



WSSFC 2024

Substantive Law Track – Session 3

What Every Lawyer Should Know About Immigration Law

Presenters:

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About the Presenters...

Amanda K. Gennerman has been practicing immigration law exclusively since 2004. Prior to joining Pines Bach, LLP as a Partner, she was the founder of Gennerman Law Group located in Madison, Wisconsin (2004-2020). Amanda's practice focuses on multiple areas of immigration law, including family-based petitions, consular processing, humanitarian petitions, naturalization and removal defense. She is a cofounder, board member and volunteer of the Community Immigration Law Center (CILC) in Madison. She has presented on immigration topics to community organizations through-out Wisconsin. Her work has been published in the Immigrant Legal Resource Center, "U Visa Manual." She was voted a Rising Star Attorney of Wisconsin in 2006, 2008, 2009 and was awarded the Dane County Pro Bono Award for Legal Services in 2010 and 2022. She is a member of immigration professional organizations including ASISTA and American Immigration Lawyers Association (AILA). She is currently the WI/AILA Chapter Secretary.

Aissa Olivarez is the Managing Attorney at the Community Immigration Law Center (CILC). She is also a junior partner at Eastbridge Law Group, LLP located in Madison, Wisconsin. Aissa has represented many clients in removal proceedings, bond proceedings, and appeals. Prior to joining CILC, Aissa was a Staff Attorney at the Pro Bono Asylum Representation Children's Project (ProBAR), where she represented unaccompanied minor children who were placed in removal proceedings by the Department of Homeland Security in Harlingen, Texas. During law school, Aissa participated in the Immigrant Justice Clinic and the Defenders Project at the University of Wisconsin Law School. In September 2018, Aissa was awarded the Belle Case LaFollette Award by the Wisconsin Law Foundation for her work with under-served communities. Aissa earned her B.A. in Government from the University of Texas at Austin. She was a first-grade teacher for 4 years in the Austin Independent School District before deciding to pursue her law degree. She graduated from the University of Wisconsin Law School in May 2016, where she was an active leader in the Student Bar Association and served as president of the Latinx Law Student Association. During her tenure at UW, she received accolades such as the Barbara B. Crabb Prize, the LLSA *Comunidad* Award, the Ray and Ethel Brown Award, the Public Interest Scholar Award as well as the Children's Justice Project Fellowship, among others. She is most recently the recipient of the 2019 Ilda C. Thomas Award from Centro Hispano. She was named one of Wisconsin's Most Influential Latinos in 2021. Aissa lives in Madison, Wisconsin with her husband and daughter.

Gabriela Parra is a Partner at Layde & Parra SC in Milwaukee, Wisconsin. She earned her undergraduate degree in Political Science and Urban & Regional Studies from the University of Wisconsin-Green Bay and graduated cum laude with her law degree from the University of Wisconsin-Madison. With over nine years of experience in immigration law, Gabriela is bilingual in English and Spanish and has a broad range of expertise, including family and humanitarian cases, Asylum, litigation defense, and naturalization applications. She is a member of the American Immigration Lawyers Association and the State Bar of Wisconsin.

Raluca Vais-Ottosen is a Partner at DeWitt Law Firm and the Chair of the firm's Immigration Practice Group. She practices primarily immigration law, a passion that was born from her own immigration from Romania. Raluca is licensed to practice law in the States of Wisconsin and New York, as well as before the Seventh Circuit Court of Appeals and the U.S. District Courts for the Eastern and Western Districts of Wisconsin. She obtained her Master in Law (LL.M) from Louisiana State University in 2004. Prior to coming to the U.S., Raluca obtained her law degree from the Spiru Haret Law School in Bucharest, Romania, and her undergraduate degree with a concentration in mathematics and physics from Petru Rares National College in Piatra Neamt, Romania. Raluca represents clients in all aspects related to U.S. citizenship and naturalization, adjustment of status to permanent residence (green card), consular processing for immigrant visas, spouse visas, fiancé(e) visas or other family-based visas, H-1B and other work and business visas, permanent residence through employment including PERM and National Interest Waivers, student visas, J-1 visas and waivers, among others. Raluca also routinely assists and represents employers in matters related to the I-9 Employment Eligibility Verification, including internal audits and government investigations. In addition to her immigration practice, she also has an extensive background in Employment Law. She has assisted companies in a number of areas, including but not limited to claims of workplace discrimination, harassment and retaliation, termination and constructive discharge, workplace investigations by state and federal agencies, as well as employment litigation.

