

MEMORANDUM

To: Rafael Madan, General Counsel, Office of Justice Programs, U.S. Department of Justice; Joye Frost, Director, Office for Victims of Crime, U.S. Department of Justice

CC: Deena Jang, Director, Federal Coordination and Compliance Section, U.S. Department of Justice

From: Leslye E. Orloff, Director; Benish Anver, Policy Attorney; and Robert D. Goodis, Law and Policy Intern, National Immigrant Women's Advocacy Project, American University, Washington College of Law

Date: October 1, 2015

Re: State Restrictions on Immigrant Access to VOCA Compensation Funds

I. Introduction

Alabama and Nevada are the only two states in the United States that have explicitly imposed regulatory and/or statutory restrictions that limit or prohibit immigrant access to Victims of Crime Act (VOCA) compensation. The National Immigrant Women's Advocacy Project (NIWAP) is aware of one additional state, Indiana that explored imposing but, to date, has not imposed a similar restriction on immigrant crime victim access to crime victim compensation.

Although immigrant restrictions on access to VOCA funded victim compensation has only been imposed in two states, crime victim assistance experts have found that immigrant crime victims are having problems accessing VOCA funded victim compensation "all over the country" with language access and resource limitations of programs serving crime victims as contributing factors.¹ The groundbreaking Vision 21 Report published by the Office of Victims of Crime found that the lack of legal immigration status is a contributing factor to the fact that 42% of crime victims never report serious violent crime to law enforcement.² Vision 21 lists

¹ For example, some information suggests the problems of immigrant access exist "all over the country" but that they may result from resource and language limitations. Testimony of Susan Herman, Executive Director, National Center for Victims of Crime, *Regarding the Victims of Crime Act (VOCA) Fund*, submitted to the House and Senate Subcommittees on Commerce, Justice, State and the Judiciary, Committees on Appropriations (Apr. 11, 2003), available at: [http://www.victimsofcrime.org/media/newsroom/speeches-and-testimony/regarding-the-victims-of-crime-act-\(voca\)-fund](http://www.victimsofcrime.org/media/newsroom/speeches-and-testimony/regarding-the-victims-of-crime-act-(voca)-fund).

² U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, *Vision 21 Transforming Victim Services Final Report Executive Summary & Recommendations* 18 (May 2013) (hereinafter "Vision 21 Report"), ("Additionally undocumented immigrant victims who fear deportation or law enforcement may simply not ask for help. Law in some states that restrict rights and services for undocumented immigrants, even if they are criminally victimized, further complicate the challenges in serving those victims"), available at: http://ovc.ncjrs.gov/vision21/pdfs/Vision21_Report.pdf.

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undocumented immigrant victims among the historically underserved populations of crime victims that face barriers to accessing services and exercising their legal rights.³ The Violence Against Women Act (VAWA) similarly recognizes the vulnerability of immigrant crime victims listing alienage status as one of the factors that places immigrant victims within the VAWA definition of crime victims underserved because of their special needs.⁴

Since VOCA compensation eligibility requires that crime victims make police reports, the vast majority of immigrant crime victims who should be able, as a matter of law, to qualify for VOCA compensation will also qualify for one of the special forms of immigration relief designed to help immigrant crime victims. Many will qualify for protection as victims of domestic violence, elder abuse, or child abuse, abandonment, or neglect to file for immigration relief under VAWA (VAWA self-petitioning, VAWA suspension of deportation, VAWA cancellation of removal) or the Special Immigrant Juvenile Status (SIJS) program. Having made a police report provides helpful, but not required evidence, of crime victimization useful in the victim's immigration case application. Other victims of family violence, sexual assault, human trafficking or other listed crimes who have made police reports should be able to access crime victim compensation in all states. Immigrant victims who make police reports will also legally qualify to pursue crime victimization related immigration relief, including U visas created by VAWA and Trafficking Victims Protection Act (TVPA) protections (continued presence, T visas).

Immigrant victims of domestic violence, sexual assault, and human trafficking who are eligible for, and in the process of, pursuing immigration relief are particularly vulnerable to ongoing victimization and becoming targets of perpetrator retaliation, including witness tampering and obstruction of justice, because of their police reports and cooperation in criminal investigations and prosecutions.⁵ Research conducted by NIWAP has found that a high proportion of immigrant victims pursuing immigration relief through the VAWA and U visa programs continue to reside with their abusers or remain in abusive employment until they receive work authorization.⁶ While victims' cases are pending, many immigrant victims' perpetrators actively try to have victims removed from the United States. Victims also become targets for state and local immigration enforcement actions. Victims with pending VAWA self-petitions and U visa cases become the subject of Department of Homeland Security (DHS) immigration enforcement actions due to traffic stops (VAWA self-petitioners 28.6%; U visa

³ *Id.* at 3.

⁴ 42 U.S.C. 13925(a)(39) (2013).

⁵ See Vision 21 Report at 11 (“Additionally, crime victims who are undocumented immigrants often avoid contact with the criminal justice system for fear of deportation, making them attractive targets for predatory criminals, especially those involved in human trafficking, sexual exploitation, and domestic violence”) (citing Jacob Bucher, Michelle Manasse, and Beth Tarasawa, *Undocumented Victims: An Examination of Crimes Against Undocumented Male Migrant Workers*, 7(2) SOUTHWEST J. OF CRIMINAL JUSTICE 159-79 (2010), available at: [http://swacj.org/swacj/archives/7.2/Bucher%20Article%20\(3\).pdf](http://swacj.org/swacj/archives/7.2/Bucher%20Article%20(3).pdf); see discussion *infra* Part V for data on cooperation with law enforcement and the justice system despite continuing to live with their abusers and experiencing high rates of consistent abuse).

⁶ KRISZTINA SZABO, DAVID STAUFFER, BENISH ANVER, AND LESLYE E. ORLOFF, EARLY ACCESS TO WORK AUTHORIZATION FOR VAWA SELF-PETITIONERS AND U VISA APPLICANTS 3 & 9 (Feb. 12, 2014) (hereinafter “NIWAP Work Authorization Survey”) (Respondents of this survey were service providers in domestic violence, sexual assault, human trafficking, and other victim services programs. 324 respondents from 47 states and 3 U.S. territories reported on approximately 4,800 cases with filed and/or pending between January 2011 and September 2013), available at: <http://niwap.org/reports/Early-Access-to-Work-Authorization.pdf>

applicants 30.1%) and to the victim being reported to DHS by the abuser or the abusers' family members (VAWA self-petitioners 38.3%; U visa applicants 26.7%).⁷

Despite the danger and fear of removal, a significant proportion of immigrant crime victims who file police reports and who have filed VAWA or U visa immigration cases turn to the justice system for protection when they are subjected to future incidents of crime victimization. Both U visa applicants (25.2%) and VAWA self-petitioners (36.2%) continue filing file police reports when subject to ongoing abuse.⁸ Almost half of VAWA self-petitioners (47.6%) and 43.7% of U visa applicants seek protection orders while their immigration cases are pending and another 15.4% of VAWA self-petitioners and 20.7% of U visa victims wait to file protection orders until after their immigration cases are approved.⁹ Additionally, over 70% of U visa victims continue providing ongoing helpfulness in criminal investigations and prosecutions after filing their U visa case.¹⁰

Ensuring access to victim compensation for immigrant crime victims fulfills one of the central tenants of the VOCA crime victim compensation program, providing services and support needed to help crime victims heal and remain safe when they summon the courage to come forward and report crime and cooperate in the detection, investigation, prosecution, conviction and/or sentencing of criminal perpetrators.¹¹ The access to the types of assistance VOCA compensation provides is particularly helpful for immigrant crime victims who are not eligible to access physical or mental health care through the state and federal health care exchanges and often have little access to economic resources independent from their abusive spouses, intimate partners or employers. Immigrant crime victims need access to health care, mental health treatment and counseling, funds to pay for repair or replacement of property, documents, and payment of costs associated with or needed to facilitate the victims attendance at meetings with police and prosecutors and at court hearings.

When states prohibit payment of crime victim compensation to large groups of immigrant crime victims, even the group of immigrant victims who meet the states' narrow definition of "foreign born", persons who qualify¹² often do not receive VOCA compensation. The research in

⁷ *Id.* at 26.

⁸ *Id.* at 29.

⁹ *Id.* at 29-30.

¹⁰ *Id.* at 29 (Finding a 73.1% cooperation rate). *See also*, LESLYE E. ORLOFF, LEVI WOLBERG AND BENISH ANVER, U VISA VICTIMS AND LAWFUL PERMANENT RESIDENCY 5 (Sept. 6, 2012) (survey found that 70% of U visa applicants and U visa holders were requested to and continued cooperating with law enforcement conducting criminal investigations and prosecutions. An additional 29.45% wanted to provide ongoing cooperation but were not requested to do so because their cooperation was not requested for a variety of reasons. These include: a warrant was issued for the perpetrator's arrest, but the perpetrator had not been arrested; the perpetrator of a sexual assault off a had not yet been identified; there were multiple victims and the prosecutor chose not to call the U visa applicant who had cooperated in the criminal investigation as a witness at trial), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/education-financial-aid/U-Visas-and-Lawful-Permanent-Residency.pdf>.

