE's arrest of victim:	Domestic violence shelter
Date of ICE's arrest of victim:	2003
Violation of 8 U.S.C. 1367(a)(1):	ICE acted on information furnished by abuser that victim was in hiding in a domestic violence shelter, and then exerted pressure on the local police chief to obtain access to the confidential shelter.
Victim's immigration case:	Eligible for U interim relief
Victim:	Eliska Novak

Eliska Novak fled to a confidential domestic violence shelter. ICE agents showed up at the shelter insisting to see Eliska, but the shelter director refused access citing that the confidential shelter was open to all domestic violence victims, regardless of immigration status. The ICE agents then left the shelter. Later the local police chief called the shelter director explaining that the ICE agents just wanted to ask Eliska a few questions. The shelter director and the local police chief had a well-established history of working together to serve all domestic violence victims. In response to the police chief's request, the shelter director allowed the ICE agents to enter the shelter. They immediately arrested Eliska and placed her in removal proceedings.

This case is extremely troubling and illustrates how the abuser used ICE to locate and punish the victim who was living for her protection in a confidential domestic violence shelter. It also illustrates how ICE agents enlisted the local police chief to mislead the shelter staff and persuade them to violate their own VAWA and Family Violence Prevention and Services Act non-disclosure obligations to gain access to the victim. This incident had far-reaching effects; many other immigrant women and children who had taken refuge in the shelter were frightened by the arrival of the ICE agents, and word quickly spread among immigrant communities that domestic violence shelters are not safe for immigrants. This leaves immigrant victims of domestic violence with no "safe" place to go; with no choice but to remain in violent, dangerous homes. VAWA III sought to minimize this scenario by prohibiting DHS officers from undertaking enforcement actions at shelters.[134]

[134] ICE Memorandum, supra note 92.

HELPING VAWA CONFIDENTIALITY WORK TO HELP IMMIGRANT VICTIMS AND RESPONDING TO VIOLATIONS OF VAWA CONFIDENTIALITY[135]

Collecting Information and Prevention of Violations

Safety Steps for Victims With VAWA Confidentiality Protected Cases Filed with DHS. Advocates and attorneys working with immigrant crime victims who have filed cases with DHS for VAWA, T, U or other VAWA Confidentiality protected immigration cases should take the following steps to protect themselves against immigration enforcement, detention and removal:

- Memorize the "A" Number: Once any immigration case has been filed the immigrant's case file will be assigned an identification number. This number begins with the letter "A." Victims should be strongly encouraged to memorize this number and if ever stopped by an immigration enforcement official or local police, should tell them the following:
  - They are a crime victim
  - They have filed a VAWA confidentiality protected immigration case with DHS. Provide the officer their "A" number.
- Ask the DHS Official to Check the "384 Red Flag" System: DHS officials have been directed when they encounter a potential victim to check the "Central Index System" for the victim's name and/or "A" number. All persons who have filed VAWA Confidentiality protected cases will appear in the system. DHS has been instructed not to pursue enforcement actions against crime victims and witnesses, except in limited circumstances that include national security, public safety, history of criminal convictions or history of egregious immigration violations.
- Victims who are pregnant, nursing and/or are the primary caretakers of children: If the victim is the primary caretaker of children, pregnant, or nursing they should also provide that information to the first DHS official they encounter and continue telling this fact to DHS. DHS has policies designed to prevent the detention of these immigrants
- Ask to call their lawyer and/or advocate
- Ask for an interpreter if the victim is limited English proficient.

To help victims, particularly those who are limited English proficient, convey this vitally important information to immigration enforcement officials, advocates and attorneys should provide the client with a page that contains the information described above. This should be written in English and addressed to the DHS or law enforcement official. It should be filled in with the victim's "A" number and your phone number.

Carry copies of VAWA confidentiality materials with you to family court proceedings. If a DHS enforcement officer (ICE[136] or CBP[137]) agent arrives at the courthouse[138] to arrest a domestic violence or sexual assault survivor, it is likely that the agent does not know about the protections afforded by the confidentiality provisions of VAWA. You, as the advocate for the survivor, may be able to prevent her arrest and/or detention by educating the agent. Showing the agent and the judge copies of the following documents may help you. These statutes and DHS memoranda describe federal laws and DHS policies designed to offer protection to immigrant crime victims and to deter detention, removal and enforcement actions against immigrant survivors:[139]

[135] This section of the chapter was jointly written by Hannah F. Little, Director, Immigrant Justice Project, Legal Services of Southern Piedmont, Charlotte, NC and Leslye E. Orloff. For technical assistance on VAWA confidentiality issues contact National Immigrant Women's Advocacy Project. (202) 274-4457. niwap@wcl.american.edu

[136] Immigration and Customs Enforcement handles enforcement of immigration laws generally in the interior of the United States.

[137] Customs and Border Patrol handles enforcement of immigration laws at borders, airports, and other ports of entry as well as at DHS checkpoints within the United States.

[138] The same applies to any other location protected by VAWA confidentiality including: domestic violence shelters, rape crisis centers, supervised visitation centers, family justice centers, victim's services or victim's services providers or community based-organizations, and courthouses. See INA, Section 239(e).

[139] All documents are contained in Legal Momentum's web library at: www.iwp.legalmomentum.org

- IIRIRA §384: prohibits DHS employees from acting solely on information given by the abuser and/or family members of the abuser; prohibits DHS from disclosing any information relating to VAWA self petitioners or applicants for T and U visas.[140]
- INA § 239(e): certification of VAWA confidentiality compliance for enforcement actions at prohibited locations.[141]
- DHS Broadcast Message on New 384 Class of Admission Code: informs DHS officials "to become familiar with a new code in the Central Index System (CIS). The new Class of Admission (COA) code "384" was created to alert DHS personnel that the individual is protected by confidentiality provisions. Information about the location, status, or other identifying information of any individual with the code "384" may not be released."[142]
- Crime Victims and Witnesses Memo, John Morton, Director, U.S. Immigration and Customs Enforcement, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, at 3 (June 17, 2011).[143]
- Prosecutorial Discretion Memo, John Morton, Director, U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency, at 2 (June 17, 2011).[144]
- Memorandum from Paul Virtue, Acting Executive Associate Commissioner, on Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384 (May 5, 1997).[145]
- Memorandum from John P. Torres, Director of Detention and Removal Operations, & Marcy M. Forman, Director of Office of Investigations, Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 (January 22, 2007) (designates prohibited locations including, but not limited to, state courthouses, domestic violence shelters, rape crisis centers, victims services centers, and supervised visitation centers and clarifies that a self-petitioner is someone the officer believes presents credible evidence that she is eligible for one of the designated forms of relief).[146]
- Pending Applications Memo, John Morton, Assistant Secretary, U.S. Customs and Immigration Enforcement, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (August 20, 2010).[147]
- Cases in Proceedings Adjudication Memo, U.S. Citizenship and Immigration Services, Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11-16 (PM-602-0029) (February 4, 2011).[148]
- This chapter

Reporting Violations to ICE

Record facts and initial impressions immediately. It is well known that people forget information with the passage of time. Most of us have experienced it in our work with clients as we attempt to nail down the details of events, names, and dates in the preparation of cases. As it is true for our clients, it is true for us as attorneys and advocates. If you suspect a violation of VAWA confidentiality, it is important to write down a detailed account of what happened as soon as possible after it happened. This may mean jotting notes down while meeting with your client or while en route to the local ICE office or state courthouse. At this point, the purpose of your notes is to retain the details of what happened while the details are still fresh, not to create a formal summary of the events.