Session: **What Every Lawyer Should Know About Immigration Law**

Time: Thursday, October 17, 2024 at 1:45 - 2:35 PM

Session Presenter Name(s) & Firm(s): Raluca (Luca) Vais-Ottosen (DeWitt LLP), Gabriela Parra (Layde & Parra S.C.), Amanda K. Gennerman (Pines Bach, LLP), Aissa Olivarez (Community Immigration Law Center and Eastbridge Law Group, LLP)

Impact of immigration status on business law and employment law matters

Business law

- Mergers and acquisitions:
 - I-9 Employment Eligibility Verification
 - 8 CF.R. § 274a.2(b)(1)(viii) – allows for successor in interest treatment for I-9 purposes; but...
 - acquiring deficient I-9 records leads to legal liability and increases the risk to employ individuals without work authorization
 - Continuing employees subject to work visa petitions
 - Acquiring employer *must* file a change of employer petition unless successor in interest applies.
 - Acquiring employer *may* file change of employer petition even if successor in interest applies, if beneficial to the company and employee's plans for employment-based permanent residence

Recommended practice: the M&A due diligence process should include an I-9 audit, and an inquiry as to whether any employees who would continue with the acquiring company are subject to an immigration petition filed by the company being acquired.

- Start-ups/new business formation: client wants to open a business in the U.S. but is here on a temporary visa
 - The law does not prohibit a visa holder from having ownership interest in a business; but...
 - Ownership interest does *not* necessarily confer employment authorization
 - Working for that business may cause the individual to be in violation of the visa terms, and is no longer maintaining legal status
 - 8 C.F.R § 248.1 – an individual lawfully admitted to the U.S. as a nonimmigrant “who is continuing to maintain his or her nonimmigrant status, may apply to have his or her nonimmigrant classification changed to any nonimmigrant classification....”

- 8 U.S.C. § 1255(c)(2), (c)(7), and (c)(8) – prohibit an individual from adjusting status to permanent residence inside the U.S. if the person engaged in unauthorized employment, failed to maintain non-immigrant status, or otherwise violated the terms of their nonimmigrant visa (some exceptions apply)

Recommended practice: ascertain the client’s citizenship status before creating the company. Incorporate POB question in any initial intakes/client questionnaires; if POB is anything other than the U.S., additional inquiries and legal analysis are required to ascertain the impact of potential business ownership on the client’s current status *and* on client’s future ability to change or adjust immigration status.

Employment law and/or legal areas involving back/future pay damages

- Relief for back pay and/or future pay is limited by the plaintiff’s immigration status
 - *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002)
 - Employee was laid off after supporting union-organizing campaign at the plant. NLRB found that the employee’s layoff was in violation of NLRA and ordered backpay. At the hearing to determine the amount of backpay, it was discovered that employee was not legally present in U.S. and had never had work authorization.
 - ALJ found that employee was precluded from any relief because of the Immigration Reform and Control Act (IRCA) that makes it unlawful for employers to hire undocumented workers or for employees to use fraudulent documents to obtain work (he had used a friend’s birth certificate).
 - NLRB reversed with respect to backpay, and Court of Appeals denied review
 - Supreme Court held: back pay to undocumented worker “is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA).”
 - *Burlington Graphic Sys., Inc. v. Dep't of Workforce Dev.*, 359 Wis. 2d 647, 859 N.W.2d 446 (2014)
 - Employee required ongoing medical treatment, for which she needed time off. When she returned to work a month later, she was terminated for excessive absence. She filed FMLA claim with DWD.
 - Before the hearing, the company rehired the employee but treated her as a new hire for purposes of I-9 verification, therefore asked her to present proof of identity and work

authorization. Employee could not produce proof of lawful work authorization, so she was terminated again, this time for being an undocumented worker.