¹¹ 42 U.S.C. § 10602(d)(2); *see also* Cecilia Olavarria, Amanda Baran, Leslye Orloff, & Grace Huang, *Access to Programs and Services That Can Help Battered Immigrants*, in BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS 12-13 (2013), available at: http://niwaplibrary.wcl.american.edu/public-benefits/unrestricted-benefits/BB_4.1-Access_to_Services_that_Help_Battered_Immigrants-2006-MANUAL-BB.pdf

¹² In both Nevada and Alabama, the following groups of immigrant crime victims who make police reports are not eligible for victim compensation; victims who are: undocumented, who have pending VAWA, TVPA, or SIJS

Alabama and Nevada conducted for this report suggests that lack of clear information and direction about what is legally available to which immigrant crime victims creates confusion among service providers that results in immigrant victims who are eligible for crime victim compensation not receiving it. Issuance of federal regulations providing clarity and direction to the states and the field that all immigrant crime victims who meet non-immigration related eligibility criteria can receive VOCA funded victim compensation without regard to the victims' immigration status at the time of victimization is greatly needed.

Such regulations would help provide critical economic support and improved access to health care needs related to the crime victimization for immigrant crime victims who are undocumented when they are targeted by crime perpetrators. It will also facilitate and support the legislative purpose of the VAWA, T and U visa, and SIJS programs in encouraging immigrants who are victims of crime committed against them in the United States to come forward, report crime, and cooperate in criminal investigations and prosecutions needed to hold perpetrators accountable making communities safer.

This memorandum will provide a discussion of the restrictions in Alabama and Nevada on immigrant crime victim access to VOCA funded compensation. The form and substance of these restrictions, as well as their effects in the field will be discussed. Since both the Nevada statute and the Alabama regulation limit access to victim compensation to immigrants who lawfully reside or are lawfully present in the United States, the first section of this memorandum sets out the federal definitions of the terms lawfully residing and lawful presence. These terms are defined by various federal agencies and are used most often in the context of access to health care.

The final section of this memorandum will discuss recommendations that Office of Victims of Crime and the Office of Justice Programs issue regulations requiring that VOCA compensation funds be available to all crime victims without regard to the crime victim's immigration status at the time of the crime victimization or thereafter and that VOCA administrators and all victim services agencies receiving VOCA funds receive training on the new regulations.

II. Federal Law Definitions of *Lawfully Residing* and *Lawful Presence*

The Affordable Care Act¹³ makes “lawfully present” immigrants eligible for health care insurance coverage through the Health Insurance Marketplace.¹⁴ The term “lawfully present” has been defined by the U.S. Department of Health and Human Services to include a wide range of immigrants.¹⁵ This list includes but is not limited to and is much broader than “qualified

immigration cases, and immigrants who do not otherwise fall within the narrow list of foreign born persons who qualify for VOCA compensation.

¹³ Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 § 1411(a)(1) (2010).

¹⁴ See “Coverage for lawfully present immigrants” at <http://www.healthcare.gov/immigrants/lawfully-present-immigrants>

¹⁵ This list of ACA eligible lawfully present immigrants is substantially similar to the list of immigrants who fall within the definition of “lawfully residing” immigrants that states may elect to provide access to prenatal care and/or child health care without imposing a 5 year waiting period for access to health care. 31 U.S. jurisdictions

immigrants” as defined by PRWORA. The categories of immigrants defined under federal law to be lawfully present include:¹⁶

- Qualified non-citizens
 - Lawful permanent residents;¹⁷
 - Asylees and Refugees;
 - Cuban/Haitian entrants and immigrants paroled into the U.S. for at least one year;
 - Conditional entrants granted before 1980;
 - Persons granted withholding of deportation;
 - Member of a federally recognized Indian tribe or American Indian born in Canada;
 - Battered immigrant VAWA spouses, children or parents;¹⁸ and
 - Victims of human trafficking and her or her spouse, child, sibling,¹⁹ or parent including persons with a pending application for a trafficking victim T visa¹⁹

- Humanitarian forms of immigration relief:
 - Temporary Protected Status (TPS);²⁰
 - Special Immigrant Juvenile Status;²¹
 - Asylum applicants;²²
 - Trafficking victims with continued presence or T visa applications filed;²³ and

have elected the option to remove this waiting period. Lawfully residing under a number of federal public benefits programs means an individual is lawfully present for purposes of the Child Health Insurance Program Reauthorization Act, the Supplemental Nutrition Assistance Program, and the Social Security Act regulations. *See* Memorandum from Centers for Medicare & Medicaid Services to State Health Officials, *Medicaid and CHIP Coverage of “Lawfully Residing” Children and Pregnant Women 2* (Jul. 1, 2010) (“[T]he terms “lawfully residing” and “lawfully present” are broader than the term “qualified alien” in section 431 of PRWORA (8 U.S.C. § 1641) with respect to immigration status (the term “qualified alien” does not include residence-based criteria.”), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/health-care/CMS%20Lawfully%20Residing%20Medicaid%20and%20CHIP%207.1.10.pdf>

¹⁶ <http://www.healthcare.gov/immigrants/lawfully-present-immigrants>

¹⁷ This category includes conditional permanent residents who are also green card holders. From a crime victim perspective, this category includes battered spouse waiver eligible battered immigrants.

¹⁸ VAWA self-petitioners are an example of one group of qualified immigrants who are undocumented at the time of receiving qualified immigrant status. VAWA self-petitioners under Alabama’s interpretation of lawful presence would be denied victim compensation for all incidents of domestic violence occurring prior to the victim’s filing for VAWA immigration protection and receipt of a prima facie determination in their VAWA self-petitioning case. VAWA cancellation of removal and VAWA suspension of deportation applicant battered immigrants seldom receive prima facie determinations from immigration judges and thus must wait until final adjudication of their VAWA cancellation or suspension application to be considered qualified immigrants.

¹⁹ This is another example of a crime victim who is both a qualified immigrant and lawfully present who would be denied victim compensation for trafficking crimes occurring prior to the victim’s application for a T visa and receipt of a bona fide determination in the victim’s T visa case.

²⁰ Includes applicants who have received work authorization, but who are undocumented until they are granted TPS.

²¹ Abused, abandoned, or neglected immigrant children applying for SIJS are lawfully present upon filing their application for SIJS although they are undocumented until they are granted SIJS status and lawful permanent residency based on the approved SIJS application.

²² Asylum applicants who receive work authorization or are under age 14 are lawfully present once their asylum application has been pending for at least 180 days.

²³ Trafficking victims are lawfully present once they file their T visa application or are granted continued presence.

- Persons granted withholding of deportation or removal under immigration laws or the Convention against Torture
- Non-immigrant visa holders:
 - Work visas;
 - Student visas;
 - U visas;
 - T visas;
 - Diplomatic visas;
 - International organization worker visas;
 - Religious worker visa; and
 - Citizens of Micronesia, the Marshall Islands and Palau
- Legal Status conferred by other immigration laws:
 - Deferred Action Status;²⁴
 - Deferred Enforced Departure;
 - Lawful temporary resident;
 - LIFE Act;
 - Family Unity;
 - Resident of American Samoa;
 - Administrative order staying removal issued by the Department of Homeland Security;
 - Registry applicants;²⁵
 - Order of supervision;²⁶
 - Legalization applicants under the LIFE Act;²⁷ and
 - Applicants for cancellation or removal or suspension of deportation²⁸

III. VOCA Compensation Restrictions in Nevada

The Nevada Victims of Crime Program (“NVOCP”) was established by the Nevada Legislature in 1969 under Nevada Revised Statutes Title 16, Correctional Institutions. The NVOCP provides and oversees victim assistance and victim compensation in the state. While current state laws do not completely prohibit immigrant victim access to victim assistance, Nevada Revised Statute (N.R.S.) 217.220 severely limits the circumstances in which an award of victim compensation may be made. Prohibiting access to victim compensation when a victim “[w]as not a citizen of the United States or was not lawfully entitled to reside in the United States at the time the incident upon which the claim is based occurred or the victim is unable to provide

²⁴ Except Deferred Action for Childhood Arrivals is not an eligible immigration status for health insurance applications.

²⁵ Are lawfully present once they receive work authorization from DHS, although undocumented until case is finally adjudicated.

²⁶ Are lawfully present once they receive work authorization from DHS, although undocumented until case is finally adjudicated.

²⁷ Are lawfully present once they receive work authorization from DHS, although undocumented until case is finally adjudicated.

²⁸ Are lawfully present once they receive work authorization from DHS, although undocumented until case is finally adjudicated. This category includes battered immigrant VAWA applicants who abused spouses and children.

proof that the victim was a citizen of the United States or was lawfully entitled to reside in the United States at that time.”²⁹

The statute, in its current form, was amended approximately 18 times since it was first enacted in 1969. A variation of the language regarding citizenship and “lawfully entitled to reside” was first added in 1997 and pre-1997 versions and required proof of residency in Nevada. Only two published court cases reference this Nevada statute governing crime victim compensation and neither case addresses citizenship, residency, or lawful presence. In our research, we were unable to locate a statutory definition for the terms used in N.R.S. 217.220, or an interpreting regulation. NIWAP’s research and conversations with victim advocates, attorneys, police, and prosecutors in Nevada found that, as the Nevada statute is being implemented in practice, only those victims who were citizens, lawful permanent residents, or qualified immigrants at the time of the crime victimization receive crime victim compensation in Nevada. The following categories of immigrant crime victims are significant examples of immigrants who are not eligible for crime victim’s compensation in Nevada:

- Trafficking victims who have been granted continued presence;³⁰
- U visa immigrant crime victims who received certifications from law enforcement, prosecutors, or courts and have filed U visa cases who are awaiting approval and visa availability;³¹
- Abused, abandoned, or neglected immigrant children with pending cases for Special Immigrant Juvenile Status;
- VAWA cancellation of removal applicants who did not obtain a prima facie determination from an immigration judge;³²
- Immigrants with legal work, student, diplomatic, exchange visitor, business related, and other non-immigrant visas; and
- Undocumented immigrants.

