



BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS

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Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants

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Foreword

The National Immigrant Women’s Advocacy Project, (NIWAP) (pronounced “new-app”) opened its doors on April 2012 as a new project at American University, Washington College of Law in Washington, D. C. NIWAP’s mission is to protect and expand legal rights, options and opportunities for immigrant women and their children and immigrant victims of domestic violence, sexual assault, human trafficking and other crimes. NIWAP aims (1) to help immigrant victims of violence against women end the destructive role that violence has played in their lives and the lives of their children and (2) to support all immigrant women in their struggles to care for and nurture their children, attain legal immigration status, and build safe, economically secure lives in the United States, lives in which they and their children may thrive.

This Manual *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants* is part of an array of resources NIWAP provides to carry out its mission. In our web library, <http://niwaplibrary.wcl.american.edu/>, you will find a wide array of resources and information supporting your work helping immigrant women, immigrant children and immigrant survivors of violence against women. This Manual focuses on legal rights and options for immigrant survivors of domestic violence including intimate partner violence, child abuse, elder abuse and abuse perpetrated by other family members or persons that are covered by your state’s protection order statute.

Breaking Barriers is a comprehensive tool that provides information that will be useful to advocates, attorneys, justice, and social services professionals working with and assisting immigrant survivors of domestic and family violence. This Manual provides a detailed overview explanation of immigrant survivors’ legal rights under immigration, family, public benefits, and criminal laws and their rights to access a broad range of victim services without regard to immigration status of the immigrant crime victim or their children. *Breaking Barriers* provides social science research findings, information about laws, policies and best practices, legislative history, tools and checklists that will help professionals working with immigrant survivors navigate intersecting legal and social services options that are legally available to assist all immigrant victims including those who are undocumented.

This Manual would not have been possible without the dedication, collaboration, creativity and industrious efforts of numerous authors who have devoted significant work during their careers to improving legal options and opportunities for domestic violence victims. Their work was supported by dedicated and hardworking interns who are also included as authors of the chapters they worked on. Over the years of this Manual’s production and completion many of the interns who contributed to this Manual have gone on to become a new generation of lawyers, federal policy makers, social workers, and academics who have continued this important work.

Our goal is to aid advocates, attorneys, government agency personnel and other professionals with the holistic knowledge needed to confidently provide effective assistance to immigrant and limited English proficient victims of domestic violence, sexual assault, stalking, dating violence and human trafficking, and their families. If you are working with immigrant survivors of sexual assault, please also consult *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* available at <http://niwaplibrary.wcl.american.edu/reference/Manuals/sexual-assault>

We have designed this Manual so each of its free-standing chapters can be used separately, as well as in combination with other chapters. This approach will also facilitate our ability to swiftly update

the chapters as new laws, regulations and policies are implemented. Our goal is to provide users with a convenient and efficient way to obtain wide-ranging up-to-date information about immigrant survivors' legal options.

NIWAP provides national technical assistance for advocates, attorneys, police, prosecutors, judges, and other professionals working with immigrant crime victims and their children on the full range of issues covered in this Manual. As you work with this Manual or any of the materials contained in our web library, <http://niwaplibrary.wcl.american.edu/>, please contact us for technical assistance by emailing us at: niwap@wcl.american.edu or calling (202) 274-4457.

We, of NIWAP, hope that *Breaking Barriers* will be of great assistance in your work.

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The development of this Manual was a collaborative effort. The richness of the material presented represents the cumulative experience and expertise of many staff members of the National Immigrant Women's Advocacy Project, American University, Washington College of Law and Legal Momentum. This manual would not have been possible without insightful contributions from a wide array of allies who are experts from across the country serving immigrant victims in their communities. Many of the allies participating in this project were Advisory Committee Members of the National Network to End Violence Against Immigrant Women (1992-2011). This Manual reflects the long term commitment and the collective expertise of its many authors whose work has been dedicated to improving legal options and access to justice for immigrant victims of violence against women and their children.

We wish to give special acknowledgment to Janice V. Kaguyutan whose contributions to this Manual were invaluable.

Our deepest appreciation goes to Kathleen Sullivan, whose expertise, editorial assistance, direction, and insight made this Manual possible.

We are also deeply indebted to the many interns who worked hard to make this Manual a reality. The interns who contributed to each chapter are identified either as co-authors or in the first footnote of the chapters containing their work.

We also wish to thank all of the Office on Violence Against Women grantees and the National Network to End Violence Against Immigrant Women members who sought technical assistance from and attended conferences planned by the staff of the National Immigrant Women's Advocacy Project, American University, Washington College of Law and previously by Legal Momentum. The allied professionals seeking technical assistance and training have helped identify the barriers and problems that needed to be addressed in this Manual. This valuable input helped us assure that this Manual would provide the types of information most useful to attorneys, advocates, and justice system personnel working to help immigrant victims of violence against women in their communities.

And, finally, deep appreciation goes to the Office on Violence Against Women, U. S. Department of Justice, for providing the funding to make this Manual possible. In particular we would like to thank Neelam Patel and Corrin Ferber for their support and guidance in shaping this project.

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Terminology

This list of terms intends to clarify the meaning and usage of specific words in this Manual, all of which are generic to the matter regarded in this publication.

Victim/Survivor: The term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions.

She/He: The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim.

