

Post-Election Q&A for Advocates and Attorneys Serving Immigrant Survivors of Gender-based Violence¹

Last Updated: November 29, 2016

WHO IS THIS DOCUMENT FOR?

- This is a Question and Answer (Q&A) for domestic violence and sexual assault (DV/SA) advocates and attorneys who are serving immigrant survivors of gender-based violence, both undocumented survivors and survivors who may be eligible for VAWA self-petitions, U visas, T visas or applying for gender-based asylum. Keep in mind that this information may change as we learn more about the plans of the incoming administration. This document is not legal advice or authority rather it is for informational purposes only and not for media attribution.

WHY IS THIS IMPORTANT FOR SURVIVOR SAFETY?

- President-Elect Trump pledged to make several sweeping changes to immigration policy within his first 100 days.² Several of those changes are related to the potential termination of the Deferred Action for Childhood Arrivals (DACA) program and increased enforcement and stricter penalties for those with criminal records and those who re-enter after a previous removal order. **As of right now, we do not know whether the incoming administration will be specifically looking to make changes to survivor-based immigration relief.** Nonetheless, staying informed about the national and local law enforcement policies and practices is essential to safety planning with survivors of gender-based violence (domestic violence, sexual assault, trafficking). If you are a victim service provider who works with immigrants and want more information about local law enforcement immigration policies and practices, please contact Domestic and Sexual Violence Coalitions in your state.³

I. INCREASED ENFORCEMENT EFFORTS

Q. I've heard about President-Elect Trump's plan for increased immigration enforcement. What does this mean for survivors of gender-based violence who are undocumented?

A. As of right now, there is existing Immigration and Customs Enforcement (ICE) guidance regarding prosecutorial discretion for victims of domestic violence and sexual assault as well as those who are involved in legal cases about the protection of their civil rights and liberties.⁴ It is not clear whether this guidance will be repealed or replaced by the new

administration.⁵ It is still unknown if there will be changes in how cases involving victims that are ultimately denied will be treated, so those who are applying for victim protections should be advised regarding the possible risk of referral for removal so they can make informed decisions when choosing to apply, especially important for those with a criminal history or a history of immigration violations. It is important to become familiar with the existing guidance and protections for victims encountered by ICE, so you can advocate for your clients to help document instances where ICE is not abiding by existing policy.⁶ To share a story, click here: bit.ly/ASISTA_ICESurvey. We will keep you posted if there are any changes to existing enforcement guidance and its impact on crime victims.

Q. President-Elect Trump has said he wants to end so-called “Sanctuary” Cities. What does this mean and what does it mean for survivors?

A. “Sanctuary” cities is a term used to describe places with formal or informal community policing policies which limit local police cooperation with federal immigration authorities. These limits are set for many reasons, including the desire to increase public safety by not eroding the trust of immigrant communities.⁷ For example, many jurisdictions do not ask about a victim’s immigration status when reporting a crime in an effort to encourage community trust and reporting of crimes. These policies also are put in place, in part, because of concerns about the legality of federal immigration detainers. An immigration detainer is a request to the jail to help transfer someone to ICE custody, but in many cases this kind of detention is illegal, and local jails will refuse to do it. However, this does not necessarily mean that ICE would not come and detain someone just as they are released from jail. Different “sanctuary city” policies have very different levels of protections for immigrants.

President-elect Trump as well as his advisors have said they want to withdraw federal funding of these “sanctuary” cities to coerce local law enforcement to participate in enforcing federal immigration laws.⁸ City officials in [Seattle](#), [Denver](#), [Santa Fe](#), [Chicago](#), [New York](#), [San Francisco](#), and [Los Angeles](#), among others, have been steadfast in their commitment to offering emergency, life-saving services to all residents, including immigrants. Sanctuary cities do not have the power to stop ICE from arresting and detaining people. They only have the power to offer their own services to immigrants or to restrict the extent of their assistance to federal immigration agents. The de-funding of cities that pledge basic protection of immigrants’ safety and well-being may have a tremendous impact on survivors. Forcing state and local law enforcement agencies to enforce federal immigration law will negatively impact survivors’ trust in law enforcement and reduce their reporting of criminal activity.

Practice Pointer: Advocates should stay informed about the policies and practices of their local and state law enforcement agencies to best advise clients on their risks. If you're not sure about your local law enforcement's immigration related policies and practices, please contact the Domestic and Sexual Violence Coalitions or immigrant rights organizations in your state.⁹ Clients who have pending immigration cases should carry contact information (business cards) for their attorney/representative at all times, in case they are detained by law enforcement.