The approach taken by the Nevada statute requires that each of these groups of crime victims be lawfully present at the time of victimization to qualify for crime victim’s compensation in Nevada. However, Nevada imposes its own definition of lawfully present that excludes many immigrants who are considered lawfully present under federal immigration and health care laws, including the Affordable Care Act; examples include: trafficking victims with continued presence, immigrant children with pending SIJS applications, U visa cases that are wait list approved, and immigrants who have received legal work, student, diplomatic, religious or other

²⁹ N.R.S. 217.220(1)(b).

³⁰ There are some reported cases in which trafficking victims with continued presence may be receiving some access to victim compensation in Nevada, but this access does not appear to be consistent or statewide.

³¹ The current backlog in U visa adjudications is 12-18 months and cases that will be approved once U visas become available are placed on a waitlist that is currently approximately an additional 2+ years.

³² Although there is a policy that has been in place since 1997 setting out the process for immigration judges to use in issuing prima facie determinations, the process is seldom used. See Memorandum from Michael J. Creppy, Chief Immigration Judge, Office of Chief Immigration Judge, Executive Office for Immigration Review, Department of Justice, to All Assistant Chief Immigration Judges, All Immigration Judges, All Court Administrators, and All Support Staff, *Operating Policy and Procedure Memorandum 97-9: Motions for “Prima Facie” Determination and Verification Requests for Battered Spouses and Children* (1997), available at: http://iwp.legalmomentum.org/immigration/vawa-self-petition-and-cancellation/government-memoranda-and-factsheets/VAWA_EOIR%20Prima%20Facie%20Determination.pdf

non-immigrant visas. All of these legally present immigrants are not considered lawfully present under Nevada law and are denied victim compensation in Nevada.

NIWAP's field research³³ on VOCA found some significant confusion among victims' advocates, assistance providers and the VOCA compensation administrator's office in Nevada. Generally, survey respondents in Nevada indicated strict adherence to the current language of N.R.S. 217.220. However, when asked which immigrants could receive crime victim compensation in Nevada, only two (2) of the 16 respondents correctly identified the list of immigrant crime victims in the state of Nevada that qualified for crime victim compensation.

IV. VOCA Compensation Restrictions in Alabama

The Alabama Crime Victims Compensation Commission ("ACVCC") was established by the Alabama Legislature in 1984 under Alabama Code Title 15, Criminal Procedure. Like the NVOCP in Nevada, the ACVCC provides and oversees victim assistance and victim compensation in Alabama. Under state law, the ACVCC is an administrative agency with rulemaking and regulatory authority.³⁴ The Alabama Code does not include specificity regarding individual crime victim eligibility for victim compensation. However, the ACVCC has adopted regulations setting eligibility criteria codified in the Alabama Administrative Code.³⁵ Under the ACVCC's regulations, eligibility for victim compensation requires that "[t]he victim's presence in the United States of America must be lawful," and failure within the requested time to provide any acceptable proof of immigrant eligibility as enumerated in the regulation "shall result in the non-approval of the compensation claim."³⁶

The regulation governing eligibility was first issued in 1987 and subsequently amended three times before being repealed and replaced in 2004. The regulation has been amended approximately nine times since 2004. Each version of the crime victim compensation regulation since 2004 has required lawful presence, but no version of the regulation has defined this phrase. The Alabama regulation, on its face, appears to establish exceptions to the lawful presence requirement potentially allowing the full range of immigrants lawfully present as defined DHS and Health and Human Services' (HHS) implementation of the ACA to be eligible. However, when each exception is analyzed, it is clear that the exceptions apply to only a small group of immigrant survivors and some "exceptions" effectively apply to none at all. To understand which limited groups of immigrants qualify for crime victim compensation under current Alabama law, these exceptions need to be read in conjunction with the District Court case discussed in detailed below. An analysis of the extent to which each of the exceptions in the Alabama regulations provides access to victim compensation for immigrant crime victims in light of the District Court's ruling follows the discussion of the case.

³³ As part of this research into state VOCA restrictions, legal intern/researcher Robert Goodis distributed a survey to advocates, attorneys, law enforcement agencies, courts, assistance providers, state agencies, and others in Nevada and Alabama.

³⁴ Statutorily authorized powers and duties of the Commission include the power to "[a]dopt rules and regulations as may be necessary or desirable to expedite the administration of the affairs of the commission not inconsistent with this article." Ala. Code § 15-23-5(14).

³⁵ See Ala. Admin. Code r. 262-X-4 and r. 262-X-4-.02

³⁶ *Id.* at r. 262-X-4-.02(11) and (13).

Unlike Nevada, where the restriction on immigrant access to VOCA crime victim compensation funds is statutory, Alabama’s restriction was created in the state’s implementing regulations and these regulations have been more limited than required by the text of the legislation as the result of litigation. Bernarda Uriostegui, a U visa applicant and recipient, filed suit against ACVCC after the Commission denied her victim compensation application, citing that she was “an illegal alien.”³⁷ Uriostegui applied for victim compensation after being shot three times during an attempted home-invasion robbery. The ACVCC sent a letter to Uriostegui notifying her that the application was incomplete because she had failed to provide a Social Security Number.³⁸ Uriostegui responded to the ACVCC letter by that she was lawfully present, that she had filed and was in the process of obtaining a U visa, but had not yet received immigration documentation sufficient to apply for and receive a social security number.³⁹ USCIS granted Uriostegui’s U visa application awarding her a U visa and the ACVCC denied her victim compensation approximately four months later. Uriostegui unsuccessfully appealed the denial administratively with the ACVCC, and then filed an appeal of the denial in federal court.

The ACVCC made one primary substantive argument in court: that,

because [the Commission] received sixty percent of its funding from a federal grant, the Commission by federal law (the ACVCC sought to rely upon Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) as amended, 8 U.S.C. §§ 1601 through 1646), was precluded from granting victim compensation claims made by illegal immigrants because such claimants are not *qualified immigrants* as defined by PRWORA.⁴⁰

³⁷ *Uriostegui v. Alabama Crime Victims Compensation Commission*, No. 2:10-cv-1265-PWG (N.D. Ala. Nov. 16, 2010) (Magistrate Judge’s Report & Recommendation); *Uriostegui v. Alabama Crime Victims Compensation*, No. 2:10-CV-1265-LSC (N.D. Ala. Jan. 12, 2011) (memorandum decision).

³⁸ Our survey of advocates in Alabama revealed that this is the most common point at which immigrant applicants for victim compensation run into difficulties obtaining compensation.

³⁹ U visa applicant crime victims under public benefits laws are considered Persons Residing Under Color of Law (PRUCOL) once their U visa application has been filed. PRUCOL allows some U visa applicants in some states under state law to receive state funded public benefits. For a state by state map of which states have elected to provide which state funded public benefits to which groups of immigrant crime victims and other immigrants usually pregnant women and children go to http://niwap.org/niwap_main/benefitsmap/. U visa applicants become lawfully present under federal policies implementing the Affordable Care Act when they receive conditional waitlist approval of their U visa application which includes a grant of deferred action status by the Department of Homeland Security. See Memorandum from Centers for Medicare & Medicaid Services to State Health Officials, *Medicaid and CHIP Coverage of “Lawfully Residing” Children and Pregnant Women 2* (Jul. 1, 2010) (“[T]he terms “lawfully residing” and “lawfully present” are broader than the term “qualified alien” in section 431 of PRWORA (8 U.S.C. § 1641) with respect to immigration status (the term “qualified alien” does not include residence-based criteria.”), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/health-care/CMS%20Lawfully%20Residing%20Medicaid%20and%20CHIP%207.1.10.pdf>.

⁴⁰ *Uriostegui* (2010) at 5. In meeting with representatives from OJP and OVC to discuss initial results of this research, it was indicated that states typically received around 30% of their VOCA funding from the federal VOCA Fund. Our initial research showed similar data. See Douglas Evans, *Compensating Victims of Crime* (June 2014) 3, http://www.justicefellowship.org/sites/default/files/Compensating%20Victims%20of%20Crime_John%20Jay_June%202014.pdf (Report published by Research & Evaluation Center, John Jay College of Criminal Justice, City University of New York) (“States receive approximately 37 percent of their victim compensation funds from federal VOCA/CVF funds”). The ACVCC itself indicated to the District Court that 60 percent of its compensation fund is derived from federal funds.

The ACVCC also argued that its decision and interpretation were entitled to deference. While the matter was pending before the District Court, the ACVCC contacted the Office on Victims of Crime (OVC) for clarification of the applicability of PRWORA to VOCA compensation and assistance programs. OVC supplied a detailed response to the ACVCC, explaining the federal government’s analysis of PRWORA. The OVC response described that VOCA compensation is not a “federal public benefit” and is not subject to PRWORA’s immigrant access restrictions. Instead, VOCA compensation is defined by OVC to be *restitution* intended to “restore a person to pre-victimization status” and not a *benefit*, and therefore is not subject to federal public benefit restrictions.⁴¹

While the Court held that ACVCC was not entitled to deference on the issue of whether VOCA programs are federal public benefits within the meaning of PRWORA, the Court also held that the OVC letter explaining the applicability of PRWORA to VOCA programs was entitled to the lesser, nonbinding deference standard established in *Skidmore v. Swift & Co.*⁴² and not the level of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁴³ The Court went on to say that the interpretation and explanation in the OVC letter issued by Frost “is not reasonable” and held that VOCA compensation is a public benefit under PRWORA as the ACVCC argued.⁴⁴

Although both *Skidmore* and *Chevron* established judicial deference to federal government agencies’ interpretations of statutes where the language of the statute was in dispute, the level of deference given under each case is distinct. *Skidmore* established more generally applicable principles of deference to an agency’s interpretation of a statute that it enforces that, while being valuable in the court’s analysis, were not binding on the court that was adjudicating ambiguous language within that statute.⁴⁵ In *Chevron*, the Supreme Court created a two prong test to determine when courts should defer to an agency’s interpretation of a statute. First, the court has to determine whether the statutory language in question is ambiguous and applies the plain meaning of the language if it determines that the language is not ambiguous, irrespective of the agency’s interpretation. If the court determines that the statutory language in question is ambiguous, it must defer to the agency’s interpretation so long as it is a reasonable one.⁴⁶ *Chevron* deference, is not, however, a broad grant of deference to federal agency interpretations of ambiguous statutes; deference must be given only in instances where the ambiguity “constitutes an implicit delegation from Congress to the agency to fill in statutory gaps.”⁴⁷

Delegation of authority from Congress can “[b]e shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other

⁴¹ Letter from Joye E. Frost, Acting Director, Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice, to Cassie T. Jones, Executive Director, Alabama Crime Victims’ Compensation Commission (Jul. 2, 2010) (on file with NIWAP).

