# **Protections from DHS Enforcement Action for Vulnerable Populations: What has changed and what remains?**

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The Trump Administration's immigration executive orders and related agency memoranda represent a potentially dramatic shift in policy regarding the arrest, detention, and deportation of crime victims, domestic violence victims, and other vulnerable populations. A review of the current implementation of those agency policies that have traditionally aimed to protect vulnerable populations from DHS enforcement action shows they are squarely under fire. Accordingly, attorneys representing vulnerable populations should be aware of other options for slowing or stopping enforcement actions against their clients.

## *Victim[1] Memos*

Previously, a web of DHS internal guidance and policy memoranda combined to create a comprehensive set of protections for vulnerable populations from DHS enforcement action.[2] DHS policy on treatment of this group was principally captured in a series of memos issued in 2011 by former ICE Director John Morton ("the Morton Memos").[3] Together, these memos instructed DHS to exercise prosecutorial discretion for certain groups, including: victims of domestic violence, human trafficking, and other violent crimes; individuals with pending

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[1] For the purpose of this paper, the term "victim" has been chosen over the term "survivor" because it is the term used throughout the INA and by the Department of Homeland Security when referring to access to remedies created for vulnerable populations.

[2] *See, e.g.* Memorandum from Peter S. Vincent, Principal Legal Advisor, Guidance Regarding V Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal (Sept. 25, 2009); Memorandum from William J. Howard, Principal Legal Advisor, VAWA 2005 Amendments to Immigration and Nationality Act and 8 U.S.C. § 1367 (Feb. 1,2007); Memorandum from Julie L. Myers, Assistant Secretary of ICE, Prosecutorial and Custody Discretion (Nov. 7, 2007); Memorandum from William 1. Howard, Principal Legal Advisor, Prosecutorial Discretion (Oct. 24, 2005); Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, Exercising Prosecutorial Discretion (Nov. 17, 2000).

[3] Memorandum from John Morton, Case-by-Case Review of Incoming and Certain Pending Cases (Nov. 17, 2011); Memorandum from John Morton, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011); Memorandum from John Morton, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

applications for relief; individuals pursuing civil rights complaints; and those whose cases involved compelling humanitarian factors, including length of time in the U.S. and family and other community ties.[4]

However, with the exception of the June 2012 DACA and November 2014 DAPA memos, the DHS memo implementing President Trump's executive orders on immigration unequivocally rescinds all prior guidance on the exercise of prosecutorial discretion for particular groups.[5] Nothing in the February 2017 memo specifically addresses, much less exempts, victims or other groups traditionally protected by prior agency policy.

The fate of the Morton Memos protecting victims is uncertain. In February 2017, undercover CBP agents arrested a victim of domestic violence inside an El Paso courthouse after she had just obtained a protective order against her abusive boyfriend.[6] In the aftermath, at least one ICE spokesperson asserted that the 2011 Victim Witness Memo remains in effect and that ICE "will take into consideration if an individual is the immediate victim or witness to a crime, in determining whether to take enforcement action."[7]

*DHS Sensitive Location Memos*

ICE and CBP both have policies in place that provide that "enforcement actions at or focused on sensitive locations … should generally be avoided."[8] Locations protected under the memos include, among others: schools and daycares; medical treatment and health care facilities, places of worship, such as churches, synagogues, mosques, and temples; religious or civil ceremonies or observances, such as funerals and weddings; and public demonstrations, such as a march, rally, or parade.[9]

Both memos are careful to carve out sweeping exceptions to the general rule against enforcement action at protected locations, including those involving exigent circumstances and where prior approval is obtained from a supervisor. Notably, the CBP memo further exempts

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[4] *Id.*

[5] "Enforcement of the Immigration Laws to Service the National Interest," February 20, 2017, at 2.

