











## Representing Workers at the Intersections of Immigration and Sex Harassment

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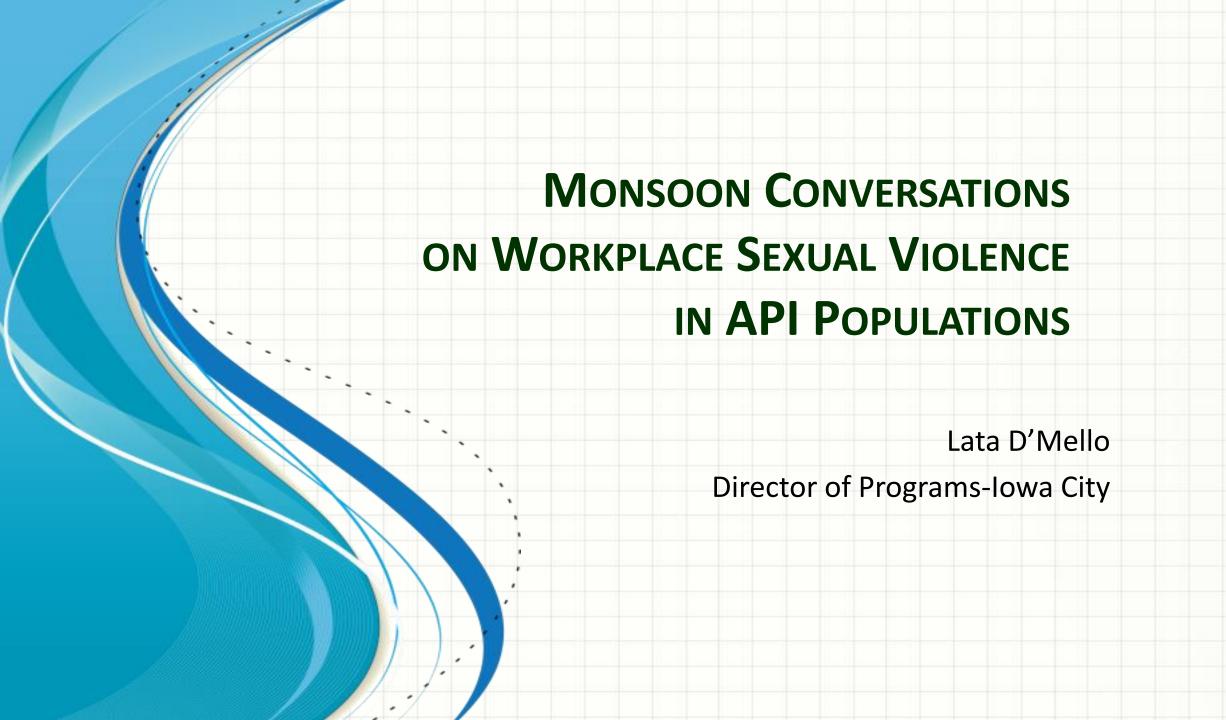
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## Monsoon background

- Monsoon Asians and Pacific Islanders in Solidarity
   ("Monsoon") serves victims/survivors of domestic violence,
   sexual assault, human trafficking and gender-related
   homicide in Asian and Pacific Islander (API) communities
   across lowa
- Monsoon's mission is to end all forms of gender-based violence and build healthy communities through transformative justice and social change
- Advocates are mobile, multilingual and bi/multicultural
- Monsoon started as a volunteer program in 2003, became a 501©3 organization in 2007, and officially opened its doors on December 15, 2007



#### **API** communities

- Central Asians Afghani, Azerbaijani, Kazakh, Kyrgyz, Tajik, Turkmen, Uzbek
- East Asians Chinese, Japanese, Korean, Okinawan, Taiwanese, Tibetan
- Hawaiians and Pacific Islanders Carolinian, Chamorro, Chuukese, Fijian,
  Guamanian, Hawaiian, Kosraean, Marshallese, Native Hawaiian, Niuean,
  Palauan, Pohnpeian, Samoan, Tokelauan, Tongan, Yapese
- Southeast Asians Burmese, Cambodian, Filipino, Hmong, Indonesian,
  Laotian, Malaysian, Mien, Papua New Guinean, Singaporean, Timorese, Thai,
  Vietnamese, Tai-Dam, Karen, Karenni, Shan, Rohingya
- South Asians Bangladeshi, Bhutanese, Indian, Maldivian, Nepali, Pakistani,
  Sri Lankan
- West Asian Contested term because most people from the region do not self- identify as such, but it refers to what is commonly known as the Middle East (Bahrain, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Palestinian territories, Qatar, Saudi Arabia, Syria, Turkey, United Arab Emirates, Yemen)
- Asian diaspora Dispersion of Asians from their original homeland; many have never set foot in that homeland