Sexual Orientation and Gender Identity: VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples.¹ As a result of these laws VAWA self-petitioning is now available to same-sex married couples² including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

¹ The Windsor decision overruling on DOMA and new Department of Homeland Security policy following issuance of the Windsor decision deems same-sex married couples “spouses” for immigration purposes. *United States v. Windsor*, 12-307 WL 3196928; <http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>

² This includes protections for all spouses without regard to their gender, gender identity (including transgender individuals) or sexual orientation.

1.1

Dynamics of Domestic Violence Experienced by Immigrant Victims¹²

By Leslye Orloff and Olivia Garcia

A victim of domestic violence faces a variety of complex legal and personal issues that can be further exacerbated by the pressures of immigration and culture concerns.³ Battered immigrant⁴ women often feel

¹ “This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.” The assistance of Nadia Firozvi of the University of Baltimore School of Law, Lisa Herrmann of the University of Virginia, Shiwali Patel of Boston University and Jessica Shpall of the University of California at San Diego in developing this chapter is greatly appreciated.

² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, go to <http://niwaplibrary.wcl.american.edu/immigration>.

⁴ The term “immigrant,” unless otherwise noted, will be used in this manual as a general term to also include both documented and undocumented immigrants, refugees and migrants. The term “undocumented” refers to people currently living in the United States without permission from the Department of Homeland Security (formerly the Immigration and Naturalization Service). This unauthorized residence could result from a visa violation or an unlawful entry. “Documented” immigrants are those who hold valid visas to live in the United States, and include legal permanent residents (“green card” holders). These documented populations, although they are lawfully present in the United States, are often uninformed or misinformed about their legal rights. Many battered immigrants who are currently undocumented immigrants may qualify to

Overview of Domestic Violence

isolated from their communities, both domestically and internationally. Moreover, foreign-born women are frequently uninformed, unfamiliar with or simply confused about, their legal rights and the social services available to them in the United States. This is due, in part, to the lack of interactions between immigrant victims and government agencies. Unfortunately, too often both, governmental and non-governmental agencies that help to redress domestic violence are not prepared to meet the diverse needs of battered immigrant women. Many lack language accessibility, cultural sensitivity, and have insufficient information regarding the legal rights of battered immigrants. The needs of immigrant victims can be met by educating advocates and attorneys, and ensuring that justice-system employees in all communities know immigrant victims' legal rights. Immigrant victims' access to services can be significantly improved by increasing the cultural sensitivity of these professionals. This means replacing prior assumptions individuals might have had about immigrant victims and their perpetrators. In doing so, these professionals can serve as culturally sensitive and well-informed guides to help immigrant victims navigate through their legal and personal challenges resulting from the violence they have endured.

In order for readers to better understand immigrant victims of violence against women, this manual seeks to explain the complex topics of domestic violence and immigration laws that are intended to assist immigrant survivors. The goal of this manual is to provide support and assistance to advocates and attorneys, arming them with the knowledge they need to confidently provide effective assistance to battered immigrant victim and the immigrant community. Additionally, this text is being written to provide immigrant advocates, immigrant attorneys, and social service providers to immigrant communities, with an understanding of general domestic violence dynamics and how these affect immigrant victims. Each of the following chapters will highlight particular issues of importance for advocates and attorneys helping immigrant victims overcome systemic barriers and find ways to navigate through systems that are not often responsive to immigrant victims' needs.

This chapter provides background information about the dynamics of domestic violence as experienced by immigrant victims. It provides a definition for domestic violence. Nine subsequent sections explain how immigrant victims fear deportation, the specific economic issues they experience, particular concerns about child custody, popular misconceptions about the U. S. legal system, and how advocates can help rebuild social support networks for immigrant victims. The chapter addresses culturally sensitive topics regarding health care, police relations and women's efforts to leave abusers.

Definition of Domestic Violence

Violence against a woman caused by an intimate partner is a common occurrence in the United States. Domestic violence crosses racial, ethnic, national origin, religious, age, socioeconomic, and sexual lines.⁵ It is also important to note that same-sex violence happens at approximately the same rate as opposite-sex battering.⁶ The July 2000 *National Violence Against Women Survey* by the United States Department of Justice found that violence against women is primarily intimate-partner violence: 64. 0% of the surveyed women who reported being raped, physically assaulted, and/or stalked since age 18 were attacked by a current or former spouse, boyfriend, cohabiting partner, or date.⁷ According to a 1998 Commonwealth Fund

attain legal immigration status either through the Violence Against Women Act (VAWA) or the U-Visa crime victim visa provisions discussed in Chapters 3 of this manual.

⁵ American Bar Association Commission on Domestic Violence <http://www.abanet.org/domviol/stats.html> & Heise, Lori L., Jacqueline Pitanguy and Adrienne Germain. *Violence Against Women: The Hidden Health Burden*. The World Bank. No. 255. Washington, DC page 14. Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's right to Counsel*, 34 *Gonz. L. Review*. 329, 332 (1998-1999). See generally, Honorable Karen Burstein, *Naming the Violence: Destroying the Myth*, 58 *ALB. L. Review* 961 (1995); Zanita E. Gfenton, *Domestic violence in Black and white: Racialized Stereotypes in Gender violence*, 8 *Colum J. Gender and Law*. 1 (1998).