- FMLA claim proceeded to hearing. ALJ found for the employee and ordered attorney's fees but refused to award back pay because she was unauthorized to work
- On appeal, the company argued that the employee was not a prevailing party because her backpay was rejected, so attorney's fees were not warranted. The Court disagreed and affirmed finding of violations of FMLA and attorney's fees award. Also affirmed lack of back pay award because of employee's lack of work authorization.

Recommended practice for plaintiff's attorneys: ascertain the client's citizenship status during the initial consultation, in order to properly advise on available damages. Incorporate POB question in any initial intakes/client questionnaires; if POB is anything other than the U.S., additional inquiries and legal analysis are required to ascertain the impact of the client's current status on any back pay or future pay awards.

Recommended practice for defense attorneys: incorporate interrogatory or deposition questions regarding the plaintiff's place of birth. If born in the U.S., no further inquiry needed. If born abroad, request evidence of lawful work authorization for all relevant periods covering any demand for back pay or future wages.

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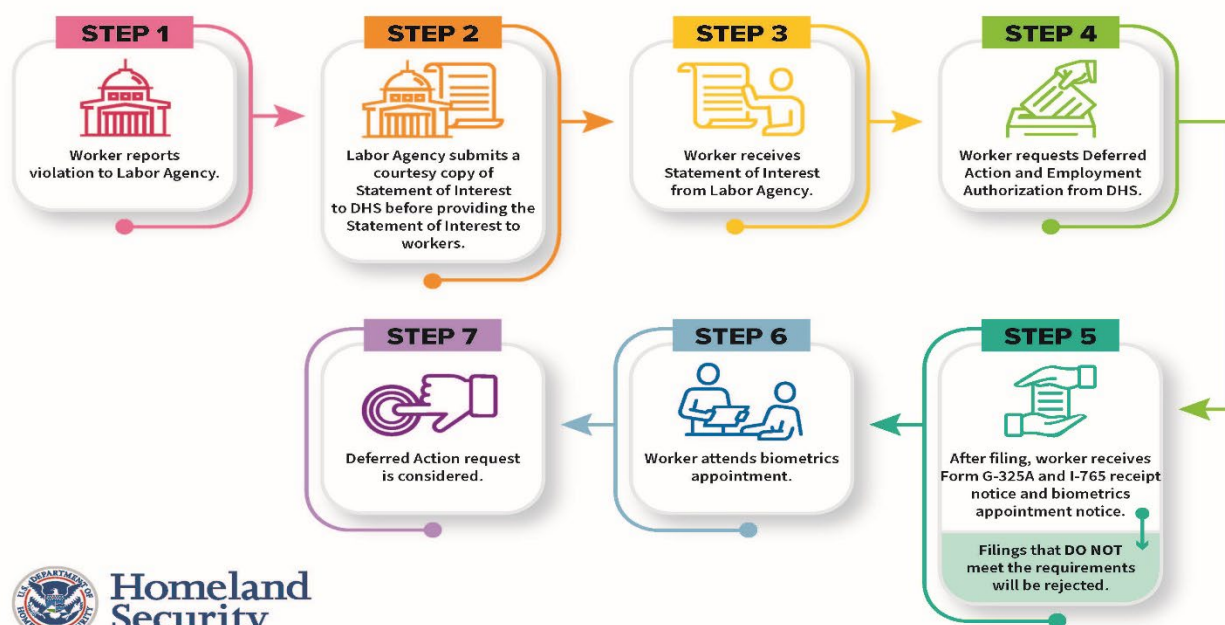
Impact of immigration status on labor violations and employment law matters

Labor-Based Deferred Action

Purpose: Labor-Based Deferred Action empowers noncitizens to exercise their rights by reporting workplace violations without fear of immigration consequences.

Overview: It is a temporary immigration benefit for noncitizens who collaborate with federal, state, and local employment agencies to uphold labor laws. This protection aims to address employers who exploit the undocumented status of workers to intimidate them from reporting abuses or participating in investigations.