## Immigrants experiencing workplace sexual violence

- Factories, farms, hospitality industry, medical and healthcare sites, domestic work, educational institutions, unlicensed entities, students on CPT/OPT, immigrants with work authorization
- Hired through subcontractors
- Vulnerability, such as night-shift cleaning staff
- Job isolation (shift work)
- Unlicensed spas/popup massage parlors
- Often supervisors are the harm-doers
- Immigrant-on-immigrant violence

## Victim experiences

- Financial constraints: Sending money home
- Job threats
- Uncertain immigration status
- Ignorance/concerns about documentation
- Cultural-spiritual victim responses on "forgiveness"
- HR silence/collusion
- Law enforcement inaction
- Prosecutors do not want a "low-profile" case

### Monsoon cases

- Women of color: Combination of gender and race/ethnicity
- Case of sexual assault in meatpacking plant involving a registered sex offender – no background checks, police disinterest, prosecutor neglect
- Case of sex trafficking religious study at "safe house"
- Victim subjected to cyber sexual assault
- F-1 visa student on OPT in engineering company
- Graduate student victim of stranger rape (offcampus)

## LEGAL AID AT WORK

# PRACTICE TIPS: REPRESENTING UNDOCUMENTED WORKERS IN EMPLOYMENT CASES.

January 2022



# Initial Considerations when Representing Undocumented Workers.





### The Client Relationship.

#### Initial Consult

 Rights apply equally: always explain what relief is available regardless of immigration status

#### Beginning representation

- Do you have work authorization?
- Does your employer know that you are undocumented?



## Immigration-Based Retaliation and the Immigration Attorney Referral

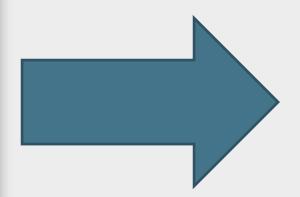
Network.

Risk of retaliation and immigration-based retaliation: illegal but possible

 Here is what we can do to prevent it

## **Encourage consult with an immigration attorney**

 Address risk of retaliation and possible affirmative actions to remedy or improve immigration





status

# Immigration-Based Retaliation and the Immigration Attorney Referral Network.

Legal Aid at Work set up an immigration attorney referral network.

Previous system was ad hoc; based on the individual attorney's contacts and personal practices.

Now: before litigation and limited representation where immigration status is at issue at all:

- Created a written policy
- Spreadsheet with private attorneys and non-profit organizations
- Legal Aid at Work pays the consult fee



## Undocumented Workers' Rights Under Biden DHS.

October 12, 2021, Department of Homeland Security (DHS) Secretary Alejandro Mayorkas Memorandum on worksite immigration enforcement (Policy Statement 065-06).

- Instructs DHS to "adopt . . . policies to facilitate the important work of" labor/employment agencies to protect workplace rights.
  - more severe consequences to exploitative employers;
  - encourage workers to report violations & cooperate in investigations
  - increase coordination between DHS and federal/state labor/employment agencies.
- Immediate policy changes:
  - End mass worksite raids.
  - Consider workers' requests for prosecutorial discretion.
- Internal 60-day policy review (ended on December 11, 2021).



## Undocumented Workers' Rights Under Biden DHS: Practice Tips.

- Consider whether to seek prosecutorial discretion (e.g. deferred action) based on workplace dispute:
  - Immigration attorney essential (ex: prior removal order?);
  - Connect with advocates who are already doing this for tips;
  - Consider which agency, if applicable, may be most amenable to this.
- **File administrative charge with relevant agency** (after client counseling repotential retaliation):
  - Potential for agency request for prosecutorial discretion; and,
  - Added layer of protection if employer retaliates.
- Client counseling re: DHS policy and potential employer retaliation:
  - If come into contact with ICE, tell them about charge/complaint;
  - Provide client with representation letter to provide to ICE.