[6] http://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/

[7] http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html

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[9] *Id.*

"operations that are conducted at or near the international border (including the functional equivalent of the border" and "operations that bear nexus to the border."[10]

DHS maintains that the Sensitive Locations memos are still in place, but its track record is mixed, at best. Multiple recent enforcement actions across the country violate the spirit, if not the letter, of these memos. For example, in February 2017, ICE agents in Alexandria, Virginia, arrested multiple men leaving a church homeless shelter, prompting the ICE spokeswoman to emphasize that the actions was not a violation of agency policy because "the arrests took place across the street from the church and not on church property."[11] Two weeks later, ICE agents in Jackson, Mississippi, arrested a twenty-two year old former DACA recipient with a pending application for renewal just minutes after she left a news conference where she spoke out against Trump administration's immigration polices and ICE enforcement action taken against her family members.[12] While ICE pointed to her outstanding order of expedited removal and insisted that she was arrested as part of a "targeted immigration enforcement action," they later released her in an exercise of prosecutorial discretion.[13]

*VAWA Confidentiality Provisions*

Notably, the February 2017 El Paso incident was not in violation of the CBP's Sensitive Location policy, which does not protect courthouses. Still, the arrest serves as an important reminder of the remaining statutory protections for certain groups of victims: the VAWA confidentiality provisions. And unlike the Sensitive Locations and Victims memos, these protections are enshrined in federal law.

VAWA Confidentiality[14] provisions provide three types of protections to non-citizen victims:

- Nondisclosure Provisions[15]
- Prohibited Source Limitations[16]
- Enforcement Location Limitations[17]

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[10] *Id.* at 2.

[11] http://www.nbcwashington.com/news/local/ICE-Agents-Arrest-Men-Leaving-Alexandria-Church-Shelter-413889013.html

[12] http://www.cbsnews.com/news/dreamer-arrested-after-speaking-about-immigration-issues/

[13] http://www.slate.com/blogs/the_slatest/2017/03/10/daniela_vargas_has_been_released_by_ice.html

[14] Violence Against Women Act's (VAWA) VAWA confidentiality protections under U.S. immigration laws are contained in the statute at IIRIRA 384; 8 U.S.C. 1367, and INA 239(e); 8 U.S.C. 1229(e).

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

[16] IIRAIRA 384(a)(1); 8 U.S.C. 1367(a)(1)

[17] INA 239(e); 8 U.S.C. 1229(e)

The Nondisclosure provisions protect the confidentiality of information provided to the government by non-citizen victims, while the second and third VAWA confidentiality prongs address protections for victims against DHS enforcement actions. Unlike the first prong, the Source Limitations and Enforcement Location Limitations provisions protect victims regardless of whether they have filed a form of VAWA confidentiality protected immigration relief and without regard to whether they will ever file.[18]

Restrictions on Disclosure of Information

This VAWA confidentiality provision prohibits employees[19] of the Department of Homeland Security (DHS), Department of Justice (DOJ) and Department of State (DOS) from releasing to any person information contained in a protected immigration file, including whether such a protected case exists at all.[20] This nondisclosure provision is triggered once a protected application type has been filed with DHS, and continues until and unless said application is denied, and all avenues of appeal have been exhausted. Protected applications include VAWA-based applications[21], as well as U and T[22] visa applications. According to DHS policy, once an individual files a VAWA self-petition, a T visa application, or U visa petition with USCIS, the person's file is updated with code "384" to alert DHS personnel that the person is protected under section 1367.[23] This prohibition is not limited to federal officials; it can also be invoked to prevent the release of protected information through family courts, criminal courts and civil claims.

Prohibited Source Limitations on DHS Action

This provision prohibits DHS officials from using information provided *solely* by an abuser, trafficker or U visa crime perpetrator (or family member) as the basis for taking adverse action – including determinations of admissibility or deportability, and enforcement actions –

[18] IIRAIRA 384(a)(1); 8 U.S.C. 1367(a)(1), and INA 239(e); 8 U.S.C. 1229(e), and Department of Homeland Security, Instruction 002-02-001 "Implementation of Section 1367 Information Provisions," (Nov. 7, 2013) at pages 9, 10 and 12, *available at* http://library.niwap.org/wp-content/uploads/implementation-of-section-1367-information-provisions-instruction-002-02-001_0_0.pdf

[19] Exceptions to the prohibition on disclosure exist in narrow circumstances. See IIRIRA 384(b); 8 U.S.C. 1367(b)