[140] Available at: http://iwp.legalmomentum.org/vawa-confidentiality/statutes/VAWA%20CONF_8%20USC%201367_2005.pdf
[141] Available at: http://iwp.legalmomentum.org/vawa-confidentiality/statutes/VAWA%20CONF_8%20USC%201229_2005.pdf
[142] Available at: http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message%20to%20DHS%20384%20COA%20Final%2012.21.10.pdf
[143] Available at: http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-Prosecutorial-Discretion-Memo-06-17-2011.pdf
[144] Available at: http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton%206.17.11prosecutorial-discretion-memo.pdf
[145] Available at: http://iwp.legalmomentum.org/vawa-confidentiality/government-memoranda-and-factsheets/c_VAWAConf_DHSGuidanceSec%20384_05.05.97_FIN.pdf
[146] Available at: http://iwp.legalmomentum.org/vawa-confidentiality/government-memoranda-and-factsheets/VAWA%20CONF_Torres%20ICE%20VAWA%20Confidentiality%20Memo_1.22.07.pdf
[147] Available at: http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/aliens-pending-applications.pdf
[148] Available at: http://www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/coordination-adjud-removal-proceedings.pdf;

If the violation was an ICE arrest in a prohibited location and you were present for the arrest, your notes should include what the agent said to you and how the agent responded after you told him you believed his actions were a violation of the confidentiality provisions of VAWA. You should also record who else was present and saw the arrest, e.g., the abuser, bailiffs, social worker, victim advocate, or the judge.

If the violation was an arrest or adverse determination for your client based on information provided by her abuser, this step may involve keeping a series of detailed notes rather than recording one single event. For example, if your client has told you that her abuser has threatened to report her to ICE or to sabotage her pending immigration case, note the circumstances of the threat(s), when the threat(s) occurred, and the frequency of the threat(s). DHS officials are unlikely to tell you whether they are acting on information received from the abuser. Thus, it will be important to record the details of the arrest or adverse determination in order to connect these facts to the abuser or the abuser's family member. For example, the arrest may have occurred in a location or at a time that the abuser specifically threatened or the adverse determination may have been made based on information only the abuser would have. Violations of this nature can be more difficult to document, but detailed notes may give you a better chance of proving that there was a violation.

If the violation involved a disclosure of information by DHS to the abuser, the abuser's family member or any other person, then this step may also involve a series of notes. It will be important to document how you or your client discovered the disclosure and why you believe the information came from a DHS employee.

Contact the local DHS office involved. Before preparing a formal complaint, contact the DHS office in your area. It is important to develop local relationships, as these relationships will immediately benefit your client(s). Reach out to the immediate supervisor of the ICE agent, USCIS[149] or CBP official involved and let them know that you think an arrest, part of an enforcement action, and/or adverse determination was made based on a violation of VAWA confidentiality. If your client has not yet filed the qualifying immigration application, carry enough evidence to show credible evidence that she would qualify.[150] If you do not know who the immediate supervisor is, you may also contact the local Victim/Witness Coordinator. The Victim/Witness Coordinator may not have the ability to correct the arrest or adverse determination but he or she can assist you in locating someone who can. Depending on the response from the local office, you may decide it is unnecessary to file a formal complaint with DHS about the violation.

Develop relationships to prevent further violations. Even if the violation does not lead to immigration enforcement, involvement of immigration officials can jeopardize the safety of immigrant victims. DHS employees should be encouraged to create mechanisms for protection of immigrant victims. These mechanisms may include:

- Identifying a DHS immigrant victim witness liaison or point of contact you can work with.[151]
- Developing a local mechanism for DHS and the immigration courts to quickly and safely input change of address information so that it remains confidential and batterers do not find out about immigration related interviews in victim's cases.
- Developing a local training with DHS adjudicators, enforcement agencies, DHS trial attorneys, and immigration judges to help them identify victims whom they encounter who qualify for VAWA, T, U, battered spouse waivers and other forms of immigration relief.

Immigration Relief

If your client is detained by DHS, outline other critical and compelling issues beyond the VAWA Confidentiality violation including:

- client being the primary/sole caretaker of a child;
- breastfeeding a child;
- health issues,

[149] U.S. Citizenship and Immigration Services. Handles the processing of visa applications and adjudication of grants of lawful permanent residency and naturalization.
[150] Evidence could include police reports, photos, protection orders, the protection order petition with the violence facts, civil or criminal court orders with a finding of abuse, or other documents that may be used to document abuse for a VAWA self-petition.
[151] Call National Immigrant Women's Advocacy Project for a referral in your area.

- health and danger to other family members.

You should also advocate for:
- the cancellation of a Notice to Appear ("NTA") if one has been issued;
- the prevention of any NTA from being served on the court if it hasn't been served already;
- a joint motion to dismiss with the DHS trial attorney;
- the exercise of prosecutorial discretion not to issue an NTA

When The Victim Has Been Placed In Immigration Court Proceedings:
- Ask the immigration judge to require DHS to provide certifications required under INA section 239(e).
- Ask the immigration judge to require DHS to prove that no part of the enforcement action was related to any form of VAWA confidentiality violation.
- Ask the immigration judge to terminate the removal action against the immigrant victim(s).
- Request that the trial attorney representing DHS in the removal action join in a joint motion asking that the immigration judge terminate the removal proceedings.
- Subpoena the immigration enforcement agent to testify at a motion to dismiss hearing about the facts related to the enforcement action against your client.
- Insist that court proceedings in the immigration case be excluded from the court's electronic notification system and that all proceedings be closed.

Violations in Family Court

File a Rule 11 *Motion in Limine* when the opposing counsel in family court threatens deportation or criminal action.
- See Rule 11 Memorandum attached as Appendix A to this chapter.
- See Rule 11 *Motion in Limine* to be used when the immigrant victim of violence is a Plaintiff, attached as Appendix B to this chapter. (In cases where the immigrant victim of violence is a Defendant, simply reverse "Plaintiff" and "Defendant" throughout the motion)

Make a Formal Complaint to the Office of Civil Rights and Civil Liberties with the Department of Homeland Security

If the violation is particularly egregious or if the local office is unresponsive, a formal complaint may be your best recourse. The DHS has set up procedures for receiving VAWA confidentiality enforcement requests. Complaints are to be filed with the DHS Office of Civil Rights and Civil Liberties as outlined below:

Prepare a detailed fact memo regarding the case. Start by including appropriate case identifying information including your client's name, date of birth and A number, your client's contact information to the extent available and your contact information. Flesh out and clearly outline the facts regarding the violation. This should include a brief procedural history of the case, your history with your client, the facts making your client eligible for immigration relief or protection under VAWA confidentiality provisions and the status of any pending family, immigration, or criminal law cases. Then, prepare a detailed summary of your notes regarding the VAWA confidentiality violation. Include as much detail as possible including name(s) and office of the DHS official(s) or employees involved; date, time and location of violation; what was said or done and by whom; who was present; who witnessed anything relevant; etc.

Attach supporting documentation.
Attach documentation that supports your client's eligibility for protection under confidentiality provisions as well as other documentation supporting the allegation of a violation. This may include:
- Immigration notices and proof of eligibility as a VAWA, T or U visa victim
- Copies of DHS filings, including but not limited to I-360 Self Petitions, Petitions for U Nonimmigrant Status, Receipt Notices, Approval Notices, etc.
- DHS documentation served on your client as part of the violation
- Copies of state court pleadings relating to the case, including domestic violence protection order complaints, custody or divorce complaints, criminal charges

- Copies of state court orders relating to the case, including domestic violence protective orders, custody orders, child support orders, criminal convictions, and the history of any other court orders involving the victim, her children and the abuser.
- Fact memos or Affidavits from witnesses summarizing the incident. Third party witnesses such as state court officials or unrelated bystanders may be reticent to do this. However, it is worth asking and advocating for their assistance. If these witnesses do not provide a written summary, compile a list of their names and contact information to submit with your Complaint. This will enable the DHS officials who investigate the violation to interview witnesses.

File the complaint with the local office responsible for the violation.[152]
It is important to first file this compliant with the supervisors in charge of the unit or employees responsible for the violation so that the local office can investigate or be given time to investigate and sanction violators as well as to develop appropriate protocol to address potential future violations.