### Representing Undocumented

#### Workers.

Understand that the **client's intersecting identities** may lead them to be more hesitant to share information or could limit the methods they are interested in.

- Offer choices!
- Other non-legal modes of advocacy, including community support
  - Connect workers with community support
- Provide immigration attorney consult
- Avoid providing identifying information to the (ex-) employer
- Representation letter & 10.12.21







## Immigration-Status Issues in Discovery.





### Discovery.

- Immigration status <u>NOT relevant to liability</u> BUT defendants will try to make it relevant. Be prepared.
  - Written discovery.
  - Depositions.
- Questions that don't seem related to immigration status could be: Where did you go to school? Where were you married?
- Protective Orders:
  - FRCP 26(c)
  - Rivera v. NIBCO, Inc., 364 F.3d 1057, 1066 (9th Cir. 2004)
- California SB 1818.



### Discovery.

- Immigration status <u>CAN be relevant to remedies.</u>
  - Not seeking backpay may decrease chances of having to respond to status inquiries. (*Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002))
  - *Torres v. Precision Indus.*, Inc., 995 F.3d 485, 495 (6th Cir. 2021): compensatory and punitive damages were "unrelated to [plaintiff's] immigration status" and therefore permitted in full.
- Consider bifurcating liability and remedies phases:
  - *Rivera v. NIBCO*, Inc., 364 F.3d 1057 (9th Cir. 2004): even if status relevant to remedies, inquiries can be handled post-trial, in camera proceeding.
- If client currently or previously undocumented while employed, discuss so they can decide on tradeoffs.



## Immigration-Status Issues in Settlements.





#### **Settlement and Taxes.**

- We are not tax attorneys.
- General principles
  - Avoid fraud
  - Avoid discovery of the worker's immigration status
- Tax Documents
  - Verify early on if the worker has an ITIN
    - If not, possible area of discussion with an immigration attorney
  - Include claims for physical injury, which are not taxed
  - For claims of back pay, the employer should already have the worker's W-4
    - But wages are subject to higher taxes
  - When a W-9 is required and the worker has an ITIN and/or is willing to apply for one, have the settlement paid directly to Legal Aid at Work and then we pay the worker
- Address
  - Can use a trusted person's address instead on the W-9
  - Checks sent directly to your organization.





# Representing Workers at the Intersections of Immigration and Sex Harassment

Webinar Legal Network for Gender Equity

January 10, 2022



## U Visa Requirements

- Victim of a qualifying criminal activity
- Has been, is being, or is likely to be helpful in
  - Detection, investigation, prosecution, conviction, or sentencing
- Suffered substantial physical or mental abuse as a result of the victimization
- Possesses information about the crime
- Crime occurred in the U.S. or violated U.S. law
- Work authorization with deferred action at bona fide or waitlist determination reducing waits from 5 years in 2021



## U - VISA QUALIFYING CRIMINAL ACTIVITY DEFINED AT 8 U.S.C. § 1101(A)(15)(U)(III)

- Includes **attempt**, **conspiracy**, or **solicitation** to commit:
  - Abduction
  - Abusive Sexual Contact
  - Being held hostage
  - Blackmail
  - Domestic Violence
  - Extortion
  - False Imprisonment
  - Female Genital Mutilation
  - Felonious Assault
  - Fraud in Foreign Labor Contracting
  - Incest
  - Involuntary Servitude

- Kidnapping
- Manslaughter
- Murder
- Obstruction of Justice
- Peonage
- Perjury
- Prostitution
- Rape
- Sexual Assault
- Sexual Exploitation
- Slave Trade
- Stalking
- Torture
- Trafficking
- Witness Tampering
- Unlawful Criminal Restraint



#### State Labor Crimes and the U visa

- Forced labor
  - Abduction
  - Blackmail
  - False imprisonment
  - Felonious Assault
  - Involuntary servitude
  - Kidnapping
  - Unlawful criminal restraint
  - Slave Trade
  - Sexual Exploitation