Q. Will there be a change to ICE's policy regarding enforcement actions in sensitive locations, like shelters?

A. Currently, the Department of Homeland Security (DHS) has limited the authority of its officers to engage in enforcement actions at sensitive locations.¹⁰ This means that, ICE and Custom and Border Protection (CBP) officers are prohibited, with certain exceptions, from conducting enforcement activities at or near "sensitive locations," including hospitals, schools, places of worship, and during public religious ceremonies and public demonstrations or rallies. While these memos do not list domestic violence shelters/housing and rape crisis centers as "sensitive locations," a 2007 memo¹¹ encouraged ICE officers to use prosecutorial discretion when encountering victims of domestic violence and sexual assault, and discouraged officers from making arrests at domestic violence shelters, rape treatment centers, and other sensitive locations enumerated in INA § 239(e).¹²

It is not clear whether the incoming administration intends on withdrawing these ICE prohibitions. If the administration does in fact withdraw these memoranda and/or issues superseding memoranda, ICE will likely be free to engage in enforcement actions at these sensitive locations. However, VAWA 2005 created special enforcement provisions codified in INA § 239(e), which provide that ICE is prohibited from engaging in enforcement actions at locations like domestic violence shelters, victim service providers, family justice centers and courthouses (if the victim is there for a victim related matter) if the information regarding the location is provided by an abuser.¹³

In addition to potential changes to policy on sensitive locations, the incoming administration may [also expand the use of expedited removal procedures](#), so that it does not only occur at the border, points of entry, and border checkpoints set up within a certain distance of a border. Since it is likely that there will be an increased effort to stop and deport non-citizens, it is even more important that advocates working with survivors get help in figuring out whether they qualify for immigration status.

Practice Pointer: *If you manage or provide services in domestic violence shelter/housing or a rape crisis center and are uncertain about when you are prohibited from permitting or required to permit ICE, CBP or local/state law enforcement onto the premises of your facilities, please contact the Domestic and Sexual Violence Coalitions in your state. The Violence Against Women Act (VAWA), the Family Violence Prevention and Services Act (FVPSA), and other state confidentiality laws continue to prohibit domestic and sexual violence victim services providers from disclosing the personally identifying information of those who have requested or received services (such as the service of staying in a domestic violence shelter/housing) without informed consent from service recipients to release information, court mandate, or other specific state law exceptions.*

Q: Will contacting law enforcement to report crimes or to get a certification of helpfulness in investigating or prosecuting a crime be more dangerous now?

A: It depends. Contacting law enforcement could be more dangerous for a variety of reasons, depending on how they interpret and implement any new immigration-related directives. It is important to be aware of potential anti-immigrant bias, even if you think your allies and system partners are immigrant-friendly, since actions by an individual officer can result in your clients being apprehended by ICE very quickly.

In a future administration, there will likely be an increase in agreements between local law enforcement and ICE encouraging local law enforcement to help identify those who are undocumented and turn them over to ICE for swift deportation. The rhetoric from the campaign is extremely problematic for immigrant survivors, as it may deter survivors from coming forward to report abuse and access services.

Practice Pointers: *Advocates (domestic and sexual violence, in particular) and attorneys should always check any likely system response before sending a noncitizen client alone to local law enforcement for a U visa certification. If you are not already working in partnership with allies in other systems, now is the time to create those alliances. They will help you identify, and maybe change, local law enforcement and ICE practices that harm noncitizen survivors. Stay in touch with a national organization, such as the agencies that collaborated on this Q&A or the Domestic and Sexual Violence Coalitions in your state.*

It's even more important now that you develop relationships with your local decision makers, including at local ICE and CBP offices. DV and SA organizations, in particular, should be involved in these efforts, offering to educate District Officials about violence against immigrant women and children and how your agencies work with survivors. If you are unsure about how or if to engage with ICE and CBP on immigrant survivor related

*policies and practices, please contact the Domestic and Sexual Violence Coalitions or immigrant rights organizations in your state.*¹⁴

II. DEFERRED ACTION, PENDING REGULATIONS, & WAITLISTS

Q. If President-Elect Trump cancels Deferred Action for Childhood Arrivals (DACA), what does that mean for VAWA self-petitioners, those on the U waitlist with deferred action or eligible T visa applicants?