Filing Complaints about VAWA Confidentiality Violations with the Department of Homeland Security
If the appropriate office fails to respond within a reasonable amount of time, file the complaint with DHS Office of Civil Rights and Civil Liberties. Your cover letter should include a formal complaint and request for investigation. Document what efforts you have made to address with the office responsible for the violation. The letter should cite INA §384 (8 USC §1367) and specify the violation. The letter should also serve as a roadmap to all the exhibits attached in support of your complaint. The Complaints should be addressed to:

The Department of Homeland Security
The Office of Civil Rights and Civil Liberties
Review & Compliance Unit
245 Murray Lane, SW
Building 410, Mail Stop #0800
Washington, DC 20528

Please contact NIWAP in advance of filing such complaints in order to strategize on filing the most effective complaint, centralize documentation of complaints, and for follow up with DHS CRCL on filed complaints.

[152] For the formal DHS compliant process, s*ee* Appendix 3.x "Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security" Department of Homeland Security, The Office of Civil Rights and Civil Liberty. *Available at*: http://iwp.legalmomentum.org/reference/additional-materials/vawa-legislative-history/government-memoranda-and-factsheets/VAWA%20CONF_DHS%20Complaint%20Instructions_2008.pdf/at_download/file.

Memorandum
VAWA Confidentiality and Federal Civil Procedure Rule 11 Violations[153]

Discussion

The Federal Rule of Civil Procedure Rule 11 provides for the striking of pleadings and the imposition of disciplinary sanctions on attorneys or pro se litigants who abuse the signing of pleadings. Specifically, Rule 11(b)(1) provides that an attorney or pro se litigant presenting to the court a pleading, written motion, or other papers, certifies to the attorney's best knowledge that the claims, defenses, and other legal contentions are not meant to harass, cause unnecessary delay or increase the cost of litigation.

And further, Rule 11(b)(2) provides that an attorney or pro se litigant presenting to the court a pleading, written motion, or other papers, certifies to the attorney's best knowledge that the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

An attorney or pro se litigant is considered to be presenting to the court when the attorney signs, files, submits, or later advocates a pleading, written motion, or other paper. Fed.R.Civ.P. 11(b). The sanctions for an attorney or pro se litigant violating Rule 11 can be instituted on the court's initiative, or by motion. Fed.R.Civ.P. 11(c)(1). The procedure for filing a motion for Rule 11 sanctions includes a "safe harbor" of twenty-one days between the service of the motion and its filing with the court, so that the individual who has allegedly violated Rule 11 has twenty-one days to retract the statement. Fed.R.Civ.P. 11(c)(1)(A). Due to the nature of Rule 11 being a remedy deterring malicious behavior, rather than enriching the aggrieved party, the penalties include economic and direct costs only. Fed.R.Civ.P. 11(c)(2). Monetary sanctions are allowed for all Rule 11 violations, except Rule 11(b)(2) frivolous argument violation. Fed.R.Civ.P. 11(c)(2)(A).

Rule 11 was promulgated to limit abuses and bad faith acts by attorneys and pro se litigants in court. Tarkowski v. County of Lake, 775 F.2d 173, 175-176 (7th Cir. 1985). Rule 11 applies only to assertions contained in papers filed with or submitted to the court. This Rule does not cover matters arising for the first time during oral presentations to the court, where

[153] Developed by Michael Lyons and Darcy Paul, Morgan Lewis and Bockius, LLP

counsel or pro se litigant may make statements that would not have been made if there had been more time to study and reflect. However, the sanctions of Rule 11 take effect when the attorney or pro se litigant advocates or reaffirms to the court a position contained in a pleading after learning that the position ceases to have merit. Adv. Com. Notes Fed.R.Civ.P. 11.

To protect the clients of advocates or attorneys working with immigrant victims of violence during civil trials, the advocates or attorneys may take advantage of either:

(1) Rule 11(b)(1) and argue that threats of deportation or criminal action during a civil trial constitute harassment, cause unnecessary delay, or increase the cost of litigation; See People v. Wickes, 112 A.D. 39, 49 (S.Ct. N.Y. App. Div., 1906) citing People v. Eichler (75 Hun 26, 26 N.Y.S. 998; appeal dismissed, 142 N.Y. 642) (holding that an attorney who threatens criminal prosecution to a person involved in the same civil case commits moral turpitude, and the attorney's belief in the person's guilt is no defense, and not even a mitigating factor); or

(2) Rule 11(b)(2) and argue that threatening deportation or criminal actions in a civil trial is not warranted by existing law, or constitutes a frivolous argument to change the law or propose new law. See In re Hart, 131 A.D. 661, 666-667 (S. Ct. N.Y. App. Div., 1st Dept, 1909) (holding that threatening criminal prosecution in order to force a settlement of a civil action is illegal, improper and unprofessional; a threat for criminal prosecution may even be guised under a friendly veil, but the court analyzes the intent to induce the other side to act in a certain manner in the civil case).

Conclusion

Advocates or attorneys for immigrant victims of violence have two courses of action in a situation where the opposing counsel is making threats of deportation or criminal prosecution during or before a civil trial. Such threats are generally considered to be a crime, or at the minimum, a malicious behavior, and can qualify as a harassment or exertion of undue influence to fulfill the elements either Rule 11(b)(1) or (2). In such instances of receiving threats of deportation or criminal prosecution issued against their clients, advocates or attorneys representing immigrant victims of violence may serve a Rule 11 motion, and if the opposing counsel or pro se litigant has not retracted his/ her words in twenty-one days, the advocates or attorneys may file the motion and qualify for restitution. However, for proper delivery of a Rule 11 motion, the advocates or attorneys must determine whether the threat in a particular case can

be interpreted as a harassment or a frivolous representation in front of the court. This determination must be made on a case-by-case basis.

Motion in Limine for Federal Rule of Civil Procedure 11 starts on top of next page.[154]

[154] Developed by Michael Lyons and Darcy Paul, Morgan Lewis and Bockius, LLP and Soraya Fata, Legal Momentum

[**INSERT COURT NAME AND JURISDICTION**]

[INSERT NAME OF PLAINTIFFS] Plaintiffs, v. [INSERT NAME OF DEFENDANTS] Defendants.	Civil Action No. [DOCKET NUMBER]

PLAINTIFFS' *MOTION IN LIMINE* TO STRIKE THE DEFENDANTS' PLEADINGS, MOTIONS, AND ADVOCACY FOR PLEADINGS AND MOTIONS FOR VIOLATION OF FEDERAL RULE OF CIVIL PROCEDURE 11

Through their undersigned counsel, Plaintiffs hereby move to strike the Defendants' pleadings for violating the Federal Rule of Civil Procedure 11 (hereinafter "Rule 11"), on the grounds that Rule 11 provides for striking of Defendants' pleadings and advocacy of pleadings that seek to harass, cause unnecessary delay, increase the cost of litigation, or set forth frivolous contentions of law. Plaintiffs have attached a Memorandum in Support of the Plaintiffs' *Motion In Limine* that outlines the grounds for their motion.

Respectfully submitted,

_____/s/_____
[NAME
TITLE
CONTACT INFORMATION]

[**INSERT COURT NAME AND JURISDICTION**]

[INSERT NAME OF PLAINTIFFS]	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. [DOCKET NUMBER]
	)	
[INSERT NAME OF DEFENDANTS]	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' *MOTION IN LIMINE* TO STRIKE THE DEFENDANTS' PLEADINGS, MOTIONS, AND ADVOCACY FOR PLEADINGS AND MOTIONS FOR VIOLATION OF FEDERAL RULE OF CIVIL PROCEDURE 11

I. INTRODUCTION

The Defendants' pleadings and advocacy for their pleadings that seek to threaten deportation or criminal sanctions in a civil trial should be excluded and stricken from the record on the grounds that such pleadings, advocacy of such pleadings, and motions that violate Rule 11.

Rule 11 was promulgated to prevent abuses, acts of bad faith, and punish violations of conduct in the signing and advocacy of pleadings and motions, whether by an attorney or a pro se litigant. An abuse, an act of bad faith, or violation of conduct can be inferred from behavior that harasses, causes unnecessary delay, increases the cost of litigation, or presents frivolous legal contentions.