[20] IIRAIRA 384(a)(2); 8 U.S.C. 1367(a)(2)

[21] VAWA self-petitions, VAWA Cuban Adjustment Act, VAWA Haitian Refugee Immigration Fairness Act, VAWA Nicaraguan Adjustment & Central American Relief Act, VAWA cancellation of removal, VAWA suspension of deportation, Battered spouse waivers, VAWA work authorization abused spouses of visa holder applicants

[22] Including Continued Presence

[23] U.S. Citizenship and Immigration Services, DHS Broadcast Message on New 384 Class of Admission Code (Dec. 21, 2010), available at http://library.niwap.org/wp-content/uploads/CONF-VAWA-Gov-MsgeDHS384-12.21.10.pdf

against a non-citizen victim.[24] Before acting on information received by an abuser, DHS officers must first corroborate the information through an independent source. Moreover, DHS policy requires that its employees to preemptively document the information in the individual's A-file and seek supervisory review and approval.[25] This protection extends to those who do not qualify to file for immigration relief, as well as to those who have not yet filed for relief as long as they have been a victim of the enumerated crimes, specifically VAWA battery or extreme cruelty, a severe form of human trafficking, or any of the U visa qualifying crimes.[26]

Enforcement Location Limitations on DHS

Section 239(e) of the INA mandates that when a DHS enforcement action takes place at one the enumerated protected location, DHS is required to disclose that fact on the individual's Notice to Appear and certify that the action did not violate the VAWA confidentiality provisions, which includes the prohibition against reliance upon abuser-provided information.[27] Moreover, DHS policy mandates that, before issuing a Notice to Appear (with 1367 compliance certification) as the result of an enforcement action at a protected location, DHS employees list the details of their compliance with the VAWA confidentiality provisions on the non-citizens Form I-213.[28] This protection applies to all persons, regardless of whether an individual has filed an application for immigration relief, intends to file, or qualifies for immigration relief.[29]

Locations that are protected under this VAWA confidentiality provision from immigration enforcement include, among others: domestic violence shelter; victim services provider; community-based organizations; and courthouse if the non-citizen "is appearing in connection

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[24] IIRAIRA 384(a)(1); 8 U.S.C. 1367(a)(1)

[25] Department of Homeland Security, Instruction 002-02-001 "Implementation of Section 1367 Information Provisions," (Nov. 7, 2013) at pg. 11, *available at* http://library.niwap.org/wp-content/uploads/implementation-of-section-1367-information-provisions-instruction-002-02-001_0_0.pdf

[26] IIRAIRA 384(a)(1); 8 U.S.C. 1367(a)(1)

[27] INA 239(e); 8 U.S.C. 1229(e)

[28] "… before issuing an Notice to Appear (with the requisite section 239(e) certification of compliance with 8 U.S.C. section 1367) to an alien against whom an enforcement action leading to a removal proceeding was taken at a sensitive location, DHS employee record on the Form I-213: (1) the sensitive location at which the enforcement action was taken; (2) whether information related to the alien's admissibility or deportability was supplied by a prohibited source; (3) whether and to what extent such information was independently verified; and (4) an acknowledgement of compliance with the nondisclosure requirements." Department of Homeland Security, Instruction 002-02-001 "Implementation of Section 1367 Information Provisions," (Nov. 7, 2013) at pg. 12, *available at* http://library.niwap.org/wp-content/uploads/implementation-of-section-1367-information-provisions-instruction-002-02-001_0_0.pdf

[29] INA 239(e); 8 U.S.C. 1229(e)

with a protective order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking or stalking…"[30]

Enforcing the VAWA Confidentiality Provisions

Section 8 U.S.C. 1367(c) provides that a DHS employee's violation of any of the three types of VAWA confidentiality provisions is punishable by disciplinary action and a fine of up to $5,000 for each violation committed.[31] Moreover, the VAWA legislative history indicates Congress' intention that removal proceedings filed in violation of the VAWA confidentiality provisions should be dismissed.[32]

When VAWA confidentiality violations happen, aim to advocate for your client on the spot by providing the arresting officer with evidence of your client's victimization, copy of the VAWA confidentiality statutes[33] and DHS policy[34]. Collect identifying information about the violating officer, and file a complaint locally with the supervisor of the local DHS office, urging that the supervisor take immediate steps to mitigate the harm caused by the VAWA confidentiality violation, including release of your client, cancellation of an NTA, the dismissal of immigration proceedings, in addition to the assessment of penalties against the offending officer. If a satisfactory local response is not received, practitioners should file a formal complaint with the DHS Office of Civil Rights and Civil Liberties (CRCL).