A. Deferred Action is a form of prosecutorial discretion that has been around for over 40 years.¹⁵ The next administration can cancel Deferred Action in the context of DACA easily because DACA was created by executive action. By contrast, the issuance of Deferred Action to approved VAWA self-petitioners is provided **by statute**.¹⁶ In the U and T visa context, Deferred Action is granted to those on the waitlist pursuant to regulations.¹⁷ While the Trump administration could conceivably make changes to the regulations, this would take time and may require notice and comment. At this point, challenging Deferred Action in the context of VAWA, U and T visas does not appear to be a priority, and any efforts to undo the process that has been around for the last 16 years will be stridently opposed. In addition, some DACA recipients may be eligible for VAWA, T, U, Special Immigrant Juvenile Status, or asylum status, and it is advisable to screen for these remedies as soon as possible. Aside from the issue of deferred action, it is possible that a new administration may de-prioritize the processing of cases involving victims, increase scrutiny of applicants and their evidence, and make the processing of these cases more burdensome altogether.

Practice Pointer: For a quick guide to immigration-related screening questions for advocates and attorneys See IRLC Client Intake Form and Notes available here: <http://bit.ly/ILRCclientIntakeAndNotes>.¹⁸

Q: Are the updates to the T and U visa regulations going to be passed before January? What about a parole policy for those on the U visa waitlist?

A: The status of pending policy and regulatory updates is still up in the air, though the T visa regulations may be closer to being final.¹⁹ It is unclear at this point whether we'll have any updates regarding the parole policy for U waitlisted clients before January 2017. USCIS has said to expect the streamlined parole policy released sometime in FY 2017. In the meantime, advocates can continue to request parole through the traditional process with the Humanitarian Affairs Bureau.²⁰

III. PROTECTING GENDER-BASED VIOLENCE ASYLUM SEEKERS

Q: How will Trump policies affect survivors of gender-based violence seeking asylum?

A. On August 26, 2014, the Board of Immigration Appeals (the nation's highest immigration tribunal) issued a precedential decision, *Matter of A-R-C-G-*, recognizing domestic violence as a basis for asylum.²¹ Since then, we have seen a marked increase in grants of asylum based on gender-based violence. However, attorneys have experienced inconsistent success, particularly with cases that do not as closely fit the facts in *A-R-C-G-*, such as those in which the woman was not married to her abuser or was in a forced relationship with a gang member.

Asylum protection is codified in law and cannot be eliminated without legislative action. There are also good precedent decisions, like *A-R-C-G-*, interpreting the law and it would take time and process to backpedal from these. Nevertheless, under the new administration, there may be increasing pressure for adjudicators to deny asylum claims based on violence against women (and across the board). Agency guidance and eventually agency precedent decisions on asylum law may become more restrictive. In some jurisdictions, cases are beginning to move through the process more quickly due to the hiring of new asylum officers and immigration judges. Attorneys and advocates whose clients are prepared to move forward may wish to contact the relevant office or court and request expedited adjudication.

If heightened enforcement and detention at the border are carried out as promised, these policies will likely curtail access to asylum for newly-arrived asylum seekers. More women who may be eligible for immigration relief may be deported without the opportunity to ask for protection; others may enter the US but be afraid to present themselves to seek asylum. It will be all the more important for attorneys and advocates to provide services to survivors to ensure that they have complete information and robust advice, and that their asylum claims are presented as strongly as possible. Feel free to contact the Center for Gender & Refugee Studies for assistance with your case.²²

Practice Pointer: Attorneys representing survivors of gender-based violence who are not in deportation (“removal”) proceedings, do not have pending applications with DHS, and are considering an affirmative asylum application should, even now more than ever, carefully advise their clients on the risks inherent in their particular cases (e.g. previous contact with DHS, criminal issues) as well as the overall heightened risk of affirmatively identifying themselves to DHS. Where possible, advocates should offer to use their office

address on immigration applications filed on behalf of their clients, or to assist clients in getting a PO Box to avoid disclosing their address to DHS.

¹ This document was prepared by [Americans for Immigrant Justice](#), [Asian Pacific Institute on Gender-Based Violence](#), [ASISTA Immigration Assistance](#), [Casa de Esperanza: National Latin@ Network](#); [Center for Gender & Refugee Studies](#), [Freedom Network USA](#), [Immigrant Legal Resource Center](#), [Immigration Center for Women and Children \(ICWC\)](#), Julie Marzouk Assistant Clinical Professor, Dale E. Fowler School of Law at Chapman University, [Minnesota Coalition for Battered Women](#), [National Immigrant Justice Center](#), [Tahirih Justice Center](#), [We Belong Together](#).

² For a full list of items from his 100 day plan, See Donald J. Trump Contract with the American Voter, Available here: <http://www.pbs.org/newshour/runtdown/president-elect-donald-trumps-plan-first-100-days/#document/p1>

³ To contact your state Domestic and Sexual Violence Coalition, you can find their contact information is available here: <https://www.justice.gov/ovw/local-resources>.