The Defendants may not threaten deportation or criminal sanctions to the Plaintiff due to the abusive, harassing and intimidating nature of doing so in a civil trial, and due to the bad faith and frivolous nature of conduct in making an argument for an unlawful contention of law.

For the reasons detailed below, this Court should strike the Defendants' pleadings, advocacy of such pleadings, and motions that violate Rule 11.

ARGUMENT

I. LEGAL STANDARD

The Federal Rule of Civil Procedure Rule 11 provides for the striking of pleadings and the imposition of disciplinary sanctions on attorneys or pro se litigants who abuse the signing of pleadings.

Rule 11 was promulgated to limit abuses and bad faith acts by attorneys and pro se litigants in court. Tarkowski v. County of Lake, 775 F.2d 173, 175-176 (7th Cir. 1985). Rule 11 takes effect when the attorney or pro se litigant advocates or reaffirms to the court a position contained in a pleading after learning that the position ceases to have merit. Generally, Rule 11 was enacted to require litigants to "stop and think" before making assertions in court. Fed.R.Civ.P. 11 advisory committee notes.

The provisions of Rule 11 apply to motions and other papers by incorporation of Rule 11 into the Federal Rule of Civil Procedure 7(b)(3), which expressly states that "[a]ll motions shall be signed in accordance with Rule 11."

An attorney or pro se litigant is considered to be "presenting" to the court when the attorney or pro se litigant signs, files, submits, or later advocates a pleading, written motion, or other paper. Fed.R.Civ.P. 11(b). The sanctions for an attorney or pro se litigant violating Rule 11 can be instituted on the court's initiative, or by motion. Fed.R.Civ.P. 11(c)(1). The procedure for filing a motion for Rule 11 sanctions includes a "safe harbor" of twenty-one days between the service of the motion and its filing with the court, so that the individual who

has allegedly violated Rule 11 has twenty-one days to retract the statement. Fed.R.Civ.P. 11(c)(1)(A).

An attorney who initiates, causes to be initiated, or threatens to initiate a criminal prosecution for the purpose of influencing a civil matter is violating the rules of ethics. See Model Code of Prof'l Responsibility DR 7-105 (1983). See also Gregory G. Sarno, Annotation, *Initiating, or Threatening to Initiate, Criminal Prosecution as Ground for Disciplining Counsel*, 42 A.L.R.4th 1000 (2006). Additionally, a practitioner may be sanctioned, or even disbarred, for coercing any person connected to the case, for making false statements of material fact or law, or for frivolous behavior before the immigration courts – a rule which closely mirrors Rule 11. 1-4 Immigration Law & Procedure § 4.03 (2007).

A Plaintiff that has been harassed, intimidated or treated in a bad faith manner by a Defendant has two recourses: Rule 11(b)(1) and Rule 11(b)(2).

A. Rule 11(b)(1)

Rule 11(b)(1) provides that an attorney or pro se litigant presenting to the court a pleading, written motion, or other papers, certifies to his/ her best knowledge that the claims, defenses, and other legal contentions are not meant to harass, cause unnecessary delay or increase the cost of litigation.

Presentations to the court that contain threats of deportation or criminal action during a civil trial constitute harassment, cause unnecessary delay, or increase the cost of litigation; See People v. Wickes, 112 A.D. 39, 49 (S.Ct. N.Y. App. Div., 1906) citing People v. Eichler (75 Hun 26, 26 N.Y.S. 998; appeal dismissed, 142 N.Y. 642) (holding that an attorney who threatens criminal prosecution to a person involved in the same civil case commits moral

turpitude, and the attorney's belief in the person's guilt is no defense, and not even a mitigating factor).

B. Rule 11(b)(2)

Rule 11(b)(2) provides that an attorney or pro se litigant presenting to the court a pleading, written motion, or other papers, certifies to the attorney's best knowledge that the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Presentations to the court that contain threats of deportation or criminal action in a civil trial is not warranted by existing law, or constitutes a frivolous argument to change the law or propose new law. See In re Hart, 131 A.D. 661, 666-667 (S. Ct. N.Y. App. Div., 1st Dept, 1909) (holding that threatening criminal prosecution in order to force a settlement of a civil action is illegal, improper and unprofessional). The courts consider an improper threat for criminal prosecution to be made in bad faith even if guised under a friendly veil, as the court analyzes the intent to induce the other side to act in a certain manner in the civil case. Id.

C. Sanctions for Violating Rule 11

In crafting a sanction for violation of Rule 11, the courts have considerable discretion, including striking the offending presentation; issuing an admonition, reprimand, or censure; requiring participation in seminars and other educational programs; ordering fines payable to the court; and referring the matter to disciplinary authorities. Fed.R.Civ.P. 11 advisory committee notes.

Although Rule 11 carries the purpose to deter rather than to compensate, the Court allows in unusual circumstances for monetary sanctions payable to the offended party for violations of Rule 11(b)(1).

In analyzing the appropriate sanction, the court analyses whether the improper conduct was willful or negligent; whether it was part of a pattern of activity, or an isolated event; whether the offender has engaged in similar conduct in other litigation; whether the conduct has infected the entire paper, or only one particular count or defense; whether it was intended to injure; what effect the conduct had on the litigation process in time or expense; whether the offender person is trained in the law; what amount may be needed to deter the offender from repeating the offense; what amount is needed to deter other litigants from similar activity. Fed.R.Civ.P. 11 advisory committee notes.

II. THE COURT SHOULD STRIKE THE DEFENDANTS' PLEADINGS, MOTIONS, AND ADVOCACY FOR PLEADINGS AND MOTIONS FOR VIOLATION OF RULE 11 BECAUSE THEY HARASS, INTIMIDATE, CAUSE UNNECESSARY DELAY OR INCREASE THE COST OF LITIGATION

[INSERT FACTS FOR APPLICATION OF THE RULE 11(b)(1) LEGAL STANDARD ABOVE TO THE FACTS OF THIS CASE]

III. THE COURT SHOULD STRIKE THE DEFENDANTS' PLEADINGS, ADVOCACY FOR PLEADINGS, AND MOTIONS FOR VIOLATION OF RULE 11 BECAUSE THEY ARE FRIVOLOUS AND MADE IN BAD FAITH.

[INSERT FACTS FOR APPLICATION OF THE RULE 11(b)(2) LEGAL STANDARD ABOVE TO THE FACTS OF THIS CASE]

Iς. CONCLUSION

The Defendants are attempting to present to the court pleadings and motions that unlawfully threaten deportation or criminal action to the Plaintiff, causing harassment, intimidating, unnecessary delays, and increases in cost of litigation to argue frivolous claims that are not proper statements of law.

This Court should strike the Defendants' presentation of pleadings and motions to the extent that they threaten deportation or criminal actions, and impose disciplinary sanctions on the Defendants and their attorneys for their bad faith conduct and abuse of Rule 11.

Dated: [MONTH DAY], 2007

By: /s/
[NAME
TITLE
CONTACT INFORMATION]

[**INSERT COURT NAME AND JURISDICTION**]

[INSERT NAME OF PLAINTIFFS]	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.[DOCKET NUMBER]
	)	
[INSERT NAME OF DEFENDANTS]	)	
	)	
Defendants.	)	
	)	

ORDER

Having considered this matter on the Plaintiffs' *Motion in Limine* to Strike the Defendants' Pleadings, Motions, and Advocacy for Pleadings and Motions for Violation of Federal Rule of Civil Procedure 11, it is hereby

ORDERED that the motion is granted, and that the Defendants are barred from making threats of deportation or criminal action in the above-captioned case.

Date:_____

_____
[NAME OF JUDGE]
[TITLE OF JUDGE/ COURT]

APPENDIX C

VAWA Confidentiality Violation Complaint starts on top of next page.

[Insert Date]

U.S. Department of Homeland Security
Office for Civil Rights and Civil Liberties
Review & Compliance Unit
245 Murray Lane, SW
Building 410, Mail Stop #0800
Washington, DC 20528

RE: VAWA Confidentiality Violation
Client Information: [Insert Client name, date of birth and A number]

To Whom It May Concern:

I am writing on behalf of my client, *[Insert client's name]*, to report a violation of the VAWA confidentiality provision, IIRIRA §384.[155] *[Insert client name]* is eligible for protection under this VAWA confidentiality.