If your client is placed in removal proceedings in connection with a violation of the VAWA confidentiality provisions, consider whether any of the following actions may be appropriate to take: ask the Immigration Judge to require DHS to provide certifications required under INA section 239(e); request that the Immigration Judge dismiss the removal action against your client; subpoena the violating DHS officer to testify at a motion to dismiss hearing about the facts of the enforcement action; or seek agreement with the Office of Chief Counsel to dismiss the proceedings.

Strategies for Representing Vulnerable Population before EOIR and ICE

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[30] *Id.*

[31] IIRAIRA 384(c); 8 U.S.C. 1367(c)

[32] Bi-Partisan (Sensenbrenner-Conyers) Judiciary Committee Report, 151 Cong. Rec. E2605 (2005); H. COMM. ON THE JUDICIARY, 109TH CONG., DEP'T OF JUSTICE APPROPRIATION AUTHORIZATION ACT, FISAL YEARS 2006 – 2009, H.R. REP. NO. 109 – 233, AT 123

[33] IIRAIRA 384; 8 U.S.C. 1367, and INA 239(e); 8 U.S.C. 1229(e).

[34] Department of Homeland Security, Instruction 002-02-001 "Implementation of Section 1367 Information Provisions," (Nov. 7, 2013), *available at* http://library.niwap.org/wp-content/uploads/implementation-of-section-1367-information-provisions-instruction-002-02-001_0_0.pdf

When we think of vulnerable population, it is generally women and children that come to mind. However, with the latest changes in immigration every immigrant, particularly those in removal proceedings are deemed to be vulnerable. Once an individual is placed in removal proceedings and the case is before the EOIR, preparation is the key. It is important, (as so many of us forget to do so) to state verbally, or in writing, when representing a client pro-bono. While not automatic, it is a known fact that most Immigration Judges, and sometimes the Trial Attorneys (DHS counsel/the TAs), are inclined to be more accommodating to the pro-bono attorneys.

Do not plea if you have never seen the NTA, or if you have a copy of the NTA but you are not ready to proceed. If you need time to prepare, conduct research or seek help from fellow attorneys, always ask for attorney preparation time or a continuance on the matter, for good cause.[35] Read the NTA carefully, if you see issues with it, challenge it and seek termination of proceedings.[36] To preserve the record for appeal, always state your reasons clearly during the hearing.

Once you have pleaded to the NTA, the most important part will be identifying the relief in Court. While asylum is first that comes to mind (and do not forget Humanitarian Asylum), explore other forms of relief such as Special Rule Cancellation for Battered Spouse or Child (VAWA Cancellation); Special Immigrant Juvenile Status (SIJ), (work closely with a family law attorney on this); the T-visa (for victims of severe forms of human trafficking); or U-visa if your client has been a victim of a crime that has occurred in the United States.[37]

Further, if during the course of the proceedings, any of the petitions filed with the USCIS is pending or has been approved, you can seek administrative closure or termination of proceedings, depending on your circumstances.[38] By the time the most vulnerable population, such as the UACs or the young asylees meet an immigration attorney, they have already been questioned by individuals they do not know (from CBP to ICE, then placed with ORR, and other shelters). The children are confused, and have no idea what expects them in Immigration Court. Most of the time, they are embarrassed to talk about their traumatic personal experiences. This is why an empathetic, non-judgmental and open communication, is essential since the beginning to ensure a solid relationship with them which leads to a successful legal representation. It starts

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[35] *See* 8 C.F.R.§§ 1240.6. *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983).

[36] *See* Practice Advisory: "Notices to Appear: Legal Challenges and Strategies*" American Immigration Counsel*. N.P., June 30, 2014.