⁶ David M. Zlotnik, *Empowering the Battered Woman: The use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*. 59 *Ohio St. Law Journal* 1153, 1162-63, 1215 (1995). Kathleen Finley Duthu, *Why Doesn't Anyone Talk about Gay and Lesbian Domestic Violence?* 18 *Thomas Jefferson Law Rev.* 23, 24 (1996).

⁷ Tjaden, P. & Thoennes, N. (July 2000). *Full report of the prevalence, incidence, and consequences of violence against women*. (Publication #NCJ83781). Washington, DC: United States Department of Justice, Bureau of Justice Statistics. Available at: <http://www.ncjrs.org/pdffiles1/nij/181867.pdf>.

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Survey, nearly one-third of American women (31%) report being physically or sexually abused by a husband or boyfriend at some point in their lives.⁸ Violence by an intimate partner is far more likely to end in injury than violence by a stranger, and should, therefore, be considered more dangerous. Statistics from the Department of Justice revealed that in approximately 2 million of the 4.8 million intimate partner rapes and assaults reported, the victim was injured.⁹ Victims sustain injuries in 48% of incidents of violence committed by an intimate partner, and in 32% of incidents of violence committed by a family member.¹⁰

A study of Latina immigrants who were surveyed in the Washington, DC metro area showed that, almost 50% have been abused physically, 11% sexually abused, and 40% had been psychologically abused.¹¹ Although the domestic violence rates are numerically close between US-born women and immigrant women, the dynamics are quite different for immigrant battered women. For example, immigrant women who have been in the U. S. for less than three years are less likely to call the police for help for fear of language barriers,¹² or because they fear a lack of responsiveness from police officers in documenting the event or arresting the abuser.¹³ In turn, these obstacles for battered immigrant victims are tools of power and control for the abusers.

Domestic violence is a harsh reality for any woman, and for a woman who is unfamiliar with language, resources or a social support network, intimate partner violence can be even more traumatic. Abuse is an extension of power and control the abuser has over the victim. Some specific examples of power and control tactics are; emotional abuse, economic abuse, sexual abuse, coercion and threats, using children as leverage for the victim to endure the abuse, using citizenship or residency privilege, intimidation, isolation or manipulating situations in order to keep the victim dependent upon him. For many years domestic violence was seen in law as mainly consisting of physical and/or sexual abuse. In 1994, the Violence Against Women Act (VAWA) introduced the concept of the term *extreme cruelty*, which includes being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution is also considered domestic violence

BATTERING AND EXTREME CRUELTY

It is important for advocates and attorneys working with immigrant victims to become familiar with the definition of “domestic violence” under U. S. immigration law. Department of Homeland Security regulations state that abuse encompasses both battery and extreme cruelty.¹⁴ Physical abuse and sexual abuse are the most common forms of abuse. Domestic violence includes, but is not limited, to: throwing objects, pushing or shoving, physical restraint by forcefully holding or tying up the victim (such as locking her in the house or room), slapping, pulling hair, punching, kicking, burning, choking, strangling or smothering, slamming the victim’s head into a hard object, beating up the victim, throwing the victim on the floor, running into the victim with an automobile, putting a dangerous substance, such as gasoline, on the victim’s skin, hair, or eyes, pushing, scratching, biting, burning, attacking, hitting, cutting, or stabbing the victim with a knife or

⁸ Karen Scott Collins, Cathy Schoen, Susan Joseph, Lisa Duchon, Elisabeth Simantov, and Michele Yellowitz. *The Commonwealth Fund. Health Concerns Across a Woman’s Lifespan: 1998 Survey of Women’s Health*, May 1999. Available at: http://www.cmf.org/programs/women/ksc_whsurvey99_332.asp

⁹ Tjaden, P. & Thoennes, N. (July 2000). *Full report of the prevalence, incidence, and consequences of violence against women*. (Publication #NCJ83781). Washington, DC: United States Department of Justice, Bureau of Justice Statistics. Available at <http://www.ojp.usdoj.gov/bjs>.

¹⁰ Thomas Simon, James Mercy, and Craig Perkins. Injuries from Violent Crime 1992-98, Bureau of Justice statistics, Center for Disease Control and Prevention. <http://www.ojp.usdoj.gov/bjs/pub/pdf/ivc98.pdf> National Crime Victimization Survey June 2001. NCJ 168633

¹¹ Giselle Aguilar Hass et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in DOMESTIC VIOLENCE: GLOBAL RESPONSES 93(2000).

¹² Leslye E. Orloff et al., *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 44, 71 (2003).

¹³ Orloff, Leslye, Deean Jang and Catherine Klein. American Bar Association. Vol. 29, No. 2, 316, Summer 1995.

¹⁴ 8 C.F.R. 204.2(c)(1)(E); see also INA §216(c)(4)(C), 8 U.S.C. 1186(c)(4)(C) (1994).

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machete, attacking, hitting, or shooting the victim with a gun, hitting the victim with other objects, and/or assaulting during pregnancy.¹⁵

Sexual abuse is typically defined as: rape, forcing a victim to participate in unwanted sexual behavior, making derogatory remarks about the victim, such as calling her a prostitute or mail-order bride,¹⁶ telling her that she is legally required to have sex with him whenever he wants until they are divorced (in most states, a couple cannot be legally divorced until they are separated and have not had sex for six months),¹⁷ making the victim view or perform in pornographic material, forcing the victim to have sexual relations with other men or engage in prostitution, accusing her of having sex with other men or of trying to attract other men through such behavior as applying makeup, and/or suggesting on legal documents that the victim has a history of prostitution.