[NOTE TO ADVOCATE-ATTORNEY: Victims can qualify for VAWA confidentiality protection whether or not they will be filing for immigration benefits under VAWA, a T-Visa or U-Visa. If your client has filed or will be filing for VAWA, T or U immigration relief add the following sentence: My client is filing [has filed] for relief as (specify which type of relief)*].*[156]

IIRIRA §384 VAWA Confidentiality provisions provide three types of protections to immigrant victims of violence who qualify for protections either as self-petitioners or under a broader category of protected immigrants.[157] Protected immigrants include those who are victims of:

- Battery or extreme cruelty from a qualifying family member or the abuser's family member living in the same house,
- Any other VAWA self-petitioners,
- A qualifying U-visa criminal activity, or
- A severe form of trafficking in persons.[158]

It should be noted that victims of battery or extreme cruelty perpetrated by family members receive VAWA confidentiality protections although they may not be eligible for and may not have applied for immigration relief as VAWA self-petitioners, VAWA suspension of deportation, VAWA cancellation of removal, T-visa or U-visa. T-visa and U-visa victims receive VAWA confidentiality protection if they are **eligible** for either a T or U visa.

VAWA self-petitioners include all of the following:

- an alien, or a child of the alien, who qualifies for relief as:[159]

[155] IIRIRA §384; 8 U.S.C. §1367.
[156] Enclosed please find documentation demonstrating eligibility for VAWA confidentiality protections.
[157] IIRIRA §384 *codified in* 8 U.S.C. §1367.
[158] IIRIRA §384(a)(1) *codified in* 8 U.S.C. § 1367(a)(1).
[159] INA §101(a)(51); 8 U.S.C. §1101(a)(51).

- (A) An abused spouse, child, parent, intended spouse of a U.S. citizen INA Section 204(a)(1)(A) (iii), (iv), or (vii);
- (B)An abused spouse, child or intended spouse of a lawful permanent resident INA Section 204(a)(1)(B) (ii) or (iii);
- (C) A conditional resident spouse eligible for a battered spouse waiver INA Section 216(c)(4)(C);
- (D)a person who qualified under the first section of Public Law 89-732 (8 U.S.C. 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty (spouse or child of a Cuban Adjustment Act immigrant whether or not the victim is Cuban);
- (E) a person who qualifies under section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. 155 note) (Haitian National abused spouse or child);
- (F) a person who qualifies under section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act;[160]
- (G) as person who qualified under section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).[161]

There are three different types of VAWA Confidentiality protections. The first provision prevents the Department of Homeland Security, the Department of Justice or the Department of State from using information provided solely by a perpetrator or certain family members to take an adverse action regarding admissibility or deportability against any protected immigrant as defined above.[162] The second provision precludes the Department of Homeland Security, the Department of Justice or the Department of State from disclosing information relating to self-petitioner unless there is a legitimate Departmental purpose.[163] The third prong creates locational protections precluding enforcement actions at any of the following locations: domestic violence shelter; victim services program; family justice center; supervised visitation center; or courthouse or in connection with the appearance at a courthouse in connection with a protection order case, a child custody case or other civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking.[164]

VAWA Confidentiality also creates specific certification requirements for the Department of Homeland Security. In the Notice to Appear (NTA), if any part of an enforcement action took

[160] Under VAWA, spouses and children subjected to battering or extreme cruelty were eligible to apply for NACARA 202 adjustment if the abuser was eligible for NACARA 202 benefits, even if he never filed for benefits. The application deadline for VAWA NACARA 202 has passed, but victims who filed would continue to be covered by VAWA confidentiality protections.
[161] Under VAWA, spouses or children subjected to battering or extreme cruelty by an abusive Guatemalan, El Salvadoran or Eastern European NACARA 203 applicant may directly apply for NACARA 203 benefits. To qualify, the petitioner must be a spouse or child of the NACARA 203 applicant at the time the NACARA 203 applicant –was granted suspension of deportation or cancellation of removal; filed an application for suspension of deportation or cancellation of removal; or registered for benefits under the settlement agreement in American Baptist Churches, etc. al. v. Thornburgh (ABC), applied for temporary protected status, or applied for asylum.
[162] IIRIRA §384(a)(1) *codified in* 8 U.S.C. § 1367(a)(1).
[163] IIRIRA §384(a)(2) *codified in* 8 U.S.C. § 1367(a)(2). (The protections offered by this section are explicitly limited to victims who have filed cases for immigration relief from either DHS or an immigration judge.) The prohibition on disclosure continues until such case has been denied "on the merits," rather than on mootness or procedural grounds. *See Hawke*, 2008 WL 4460241 at *7.
[164] INA §239(e)(2); 8 U.S.C. §1229(e)(2).

place at any of the prohibited locations DHS must certify in the NTA that no part of the enforcement action was undertaken in violation of section 384 of IIRIRA[165].

Congress recognized that abusers of immigrant victims and crime perpetrators of domestic violence, trafficking, sexual assault, and other criminal activity often threaten victims with deportation.[166] To stop abusers from using the victim's immigration status, including threats to deport or report the victim as a means to further abuse or criminal activity, Congress created VAWA immigration relief for immigrant victims and VAWA confidentiality. The VAWA confidentiality provisions were created so that batterers or crime perpetrators are not able to use the immigration system as a tool to further control their victims. In 1996, Congress enacted IIRIRA Section 384, which created the framework for these protections.[167] This provision has been subsequently expanded through reauthorizations of the Violence Against Women Act.

As provided for in the complaint process outlined by the Office for Civil Rights and Civil Liberties of DHS, I am submitting a complaint on behalf of my client, outlining violations of the VAWA Confidentiality provisions.

I. [Insert Client name] is eligible for protection under the VAWA Confidentiality Act Provisions.

As stated above, [Insert Client name] qualifies for §384 protections based on [his/her] status as a [protected immigrant/VAWA self-petitioner]. [*State the category of the client's qualification*] I have attached proof of this eligibility. [*If an application has not been filed but is a protected immigrant/self-petitioner, include a narrative of what makes your client eligible as a protected immigrant or a VAWA self-petitioner and identify documents demonstrating eligibility. Several types of possible documents are listed below*]

II. [Insert Client name] is/has been subject to a violation of the VAWA Confidentiality Act Provisions.

A. Procedural History of the case:
[Include the status of any immigration filings and enforcement actions, family, protection order or criminal cases. Include dates, jurisdiction and case numbers wherever possible.]

B. Facts of the Violation

[165] INA §239(e)(1); 8 U.S.C. §1229(e)(1).

[166] *See* 151 Cong. Rec. *E2605, E2607 (daily ed. Dec. 18, 2005)(statement of Rep. Conyers) (stating «I believe that Section 817 of this Act contains same of the most important protections for immigrant victims. This section is enhances VAWA's confidentiality protections for immigrant victims and directs immigration enforcement officials not to rely on information provided by an abuser, his family members or agents to arrest or remove an immigrant victim from the United States. Threats of deportation are the most potent tool abusers of immigrant victims use to maintain control over and silence their victims and to avoid criminal prosecution. In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings. In 2000, and in this Act, Congress extended these protections to cover victims of trafficking, certain crimes and others who qualify for VAWA immigration relief. These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims' immigration cases, and encouraging immigration enforcement offices to pursue removal actions against their victims.»); *see also* *Hawke*, 2008 WL 4460241, at *7 (citing statement of Rep. Conyers for proposition that the purpose of the confidentiality provisions is to prevent the use of the immigration system against victims).

[167] Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104-208 (1996).