⁴ ICE Memoranda “Prosecutorial Discretion: Certain Victim Witnesses and Plaintiffs” (June 17, 2011); Available here: <http://bit.ly/ICEVictimWitnessMemo2011>

⁵ Despite this guidance, there have been instances of ICE proceeding with the removal of U visa applicants while their applications were pending even in this administration.

⁶ Including but not limited to ICE Memorandum. “Adjudicating Stay Requests Filed by U nonimmigrant status Applicants.” (September 24, 2009). Available here: <http://bit.ly/2009ICEMemoStaysforUvisaApplicants> ICE Memoranda for OPLA Attorneys, “ICE Guidance on U Nonimmigrant Status Applicants in Removal Proceedings or with Final Orders of Deportation and Removal. (September 25, 2009), Available here: <http://bit.ly/ICE2009VincentMemo>. Parental Interests Directive Memoranda. ICE Memoranda. “Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (August 20, 2010). Available here: <http://bit.ly/ICE2010MemoPendingApplications> ICE Directive on the Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (August 2013). Available here: <http://bit.ly/ICEParentalInterestDirective>

⁷ American Immigration Council. Fact Sheet: “Sanctuary Cities , Trust Act and Community Policing Explained.” Available here: <https://www.americanimmigrationcouncil.org/research/sanctuary-cities-trust-acts-and-community-policing-explained>; see also ILRC, “Legal Analysis of Immigration Detainers,” available at <https://www.ilrc.org/legal-analysis-immigration-detainers>

⁸ For more information on the types of federal funding that could be cut, see ILRC, “Fact Sheet on Sanctuary Cities and Public Funding,” available at <https://www.ilrc.org/fact-sheet-sanctuary-policies-and-federal-funding>.

⁹ For a list of immigration service providers, consult Immigration Advocates Network’s Legal Directory. Available here: <https://www.immigrationadvocates.org/nonprofit/legaldirectory/>

¹⁰ Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, “Enforcement Actions at or Focused on Sensitive Locations” 10029.2 (October 24, 2011); Available here: <http://bit.ly/ICESensitiveLocationMemo>. Memorandum from Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement, “Field Guidance on Enforcement Actions or Investigative Activities At or Near Sensitive Community Locations” 10029.1 (July 3, 2008) Available here: <http://bit.ly/ICEFieldGuidanceSensitiveLocations> ; Memorandum from Marcy M. Forman, Director, Office of Investigations, “Enforcement Actions at Schools” (December 26, 2007); Memorandum from James A. Puleo, Immigration and Naturalization Service (INS) Acting Associate Commissioner, “Enforcement Activities at Schools. Places of Worship. or at funerals or other religious ceremonies” HQ 807-P (May 17, 1993).

¹¹ Memorandum from John P. Torres, Office of Detention and Removal Operations & Marcy M. Forman, Office of Investigations on Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 (January 22, 2007). Available at: <https://www.ice.gov/doclib/foia/prosecutorial-discretion/vawa2005.pdf>

¹² INA § 239(e) Certification of Compliance With Restrictions on Disclosure- (1) IN GENERAL- In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1367) have been complied with. (2) LOCATIONS- The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien 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 alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) 3/ of section 101(a)(15) .

¹³ See Immigration and Customs Enforcement. “Interim Guidance Relating to Officer Procedure Following Enactment of VA W A 2005” January 22, 2007. Available at: <http://bit.ly/ICEMemoVAWA2005Confidentiality>

¹⁴ For a list of immigration service providers, consult Immigration Advocates Network’s Legal Directory. Available here: <https://www.immigrationadvocates.org/nonprofit/legaldirectory/> To contact your state Domestic and Sexual Violence Coalition, you can find their contact information is available here: <https://www.justice.gov/ovw/local-resources>.

¹⁵ [xii] National Immigration Forum. “Deferred Action Basics” Available at:

<http://immigrationforum.org/blog/deferred-action-basics/>

¹⁶ INA 204(a)(1)(D)(i)(II).

¹⁷ 8 CFR 214.14(d)(2); 8 CFR 213.11(m)(2). Though in the T visa context, the annual cap has never been met; thus to date there has not yet been a T visa waitlist which would necessitate deferred action.

¹⁸ [xiv] For more resources and screening tools, visit Immigration Advocates Network at

<https://www.immigrationadvocates.org/>.

¹⁹ The Office of Management and Budget website has an interim final rule date of January 2017:

<http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=1615-AA59>

²⁰ For additional resources on using parole for waitlisted U visa holders, visit

<http://bit.ly/ParoleAdvisoryDec2015>.

²¹ *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014). Available at:

<https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/3811.pdf>

²² To request technical assistance on a gender-based asylum case from the Center for Gender and Refugee Studies, visit: <http://cgrs.uchastings.edu/request-assistance/requesting-assistance-cgrs>