⁴² 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed.124 (1944).

⁴³ 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d (1984).

⁴⁴ *Uriostegui* (2010) at 30-31 (it should be noted that the District Court only decided on the matter of access to victim compensation and not access to victim assistance because assistance programs were not part of the questions presented).

⁴⁵ *Skidmore*, 323 U.S. at 139-40.

⁴⁶ *Chevron*, 467 U.S. at 844.

⁴⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120,160 (2000)(citing *Chevron*, 467 U.S. at 844).

indication of a comparable congressional intent.”⁴⁸ The District Court in *Uriostegui*, in holding that *Skidmore* deference applied, determined that OVC’s interpretation, while valuable, was not binding on the Court to limit the Court’s analysis of PRWORA eligibility standards applying to access to VOCA compensation because the interpretation was made in an agency issued letter and not through formal agency functions, like notice and comment rulemaking or adjudication, that establish Congress’ delegation of authority to interpret an ambiguous statute it administers.⁴⁹

After receiving a favorable ruling from the District Court in *Uriostegui*, the ACVCC issued its final order in the *Uriostegui* case on March 18, 2010. This ruling established that, as a matter of Alabama law, the ACVCC’s interpretation of the Alabama state crime victim compensation regulations require that an immigrant crime victim’s eligibility for crime victim compensation in Alabama is determined by the victim’s immigration status on the date of the victim’s crime victimization. When the *Uriostegui* court confirmed the ACVCC ruling in the appeal, the court granted Alabama permission to continue applying this interpretation to cases of immigrant crime victims in Alabama going forward. This, in fact, has been the practice in Alabama that continues today in which with the ACVCC requires that lawful presence set forth in Ala. Admin. Code r. 262-X-4-.02(11) must be satisfied at the time of the crime victimization incident upon which the victim’s compensation claim is based.⁵⁰

Although it appears that some foreign born persons beyond persons who are naturalized citizens or lawful permanent residents qualify for crime victim compensation under the Alabama state regulations, when the regulations and the exceptions contained in the regulations are read in conjunction with the decision in *Uriostegui*, in fact and in practice, significant numbers of immigrant crime victims are turned away for crime victim compensation in Alabama. As the discussion below makes clear, many immigrants considered lawfully present under the federal law’s definition of that term under health care and other laws are not eligible for victim’s compensation funds in Alabama.

The Alabama regulations implementing crime victim compensation grant creates some limited exceptions to the ban on access to crime victim compensation funds for immigrants who do not fit within Alabama’s definition of lawfully present immigrants. The groups of immigrant survivors that the exception applies to are anyone who is:

“(1) a qualified immigrant (as defined in 8 U.S.C. § 1641); (2) a nonimmigrant under the Immigration and Naturalization Act [8 U.S.C.A §1101 et seq.]; or (3) an alien who is paroled into the United States under section 212(d)(5) of [the Immigration and Naturalization Act] [8 U.S.C.A. §1182(d)(5)] for less than one year.”⁵¹

The regulation states that these three categories of immigrants are eligible to receive state or local public benefits. The exception appears to allow access to crime victim compensation for

⁴⁸ *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

⁴⁹ The court cited *Mead*, 533 U.S. at 228 stating, “[c]ourts afford varying levels of credit to agency interpretations, depending upon all the circumstances and looking particularly to ‘the degree of the agency’s care, its consistency, *formality*, and relative expertness, and to the persuasiveness of the agency’s position.’” (emphasis added).

⁵⁰ *Uriostegui* at 6 and 25 (note 11, second paragraph).

⁵¹ *Id.* at r. 262-X-4-.02 (11) (citing 8 U.S.C. §1621(a)).

qualified immigrants as defined by PRWORA.⁵² The categories of immigrant crime victims who could qualify for crime victim compensation under section (1) of the regulations would primarily be lawful permanent residents, refugees, asylees, VAWA self-petitioners who have received prima facie determinations and T visa applicants who have received bona fide determinations.

The final exception listed in the regulation states that an immigrant who is “[c]ertified as a victim of human trafficking [*sic*] pursuant to 22 U.S.C. §7105 may be eligible for compensation benefits.”⁵³ This exception is presumably carved out for victims of human trafficking to whom immigration laws offer protection under the continued presence and T visa programs and whom HHS certifies as trafficking victims. This group of human trafficking victims have been granted, under the Trafficking Victims Protection Act (TVPA),⁵⁴ access to benefits, services and assistance to the same extent as available to refugees and asylees due to the highly vulnerable nature of their victimization. However, the exception in the Alabama regulation that purports to offer an exception from the immigrant bar to access to crime victim compensation for human trafficking victims who have not at the time of their victimization are already qualified immigrants,⁵⁵ does not, in practice, expand eligibility the way it seems to. In fact, the statute that is referenced in the regulation pertains to assistance for trafficking victims in *other* countries and not to trafficking victims in the United States.⁵⁶ The section cited renders the portion of subsection 11 ineffective in helping victims of human trafficking in Alabama access victim’s compensation.

The District Court did not rule on whether or not VOCA compensation distributed through the ACVCC is a federal public benefit or a state or local public benefit. However, under the ACVCC interpretation of the Alabama statute in its 2010 *Uriostegui* final order, this exception would apply only to those crime victims who *at the time of the crime victimization* were already qualified immigrants, nonimmigrants (including U and T visa, student, visitor, and work visa holders), or who had already been granted humanitarian or public interest parole into the United States. Under the ACVCC’s rulings post- *Uriostegui*, immigrant survivors would only have access to VOCA compensation for victimization occurring *after* they became qualified immigrants, after they were awarded a non-immigrant visa or after they were granted humanitarian parole. They would not be able to receive crime victim compensation for victimization that qualified them for VAWA or TVPA based immigration relief.

This regulatory exception as implemented by the ACVCC post-*Uriostegui* results in immigrant victims of human trafficking, sexual assault, domestic violence, dating, violence,

⁵² 8 U.S.C. § 1641(b).

⁵³ Ala. Admin. Code r. 262-X-4-.02(12).

⁵⁴ Pub. L. 106-386, 114 Stat. 1461 § 107 (2000).

⁵⁵ The only human trafficking victims who are qualified immigrants are victims who have received a bona fide determination in a T visa case or who have been awarded T visas.

⁵⁶

(a) Assistance for victims in other countries

1) The Secretary of State and the Administrator of the United States Agency for International Development, in consultation with appropriate nongovernmental organizations, shall establish and carry out programs and initiatives in *foreign countries* to assist in the safe integration, reintegration, or resettlement, as appropriate, of victims of trafficking.

22 U.S.C.A. § 7105(a)(1) (emphasis added).

stalking, child abuse, elder abuse and other violent crimes being cut off from access to crime victims compensation in Alabama for all crimes committed against them before the file for immigration relief. Under Alabama's interpretation of its crime victim regulations, victims of human trafficking will have to wait for many months after filing their T visa application until receipt of a bona fide determination from DHS making them qualified immigrants before they can receive victim compensation for further trafficking acts committed against them after that date. Similarly, victims of child abuse applying for SIJS status will have to await receipt of lawful permanent residency and U visa crime victims will have to wait for 1 ½ years until they receive deferred action status and will only qualify for crime victim compensation for future crimes they suffer. This approach leaves the vast majority of immigrant crime victims without access to crime victim compensation despite the fact that many (Us and Ts) are legally required to cooperate with police and prosecutors in ongoing criminal investigations, prosecutions, conviction and sentencing under immigration laws and statutes.

Under the victim compensation program in Alabama, as implemented by the ACVCC, U visa recipients would only have access to VOCA compensation for victimization that occurs after they become recipients of the U visas. The current trajectory for immigrant crime victims applying for U visas is a long one. Currently, it takes 16 months for an application to be processed and, as of the date of this memorandum, the U.S. Citizenship and Immigration Services (USCIS) is conditionally approving cases and granting deferred action status to U visa applicants who will not receive their U visas until fiscal year 2018.⁵⁷ This means that crime victims filing U visa applications have a wait of a minimum of 3 years before they will actually receive their U visa and be eligible for crime victim compensation in Alabama visas for future crimes committed against them. The second exception listed in the regulation essentially bars the vast majority of immigrant crime victims from accessing VOCA compensation in Alabama as it does in Nevada.