[Describe each VAWA Confidentiality provision that was violated and facts related to the qualifying category of protection. Explain the circumstances of each violation in as much detail as possible including: date, time, and location; gravity of violation; potential lethality and/or danger of further abuse or violence should the abuser, trafficker or other criminal perpetrator learn how to find the victim, learn the existence of any immigration case initiated on the victim's behalf; learn about any enforcement action against the victim; name(s) and office location and phone number of DHS official(s) or employees involved; the actions and communications of the DHS employees, victim, and any victim advocates; witnesses present or who otherwise have knowledge about each violation or other relevant information. Provide any information you have about whether or how the crime perpetrator was involved in the incident(s). Explain how the client's privacy and safety were compromised and rights violated as well as any harm to the client or the client's children.]

The actions of DHS officials and/or the disclosure of the nature described above, violate the VAWA confidentiality statute and are the types of behavior Congress sought to halt by creating and continuously improving VAWA confidentiality protections in each Violence Against Women Act reauthorization.

III. [Insert client's name] has made attempts to address this violation o f VAWA confidentiality with the DHS employee in violation and his/her supervisors.

[Include a summary of steps that have been taken to resolve this complaint through local channels including specific dates, the names of the DHS employees and supervisors with whom you communicated and the response to or result of each communication.]

The law provides for a civil penalty of up to $5000 and disciplinary action for each VAWA Confidentiality violation committed by a DHS employee. CRCL must fully investigate and issue penalties against DHS employees who violate VAWA confidentiality. Otherwise VAWA Confidentiality will be ineffective to protect victims and the violations of individual DHS employees will create greater incentives for crime perpetrators to continue using the government as a tool in their pattern of control and abuse. I strongly urge CRCL to take appropriate action under the law and provide my client justice with the payment of the $5000 penalty and disciplinary action.

I have attached the following documentation demonstrating my client's eligibility for VAWA Confidentiality protection and for initiation of an VAWA confidentiality enforcement action.

- ☐ Affidavits of my client and witnesses to the violation(s);
- ☐ Protected immigrant or self-petitioner eligibility - Proof of victimization and other eligibility requirements [Identify evidence of victimization that might include photographs, protection orders, police reports, hospital records, and related proof of the perpetrator's criminal activity, affidavits from other parties witnessing the crime, hospital reports];
- ☐ Communication with [identify law enforcement agencies, courts, hospitals, social workers] regarding the battering or extreme cruelty, criminal activity or trafficking;

- ☐ Copies of state court pleadings relating to the case, including domestic violence protection order complaints, custody or divorce complaints, criminal charges and information related to the criminal history of the abuser/perpetrator;
- ☐ Copies of state court orders relating to the case, including domestic violence protective orders, custody orders, child support orders, criminal convictions, and the history of any other court orders involving the victim, her children and the abuser;
- ☐ Receipts of self-petitioner, crime victim or trafficking victim filing with DHS or an immigration judge;
- ☐ Copy of DHS filing including but not limited to I-360 Self-Petition, Petitions for U Nonimmigrant Status, Petition for T Nonimmigrant Status, Receipt Notices, Approval Notices, etc.;
- ☐ Communication with [identify DHS employees/supervisors] reporting the VAWA Confidentiality violation and records or a description of any response received;
- ☐ Immigration forms associated with the violation [specify which forms];
- ☐ Names and full contact information for client, witnesses, and all DHS employees involved.

I thank you for your attention to this matter and please contact me with any further questions at [*insert phone number and e-mail address*].

Sincerely,

[*Practitioner Name]*
Attorney at Law

APPENDIX D

Motion for Protective Order To Prevent Disclosure in Family Court Cases of VAWA Confidentiality Protected Information starts on top of next page.[168]

[168] Developed by Michael Lyons and Darcy Paul, Morgan Lewis and Bockius, LLP and Soraya Fata, Legal Momentum

[INSERT COURT NAME AND JURISDICTION]

[*Insert*]	)	
	)	No. [*Docket Number*]
v.	)	
	)	[*Insert Judge Name*]
[*Insert*]	)	

MOTION FOR PROTECTIVE ORDER

[*In accordance with local rule ___],*[169] *[Petitioner*] respectfully moves this Court for a Protective Order to maintain the confidentiality of any Violence Against Women Act (VAWA) confidentiality protected petition or application for immigration status or benefits filed by [*Petitioner*] pursuant to Immigration and Nationality Act (INA) §§ 101(a)(15)(T);[170] 101(a)(15)(U);[171] 101(a)(51);[172] 106;[173] 240A(b)(2);[174] or 244(a)(3)[175] (as in effect on March 31, 1999) and any information related thereto. [*Petitioner*] further requests that this Court bar [*Respondent*] from discovering, using or attempting to use (*e.g.*, in direct or cross-examination of witnesses) confidential information protected by VAWA in these proceedings. The grounds for this Motion are set forth in the attached Memorandum of Law.

WHEREFORE, for good cause shown, *[Petitioner*] requests that the Court grant this Motion and enter a Protective Order accordingly.

[169] Fed. R. Civ. P. 26(c)(1) permits federal courts, for good cause, to forbid discovery of or use of information to protect a party or person from "annoyance, embarrassment, oppression . . . ."]
[170] 8 U.S.C. § 1101(a)(15)(T) (2009).
[171] 8 U.S.C. § 1101(a)(15)(U).
[172] 8 U.S.C. § 1101(a)(51).
[173] 8 U.S.C. § 1105a.
[174] 8 U.S.C. § 1229b(b)(2).
[175] 8 U.S.C. § 1254a(a)(3).

Dated: [*Month, Day, Year*]

Respectfully submitted,

/s/

[Name
Title
Contact Information]

[INSERT COURT NAME AND JURISDICTION]

[Insert]	)	
	)	
	)	
	)	Civil No. [*Docket Number*]
v.	)	
	)	[*Insert Judge Name*]
[*Insert*]	)	
	)	
	)	
	)	

[PETITIONER*/'S MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER*

[*Petitioner*] respectfully submits this Memorandum of Law in support of [*Petitioner's]* Motion for Protective Order to maintain the confidentiality of any self-petition for immigration status[176] or benefits filed by *[Petitioner*] pursuant to the Violence Against Women Act ("VAWA") and any information related thereto. Self-petitions for immigration status or benefits by victims of domestic abuse, sexual assault, human trafficking and many forms of criminal activity, including the existence or any case, and any information related to them (collectively "VAWA protected information") are protected by VAWA's broad confidentiality provisions codified at 8 U.S.C. § 1367(a) (2008).[177] Absent limited exceptions, none of which apply here, these provisions expressly prohibit the release of protected information by the government to third parties. Although VAWA does not specifically address attempts by an abuser or a crime perpetrator to discover the same VAWA protected information from his victim in civil or criminal proceedings, Congress's intent to prevent the use by or disclosure of any information

[176] Violence Against Women Act (VAWA) confidentiality protections apply to all petitions or applications for immigration status or benefits filed pursuant to Immigration and Nationality Act (INA) §§ 101(a)(15)(T); 101(a)(15)(U); 101(a)(51); 106; 240A(b)(2); or 244(a)(3) (as in effect on March 31, 1999), 8 U.S.C §§ 1101(a)(15)(T); 1101(a)(15)(U); 1101(a)(51); 1105a; 1229b(b)(2); 1254a(a)(3) and any information related thereto.

[177] *See Hawke v. Dep't of Homeland Sec.*, No. C-07-03456 RMW, 2008 WL 4460241, at *7 (N.D. Cal. Sept. 29, 2008).

related to confidential VAWA applications to third parties is clear and unambiguous. Permitting abusers to discover or use protected information from their victims would render VAWA's confidentiality provisions meaningless and would subject victims to further abuse and harassment that VAWA is intended to prevent.

Therefore, and for the reasons described herein, [Petitioner] respectfully requests this Court issue a protective order to safeguard the existence and substance of any VAWA protected information and to bar any attempts by [*Respondent*] to discover or use such information in these proceedings.

I. FACTS

[Insert relevant facts of case, including facts related to the history of abuse, procedural background and defendant's actual or anticipated discovery request for VAWA protected information. Consider wording this section of the filing so as to not directly admit the existence of any VAWA protected immigration case.]