- Prostitution
- Trafficking
- Fraud in foreign labor contracting
- Extortion
- Peonage
- Slave trade
  - False imprisonment
  - Unlawful criminal restraint



#### State Labor Crimes and the U visa

- Involuntary Servitude
  - Abduction
  - Blackmail
  - False imprisonment
  - Felonious Assault
  - Kidnapping
  - Unlawful criminal restraint
  - Sexual Exploitation
  - Slave trade
  - Extortion
  - Peonage

- Trafficking
- Prostitution
- Peonage
  - Abduction
  - Blackmail
  - False imprisonment
  - Unlawful criminal restraint
  - Slave trade
  - Involuntary servitude
  - Trafficking
  - Sexual exploitation



## T Visa for Trafficking Victims

- A victim of a severe form of trafficking in persons
  - Sex or labor trafficking involving victim under 18 or and adult subject to force, fraud or coercion
- Victim is physically present in the U.S. on account of trafficking
- Victim must comply with reasonable requests for helpfulness in investigating or prosecuting trafficking. Exceptions
  - Under age 18
  - Physical or psychological trauma impede helpfulness/cooperation
- Removal from the U.S. would cause extreme hardship
- Work authorization and *many* federal and state public benefits = 3–18 months (2021)



### Labor Trafficking

22 U.S.C. § 7102; 18 U.S.C. § 1590

#### Act

- Recruits
- Harbors
- Transports
- Provides
- Obtains
- Benefits, financially or by receiving anything of value

#### Means

- Force
- Restraint
- Threats of harm
- Abuse or threatened abuse of the legal system
- Any scheme, plan, or pattern intended to cause the person to believe that if they did not perform labor, they would suffer serious harm or restraint

#### Purpose

- Involuntary servitude
- Peonage
- Debt Bondage
- Slavery



### Sex Trafficking

22 U.S.C. § 7102; 18 U.S.C. § 1591

#### **Process -Act**

- Recruits
- Entices
- Harbors
- Transports
- Provides
- Obtains
- Advertises
- Maintains
- Patronizes
- Solicits
- Benefits, financially or by receiving anything of value

#### Means

- Force
- Fraud
- Coercion

 Proof of force, fraud, or coercion not required for sex trafficked children under 18.

#### **Purpose-End**

- Commercial Sexual Activity
- A commercial sex act is any sexual act for which something of value is given or received
  - Money
  - Drugs
  - Food
  - Shelter
  - Clothing
  - Transportation



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## Potential U or T Visa Certifiers Labor Cases

- EEOC
- U.S. Department of Labor
- State labor enforcement agencies
- State, local, federal law enforcement or prosecution agencies
- State, local, federal, tribal, or administrative law judges, commissioners, magistrates, or other judicial officials
- Child and Adult Protective Services



#### Coexisting Involuntary Servitude & Domestic Violence

- Condition of involuntary servitude induced by
  - Means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not do or continue the work, that person or another person would suffer serious harm or physical restraint, or abuse of legal process (& threats)
    - Can occur in intimate partner, spousal, parent child and roommate relationships
    - Can include domestic servitude and sexual exploitation
- Threats of abuse
  - Physical, mental, emotional, sexual, intimidation, coercive control
- Lead to compelled or coerced labor or services or force, fraud or coercion
- Domestic labor can constitute forced labor amounting to involuntary servitude
  - Involving force, fraud or coercion
  - Goal of securing forced labor = condition of servitude



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#### Identifying Human Trafficking Occurring in Labor Cases or Cooccurring Spouse Abuse Provides Immigrant Victims ...

- Faster access to
  - Immigration relief & protections from deportation
  - Work authorization
  - Greater public benefits (NIWAP's Benefits Map)
    - Driver's licenses/federally recognized ID
    - Subsidized child care
    - Public and assisted housing
    - Educational grants and loans (FAFSA)
    - Depending on the state ...
    - TANF, Subsidized Healthcare, Food Stamps



"The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way. Justice and our country's well-being require it." Alejandro Mayorkas (DHS Memo, Sept. 30, 2021)



### VAWA Confidentiality Prongs Chart

Non- Disclosure = Discovery Bar

Protects victims who have filed a protected case with DHS

- \*VAWA self-petitions
- \*Battered spouse waiver
- \*VAWA Cancellation/Suspension
- \*U and T Visas
- \*Abused Spouses of work visa holders work authorization applications