[37] AILA InfoNet Doc. No. 14072245

[38] AILA InfoNet Doc. No. 14070344

with obtaining the correct information from the shelters or the non-profit organizations housing these individuals so we do not miss anything about their story. As we assist women and children, and represent them in removal proceedings, we should be mindful of their needs and consider other forms of counseling for them when necessary.

Seeking Termination vs. Administrative Closure before EOIR and the BIA

Administrative Closure is an exercise of prosecutorial discretion, as is the Termination of Proceedings. Knowing when to request each one is crucial for helping clients placed in removal proceedings. The Administrative Closure, which is available to an Immigration Judge and the Board, is used to temporarily remove a case from the Immigration Judge's active calendar or the Board's docket. An order of Administrative Closure is not final. At any time after a case has been administratively closed, either the Respondent's counsel or DHS may move to re-calendar it before the Immigration Judge, or re-instate the appeal before the Board. The Termination of Proceedings, on the other hand, constitutes a conclusion of the proceedings where the Immigration Judge or the Board issues a final order. In the absence of a successful appeal, DHS must file another charging document to initiate new removal proceedings on the case. Therefore, it is best to terminate proceedings rather than seek administrative closure. However, DHS is often not inclined to terminate cases.

The most efficient way to get a case administratively closed is by filing a Joint Motion. This requires negotiations with the Trial Attorney (TA). If the TA does not agree, you can file the Motion with the Court. The Immigration Judge has full authority to render a decision even if the motion is opposed by DHS. The Immigration Judge and the Board may, in the exercise of independent judgment and discretion administratively close proceedings under appropriate circumstances, even if a party opposes.[39] In *Matter of Avetisyan,* the Board set the following requirements for administrative closure: 1) the reason administrative closure is sought; 2) the basis for any opposition; 3) the likelihood the respondent will succeed on any application outside the removal proceedings; 4) the anticipated duration of closure; 5) the responsibility of either party, in contributing to current or anticipated delay; and 6) the ultimate outcome of removal proceedings.

This list is not conclusive however, which leaves attorneys room to be creative. All the evidence of strong family, economic, social ties, special talents or particular issues with health, must be included in the Motion which should be in writing (unless there is a prior agreement with the TA, and the Judge will entertain an oral Motion). Having a written Motion (in addition to excellent oral advocacy) is important especially to preserve the evidence for appeal. If your

[39] *See Matter of Avetisyan*, 25 I&N Dec. 288 (BIA 2012).

client does not have any available form of relief in Court, always consider Administrative Closure as an option. Keep in mind Administrative Closure is not final.

Termination of Proceedings can be requested on a case where DHS cannot sustain the charges in the Notice to Appear (NTA); where the NTA is improvidently issued, or when a client in removal proceedings has relief immediately available outside the Court. Termination of Proceeding can also be requested in cases involving respondents with mental competency issues.[40]

For individuals with Orders of Supervision (OS), who are in removal proceedings, always be prepared to accompany the clients to the appointment, and keep any USCIS notices or copies of Court filings with you. For individuals with final Removal Orders, already under an Order of Supervision, be prepared to file Application for Stay of Deportation or Removal, in person, to the local Enforcement and Removal Operations (ERO) office.[41]

A separate application must be filed for each person/family member seeking a Stay of Removal. While the approval of Stay is discretionary by the Field Director, a well prepared package for each individual containing the correct filing fee; a valid passport (if no passport exists, be prepared to explain why it does not exit, and any measures taken to procure a passport); family and community ties/birth certificates of USC/LPR family members; work record, income tax filings; medical documentation from doctors, if any; evidence of intent to comply with the order (plane ticket), etc., are most helpful for a successful Application for Stay. Additionally, a strong legal brief from the legal representative as well as strong advocacy in person while filing the Application for Stay is strongly recommended in order to improve the chances of approval for the Stay of Removal.

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[40] *See Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011). *See also* "Safeguards in Removal Proceedings for Noncitizens Who Lack Mental Competency" *American Immigration Council.* N.p., 20 Dec. 2013. Web. 7 May 2014.

[41] *See* 8. C.F.R. 241.6.