The research NIWAP conducted in Alabama found that, in practice, as reported by the VOCA administrator and advocates and attorneys working with immigrant victims in the state, few human trafficking victims are receiving VOCA compensation in Alabama unless they already have T visas on the date of victimization or are victimized again in the future. Our research has revealed similar confusion in Alabama to what we saw in Nevada among advocates and others involved in victim compensation around the state. Of the seven organizations that responded, only one of the programs recognized that, in addition to citizens and lawful permanent residents, crime victims who were "qualified immigrants" at the time of their victimization also qualify for VOCA assistance under Alabama's interpretation of VOCA. The research also found that, among the respondents, there was a lot of misinformation about who did and who did not qualify for VOCA crime victim compensation in Alabama. The impact of

⁵⁷ See U.S. Citizenship and Immigration Services, USCIS Processing Time Information for the Vermont Service Center (last visited on Sept. 10, 2015), <https://egov.uscis.gov/cris/processingTimesDisplay.do> (listing May 7, 2014 as the date of applications that are currently being processed); see also U.S. Citizenship and Immigration Services, USCIS Approves 10,000 U Visas for 6th Straight Fiscal Year (Dec. 11, 2014), <http://www.uscis.gov/news/uscis-approves-10000-u-visas-6th-straight-fiscal-year> (last visited on Sept. 10, 2015) ("Although USCIS has reached the statutory cap of 10,000 U visas, it will continue to review pending petitions for eligibility....USCIS will resume issuing U visas on Oct. 1, 2015, the first day of fiscal year 2016, when visas become available again.")

denying access to VOCA compensation on this set of vulnerable immigrants will be discussed in detail below.

V. Effects of the State Restrictions

The state restrictions in Nevada and Alabama have been the source of confusion for advocates and attorneys working with immigrant victims in both states. The significant numbers of immigrant victims who do not qualify combined with the lack of clarity in both states about who does qualify is leading many working with immigrant victims to generally assume that immigrant victims do not qualify for crime victim compensation. The position taken by each state to disqualify all but a few immigrant crime victims from eligibility for the state's victim compensation program adds to the confusion. NIWAP's survey and conversations with advocates in Nevada and Alabama found that advocates and victims themselves are under the impression immigrants will not be able to qualify for VOCA compensation, even if they may fall into a permitted category such as T visa recipients in Alabama. The effect of this confusion is that many potentially eligible crime victims never apply for VOCA compensation—either because they incorrectly believe they are disqualified, or because they are unaware of the existence of VOCA compensation in general.

The true danger of Alabama and Nevada's approach is fully appreciated by reviewing research data on U visa victims and VAWA self-petitioners collected in a survey NIWAP conducted in Alabama and Nevada of programs working directly with the service providers assisting immigrant crime victims. The surveys were sent to legal services, social services, agencies, VOCA grant administrator and law enforcement, immigrant victims of domestic violence and sexual assault and other victim services providers. Twenty-six (26) agencies from Alabama and Nevada responded to the survey reporting on a total of 449 cases involving foreign born crime victims (123 cases from Alabama and 344 cases from Nevada). The programs reported representing the following immigrant victims:

- 110 battered immigrant VAWA self-petitioners;
- 160 U visa applicants who were victims of the following types of criminal activities;
 - 76 domestic violence
 - 66 sexual assault
 - 18 child abuse
- 138 undocumented immigrant victims of domestic violence and sexual assault who had not yet applied for VAWA, T or U visa immigration relief;⁵⁸ and
- 41 lawfully present immigrants
 - lawful permanent residents, student and work visa holders, DACA⁵⁹

⁵⁸ The victim services agencies in the two states have significantly different levels of experience working with immigrant victims of domestic violence, sexual assault and human trafficking. In Nevada, programs have been working with immigrant crime victims for many years. Alabama's immigrant population has grown significantly in the past decade. As a result, Alabama victim services programs have more recently become involved in working with immigrant survivors. This difference was reflected in the survey data. Alabama organizations reported working with undocumented immigrant clients who were victims of domestic violence, sexual assault, child abuse, elder abuse, dating violence and stalking, eligible to apply for immigration relief under the VAWA, T or U visa programs. Nevada programs reported on their immigrant victim clients by the type of immigration relief the clients were pursuing, were eligible for or had been awarded.

Agencies participating in the survey from Alabama included the VOCA Administrator for the state and six (6) organizations that regularly work with crime victims who need and would benefit from crime victim compensation. The survey included two agencies that had worked with immigrant victims before and after Alabama stopped providing victim compensation to immigrant victims. Geographically, the seven (7) organizations responding to the survey in Alabama served diverse geographic communities:

- Two (2) served rural communities (5,000-99,999);
- Two (2) served Mid-sized communities (100,000-399,999); and
- Two (2) served cities of 800,000+

Respondents to the survey from Nevada included the VOCA Administrator for the state and six organizations that regularly work with crime victims who need and would benefit from crime victim compensation. The survey included eleven (11) participating agencies who had worked with immigrant crime victims since before the state of Nevada limited the groups of immigrant crime victims who could receive crime victim assistance under Nevada law. The sixteen (16) organizations participating in the survey from Nevada also served geographic communities of various sizes:

- Four (4) served rural communities (5,000-99,999);
- Five (5) served Mid-sized communities (100,000-399,999);
- Four (4) served Metropolitan areas (400,000-799,999); and
- Three (3) served cities of 800,000+

This NIWAP survey found, most disturbingly, that victims of domestic violence who do not receive VOCA compensation are staying with their abusers and are subjected to continual victimization while awaiting adjudication of U visa or VAWA self-petitioner applications. A survey respondent from Washoe Legal Services in Reno, NV, told us –

Those who cannot access resources and services tend to stay with their abusers. One of my clients stayed an additional 7 years after initially being denied services, subjecting herself to ongoing physical abuse rather than risking losing her children. She was only able to leave after her abuser physically turned on the children.

NIWAP's survey found that advocates' and attorneys' clients who were denied, could not apply for, or did not apply for VOCA crime victims compensation suffered high levels of continuing abuse. The type subsequent instances of abuse suffered by victims after the crime victimization that would have made them eligible for VOCA but for their immigration status included incidents, attempts, and threats of:

- Physical violence: 46%;
- Sexual violence: 25%;
- Human trafficking: 8.2%

⁵⁹ The dating violence cases reported fell within this category.

- Extreme cruelty including coercive control: 30%;
- Abuse of the victim’s children: 38%; and
- Economic abuse: 41%

The survey results also indicated that, of the immigrant victims who were denied, did not, or could not apply for VOCA assistance 13% had no children and 87% had children with over 50% having three or more children.⁶⁰

The NIWAP survey also sought to learn more about the impact that lack of access to crime victim assistance had on immigrant crime victims. Agencies participating in the survey were asked the extent of their agreement with the following statements. For questions numbered 1-12, participants were asked to select whether they strongly support, moderately support, strongly rebut, or moderately rebut the statements. For questions numbered 13-14, participants were asked to state whether they strongly agree, moderately agree, strongly disagree, or moderately disagree with the statements. High percentages of the agencies working with immigrant crime victims reported that victims able to access VOCA crime victim assistance were more successful at leaving abusive family and employment relationships than victims who did not receive VOCA assistance. Compensation recipient victims also had greater access to health care and mental health treatment and were better able to provide ongoing participation in criminal investigations and prosecutions.

Table 1

Difference VOCA Compensation Makes in Crime Victims Lives	Strongly or Moderately Agree
1. Recipients of VOCA compensation are more successful at escaping the abusive family relationship than are non-recipients.	90.9%
2. Recipients of VOCA who could benefit from mental health treatment related to the crime victimization are more likely to seek treatment than non-recipients.	90.9%
3. Recipients of VOCA compensation are more successful at escaping the abusive employment relationship than are non-recipients.	81.8%
4. Recipients of VOCA compensation are more likely to file police reports when they suffer future crime victimization than are non-recipients.	81.8%
5. Recipients of VOCA compensation are more likely to obtain medical care for injuries related to their crime victimization than non-recipients.	81.8%
6. Recipients of VOCA compensation are more likely to call the police for help if they suffer future crime victimization than are non-recipients.	72.7%

⁶⁰ The number of dependents was unknown in 26% of cases reported to our survey.

7. Recipients of VOCA compensation are more likely to cooperate with law enforcement than are non-recipients.	72.7%
8. Recipients of VOCA compensation are more likely to seek civil protection orders than are non-recipients.	72.7%
9. Recipients of VOCA compensation demonstrate more effective (speed and stability) medical and psychological recovery than non-recipients.	72.7%
10. Recipients of VOCA compensation are more likely to achieve financial stability and independence than are non-recipients.	72.7%
11. Recipients of VOCA compensation are more likely seek court orders granting them custody of their children than are non-recipients.	63.6%
12. Recipients of VOCA compensation are more likely seek child support orders than are non-recipients.	63.6%
	Moderately or Strongly Disagree
13. The current structure of VOCA restrictions in our state is clearly defined and easily understood.	63.6%
14. There are adequate programs available to non-citizens to fill in the gap left by VOCA restrictions.	72.7%

NIWAP's survey asked agencies working with immigrant crime victims to also report on their crime victim clients who were able to access VOCA assistance in Nevada and Alabama because, at the time of the victimization, the victim qualified for VOCA assistance in the state. These clients were naturalized or U.S. born citizens, or lawful permanent residents. Agencies reported the extent to which VOCA recipient clients also experienced ongoing incidents, attempts, and threats, but that VOCA recipient clients experienced future incidents at lower rates than immigrant victims ineligible in the state for VOCA compensation. The ongoing abuse rates by type of abuse and the comparison of that rate to the rate of abuse experienced by VOCA ineligible victims are as follows:

- Physical abuse: 43.3% -- 6% lower than ineligible victims;
- Sexual assault: 25% -- 33% lower than ineligible victims;
- Human trafficking: .7% -- 92% lower than ineligible victims;
- Extreme cruelty including coercive control: 16.7% -- 44% lower than ineligible victims;
- Abuse of the victim's children: 21.7% -- 43% lower than ineligible victims; and
- Economic abuse: 30% -- 27% lower than ineligible victims

The trends found in the Alabama and Nevada survey conducted for this report were consistent with findings from larger national surveys undertaken by NIWAP in recent years. NIWAP research has found that immigrant victims of domestic violence, sexual assault, and human trafficking who file for immigration relief through the VAWA, and T and U visa programs face significant economic barriers that impede their ability to leave their abusive

relationship or employment.⁶¹ Lack of access to VOCA crime victims compensation accentuates these problems.