Violation = \$5,000 fine and/or disciplinary action

Abuser-Provided Information Prohibition

> Includes family members of abusers, crime perpetrators and their agents

#### **Protects:**

- \*All victims abused by spouse or parent
- \*All victims in the process of applying for U or T visas

Location Prohibitions

#### **Protects:**

All Victims

#### **Requires:**

No action at protected locations OR

Notice to Appear must state how they complied with VAWA confidentiality



## DHS Enforcement Priorities 9.30.2021 and Trasvina ICE 5.27.21 Memo: *Mitigating Factors*

- Crime victim, witness, party in legal proceedings
- Eligible for humanitarian or other immigration relief
- Advanced/tender age/pregnancy
- Poor health or serious medical condition
- Length of time in U.S.;
- Person is likely to be granted temporary or permanent immigration relief
- Military or public service by immigrant or family member
- Impact on family in U.S. of loss of caregiver/provider
- History of work in the U.S.
- Pursuit or completion or education in the U.S.
- Time since offense, rehabilitation, conviction vacated or expunged



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#### DHS Enforcement Priorities 9.30.2021

- Terrorism, espionage, or threat to national security
- Threat to border security if
  - Apprehended while attempting to unlawfully enter the U.S.; or
  - Apprehended inside the U.S. after unlawfully entering after 11/1/20
- Current threat to public safety due to serious criminal conduct
  - Individual assessment based on totality of the circumstances
  - Gravity and sophistication of the offense, conviction, sentence
  - Nature and degree of harm; Use of dangerous weapons
  - Serious prior criminal record



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#### **Technical Assistance and Materials**

- Power Point presentations and materials for this conference at
  - https://niwaplibrary.wcl.american.edu/timesup22
- Employment based criminal activities charts
  - https://niwaplibrary.wcl.american.edu/dolcharts
- NIWAP Technical Assistance:
  - Call (202) 274-4457
  - E-mail info@niwap.org
- Web Library: <u>www.niwaplibrary.wcl.american.edu</u>
- Webinars at
  - http://niwaplibrary.wcl.american.edu/all-niwap-webinars



#### Drivers' Licenses

- Upon receipt of work authorization federally recognized driver's license or ID = 44 states
  - VAWA approved cases with deferred action (2 years)
  - U with deferred action (1-5 years)
    - Bona fide or waitlist approval
  - T visa bona fide or Continued presence
  - DACA
  - SIJS (3 years) with lawful permanent residence
- State issued licenses and IDs = 13 states
- Deferred action = KS, MO, VA
- VAWA prima facie = ME



# Health Care Subsidies – State Funded Benefits For Immigrants Including During the 5 Year Bar

- T Visa Bona Fide, Continued Presence, Refugees, Asylees
  - -All states
- All Qualified immigrants = 3 states
- Qualified Abused Immigrants = 2 states
- Lawfully present children = 31 states
- Lawfully present pregnant women = 23 states



### TANF and TANF Child Care – State Funded Benefits During 5-Year Bar

- T Visa Bona Fide or Continued Presence
  - All states
- Qualified immigrants = 15 states
- Qualified abused immigrants = 6 states
  - VAWA Self-Petitioners (2-3 months)
  - SIJS lawful permanent residents (1-3 years)
  - U visa lawful permanent residents (21+ years)
- U Visa Wait list approval (5 years) = 3 states
- SIJS applicants = 7 states
- U visa applicants = 4 states