II. THE VIOLENCE AGAINST WOMEN'S ACT PROVIDES BROAD PROTECTIONS TO VICTIMS OF DOMESTIC VIOLENCE.

VAWA was originally enacted in 1994 primarily as a mechanism to provide funding for programs and services to assist victims of domestic violence and other specified crimes.[178] In addition, however, VAWA also created important legal protections for immigrant victims of domestic violence, child abuse, sexual assault, human trafficking and other criminal activity.[179] Those protections have expanded over the years through a series of amendments in 1996, 2000,

[178] Violent Crime Control and Law Enforcement Act ("1994 VAWA Act"), Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[179] INA Section 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) offers immigration relief to victims of specific criminal activities. The U-visa regulations issued by the Department of Homeland Security summarize this criminal activity as follows: "INA sec. 101(a)(15)(U)(i), 8 U.S.C. 1101(a)(15)(U)(i). Qualifying criminal activity is defined by statute to be ''activity involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]'' Id.,(iii). The list of qualifying crimes represents the myriad types of behavior that can constitute domestic violence, sexual abuse, or trafficking, or are crimes of which vulnerable immigrants are often targeted as victims." 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007).

and 2005.[180] Two significant VAWA provisions relating to battered immigrants and immigrant crime victims include: (1) the right to "self-petition" to obtain lawful immigration status and other benefits; and (2) broad confidentiality protections that prohibit release of the existence and substance of a VAWA petitioner's application. As demonstrated repeatedly throughout VAWA's legislative history, Congress specifically enacted these provisions to prevent abusers and crime perpetrators from using immigration status as a means to further control, harass, abuse or intimidate their victims. *See, e.g.*, H.R. REP. NO. 109-233 at 120 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 1636, 1671; 151 CONG. REC. E2605-04, E2607 (2005) (statement of Rep. Conyers) (VAWA confidentiality provisions "are designed to ensure that abusers and criminals cannot use the immigration system against their victims . . . [such as by] using DHS to obtain information about their victims, including the existence of a VAWA immigration petition. . . ."); H.R. REP. NO. 106-939 at 110 (2000), *as reprinted in* 2000 U.S.C.C.A.N. 1380, 1401-02 (Congress implemented these provisions "to ensure that domestic abusers with immigrant victims are brought to justice and that battered immigrants [] are able to escape the abuse").

A. VAWA Allows Battered Immigrants and Immigrant Crime Victims to Self-Petition Without the Knowledge of Their Abusers.

Under normal circumstances, documented partners, spouses or family members are involved in petitioning for immigration benefits on behalf of their immigrant partners, spouses or family members. However, recognizing that victims of abuse need to break free from the control of their abusers, Congress, through VAWA, gave victims the right to self-petition for immigration status and benefits on their own and, importantly, without the knowledge, consent

[180] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("1996 VAWA Act"), Pub. L. No. 104-208, 110 Stat. 3009 (1996); Victims of Trafficking and Violence Protection Act of 2000 ("2000 VAWA Act"), Pub. L. No. 106-386, Div B, Title V, 114 Stat. 1464 (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005 ("2005 VAWA Act"), Pub. L. No. 109-162, Title VIII, Subtitle B, 119 Stat. 3057 (2006).

or aid of their abusive partner. *See, e.g.,* 2005 VAWA Act, codified at 8 U.S.C. § 1154(a)(1)(A)(i)-(iii) (2005) (describing procedure for granting immigration status). Congress also prohibited Department of Homeland Security ("DHS") agents from making any adverse determinations regarding VAWA petitioners and other immigrant crime victims applying for VAWA related immigration relief using information provided solely by abusers, perpetrators or people associated with abusers or crime perpetrators, and required DHS agents to complete a certification of compliance in certain specified cases. *See* 8 U.S.C. § 1367(a).[181]

By allowing battered immigrants to "self-petition" and by providing them with a wide range of resources and benefits to assist them, Congress sought to empower battered immigrants to achieve independence from their abusers and limit the ability of abusers to retaliate against them. Immigrant victims of sexual assault, human trafficking and other mostly violent crimes were provided similar protection to enable and support victims in reporting crime and cooperating in the detection, investigation or prosecution of criminal activity by federal, state and local law enforcement, prosecutors, courts and state and local investigating agencies (e.g. child protective services, adult protective services, state labor boards, EEOC, etc.)

B. VAWA Broadly Prohibits Disclosure of VAWA Protected Information

The filing of any VAWA petition triggers strict confidentiality requirements that are intended to further protect victims from harassment and intimidation by their abusers. *See* 8 U.S.C. § 1367(a)(2); H.R. REP. NO. 109-233 at 120.[182] Specifically, VAWA broadly prohibits federal authorities (including, but not limited to DHS, the Department of Justice and the

[181] *See also* Memorandum from Director J. Torres to Field Office Directors and Special Agents in Charge re: "Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005" (Jan, 22, 2007), attached as Ex. 1.
[182] *See also Hawke*, 2008 WL 4460241, at *7 (stating that the congressional policy behind the enactment of the VAWA confidentiality provisions requires even moot petitions to remain confidential).

Department of State) from permitting the use by or disclosure of *any information* related to confidential VAWA applications to *any third party*.[183] *See* 8 U.S.C. § 1367(a)(2).

The importance of VAWA confidentiality protections cannot be overstated. Over the years, Congress has carefully evaluated the need for and subsequently expanded VAWA's confidentiality provisions each time it has reauthorized the Act to further protect VAWA self-petitioners from their abusers. *See, e.g.*, 1994 VAWA Act, § 40508, 108 Stat. at 1950 (enacting confidentiality provisions to protect victims of domestic abuse and directing the Attorney General to analyze means for protecting confidential information of "abused spouses to protect such persons from exposure to further abuse"); 1996 VAWA Act, H.R. REP. NO. 104-828 (Conf. Rep.), (adding provision to prevent the "use by or the disclosure of" information pertaining to an alien's application for relief where that individual is a victim of domestic abuse); 2000 VAWA Act, H.R. REP. NO. 106-939 at 111 (extending the scope of VAWA protections to improve its goal of "prevent[ing] immigration law from being used by an abusive citizen or lawful permanent resident spouse as a tool to prevent an abused immigrant spouse from reporting abuse or leaving the abusive relationship"); 2005 VAWA Act, H.R. REP. NO. 109-233, 118 (adding provisions to prevent reliance in immigration proceedings on evidence provided by abusers to "ensure that abusers and criminals cannot use the immigration system against their victims"). In addition, Congress provided for stiff penalties for those who violate the Act, subjecting federal agents and other government employees to disciplinary action and civil monetary penalties of $5,000 for each violation. *See id.* at § 1367(c).

Congress created only a few limited exceptions to VAWA's confidentiality provisions. Those exceptions include disclosure to specified agencies for certain legitimate law enforcement

[183] VAWA only permits the disclosure of information to certain specified individuals (*i.e.* sworn officers or employees of certain federal agencies) for specified purposes. *See id.* at § 1367(a)(2) (2008).

purposes, Congressional oversight, census purposes, and to assist with immigrant victim access to certain public benefits. *See* 8 U.S.C. § 1367(b). VAWA confidentiality may also be waived by the petitioner or disclosed, only with appropriate protections, in connection with an immigration court or administrative agency judicial review of a determination of a self-petitioner's immigration petition. *Id.*

Absent limited exceptions, VAWA's broad confidentiality provisions expressly prohibit the release of protected information by the government to third parties. Although VAWA does not specifically address attempts by an abuser to discover the same VAWA protected information from his victim in civil or criminal proceedings, Congress's intent to prevent the use by or disclosure of any information related to confidential VAWA applications to third parties is clear and unambiguous. Permitting abusers to discover or use protected information from their victims would render VAWA's confidentiality provisions meaningless and would subject victims to the further abuse and harassment that VAWA is intended to prevent.