Case processing procedures at the U.S. Department of Homeland Security result in victims applying for VAWA and U visas waiting for a minimum of 7 months and up to 18 months to obtain legal work authorization. The inability to work legally locks many domestic violence victims in abusive homes while they await adjudication of their VAWA or U visa immigration case. Victims who do work are locked in jobs in which they are highly vulnerable to experiencing abuse. NIWAP and programs working with immigrant victims of workplace based sexual assault⁶² have found that immigrant victims of sexual assault in the workplace also remain in their abusive workplaces until they receive work authorization. Immigrant crime victims stay with their abusers and in abusive workplaces while their applications are pending and are experiencing abuse on a weekly and monthly basis at a high rate.⁶³ In a national survey conducted by NIWAP, service providers who work with immigrant domestic violence victims reported that:⁶⁴

- 43% of VAWA self-petitioners remained with their abusers for the 6 to 18 months they were waiting to receive work authorization;
 - 56.5% faced threats, attempts, or incidents of physical battering during this time;
 - 48.6% faced economic abuse;
 - 28.7% faced further threats, attempts, or incidents of extreme cruelty; and
 - 20.4% reported that the abuser threatened, attempted, or perpetrated abuse against the victim's children

⁶¹ SZABO, ET AL., NIWAP WORK AUTHORIZATION SURVEY AT 3 & 9 (Feb. 12, 2014) (Respondents of this survey were service providers in domestic violence, sexual assault, human trafficking, and other victim services programs. 324 respondents from 47 states and 3 U.S. territories reported on approximately 4,800 cases with filed and/or pending between January 2011 and September 2013), available at: <http://niwap.org/reports/Early-Access-to-Work-Authorization.pdf>

⁶² SOUTHERN POVERTY LAW CENTER, INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY (Nov. 2010), available at: <http://www.splcenter.org/get-informed/publications/injustice-on-our-plates#.UXgvP8r4VBk>; HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT (May 2012), available at: <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual>; AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW INTERNATIONAL HUMAN RIGHTS LAW CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY, available at: https://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrlc_picked_apart.pdf; Rebecca Clarren, *The Green Motel* (Ms. Magazine, Summer 2005), available at: <http://www.msmagazine.com/summer2005/greenmotel.asp>; *Bill Tamayo: Criminal Cases Needed to End Immigrant Abuse* (June 25, 2013, 9:28 pm ET)(edited transcript from PBS Frontline interview conducted on Sept. 17, 2012), <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/bill-tamayo-criminal-cases-needed-to-end-immigrant-abuse/>; William R. Tamayo, *The EEOC and Immigrant Workers*, 44 U.S.F. L. REV. 253 (2009); William R. Tamayo, Regional Attorney, Equal Employment Opportunity Commission, Remarks at the Biannual Conference of the National Network to End Violence Against Immigrant Women (Nov. 15, 2007) (transcript on file with author) (citing settlements in the following cases, *EEOC v. Tanimura & Antle*, No. C99-20088 JW (N.D. Cal. 1999); *EEOC v. Queen's Medical Center*, No. CV01-00389-SOMLEK (D. Haw. 2002); and *EEOC v. John Pickle Co.*, No. 02-CV-0979-CVE-FHM (N.D. Okla. 2006)).

⁶³ SZABO, ET AL., NIWAP WORK AUTHORIZATION SURVEY AT 24.

⁶⁴ *Id.* at 22-24.

- 63.4% of U visa applicants, who were victims of domestic violence, remained with their abusers for 6 to 18 months;
 - 68.3% faced threats, attempts, or incidents of physical battering during this time;
 - 24.4% faced threats, attempts, or ongoing incidents of sexual assault;
 - 64.2% faced economic abuse; and
 - 19.2% reported that the abuser threatened, attempted, or perpetrated abuse against the victim’s children

Survey respondents noted that 55.8% of VAWA self-petitioners who lived with their abuser reported experience abuse at least once a month and 97.4% of U visa applicants who live with their abuser reported experiencing abuse at least once a month.⁶⁵

Immigrant victims of workplace violence are also subject to ongoing abuse. Two stories from California are illustrative of the dangers for work place sexual assault victims of being trapped in abusive employment. The first was a case of a U visa victim who could not leave her employment and survive economically to support her children until she received work authorization through the U visa program.

Maria (reported by Sargent Inspector Antonio Flores San Francisco Police Department): Maria worked for several years at a “panaderia,” a bakery, in the San Francisco bay area. There was a robbery at the location. The police were called and during the crime investigation of the robbery as we reviewed the surveillance camera tapes to gather evidence and identify the robber, we saw on that tape Maria being raped by one of her supervisors. I approached Maria and, because of the U visa, I was able to get her to make a police report and assist in the identification and criminal investigation of her attacker. As we were in the process to attempting to arrest the supervisor for the rape, the employer tipped off the perpetrator who fled. Police have not been able to locate the perpetrator to execute the warrant. We signed a U visa certification in Maria’s case and Maria filed her U visa application.

A significant period of time passed after Maria filed her U visa application. Maria continued to work for her employer. She could not leave because her income from the bakery was the sole source of support for herself and her children. Maria was a single mother. Maria’s employer hired a new supervisor who many months later, while Maria’s U visa was pending, also raped Maria. This time she went to the San Francisco Police Department immediately to report the rape. The perpetrator was arrested and convicted and Maria received a second U visa certification for her assistance in this second rape case. Maria again continued to work for the employer where the rapes occurred until she finally received a U visa approval and work authorization that allowed her to seek new employment. Maria’s inability to expeditiously obtain legal work authorization left her with no other option than to continue working for her employer who assisted her first rape perpetrator in eluding prosecution and hired a second supervisor who raped her again. The second

⁶⁵ *Id.* at 24.

rape could have been prevented if Maria had been able to obtain legal work authorization in her first U visa case much earlier.⁶⁶

The second story provides details on how abusive employers use threats of firing and actual termination to coerce victims to remain in employment where they are subjected to sexual assault.

Rosie (reported by Equal Rights Advocates, San Francisco): Rosie is a Spanish-speaking Salvadoran national who was employed as a line cook for a small fast food restaurant chain called La Barbacoa Grill. Jose and Miguel, two bilingual kitchen supervisors, did not have the authority to fire, hire, promote, demote, transfer or discipline workers, but they directed Rosie on how to cook and clean her station, and they oversaw her work during her shifts. Jose and Miguel also had the ability to send Rosie home and assign her different tasks; she was also required to take orders from them. During Rosie's employment, both Jose and Miguel subjected her to unwelcome sexual advances, including sexually explicit comments and jokes, demands for sexual touching and touching her breasts and buttocks against her will. Jose stalked Rosie and forced her to seek a restraining order. After Rosie complained to management about Jose's sexual harassment, her hours were significantly cut. Her employer attributed the change in Rosie's schedule to business slowing down for a bit, but her hours were never restored. Within months following her complaint about Jose, Miguel raped her, and she could no longer continue working there. Rosie reported the rape to the police and cooperated in the criminal prosecution of Miguel who pled guilty and was sentenced for two crimes – sexual battery and attempt to keep a victim witness from filing a police report.⁶⁷

Despite facing continued high levels of abuse while remaining with their abusers or in an abusive work environment, NIWAP's survey also found that immigrant crime victims with pending VAWA self-petitions or U visa applications cooperated with the criminal and civil justice systems.⁶⁸ A prerequisite for obtaining a U visa is cooperating with law enforcement in the detection, investigation, prosecution and/or sentencing of criminal activity and the survey found that a high number of applicants continued to cooperate while their applications were pending:

- 73.1% of U visa applicants cooperated with law enforcement while their applications were pending; and
- 43.7% sought civil or sexual assault protection orders while their applications were pending.⁶⁹

⁶⁶ From conversations and trainings presented by Sergeant Inspector Tony Flores, San Francisco Police Department (2011 and 2012).

⁶⁷ Case information on file with counsel for the victim Equal Rights Advocates, San Francisco, California.

⁶⁸ SZABO, ET AL., NIWAP WORK AUTHORIZATION SURVEY AT 32.

⁶⁹ *Id.*

The finding in NIWAP's 2014 national work authorization survey that U visa applicants continuously cooperate with law enforcement is consistent with the results of another national survey NIWAP conducted in 2012 where victims and legal services agencies reported that 70% of their clients who were U visa applicants or holders did in fact over the course of the criminal case cooperate with law enforcement in criminal investigations, prosecutions, conviction and/or sentencing.⁷⁰ In addition to those who cooperated, another 29.4% were willing to cooperate with law enforcement, but officials did not request cooperation from the immigrant crime victim.⁷¹ This often occurred because the criminal case did not proceed forward, there was a plea deal, or the criminal case was still pending, but not moving forward because the perpetrator could not be identified or there was an open warrant for the perpetrator's arrest.