In addition to physical battery and sexual abuse, the domestic violence definition under immigration law explicitly includes “acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.”¹⁸ This expanded definition also includes harassment, which involves following the victim, threatening the victim, calling the victim names, preventing the victim from leaving the room or from calling the police, interfering with the victim’s living, making unwanted telephone calls to the victim, moving within two blocks of the victim’s house, loitering in front of the battered women’s shelter where the victim is staying, and contacting the petitioner’s employer.¹⁹ This definition also encompasses a pattern of interactions in which one intimate partner is forced to change her²⁰ behavior in response to the threats or abuse. The definition is more inclusive than the state criminal or family law domestic violence definitions, which are generally limited to violent acts, kidnapping, threats, and attempts to harm or physically injure a partner.²¹

Psychological abuse is typically shown through emotional/verbal abuse and/or through dominance and isolation of resources.²² Psychological abuse plays an important role in abusive relationships because it is often a precursor to physical and/or sexual abuse. Moreover, psychological abuse does not have a concrete beginning or end, like physical and sexual abuse, and this can create a constant climate of terror for the victim. Psychological abuse may consist of: insulting the victim or driving her friends away, continually criticizing her and calling her names, ignoring her feelings, manipulating, humiliating the victim in private or public, mocking or insulting personal beliefs, regularly threatening the victim, regularly threatening to leave

¹⁵ This list derived from Mary Ann Dutton Et Al., American Bar Association, *Domestic Violence & Immigration: Applying the Immigration Provisions of the Violence Against Women Act: A Training Manual for Attorneys & Advocates* 3-4 (Bette Garlow et al. eds., 2000) and from focus groups with Latina immigrant victims of domestic violence who participated in the development of the Needs Assessment Survey of Undocumented Women the results of which were published in Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL’Y 245, 4 (2000) .

¹⁶ Instead of using the term “mail-order brides,” which has been interpreted by many to somehow blame the victim for any abuse she may suffer at the hands of her husband, the preferred description is wives who met their husbands through international matchmaking organizations.

¹⁷ Need to look at Family Law or matrimonial horn book that we had at Ayuda to get cites for divorce separation requirements in all states also include here sample case law on ongoing sexual relations and separation for purposes of divorce.

¹⁸ Department of Homeland Security Regulations [8 C.F.R. § 204.2(c)(1)].

¹⁹ Catherine F. Klein and Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra Law Review 801, 866-867 (Summer 1993)

²⁰ The use of “he” for the abuser and “her” for the victim is based on the fact that statistics show that the majority of perpetrators are male and the majority of victims are female. *Supra* note 1, at 17; Gerald T. Hotaling & David B. Thoennes, N. (July 2000). *Full report of the prevalence, incidence, and consequences of violence against women*. (Publication #NCJ83781). Washington, DC: United States Department of Justice, Bureau of Justice Statistics. Available at <http://www.ojp.usdoj.gov/bjs>

²¹ Leslye Orloff and Janice Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U. J. Gender Soc. Pol’y & L. 95, 106 (2001). See also Illinois’ Domestic Violence Act, where domestic violence is defined as “physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation,” Il. St. Ch.750 §60/227 (1986). Catherine F. Klein & Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. 801 (Summer 1993).

²² Giselle Aguilar Hass et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications, in DOMESTIC VIOLENCE: GLOBAL RESPONSES* 103-104 (2000).

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or kidnap the children, threatening to abuse her loved ones, locking the victim out of the house, taking possession of the victim's belongings and keeping control of them, throwing away the victim's belongings, controlling what the victim can and cannot do, stalking, checking the victim's mail, phone messages, and anything that may be private to her, becoming jealous and accusing the victim of sexual activity with others, controlling money and accounts without letting the victim have any control, forbidding the victim to go to work or school, or forbidding her from accepting a promotion.

Isolation falls under the category of psychological abuse. An abuser can isolate his partner by: keeping her from accessing supportive individuals in the community, telling lies about her to her family, preventing her from having contact with her family, monitoring all her phone calls, disconnecting the phone, threatening to harm someone in her family, (in the United States or in her country of origin), destroying her personal belongings (such as clothes, letters, heirlooms, photos or other items brought from her home country), threatening to bring shame on the victim's family, convincing her that his actions are not illegal unless they occur in public, threatening to throw her out of the house, blaming her for breaking up the family if she leaves him, telling her that she provoked the violence and is responsible for it. By isolating his partner, an abuser creates an environment where the immigrant victim feels she has no reliable support network.

The following are specific ways in which immigrant women are abused, although the experiences of individual victims will vary from case to case.²³

Emotional Abuse:

- Lying about her immigration status.
- Telling her family lies about her.
- Calling her racist names.
- Belittling and embarrassing her in front of family and friends.
- Causing her to “lose face”.
- Telling her that she has abandoned her culture and become “white,” or “American.”
- Preventing her from visiting sick or dying relatives.
- Abuser lying about his ability to have the immigration status of his lawful permanent resident abuse victims changed.