REQUESTS FOR DEFERRED ACTION FOR WORKERS IN SUPPORT OF LABOR AGENCY INVESTIGATIONS



Eligibility Criteria:

Available to noncitizen workers currently employed or previously employed at a workplace under investigation for labor rights violations.

Reporting Process:

Noncitizens can report violations through legal representation, nonprofits, or by representing themselves to agencies such as the Equal Employment Opportunity Commission (EEOC), Department of Labor (DOL) Wage & Hour Division, National Labor Relations Board (NLRB), or Occupational Safety and Health Administration (OSHA).

Statement of Interest Letter:

The reporting noncitizen, attorney, or advocate collaborates with the relevant labor agency to request they issue a “Statement of Interest” letter to be submitted to DHS.

The letter urges DHS to use discretion in protecting all workers employed by the company involved in labor disputes, not just the individual worker.

The protection applies to all workers at the company during the period under investigation.

Benefits of Labor-Based Deferred Action

Deferred Action Granted:

DHS grants deferred action as a discretionary decision to delay removal as part of its prosecutorial discretion. Initial grants are for four years, with the possibility of a two-year renewal. Each case is evaluated individually.

Temporary Protection and Work Authorization:

Approved noncitizens receive temporary authorized presence in the U.S. during the validity granted.

They are also eligible to apply for an Employment Authorization Document (EAD). Noncitizens do have to show a basic economic necessity, such as needing a driver's license or supporting a family, typically sufficient for approval. With an EAD, noncitizens can obtain a Social Security number, apply for lawful employment, obtain a driver's license, build credit, and access to housing and better employment opportunities. However, noncitizens granted deferred action are not considered "qualified aliens" and thus are ineligible for federal public benefits.

Labor-Based Deferred Action offers crucial protections for noncitizen workers facing exploitation and abuse. While temporary, it provides a pathway to lawful employment, safety, and the ability to vindicate their labor rights without fear of deportation.

Labor Trafficking and T Nonimmigrant Status 8 U.S.C. § 1101(a)(15)(T)

<https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-214/subpart-C>

Overview:

A T visa is a non-immigrant visa for individuals who are victims of human trafficking (either sex or labor trafficking) and are willing to assist law enforcement in investigating and prosecuting trafficking cases. The T visa provides temporary immigration benefits and offers a pathway for victims to remain in the U.S. and potentially obtain lawful permanent resident status in the future.

Labor Exploitation vs. Human Trafficking

Labor exploitation

- Involves inadequate or unpaid wages, long hours without proper compensation, and unsafe working conditions. If reported to a labor agency can make a noncitizen eligible for labor-based deferred action as discussed above.

- Employees in these situations generally believe they have the freedom to leave the employer.

Human Trafficking

- In cases of labor trafficking, the work environment involves coercion or force that prevents the employee from feeling they can leave.
- Similar to exploitation in some conditions but involves a level of control as will be discussed below that rises to trafficking.

Eligibility for a T Visa

1. Must be a victim of a severe form of labor or sex trafficking.
2. Must be physically present in the U.S. on account of trafficking.
3. Must have complied with reasonable requests for assistance in a federal, state, or local investigation or prosecution of trafficking.
 - a. Exceptions: Victims under 18 at the time of trafficking or unable to cooperate due to trauma may be exempt from the assistance requirement.
4. Must demonstrate extreme hardship involving unusual and severe harm if removed from the U.S.
5. Must be admissible to the U.S. or eligible for a waiver of inadmissibility.

Clarification: It is not necessary for the victim to have actually performed the labor or commercial sex act; they may have been rescued or escaped before the act occurred.

For this panel, the focus will be on labor trafficking as it relates to involuntary servitude.