Another critical finding in NIWAP's 2014 work authorization survey was that VAWA self-petitioners, who are not required to interact with law enforcement to obtain immigration relief, participated in the criminal justice system at a significant rate in addition to participating in the civil justice system while living with their abusers.⁷²

- 36.2% of VAWA self-petitioners filed police reports while their applications were pending;
- 33.4% helped in the investigation, prosecution, sentencing, or conviction in a criminal case; and
- 47.6% sought protection orders while their applications were pending.⁷³

As the data demonstrates, despite being unable to leave abusive homes and workplaces due to financial limitations, including a lack of access to VOCA compensation, immigrant crime victims who find the courage to come forward to report crimes to police continue to be involved in and cooperative with the criminal and civil justice systems while their immigration applications are pending. This is particularly true of immigrant crime victims who are receiving support from victim advocates and attorneys.⁷⁴

This particularly vulnerable population is blocked from receiving VOCA and state funded crime victim compensation in Alabama and Nevada, further contributing to their inability to leave abusive environments due in large part to economic barriers that include healthcare. It is important to understand that the special role VOCA crime victim

⁷⁰ LESLYE ORLOFF, LEVI WOLBERG, AND BENISH ANVER, U VISA VICTIMS AND LAWFUL PERMANENT RESIDENCY 5 (Sept. 6, 2012), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/education-financial-aid/U-Visas-and-Lawful-Permanent-Residency.pdf>

⁷¹ *Id.*

⁷² *Id.* at 31.

⁷³ *Id.*

⁷⁴ See Nawal H. Ammar, Leslye E. Orloff, Mary Ann Dutton, & Giselle A. Hass, *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, 37(3) CRIMINAL JUSTICE REV. 337-359, 352 (Sept. 11, 2012), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/AmmaretalCPO.pdf>; see also MARY ANN DUTTON, NAWAL AMMAR, LESLYE ORLOFF, & DARCY TERRELL, USE AND OUTCOMES OF PROTECTION ORDERS BY BATTERED IMMIGRANT WOMEN: REPORT TO THE NATIONAL INSTITUTES OF JUSTICE (Nov. 10, 2006), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/family-law-for-immigrants/protective-orders/research-reports-and-data/RSRCH_DV_Use_Outcomes%20Protection_Orders.pdf

compensation plays for immigrant crime victims in the states in which it is available to immigrants without regard to their immigration status at the time of the crime victimization. Immigrant victims of domestic violence, sexual assault, child abuse, elder abuse and other U visa covered crimes have no access to legal work authorization until many (7-18) months after they file their immigration case. This is a much longer wait to work authorization than experienced by asylees (whose maximum wait is 6 months), T visa applicants (3-6 months) and human trafficking victims who are granted continued presence who can receive work authorization with shorter wait times. Additionally, whether and what access immigrant crime victims have to the public benefits safety net depends upon the state in which the victim lives and the particular type of public benefit the crime victim needs.

Only human trafficking victims and immigrant victims of spouse or child abuse perpetrated by a U.S. citizen or lawful permanent resident spouse or parent who have prima facie determinations in VAWA self-petitioning cases or who have received approvals in VAWA cancellation cases are granted access to subsidized health care and/or TANF in a some states. The majority of states, however, only provide access to health care for trafficking victims and VAWA victims who are children and pregnant women. For all other immigrant victims, their primary access to health care is through VOCA compensation and through the HHS funded public and migrant health clinics. Mental health care that crime victims need is primarily accessed through VOCA compensation. Income support through TANF is generally not available to immigrant crime victims who are not VAWA victims or human trafficking cases, even in those states that offer TANF access. Nevada and Alabama are examples of states that offer no access to public benefits for immigrant crime victims. In such states, VOCA compensation plays an even more important role for immigrant crime victims who cannot access the public benefits safety net, who lack access to legal work authorization and, in most instances, state issued driver's licenses. For adult and child immigrant crime victims who are undocumented, including those in the process of attaining legal immigration status, VOCA compensation provides the access to help and financial resources they need to support their healing, participation in the criminal justice system, and repair harms caused by the crime victimization. Without access to financial assistance to pay for the following types of costs, immigrant victims become trapped in abusive relationships and abusive employment until they can file their immigration case and receive work authorization –

- Health care;
- Mental health care;
- Costs related to justice system participation; and
 - Transportation
 - Lost wages for interviews and court days
 - Child care to attend court or interviews with police, prosecutors
 - Attorneys fees if pro bono legal assistance is not available
- Repairs to
 - Damaged doors
 - Replacement of locks
 - Damaged cars and other property

NIWAP's national survey found that, once immigrant crime victims received access to independent economic resources through work authorization, they continued to participate in the civil and criminal justice levels, often at higher rates. Among VAWA self-petitioners, only 20.1% filed child custody cases in family court while awaiting work authorization; that number rises to 25.3% after receiving work authorization and increased financial stability.⁷⁵ Respondents also reported that their VAWA self-petitioning clients sought divorce at a higher rate after receiving work authorization, increasing 11.5% to 36.3%, allowing victims to leave abusive homes.⁷⁶

Immigrant victims of domestic violence and sexual assault who are undocumented have limited access to health care and mental healthcare for treatment of the physical and mental health injuries they suffer as crime victims. VOCA crime victim compensation plays a significant role in covering the costs critical to allowing crime victims, including immigrant crime victims in most states, to obtain the physical and mental health care they need to heal and move forward in rebuilding their lives following crime victimization.⁷⁷ In Alabama and Nevada, immigrants who are undocumented crime victims lack access to this important resource, which is a significant contributing factor that traps them in abusive relationships and employment because it deprives them of the mental health assistance and support they need to build the strength and courage to leave. Lack of access to funds to pay the costs of health care needs arising out of the abuse or sexual assault has the insidious effect of forcing the victim not to seek needed treatment or making the victim more dependent economically on the perpetrator if the victim incurs the costs of seeking health care.

VI. Recommendation to Overcome or Mitigate the State Restrictions

a. Issuing a Regulation

To remedy the problems discussed in this report, the Office of Victims of Crime and the Office of Justice Programs at the U.S. Department of Justice should issue regulations that guarantee access to crime victim compensation for all crime victims to meet eligibility requirements without regard to the victim's immigration or citizenship status, either at the time of the crime victimization, or at the time of application for crime victim compensation. The regulations should include strong anti-discrimination requirements barring discrimination against all individuals:

- Protected by Title VI;
- That fall within VAWA's underserved population definition (alienage status listed here);
- Are protected under VAWA's anti-discrimination protections; and
- Fall under DOJ or federal anti-discrimination laws.

⁷⁵ SZABO, ET AL., NIWAP WORK AUTHORIZATION SURVEY AT 31.

⁷⁶ *Id.*

⁷⁷ Legal Momentum & Morgan Lewis, LLP, *Post-Assault Healthcare and Crime Victim Compensation for Immigrant Victims of Violence*, in *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault*, available at: http://niwaplibrary.wcl.american.edu/public-benefits/health-care/17.3_Chart_PostAssaultHealthCare-MANUAL-ES.pdf

The regulation should also codify the legal analysis and conclusion in the July 10, 2010 Joye Frost letter, which explicitly stated that, as a matter of federal law, VOCA funded compensation and state funded compensation programs are not federal public benefits. The regulation should be worded as strongly as possible so that it can assume the field under federal preemption case law. This can be particularly helpful with regard to ensuring that, if post-regulation, the definitions applied to “lawful presence” and “lawfully residing” are the federal definitions of those terms under federal immigration and public benefits laws. The preamble to the regulation and the regulation itself should address the confusion in the field and in the Alabama Federal District Court decision as to why and how PRWORA does not apply to VOCA or state funded victim compensation programs.

Additionally, as discussed below, the regulations should be issued as a interim final rule which can go into effect immediately. This will be consistent with the approach both DOJ and DHS have adopted in issuing VAWA, T, and U visa regulations under the public health and safety exception in the Administrative Procedure Act (APA).⁷⁸ These interim rules have gone into effect at the same time as the notice and comment process was initiated. Once comments are received, the final regulation can be issued with any amendments that are adopted as the result of the comments received.

Although the restrictions that bar access to victim compensation in Alabama and Nevada were enacted in very different ways, their impact on immigrant crime victims has the identical effect. Both states cut off from VOCA and state funded victim compensation any person who is not included on the list of immigrants that the state has determined is “legally present” or “lawfully residing” in the United States at the time of the crime victimization. The Nevada restriction, which chronologically appears to be in direct response to PRWORA and IIRIRA, is a state statute enacted by the Nevada Legislature. In Alabama, the restriction on immigrant access was created by an interpretation by the ACVCC of an Alabama state regulation (Ala. Admin. Code r. 262-X-4-.02). That interpretation was given deference by the Federal District Court in *Uriostegui* allowing the ACVCC impose its interpretation of which immigrants were to be considered lawfully present in Alabama and to decide that lawful presence needed to be established on the date of the crime victimization.

NIWAP believes that issuance of a regulation by OVC and OJP would result in immigrant crime victim access to VOCA and state funded crime victim compensation in both states. In Alabama, the regulations would be entitled to *Chevron* deference and can be used post issuance to either convince the ACVCC to change its position on immigrant crime victim access or obtain a Federal District Court ruling forcing the ACVCC to change its position. In Nevada, NIWAP has learned from advocates, legal services attorneys, and prosecutors that they believe securing changes to the Nevada statute will become possible once OVC and OJP issues the regulation we are seeking. In particular, it will be helpful to provide clarifying information and guidance in the regulation and preamble to the regulation that crime victim compensation is not a state or federal public benefit under PRWORA. If victim compensation is defined by DOJ to not be a federal or state public benefit, then the PRWORA provisions that allow states to opt out of providing state funded public benefits to immigrants would not apply to authorize states to cut off immigrants from VOCA or state funded victim compensation.

⁷⁸ Pub. L. 79-404, 60 Stat. 237 (1946).