Economic Abuse:

- Forcing her to work “illegally” when she does not have a work permit.
- Threatening to report her to immigration authorities if she works “under the table.”
- Not letting her get job training or schooling.
- Taking the money that her family back home was depending upon her to send them.
- Forcing her to sign papers in English that she does not understand -- court papers, IRS forms, immigration papers.
- Harassing her at the only job she can work at legally in the U. S. , so that she loses that job and is forced to work “illegally.”

Using Coercion and threats:

- Threatening to report her to immigration authorities and get her deported.
- Threatening that he will not file immigration papers to legalize her immigration status.
- Threatening to withdraw the petition he filed to legalize her immigration status.
- Telling her that he will harm someone in her family.
- Telling her that he will have someone harm her family members in her home country.
- Threatening to harm or harass her employer or co-workers.

Using Children:

- Threatening to remove her children from the United States.
- Threatening to report her children to the immigration authorities.

²³ This document was developed at Ayuda Inc., Washington, D.C.

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- Taking the money she was to send to support her children in her home country.
- Telling her he will have her deported and he will keep the children with him in the U S
- Convincing her that if she seeks help from the courts or the police, the U. S. legal system will give him custody of the children. (In many countries men are given legal control over the children and he convinces her that the same will occur here).

Using Citizenship or Residency Privilege:

- Failing to file papers to legalize her immigration status.
- Withdrawing or threatening to withdraw immigration papers filed for her residency.
- Controlling her ability to work.
- Using the fact of her undocumented immigration status to keep her from reporting abuse or leaving with the children.
- Telling her that the police will arrest her for being undocumented if she calls the police for help because of the abuse.

Under VAWA, actions that, in and of themselves, may not constitute abuse, but are part of a pattern of actions that together amount to extreme cruelty and considered domestic violence. ²⁴ Some illustrations of “extreme cruelty” are:

Intimidation:

- Hiding or destroying important papers (i. e. her passport, her children’s passports, ID cards, health care cards, etc.)
- Destroying the only property that she brought with her from her home country.
- Destroying photographs of her family members.
- Threatening persons who serve as a source of support for her.
- Threatening to do or say something that will shame her family or cause them to lose face.
- Threatening to divulge family secrets.

Minimizing, Denying, Blaming:

- Convincing her that his violent actions are not criminal unless they occur in public.
- Telling her that he is allowed to physically punish her because he is the “man. ”
- Blaming her for the breakup of the family, if she leaves him because of the violence.
- Telling her that she is responsible for the violence because she did not do as he wished.

The enigmatic nature of domestic violence makes it a moving target because it can take on many different shapes. In addition to the most commonly recognized forms of domestic violence, physical violence and sexual aggression, psychological abuse also plays an important role in the pattern of abuse. Keeping in mind that immigration laws include some forms of emotional abuse and extreme cruelty, in the definition of domestic violence, it is important for advocates and attorneys working with immigrant victims to recognize and document extreme cruelty in the same manner as they collect information from victims about sexual abuse evidence when preparing an application for an immigration benefit under the Violence Against Women Act. ²⁵

Domestic Violence as Experienced by Immigrant Women

Immigrant victims face added fears of being deported, i. e. removed from the U S,²⁶ losing the chance of any immigration status, losing custody and access to their children, to a partner with more stable immigration or

²⁴ Department of Homeland Security Regulations [8 C.F.R. § 204.2(c)(1)].

²⁵ See chapter 3 for more information. This evidence should be collected and included in VAWA self-petitioning cases both when the case is based solely on extreme cruelty and when the extreme cruelty co-occurs with psychical and sexual abuse.

²⁶ Removal is defined as, “the expulsion of an alien from the United States. This expulsion may be based on grounds of inadmissibility or deportability.” See U.S. Citizenship and Immigration Services website at <http://uscis.gov/graphics/glossary3.htm - R>

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citizen status, and confronting the cultural ramifications of leaving an abusive spouse. Furthermore, battered immigrant women often lack information about the United States legal system, the services offered by the U. S. to help domestic violence victims, and about access to the public benefits safety net.

IMMIGRATION-RELATED ABUSE

Abusers of immigrant spouses and intimate partners often use immigration-status-related abuse to lock their victims in abusive relationships. For immigrant victims, this form of power and centrality is particularly malicious and effective. The fear induced by immigration related abuse makes it extremely difficult for a victim to leave her abuser, obtain a protection order, call the police for help, or participate in the abuser's prosecution. Immigration-related abuse plays upon the fact that the abuser may control whether or not his spouse attains legal immigration status in this country, whether any temporary legal immigration status she has *may* become permanent, and how long it may take her to become a naturalized citizen. Immigration-related abuse plays upon particular vulnerabilities for immigrant victims and usually coexists with and/or predicts escalation.