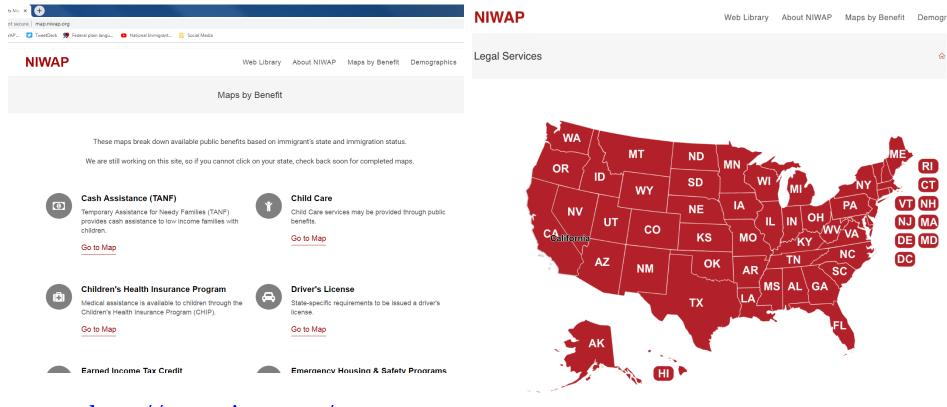


#### State Funded SNAP

- VAWA self-petitioners
  - CA, CT, ME, MN (50+), WA
- U visa applicants
  - CA, IL, ME, MN (50+), WA
- T visa applicants
  - All states



#### Resource: NIWAP's Public Benefits Maps and Charts



http://map.niwap.org/







#### **INFORMED**

Training, resources, and assistance supported by research and experience

### What We Do



#### Resources

Create, research, and curate publications, statutory and case law compilations, and other resources that strengthen prosecution practices



#### Consultations

Offer on-demand 24/7 consultations with our seasoned prosecutors to answer case-specific inquiries, discuss strategy, conduct research, and recommend data-driven solutions



#### Training Events

Develop curricula and facilitate a wide range of specialized inperson and web-based trainings designed to empower prosecutors and allied professionals



#### Partnerships & Initiatives

Provide long-term support in building frameworks for coordinated responses to gender-based violence including data collection and analysis, task force development, and training

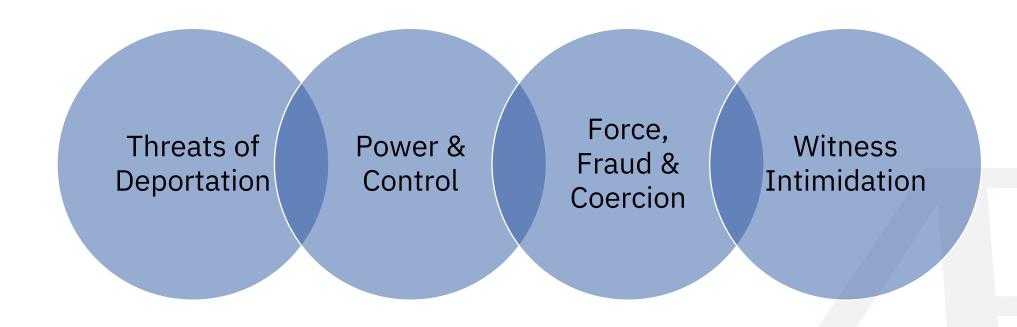
# Immigration & Prosecution

Discovery & Due Process Pretrial Litigation Trial Strategies

# Ethical Obligations

- You must provide anything that is:
  - Relevant
  - Material, or
  - Exculpatory
    - Does the information go to the witness's credibility, bias, or motive to lie?
- •Is it in your care, custody, or control?
  - Certification form
  - Communications with lawyer/advocate
  - Police reports/photos/statements