The limited exceptions to VAWA mandated confidentiality of VAWA protected information do not extend to discovery or use in civil litigation between the victim and her abuser, or to criminal litigation in which the victim testifies against her abuser. Although there is an exception permitting "disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of [VAWA protected information]," 8 U.S.C. § 1367(b)(3), that exception relates to judicial review of a self-petitioner's immigration application in immigration proceedings before an immigration judge, at the DHS administrative appeals unit or by the Board of Immigration Appeals.[184] Self-petitions are broadly protected by

[184] *See Hawke*, 2008 WL 4460241, at *6 (holding that the "judicial review" exception to VAWA confidentiality extends only to judicial review of a government determination of the immigration status of a VAWA self-petitioner, not in other civil and criminal proceedings). .

VAWA and nowhere in VAWA or its extensive legislative history is there any evidence that Congress contemplated an exception that would result in disclosure of VAWA protected information by a victim to her abuser. Rather, the opposite is true; through VAWA, Congress intentionally sought to prevent abusers from obtaining or using VAWA protected information at all.

VAWA clearly and unambiguously describes the information that the statute protects and the limited circumstances in which the information may be disclosed. A plain reading of VAWA and common sense dictate that absent the voluntary disclosure of the information by the victim[185] or other enumerated exceptions listed in section 1367(b), VAWA protected information should remain confidential regardless of whether the information resides with the government or with the victim. Any other reading of the statute would undermine the very purpose of VAWA and render utterly meaningless the statutorily mandated confidentiality provisions that are intended and designed to protect victims from further abuse, intimidation and harassment by their abusers.

If [PETITIONER] filed for immigration status or benefits under VAWA, the existence and substance of that petition, as well as any additional information related to that petition, would be covered by VAWA's broad confidentiality provisions. If *[Respondent*] in turn requested VAWA protected information from DHS or other federal agencies, government officials could not disclose that information under any circumstances without violating VAWA confidentiality requirements and subjecting themselves to sanctions. Logic and a fair reading of the statute dictate, therefore, that [*Respondent*] should not be allowed to circumvent VAWA and seek the very same protected information from the [*Petitioner*]. The fact that a victim may have

[185] Any action by a party or a judge in a civil or criminal court proceeding seeking or ordering disclosure of information that the court or the party seeking the information could not obtain from DHS would be coercion and not voluntary disclosure and would by contrary to the intent of federal VAWA confidentiality laws.

retained copies of or otherwise possess VAWA protected information (*e.g.*, copies of documents related to the VAWA petition or other related information) should not change the outcome; VAWA protected information should remain confidential.

Significantly, VAWA's strict confidentiality requirements do not expire *unless* the self-petition is denied on the merits and all opportunities for appeal of the denial are exhausted. *Id.* at § 1367(a). Confidentiality regarding granted petitions *never expires*.[186]

III. ARGUMENT

A. The Court Should Issue a Protective Order to Ensure Confidentiality of Any VAWA Protected Information.

Although VAWA does not specifically address discovery of VAWA protected information by the abuser directly from his victim in civil or criminal litigation, [*Respondent*] should not be able to obtain VAWA protected information from [*Petitioner*] that he could not legally obtain from the government. VAWA clearly and unambiguously describes the information that the statute protects and the limited circumstances in which the information may be disclosed. A plain reading of VAWA and common sense dictate that absent the voluntary disclosure of the information by the victim or other enumerated exceptions listed in section 1367(b), VAWA protected information should remain confidential regardless of whether the information resides with the government or with the victim. Any other reading of the statute would undermine the very purpose of VAWA and render utterly meaningless the statutorily mandated confidentiality provisions that are intended and designed to protect victims from

[186] *See Hawke*, 2008 WL 4460241, at *6 ("[W]hen Congress wrote "denied," the word meant "denied *on the merits*." The text of section 1367(a) harmonizes with this interpretation. The full provision dictates that the confidentiality expires "when the application for relief is denied *and all opportunities for appeal of the denial have been exhausted*." 8 U.S.C. § 1367(a). But a mooted petition cannot be appealed because there is nothing to appeal. Congress' focus on the exhaustion of all opportunities for review underscores its intent to limit the expiration of confidentiality to petitions that have been denied on the merits. This focus on the merits also accords with the fact that the confidentiality never expires on *granted* petitions filed by the victims of abuse.").

further abuse, intimidation and harassment by their abusers.

If [PETITIONER] filed for immigration status or benefits under VAWA, the existence and substance of that petition, as well as any additional information related to or contained in that petition, would be covered by VAWA's broad confidentiality provisions. If [RESPONDENT] in turn requested VAWA protected information from DHS or other federal agencies, government officials could not disclose that information under any circumstances without violating VAWA confidentiality requirements and subjecting themselves to sanctions. Logic and a fair reading of the statute dictate, therefore, that [*Respondent*] should not be allowed to circumvent VAWA and seek the very same protected information from the [*Petitioner*]. The fact that a victim may have retained copies of or otherwise possess VAWA protected information (*e.g.*, copies of documents related to the VAWA petition or other related information) should not change the outcome; VAWA protected information should remain confidential.

B. No Statutory Exception to VAWA Mandated Confidentiality Applies in this Litigation.

The limited exceptions to VAWA mandated confidentiality of VAWA protected information do not extend to discovery or use in civil litigation between the victim and her abuser, or to criminal litigation in which the victim testifies against her abuser. Although there is an exception permitting "disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of [VAWA protected information]," 8 U.S.C. § 1367(b)(3), that exception relates to judicial review of a self-petitioner's immigration application.[187]

Self-petitions and all VAWA related immigration cases filed by immigrant crime victims

[187] *See Hawke*, 2008 WL 4460241, at *7 (holding in a case of first impression that the term "determination" in § 1367(b)(3) refers to "the government's determination of a VAWA self-petitioner's immigration status" and not to civil or criminal court proceedings).

and immigrant family violence victims are broadly protected by VAWA, and nowhere in VAWA or its extensive legislative history is there any evidence that Congress contemplated an exception that would result in disclosure of VAWA protected information by a victim to her abuser. Rather, the opposite is true; through VAWA, Congress intentionally sought to prevent abusers from obtaining or using VAWA protected information at all.

IV. CONCLUSION

For the reasons stated herein, [*Petitioner]* respectfully requests that the Court grant [*Petitioner's*] Motion for a Protective Order to maintain confidentiality of any VAWA protected information and to further prohibit [*Respondent*] from seeking discovery of or otherwise using or attempting to use VAWA confidential information in this proceeding.

Dated: [*Month, Day, Year*]

Respectfully submitted,

/s/

[Name
Title
Contact Information]

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, _____, I caused a true copy of the foregoing Motion for Protective Order, Memorandum of Law and proposed Protective Order to be served by U.S. mail, postage prepaid, and to be delivered to a process server with instructions promptly to serve it personally upon:

[Name
Contact Information]

/s/
[*name*
Title
Contact Information]

Attorney[s] for [PETITIONER].

[INSERT COURT NAME AND JURISDICTION]

[Insert]	
v.	Criminal No. *[Docket Number]*
[Insert Name Of Defendant]	*[Insert Judge Name]*
Defendant.	

PROTECTIVE ORDER

*This matter comes before the Court on [*Petitioner*]'s Motion for Protective Order. Having considered [*Petitioner's*] Motion, Memorandum of Law, [any Opposition thereto], and the record herein, it is HEREBY ORDERED that:*

*[*Petitioner's*] Motion for Protective Order is GRANTED.*

It is further ORDERED that:

*1. All information regarding any self-petition by [*Petitioner*] under VAWA is protected from disclosure by 8 U.S.C. § 1367(a) and no statutory exception listed in 8 U.S.C. § 1367(b) permits disclosure of information protected by VAWA in this litigation.*

*2. [*Petitioner] *is not required to produce any information regarding a VAWA self-petition, if it exists.*

*3. Absent further Order of this Court, [*Respondent*] is prohibited from seeking discovery of information regarding any self-petition by [*Petitioner*] in discovery, or through attempting to elicit such information through direct or cross examination of witnesses during proceedings related to this litigation.*

*IT IS **SO ORDERED** this _____day of _____, 2008.*

Date:_____ _____

[*Insert Judge Name*
And Jurisdiction]

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