In addition to deterring a victim from seeking help to counter abuse, immigration related abuse could be used to interfere with the victim's abilities to survive economically apart from their abusers. Legal immigration status leads to access to work authorization that allows immigrant victims to work legally in the United States. Moreover, abusers of immigrant victims who are the mothers of their children often keep the victim from attaining legal immigration status, and then try to raise her lack of legal immigration status in a custody case in order to win custody of the children despite his history of abuse.²⁷

Some examples of immigration related abuse include, but are not limited to:²⁸

- Threatening to report her or her children to the Department of Homeland Security
- Threatening to turn her into Department of Homeland Security for deportation
- Not filing papers to confer legal immigration status on her or her children
- Threatening to withdraw or withdrawing immigration papers he filed for her and/or her children
- Asking Department of Homeland Security to revoke any family-related non-immigrant visa issued to the victim and/or her children as dependents on the abuser's work-related- diplomatic, student visa, or other visa.
- Asking Department of Homeland Security to revoke an approved family based visa petition filed by the abuser.
- Making her come to the United States on a visitor's or fiancé visa although she is already married to her spouse.
- Forcing her to sign papers written in English that she does not understand, that have to do with her immigration claims
- Not giving her access to documents that she needs for her application for lawful immigration status
- Threatening to tell immigration authorities that she married him only to obtain lawful immigration status and that their marriage is fraudulent
- Getting the immigration authorities to revoke a visa it has granted to her as his spouse
- Turning her into the immigration authorities for deportation, controlling the mail, and hiding from her notices to appear before an Immigration Judge to defend against her deportation.
- Telling her that if she calls the police for help he will have her deported
- Misinforming her about the legal system and her rights in the legal system and under immigration laws.

Research on immigration-related abuse has found that it appears to be a lethality factor. If advocates or attorneys working with battered immigrants discover that the behaviors listed above are occurring, they should

²⁷ Chapter 6 of this manual discusses how to successfully counter these arguments when they arise in custody cases.

²⁸ Advocates and attorneys working with battered immigrants on immigration cases should help the victim identify and document these types of abuse in the same manner as they document physical and sexual abuse.

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be vigilant about the possibility that the immigration-related abuse a lethality factor that predicts escalation toward physical and/or sexual violence.²⁹ When immigration-related abuse is occurring in a relationship, advocates and attorneys working with immigrant victims should fully explore whether the client is also experiencing physical or sexual abuse. Some clients may not mention physical abuse because they are ashamed, fear the abuser, or have been taught that physical abuse is a normal occurrence. Immigrant victims of sexual abuse maybe unaware that the forced sexual relations to which they have been subjected to are abusive. When physical and/or sexual abuse is not occurring, the presence of immigration-related abuse should inform the advocate or attorney that the abuse in the relationship is likely to escalate, and that they should do careful safety planning with the victim.³⁰ Advocates and attorneys should build trust in order to help the immigrant victim feel comfortable in revealing abuse that has occurred. Building a strong relationship between the victim and advocate can offer critical assistance to an immigrant abuse victim, helping her to document the pattern of physical, sexual and emotional abuse to support a VAWA immigration case or a battered spouse waiver.

FEAR OF DEPORTATION

Fear of deportation³¹ is the principal barrier to immigrant victims' seeking any type of aid after experiencing abuse, including assistance from shelters, advocates, hospitals, and the police.³² This fear of deportation affects both immigrant victims of domestic violence who have legal permission to live and work in the United States, and those that are undocumented.³³ As a result, many battered immigrants believe that they have no legal right to protection from their abuser.³⁴ Many immigrant victims of domestic violence fear deportation because their relationship to the abuser is often the basis for their eligibility to reside legally in the United States. Many victims who qualify for VAWA, battered spouse waivers or the crime victim (U) visa³⁵ have no knowledge that options exist to attain legal immigration status without dependence on their abusers. Advocates and attorneys should be extremely sensitive to this issue and immediately assure battered immigrant women that they are not in danger of being deported because they seek help from advocates and attorneys, report the abuse, and/or obtain help.

The abusive spouse may be a citizen or lawful permanent resident who uses the fact that the law grants him control over his undocumented wife's and/or child's immigration status as a tool for perpetrating domestic violence and for keeping his victims from leaving him or seeking help. In other instances the abuser may have "non immigrant" status, which is as legal permission to live and work in the United States but not permanently.³⁶ A holder of a "non immigrant" visa can in turn file for "derivative" status for his spouse and

²⁹ See Leslye Orloff and Janice Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U. J. Gender Soc. Pol'y & L. 95, 136 (2001).

³⁰ See safety planning in Chapter 5

³¹ Being placed in removal proceedings in front of an immigration judge and losing the case can lead to deportation, which is defined as being returned to one's country of origin. It should be noted; however, that many immigrants are not aware that they have the right to a trial and thus fear that any "official" (which they may believe to include shelter directors and doctors, who in reality have no right to ask for her immigration status or report her as an illegal alien) will be able to simply send her out of the country. Leslye E. Orloff, Mary Ann Dutton, Giselle Aguilar Hass and Nawal Ammar, *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 7 13 UCLA WOMEN'S L.J. 43 (2003).

³² Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 55 (2000).

³³ Raj, Anita and Jay Silverman. *Violence Against immigrant Women: Roles of Culture, Context and Legal Immigrant Status on Intimate Partner Violence*. *Violence Against Women*, Vol 8. No. 3, 2002 Sage Publications. March 2002 (367-398). Specific citation on pages 385-387

³⁴ Hogeland, Chris and Karen Rosen. *Dreams Lost, Dreams Found: Undocumented in the Land of Opportunity*. Independently published, 16, Spring 1990.

³⁵ The U-Visa is for undocumented abused immigrants who are not married to a citizen or a legal permanent resident of the United States. This legislation offers relief in cases of "certain serious crimes that tend to target vulnerable foreign individuals without immigration status if the victim has suffered substantial physical or mental abuse as a result of the crime, the victim has information about the crime, and a law enforcement official or judge certifies that the victim has been helpful, is being helpful, or is likely to be helpful in investigating or prosecuting the crime."