# Case Analysis



# Analyze Case

## Victim Selection

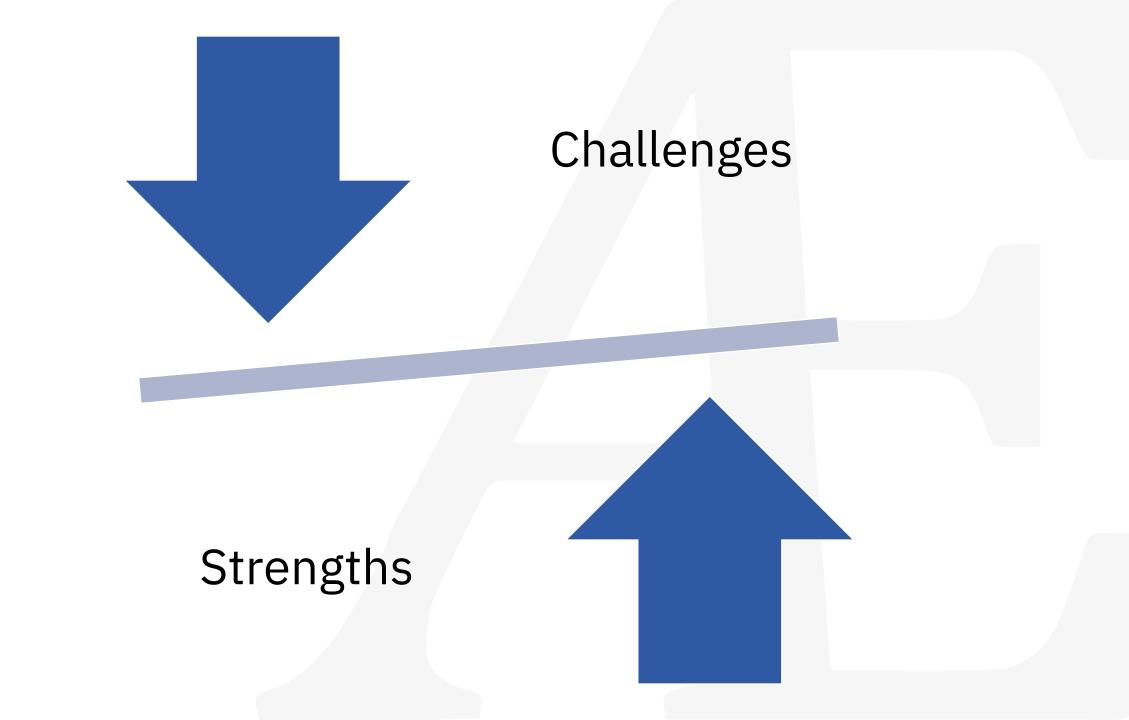
 Did the offender choose the victim because of a real or perceived vulnerability?

# Criminal Act

 Did the offender use the victim's immigration status to commit a criminal act?

# Escape Detection

 Was the victim prevented from reporting the crime to police because of their immigration status?



### Motions in Limine

# Immigration Status

- Exclusion
  - Not relevant, material, or exculpatory
  - Prejudice substantially outweighs probative value
- Limitation

#### Other Bad Acts

- Prior threats
- Subsequent threats or intimidation
- Shows motive, plan, intent, or nature of the relationship
- Includes noncriminal actions

#### Experts

- Common victim behavior
- Impact of defendant's tactics on victim
- Culture and coercion
- Immigration relief

"The visa was a tangential, collateral issue, and allowing evidence about it invited speculation about the legal status of both [victim] and, potentially, defendant, which was completely irrelevant to this case. The trial court was well within its discretion in excluding reference to the visa."

# **Expert Testimony**

Fed. R. Evid. 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data...

# Possible Experts

### **Dynamics**

- Experience working with immigrant victims
  - DV Shelter
  - Advocates
  - Rape Crisis Center
  - Investigators

### **Immigration**

- Immigration attorney
- Law Professors
- •Other attorneys that have experience with immigration issues (e.g., family law, legal aid)

Best Practice: Do not use any expert that is involved with the case or has worked with the victim

# Trial Strategies

Jury Selection



# Victim Testimony

- Introduce the victim to your jury
- •Recreate the reality of the crime
- Talk about hopes and dreams
- •Illustrate fear
- Address immigration status and visa applications
- •Emphasize immigration abuse and threats of deportation
- Preempt defense arguments

