

Common Immigration Issues that Arise in Custody Cases Involving Immigrant Crime Victims and Their Children¹

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1. The role of immigration status in custody cases

- Immigration law is increasingly becoming a factor in custody proceedings as 24% of children ages 17 and under live in households with at least one immigrant parent.²
- In custody cases where domestic violence is present, the American Bar Association (ABA) recognizes that any history of abuse in the home, not the immigration status of involved parties, must be the primary factor in determining the best interest of the child.
- Since batterers whose victims are immigrant parents often use the threat of deportation to avoid criminal prosecution, *“parties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce or child support proceedings.”* –Howard Davidson to the ABA in the report *“The Impact of Domestic Violence on Children”*³
- The U.S. Constitution protects the parent-child relationship, regardless of immigration status. As the Supreme Court of Nebraska unanimously decided:

*“The best interests of a child are served by reuniting the child with his or her parents...this presumption is overcome only when the parent has been proven unfit...[an immigrant parent does] not forfeit her parental rights because she was deported.”*⁴

- The Court concluded that courts should not engage in evaluating “culture clash”

*“Whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children’s best interests. We reiterate that the best interests of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another.”*⁵

2. Immigration relief for immigrant crime victims

- Using the immigration system as a tool of abuse often accompanies physical and sexual violence and includes threats of deportation, refusing to file or threats to withdraw or revoke immigration cases filed on the immigrant parent’s behalf. Different forms of immigration relief are available for domestic violence and child abuse victims in custody cases, and it can take the following forms:

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² EMMA BRITZ & JEANNE BATALOVA, US IN FOCUS: FREQUENTLY REQUESTED STATISTICS ON IMMIGRANTS AND IMMIGRATION IN THE UNITED STATES (Migration Policy Institute, Jan. 2013), available at: <http://www.migrationinformation.org/USfocus/display.cfm?id=931#7>.

³ HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (Aug. 1994), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/immigrant-families-and-children/The-Impact-of-Domestic-Violence-on-Children.pdf/view>.

⁴ *In re Interest of Angelica L.*, 277 Neb. 984,1007, 1009 (2009).

⁵ *Id.* at 1009.

- **VAWA self-petitioning**: allows certain spouses, children, and parents of U.S. citizens or lawful permanent residents to file for their own immigration status, without the abuser's knowledge.
- **Battered spouse waiver**: allows abused spouse with conditional lawful permanent residency to waive the requirement that they wait 2 years and file a "joint petition" with their spouse and receive full lawful permanent residency without the abusive citizen or lawful permanent resident spouse's knowledge, consent, or cooperation.
- **U visa**: gives victims of certain criminal activities temporary legal status and work eligibility in the United States for up to 4 years (domestic violence, sexual assault, and stalking are **included** as qualifying criminal activities).⁶
- **T visa or continued presence**: which allow certain victims of human trafficking and immediate family members to remain and work temporarily in the United States if they agree to assist law enforcement.

3. Common immigration status MISCONCEPTIONS that arise in custody cases⁷

- *Parent must be awarded custody to be able to confer an immigration status to their children:*
 - A parent's ability to file an application for immigration relief for their child is **NOT** related to whether or not the sponsoring parent has custody of the child.
 - Immigrant crime victims who qualify for immigration relief under VAWA, the T visa or the U visa can include their immigrant children in their application and the children will attain for legal immigration status along with their crime victim parent(s).
- *Undocumented or temporary immigration status means that the immigrant parent is at risk of removal from the United States:*
 - The Department of Homeland Security (DHS) **precludes detention or deportation of a victim** and any children included in an application for VAWA related immigration relief DHS has deemed valid.
 - Undocumented parents with children are low on DHS' priority list for removal, and enforcement officers are not to detain primary caretakers of children, nursing mothers and pregnant women, unless the immigrant poses a danger to national security or public safety.
- *Undocumented immigration status places the child at risk of parental kidnapping:*
 - Undocumented immigrant parents with children in the United States who are eligible for immigration relief are unlikely to leave the country.
 - If they leave the country when they return U.S. immigration laws can impose 3-year, 10-year, or a permanent bar to reentry that could cut parents off from their children permanently
 - The U.S. Department of Justice research lists factors that increase the risk of international child abduction. These include: *strong ties to another country, involvement in an intimate partner relationship with a partner from a different country of origin, previous threats to abduct the child, the parent feeling alienated from the U.S. legal system, or the parent has paranoid or delusional tendencies or exhibits psychopathic behavior.*⁸

⁶ The full list of criminal activities includes: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labor contracting, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, other related crimes (including attempt, conspiracy, or solicitation to commit any of the above and other related crimes). INA Section 101(a)(15)(U)(iii); 8 U.S.C. Section 1101(a)(15)(U)(iii).

⁷ For a full discussion of these misconceptions, see Soraya Fata, Leslye E. Orloff, Andrea Carcamo-Cavazos, Alison Silber, & Benish Anver, *Custody of Children in Mixed Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State Court Custody Proceedings*, 47 FAM. L. Q. 191 (Summer 2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts/family-law/ABAFLO-Mixed-Status-Custody.pdf/view>.

⁸ U.S. DEPARTMENT OF JUSTICE, JANET CHIANCONE, LINDA GIRDNER & PATRICIA HOFF, ISSUES IN RESOLVING CASES OF INTERNATIONAL CHILD ABDUCTION BY PARENTS, (Juvenile Justice Bulletin, Dec. 2001), available at: <https://www.ncjrs.gov/pdffiles1/ojdp/190105.pdf>.

- When the abuser is a naturalized citizen, lawful permanent resident, or lawful visa holder who can travel freely to and from the U.S. and the above factors are present in the relationship advocates and attorneys working with immigrant survivors should take steps to prevent international parental kidnapping.⁹
- *Immigration status impacts the **child's stability** and the parent's **ability to provide** for their child:*
 - Immigrant victims of domestic violence, child abuse and other crimes **is eligible for employment authorization** upon approval of their VAWA petition, U visa or T visa
 - (within ≈ 7 months of filing as of March 2014)
 - Courts can award custody to the immigrant parent and order parent the citizen, lawful permanent resident or undocumented parent to pay child support.
- *Immigration status impacts the immigrant parent's **ability to obtain public benefits** on the child's behalf:*¹⁰
 - **Any custodial parent can apply** for “child only” public benefits that their child qualifies to receive based on the child’s citizenship or immigration status. The granting of benefits should legally be only about the child’s immigration/citizenship status and social security number, but workers at these programs can ask about parent’s income.
 - If the immigrant victim of domestic violence qualifies for VAWA immigration relief, both the battered immigrant and included children become eligible for public benefits.

⁹ See Catherine Klein, Leslye Orloff, Laura Martinez, Jennifer Rose & Joyce Noche, *The Implications of the Hague International Child Abduction Convention: Cases And Practice*, in BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (2013), available at: http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/international-issues/6.3_FAM_BB_Hague-Intl-Child-Abduction-Convention-Cases-MANUAL-BB.pdf/view.

¹⁰ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF AGRICULTURE, POLICY GUIDANCE REGARDING INQUIRES INTO CITIZENSHIP, IMMIGRATION STATUS AND SOCIAL SECURITY NUMBERS IN STATE APPLICATIONS FOR MEDICAID, STATE CHILDREN’S HEALTH INSURANCE PROGRAM (SCHIP), TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF), AND FOOD STAMP BENEFITS (2000), available at: <http://www.hhs.gov/ocr/nationalorigin/triagency.html>.