³⁶ Examples of non-immigrant status include: college professors (INA §101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b), information technology workers (id.), diplomats (INA §101(a)(15)(A)(i), 8 U.S.C. 1101(a)(15)(A)(i), international organization employees (INA §101(a)(15)(G), 8 U.S.C. 1101(a)(15)(G), students (INA 101(a)(15)(F), 8 U.S.C. 1101(a)(15)(F), or religious workers (INA §101(a)(15)(R), 8 U.S.C. 1101(a)(15)(R).

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children.³⁷ In both the lawful permanent resident/United States citizen and non-immigrant visa-holder cases, immigration status becomes a factor that reinforces an abuser's power and discourages a woman from escaping, him or acting to stop the violence. Although there are now provisions, such as the Violence Against Women Act (VAWA), Crime Victim (U) Visa, and the Battered Spouse Waiver³⁸ that provide access to legal immigration status for many abused immigrant spouses and children who would otherwise be completely dependent on their abusers to attain legal immigration status, many isolated domestic violence victims who may qualify for these immigration benefits are not aware of these options.

Immigrant women may fear deportation even when they are legally residing in the United States with immigration authorities knowledge and permission. This occurs particularly when battered women have gained legal immigration status because of their family relationships with their abusers. Victims who received lawful permanent residency based on a petition filed with immigration authorities by their citizen or legal permanent resident spouse may wrongly believe their abuser's claims that because he gave her legal immigration status, he has the power to take it away.³⁹

The United States offers victims of domestic violence a range of services in the social services, health care and judicial systems designed to help victims and their children bring an end to the abuse they are experiencing and overcome the effects of the abuse.⁴⁰ In the United States, domestic violence is a crime, and victims can receive help through protection orders, police and criminal courts to hold their abusers and accountable. Many immigrant victims of domestic are in abusive relationships in which their abusive spouse or intimate partner has United States citizenship or a form of legal immigration status superior to the victim's immigration status. Along with this citizenship or legal immigration status comes the right to travel freely in and out of the United States. If an immigrant battered woman is deported and removed from the United States, her abuser can easily travel to follow her.⁴¹ Returning a woman to her country of origin could endanger her if that country has no effective legal approach for deterring and punishing domestic violence perpetrators.

Some immigrant victims have been willing to cooperate with law enforcement and prosecutors to have their abusers prosecuted for domestic violence crimes he committed in the United States. The abuser's criminal domestic violence conviction can lead to his deportation. If the victim is later deported to her home country,

³⁷ Derivative status is open to dependent spouses and children of visa holders who want to join their parents or spouses in the United States. Spouses and children are granted a form of legal immigration status that is completely dependent on the abusive visa holder. A non-immigrant visa holder can decide whether to apply for legal immigration status for their dependent spouse and children and can seek to have her legal status terminated at any time. In some instances dependent spouses and children can also obtain legal work authorization along with their temporary legal immigration status in other instances they cannot. Certain classes of derivative non-immigrants may apply independently for USCIS work authorization after arrival in the United States. See, e.g., Pub. L. No. 107-124, 115 Stat. 2402 (Jan. 16, 2002); Pub. L. No. 107-125, 115 Stat. 2403 (Jan. 16, 2002) amending INA §§214(e) and 214(c)(2) permitting spouses of E or L-1 visa holders, respectively, to apply for work permission; 8 CFR § 214.2(j)(1)(v). The derivative recipient of an H visa holder cannot work unless they acquire their own non-immigrant visa that allows them to work. 8 C.F.R. §214.2(h)(9)(iv).

³⁸ VAWA allows spouses and children of lawful permanent residents and United States Citizens to file a "self petition" if they can prove that the relationship of good faith, that the petitioner has been abusive, and that the self-petitioner is of good moral character. A Battered Spouse Waiver helps lawful conditional residents who would otherwise have two years, who have suffered abuse, by allowing them to file for full lawful permanent residency then abusers without help or knowledge and without having to wait two years. See Chapter 3 for more information.

³⁹ An abuser cannot have a victim's her lawful permanent residency taken away even if she received her legal permanent residency based on a petition he filed for her. Once an immigrant attains legal permanent residency there are very few instances by which ways it can be lost. If the survivor leaves the United States without Department of Homeland Security permission for more than 6 months, they can lose lawful permanent residency. See INA §212 (a)(7)(A)(i)(I), 8 U.S.C. 1182(a)(7)(A)(i)(I) (1991), and also *Khodagholian v. Ascroft*, 335 F.3d 1003, 1005-7 (2003). Additionally many criminal convictions can cause immigrants to lose lawful permanent residency. For battered immigrants this could pose the most serious risk of harm, particularly if she is living in a jurisdiction in which the police officers practice dual arrest, rather than arresting only the predominate perpetrator of abuse. in the relationship. For more detailed information about domestic violence and crimes see Chapter 1 of this manual. Leslye Orloff and Janice Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U. J. Gender Soc. Pol'y & L. 95, 136 (2001).

⁴⁰ Orloff, Leslye. Lifesaving Welfare Safety Net access for Battered Immigrant Women and Children: Accomplishments and Next Steps. *William and Mary Journal of Women and the Law*, Vol 7, Issue 3. Spring, 599 2001.