# Introduce Rebuttal Testimony

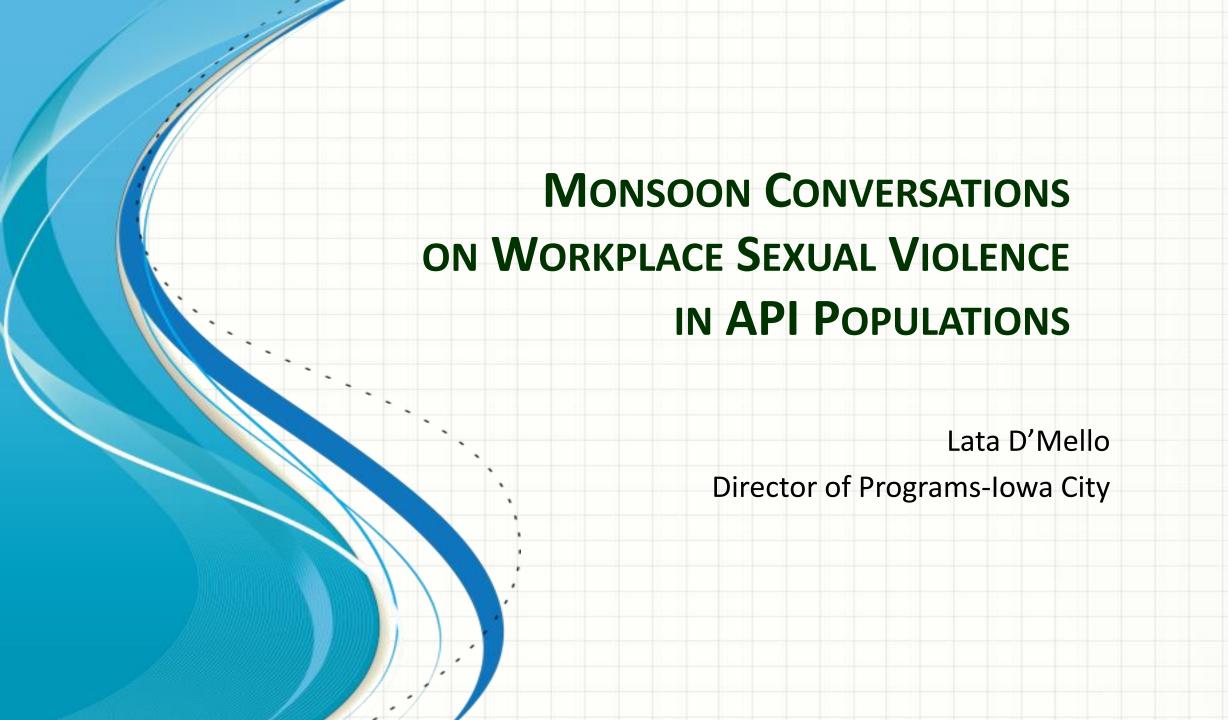
Prior Consistent Statements, Fed. R. Evid. 801(d)(B)

- Once the defendant has alleged that the victim has a motive to lie, the prosecution can introduce the victim's prior consistent statements about the charged crime
- •Door to this testimony can be opened at any time, but is likely done during cross-examination
- •Be prepared with case law and a legal brief

### Jane Anderson

#### ATTORNEY ADVISOR

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- 2 (202) 596-4229
- 1000 Vermont Avenue NW, Suite 1010 Washington, DC 20005
- www.AEquitasResource.org



### Challenges with API victims

- Gender disparities
- Self-blame or "karma"
- Multiple traumas that can include domestic violence, child sexual abuse and historical trauma; virginity/rape issue
- Language: Vocabulary, terms and interpretation/translation
- Community responses: Victim-blaming, lack of support network and retaliation
- Insufficient resources
- Low conviction rates

### Supportive services

- Monsoon is not a mandatory reporter
- Know the personal and political histories of immigrant victims
- Seek community collaborations on providing optimal services: safe housing, income, medical care, child protection, education, jobs, public benefits, other attorneys
- Explain victim rights often (and update)

### Supportive services (contd.)

- Ensure victim has an advocate who works in a program addressing gender-based violence – contact state coalitions for referrals
- Understand that advocates are not interpreters, but that advocates can help with interpretation
- Be honest and clear about possible outcomes and alternatives – advocates who build connections with victims know how to convey details without traumatizing further
- Ask advocates to do the "heavy-lifting" where possible, such as collecting documentation
- Be flexible with sharing client information

### **Thank you! Questions?**

#### **Contact Monsoon:**

515.288.0881; 319-466-9000; 563-556-1677

Helpline: 1.866.881.4641

www.monsooniowa.org

#### Offices:

- 4944 Franklin Avenue, Suite B, Des Moines, IA 50310
- Eastdale Plaza, Suite 18, 1st South Avenue, Iowa City, IA 52240
- c/o Riverview Center, 1789 Elm Street, Dubuque, IA 52001



### Questions?

TIME'S UP Legal Defense Fund & Legal Network for Gender Equity

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Twitter: @NWLC

Facebook: https://www.facebook.com/nwlc

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