Type of Trafficking	Action	End	Means
Sex Trafficking	<ul style="list-style-type: none"> • Recruiting • Harboring • Transporting • Provision • Soliciting • Patronizing • Obtaining (Of a person)	For the purpose of a commercial sex act	Induced by force, fraud, or coercion (not required when the victim is under 18 years of age)
Labor Trafficking	<ul style="list-style-type: none"> • Recruiting • Harboring • Transporting • Provision • Obtaining (Of a person)	For the purpose of subjecting the victim to: <ul style="list-style-type: none"> • Involuntary servitude • Peonage • Debt bondage • Slavery 	Through use of force, fraud, or coercion

Action/Process: How did the trafficker get them in the situation?

Methods Used by Traffickers:

1. **Recruiting:** Encouraging or soliciting someone to take a job.
2. **Harboring:** Concealing and holding someone in a particular location.
3. **Transporting:** Moving someone, with no requirement on the distance traveled.
4. **Providing:** Supplying or making a person available, such as selling someone for labor.
5. **Obtaining:** Acquiring someone by an action, like purchasing a person for labor.

Means: What did the Trafficker do to KEEP the Victim in the Situation?

- Force
 - Not defined in the Trafficking Victims Protection Act (TVPA), but generally understood as compelling someone by physical means. (Black's Law)
- Fraud
 - Not defined in TVPA but involves knowingly misrepresenting the truth or concealing facts to manipulate someone's actions.
- Coercion (unless subject to an exemption for age or an exception for trauma suffered)
 - Threats of serious harm to or physical restraint against any person;
 - Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
 - Abuse or threatened abuse of the legal process

End: What is the ultimate goal of the trafficker?

Given the time I have, we will only look at labor trafficking in the context of involuntary servitude.

Involuntary Servitude

- Involuntary servitude is a condition in which a person is compelled to work for another through threats of deportation or abuse of the legal system, physical or psychological restraining, debt bondage, manipulation, or force, and fraudulent promises. This includes general forced labor.

Examples:

A worker is recruited from another country under the promise of a job in a U.S. restaurant, but upon arrival, they are forced to work long hours for little or no pay. Their documents are

confiscated, and they are threatened with deportation if they try to leave or report the conditions. This qualifies as labor trafficking through **fraud** and **coercion**.

A domestic worker is brought to the U.S. to work for a family, but the family isolates them, withholds their wages, and forces them to work long hours under the threat of harm or deportation. The worker is subjected to **labor trafficking** through **coercion** and **fraud**.

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Impact of immigration status on family law matters

<https://niwaplibrary.wcl.american.edu/pubs/divorce-bench-card/>

Immigrant Visa Petitions

§ 101(a)(K) and § 214 Fiancée/Fiancé Visas and Petitions

- Do I really have to get married in 90 days?

§ 203 Allocation of Immigrant Visas (Preference Categories/Visa Bulletin)

- I have to wait HOW long to be united with my Spouse? Child? Sibling?

Section 203(a) of the INA prescribes preference classes for allotment of Family-sponsored immigrant visas as follows:

FAMILY-SPONSORED PREFERENCES

First: (F1) Unmarried Sons and Daughters of U.S. Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any unused first preference numbers:

A. **(F2A)** Spouses and Children of Permanent Residents: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. **(F2B)** Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents: 23% of the overall second preference limitation.

Third: (F3) Married Sons and Daughters of U.S. Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: (F4) Brothers and Sisters of Adult U.S. Citizens: 65,000, plus any numbers not required by first three preferences.

A. FINAL ACTION DATES FOR FAMILY-SPONSORED PREFERENCE CASES

6. On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are authorized for issuance to all qualified applicants; and "U" means unauthorized, i.e., numbers are not authorized for issuance. (NOTE: Numbers are authorized for issuance only for applicants whose priority date is **earlier** than the final action date listed below.)

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	22OCT15	22OCT15	22OCT15	01JAN03	01MAR12
F2A	22NOV21	22NOV21	22NOV21	08MAR21	22NOV21
F2B	01MAY16	01MAY16	01MAY16	15JAN05	22OCT11
F3	01APR10	01APR10	01APR10	22AUG00	08SEP02
F4	01AUG07	01AUG07	01MAR06	22FEB01	01FEB04

§ 204.1 General information about immediate relative and family-sponsored petitions.

§ 204.2 Petitions for relatives, widows and widowers, and abused spouses and children.