With regard to overruling the ACVCC's interpretation of the Alabama state victim compensation regulation, in *Uriostegui* the District Court noted that the reason why it did not give *Chevron* deference was because OVC issued its opinion and interpretation in the form of a letter and not through more formal means or rulemaking. Issuing a formal regulation with a notice and comment period would address the legal argument raised that the letter was not sufficient to apply *Chevron* deference and prevent courts in future cases from coming to the same conclusion as the court in *Uriostegui*. The court's counterpoints to the Frost letter provide an outline to OVC of several points that could be included in the regulation to provide legally correct information that counters the position the Federal Magistrate judge took and the Federal District court confirmed in the *Uriostegui* case. Issuing a regulation provides an opportunity for OVC to expand upon its interpretation that VOCA compensation is not a federal public benefit as defined by PRWORA and therefore establish eligibility parameters that clearly include immigrant crime victims who are undocumented at the time they become crime victims. The regulation should also make clear that undocumented victims qualify without regard to whether or not they ultimately qualify for or file for immigration relief under the VAWA, T or U visa programs.

This is important because immigrant crime victims who qualify for U visas may not be able to file their U visa application because they are unable to obtain a U visa certification from law enforcement, a prosecutor, or a judge. There are jurisdictions across the country in which police, prosecutors, or sheriffs have decided that they will not issue U visa certifications even to victims who file a police report, participate in criminal investigations, or testify at trial.⁷⁹ There are jurisdictions that are unwilling to sign certifications in both Alabama and Nevada. For many immigrant crime victims, the U visa is their only immigration option. Examples include:

- Domestic violence victims whose abusers are not citizen or lawful permanent resident spouses, parents, or over 21 year old children;
- Sexual assault victims;
- Human trafficking victims who do not qualify for T visas or continued presence because they may not be able to prove extreme and unusual hardship if they were to be removed from the United States; and
- Victims of stalking, felonious assault, murder, kidnapping, witness tampering, and other U visa listed criminal activities.⁸⁰

⁷⁹ See *Victim Visa Roulette* (Reuters)(last visited Sept. 29, 2015) (citing data provided by the U.S. Citizenship and Immigration Services on U visa certifications signed by zip code to show disparate rates of U visa certification in jurisdictions across the country), <http://graphics.thomsonreuters.com/14/uvisas/index.html>; see also NATALIA LEE, DANIEL J. QUINONES, NAWAL AMMAR, & LESLYE ORLOFF, NATIONAL SURVEY OF SERVICE PROVIDERS ON POLICE RESPONSE TO IMMIGRANT CRIME VICTIMS, U VISA CERTIFICATION AND LANGUAGE ACCESS (Apr. 16, 2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-legislative-history/Police%20Response%20U%20Visas%20Language%20Access%20Report%20NIWAP%20%204%2016%2013%20FINAL.pdf>; see also UNC SCHOOL OF LAW IMMIGRATION/HUMAN RIGHTS POLICY CLINIC, DEBORAH M. WEISSMAN, ET AL., AND ASISTA, THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE, available at: <http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf>

⁸⁰ The full list of qualifying criminal activity is as follows:

Rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, stalking, 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,

The regulation should also mirror anti-discrimination language from the Attorney General's office regarding anti-discrimination requirements that apply to programs that encounter limited English proficient immigrants, which prohibits all programs that receive federal funding or assistance directly or indirectly from discriminating on the basis of national origin, race or color.⁸¹

NIWAP also recommends that OVC use language from the Vision 21 report in the preamble to the regulation to explain the role that VOCA compensation plays in the healing process of survivors, including access to mental healthcare. Ideally, the preamble could also cite the social science research data provided in this memorandum to further show why VOCA compensation is critical to the healing process and how it increases offender accountability by encouraging and supporting victims who continue to interact and cooperate with law enforcement and the civil justice system. To the extent that the regulation would be persuasive, rather than binding authority in Nevada and any other states that consider enacting a state law that access to victim compensation for many undocumented immigrants, including information in the preamble of the regulation regarding OVC and OJP's findings would be extremely helpful in persuading Nevada to repeal its law and deterring other states from enacting such legislation. Issues to address should include the information in the Vision 21 report, particularly information on the victim's role in offender accountability through their improved ability to safely participate in the criminal and civil justice systems.

It is worth noting here that VOCA empowers OVC to enforce the anti-discrimination clause and to enforce its contracts with states by mechanisms such as reduction or termination of funding. While states generally receive only about thirty-percent of victim compensation funds from the federal VOCA Fund, this is still sufficient to carry significant weight for most jurisdictions, and may be even more effective against Alabama in particular, where the ACVCC suggested that their compensation fund is nearly sixty-percent federally funded.⁸²

We recognize that OVC would work with states to avoid sanctions so as to encourage states to cover all crime victims rather than cut off crime victim compensation for the entire state. However, we encourage structuring the regulations to have as much persuasive authority as possible to encourage the greatest number of states to serve all victims. Once the regulation has been issued, if possible, OVC should also consider including in contracts with states receiving victim compensation funding a citation to the regulation and its non-discrimination requirements. This could serve as an additional deterrent to states implementing practices or policies that discriminate against immigrant and/or limited English proficient victims in state run crime victim compensation programs. Another way to encourage states to bring their compensation programs into compliance would be to create a priority for access to discretionary funding from OVC for

obstruction of justice, perjury, fraud in foreign labor contracting, solicitation to commit any of the above-mentioned crimes, or any similar activity in violation of federal, state, or local criminal law.

INA § 101(a)(15)(U)(iii); 8 U.S.C. § 1101(a)(15)(U)(iii) (2013).

⁸¹ See Catherine Longville and Leslye E. Orloff, *Anti-Discrimination Provisions that Apply to Programs Receiving Federal Funding Serving Victims of Violence Against Women Crimes* (June 18, 2014), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/april-16-2015-healthcare-understanding-the-affordable-care-act-and-how-it-affects-immigrant-survivors-webinar/Anti%20Discrimination%20Provisions.pdf>

⁸² See *supra* note 40 and accompanying text.

programs in states that do not discriminate against immigrant, limited English proficient immigrants, or any other victims described in VAWA's anti-discrimination provisions, VAWA's underserved population definitions, and any other anti-discrimination protections cited in the regulation.

b. Issuing the Regulation as an Interim Final Rule That Takes Effect Immediately

In issuing a regulation, it is NIWAP's recommendation that DOJ issue the victim compensation regulation as an interim final rule under the good cause exception in the APA.⁸³ This exception "provides a mechanism for issuance of interim regulations that take immediate effect prior to offering the public an opportunity for notice and comment...[this exception] permits an agency to bypass the notice and comment procedure where good cause exists."⁸⁴ As the discussion above illustrates, a vast majority of vulnerable immigrant crime victims are barred from receiving VOCA funding, demonstrating a need for prompt remedy to the restrictions currently in place in Nevada, Alabama, and other states that may be considering imposing similar restrictions. Additionally, the anti-discrimination regulations we seek, if implemented, will immediately help many more immigrant victims in states across the country.

Both DOJ and DHS have issued regulations related to crime victimization as interim final regulations that went into effect immediately. The agencies sought notice and comment on the interim regulations at the same time that the regulations were issued. In each case, DOJ's Immigration and Naturalization Service (INS) and DHS' United States Citizenship and Immigration Services (USCIS) found that public health and public safety issues related to protection of crime victims and the community warranted bringing the regulations within the good cause exception of the APA.⁸⁵ The INS issued the following regulations as interim final rules:

- VAWA self-petitioning regulations (March 26, 1996);⁸⁶
- Trafficking Victims Protect Act Regulations implementing the T visa (January 31, 2002);⁸⁷ and
- Special Immigrant Juvenile Status regulations (1991).⁸⁸

The USCIS issued the following regulations as interim final rules:

⁸³ 5 U.S.C. § 553(b)(3)(B).

⁸⁴ See Memorandum from Leslye Orloff, Director, Immigrant Women Program, Legal Momentum, to Susan Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, *T and U Adjustment Interim Final Rule* (Sept. 22, 2008), available at:

<http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/JustificationforIssuanceofInterim.pdf>

⁸⁵ *Id.*

⁸⁶ 61 Fed. Reg. 13,061 (March 26, 1996).

⁸⁷ 67 Fed. Reg. 4,784 (January 31, 2002).

⁸⁸ 56 Fed. Reg. 23,207 (1991) (Early implementation of this rule will allow eligible alien juveniles to immediately obtain special immigrant status and apply for immigrant or adjustment of status to that of a lawful permanent resident. Early implementation will further allow petitioners for special immigrant juveniles and applicants for adjustment of status whose applications were denied because the applicant failed to establish eligibility for the bona fide marriage exemption to appeal the initial decisions).

- The U visa regulations (September 17, 2007);⁸⁹ and
- The T and U adjustment regulations (December 12, 2008).⁹⁰

The fact that, in some states, filing police reports is a prerequisite to filing for victim compensation as it is generally a prerequisite to demonstrating helpfulness in U visa cases and cooperation in T visa cases, immigrant crime victims are at heightened risk of retaliation, witness tampering, and coercion from criminal perpetrators, making access to crime victim compensation urgently needed. Access to crime victim compensation for immigrant crime victims promotes public health by providing the only access to physical and mental health care many immigrant crime victims in many states often qualify to receive. Public safety is promoted when immigrant crime victims have access to health care, financial, and other assistance they need to be able to attain safety that will facilitate and support them through the process of cooperating in criminal investigations and prosecutions and seeking crime victim protections available to them through the civil justice system. This includes obtaining civil protection orders, sexual assault protection orders, and custody of their children. When victims are able to access the protections offered by victim compensation, the justice system will be more effective in holding perpetrators accountable. The health and safety effect of the proposed crime victim compensation regulations justify issuing the regulations as an interim final rule that goes into effect immediately.

⁸⁹ 72 Fed. Reg. 53,032 (September 17, 2007).

⁹⁰ 73 Fed. Reg. 75,540 (December 12, 2008).