Divorce and the family-based immigration process

- Impact of divorce vs annulment (how the marriage is terminated and when matters)
- Does the termination impact a pending application/benefit/petition
- Does the termination “cut off” a future application/benefit/status
- Does the termination require the non-citizen to take additional action to maintain lawful status
- What if both parties are undocumented? What about our children born in the United States?

Violence Against Women Act Provisions (VAWA/TVPRA)

- a. The Violence Against Women Act, first enacted in 1994, was created to address the widespread problem of abused non-citizens staying with their abusers because the abusers held a key role to the victim attaining lawful immigration status in the United States. VAWA petition process mirrors the family-based process but frees the victim from having to rely on the abuser’s cooperation to petition for them.

VAWA Self Petitions (INA §204)

<https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-204#204.2>

- b. U Visas- Victims of Crimes (INA §101(a)(15(U); (INA §214(p))
<https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-214#214.14>
- c. T Visas- Victims of Trafficking (INA §101(a)(15(T); (INA §214(o))
<https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-214/subpart-C>
- d. SIJS- Special Immigrant Juvenile Status
<https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-204#204.11>

<https://niwaplibrary.wcl.american.edu/pubs/power-control-wheel-eng-niwap/>

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Impact of immigration status on criminal law matters

Criminal Law

~ Major consequences of criminal convictions

- Removal (deportation) from the United States
- Ineligible for immigration bond, resulting in mandatory custody during removal proceedings
- Ineligible for immigration waivers or relief
- Ineligible for citizenship

Recommended practice: determine an individual's current immigration status (Lawful Permanent Resident, Lawfully present, undocumented), discuss their immigration history (date of entry, lawful or unlawful entry, prior deportation), determine criminal history and arrests (everything counts! even old convictions, misdemeanors, and offenses without jail time).

~ Criminal Grounds of Removal

- Inadmissibility: 8 U.S.C. § 1182
 - For those who entered without inspection
 - Crimes involving moral turpitude (admission sufficient) *Petty offense exception*
 - Controlled substance offenses (admission sufficient)
 - Drug trafficking (reason to believe)
 - Money laundering (reason to believe)
 - 2+ crimes with aggregate sentences of 5+ years
 - (Coming to the U.S. for) prostitution and commercialized vice
- Deportability: 8 U.S.C. § 1227
 - For those who were admitted to the United States at Port of Entry of Adjusted Status
 - Crimes involving moral turpitude
 - Aggravated felonies
 - Controlled substances violations
 - Firearms-related offenses
 - Domestic violence and protection order violations
 - Stalking, child abuse/neglect

Recommended practice: determine the way your client entered the United States to first ascertain whether criminal conviction or activity may impact them, discuss alternate charges with the DA, discuss alternative sentencing options, construct plea/diversion agreements that are favorable to the non-citizen

~ Why are these considerations important?

- No right to court appointed counsel in removal proceedings
- Many non-citizens appear pro se in removal proceedings
- There is little to no time to seek post-conviction relief

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National Efforts

American Immigration Council- <https://www.americanimmigrationcouncil.org/>

ASISTA- <https://asistahelp.org/>

National Immigrant Justice Center- <https://immigrantjustice.org/>

CAST- <https://castta.nationbuilder.com/>

CLINIC- <https://www.cliniclegal.org/>

American Immigration Lawyers Association- <https://www.aila.org/>

Local Efforts

CILC - Community Immigration Law Center <https://www.cilcmadison.org/>

Centro Hispano - <https://www.micentro.org/>

CMC- Catholic Multicultural Center - <https://cmcmadison.org/immigration-legal/>

JSS- Jewish Social Services- <https://jssmadison.org/services/refugee/>

UW - Immigrant Justice Center- <https://law.wisc.edu/eji/ijc/>

Open Doors for Refugees- <https://opendoorsforrefugees.org/>

DCIA- Dane County Immigration Affairs - <https://www.danecountyhumanservices.org/Children-Youth-and-Family/Immigration-Affairs>

UMOS/Voces de la Frontera/Catholic Charities/SWCAP/Literacy Network