⁴¹ Leslye Orloff and Janice Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U. J. Gender Soc. Pol'y & L. 95, 133 (2001).

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the abuser can be waiting in the home country to retaliate against her. Both in this case and in the case where the abuser can freely travel in and out of the United States. The prospect of deportation makes it difficult for an immigrant victim to even consider seeking a court protection order, prosecuting her abuser for his crimes, and/or leaving her abuser.

The threat of being turned over to the immigration authorities and subsequently placed in removal proceedings⁴² deters a battered immigrant woman from seeking help from police stations, shelters, counseling programs, and the courts.⁴³ Domestic violence programs, either non-profit or government-sponsored, and justice-system agencies generally, have no federal obligation to inquire about the immigration status of domestic violence victims.⁴⁴ However, many battered immigrant victims believe that if they seek help they will be turned in to the immigration authorities by that agency's staff.⁴⁵ Abusers reinforce this fear by telling their wives and girlfriends that if they turn to service-providers, police, courts, or health care personnel for help, they will be reported to the immigration authorities. The battered immigrant women who do turn to the justice and social service systems for help and who are asked questions about their immigration status, or who are provided less assistance because they are non-citizens or are non-English speaking, are scared away from seeking further assistance. Knowledge of such treatment spread from woman to woman by word of mouth in immigrant communities, and can cause a ripple effect that deters other immigrant women from seeking help.⁴⁶

Many immigrant victims of domestic violence who find their way to the doors of domestic violence and legal services programs across the country may, as a matter of law, qualify for one of several forms of immigration relief available to help immigrant victims. Despite this fact, if a battered immigrant is turned into immigration authorities by her abuser, picked up in a traffic stop by an immigration officer, or detained by immigration authorities at her place of employment, there is little possibility that immigration authorities

⁴² Removal proceedings are proceedings before immigration judges in which the government is seeking the immigrants' removal from the United States and the immigration judge can order a person deported the United States. It is extremely important that battered immigrant women who are placed in removal proceedings consult a skilled immigration attorney who has been trained on VAWA to help her. National Network to End Violence Against Immigrant Women may be able to successfully obtain VAWA "cancellation of removal". If there are no local immigration attorneys familiar with VAWA Immigration Protection, contact the National Alliance to End Violence Against Immigrant Women (formerly known as National Network on Behalf of Battered Immigrant Women). (info@endabuse.org or Phone: 415- 252-8900)

⁴³ See generally Mary Ann Dutton, *Battered Women's Strategic Response to Violence: The Role of Context*, in Future interventions with Battered Women and their Families 105 (J.L. Edelson & Zvi C. Eisikovits eds. 1996).

⁴⁴ Orloff, Leslye. Lifesaving Welfare Safety Net access for Battered Immigrant Women and Children: Accomplishments and Next Steps. William and Mary Journal of Women and the Law, Vol 7, Issue 3. Spring 2001 (597-657) Page 626; Leslye E. Orloff, Mary Ann Dutton, Giselle Aguilar Hass and Nawal Ammar, *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 7 13 UCLA WOMEN'S L.J. 43, 55 (2003).

⁴⁵ Nonprofit non-governmental programs have no obligation to inquire into, or report, victim's immigration status. See also AG Order No. 2170-98. 63 FR 41664 (Aug. 4 1998). Law enforcement officers in virtually all jurisdictions (except Dade County Florida and Alabama at the time of this writing) have no federal obligation to ask about the immigration status of crime victims when the police are called for help. Leslye E. Orloff, Mary Ann Dutton, Giselle Aguilar Hass and Nawal Ammar, *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 7 13 UCLA WOMEN'S L.J. 43, 89 (2003). The only agency staff who are required as a matter of federal law to ask about immigration status and report persons known to be in the U.S. unlawfully are the staff of certain public benefits-granting agencies (e.g. TANF, Food Stamps, Medicaid, SSI). Interim Guidance Verification of Citizenship, Qualified Alien Status, and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. 62 Fed. Reg. 61344, 61345 (1997). For a fuller discussion of this issues see chapter on Public Benefits, Chapter 4 of his manual.

⁴⁶ Raj, Anita, and Jay Silverman, "Violence Against Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence," *Violence Against Women* Vol. 8 No. 3, March 2002, page 385.

Bauer, H.M. et al. 2000. Barriers to health care for abused Latina and Asian immigrant women. *Journal of Health Care for the Poor and Underserved*, 11 33-44. Bui, H.N. & Morash, M. 1999. Domestic violence in the Vietnamese immigrant community: an exploratory study. *Violence Against Women*, 5, 769-795. Dasgupta, S.D. & Warriar, S. 1996. In the footsteps of Arundati: Asian Indian Women's Experience of domestic violence in the U.S. *Violence Against Women*, 2, 238-259. George, M.S. & Rahangdale, L. 1999. Domestic Violence and South Asian Women. *North Carolina Medical Journal*, 60, 157-159. Haile-Mariam, T. & Smith, J. 1999. Domestic violence Against Women in the International Community. *Emergency Medicine of North America*, 17, 617-630. Huisman, K.A. 1996. Wife battering in Asian American Communities: Identifying the service needs of an overlooked segment of the U.S. population. *Violence Against Women*, 2, 260-283. Kulwicki, A.D. & Miller, J. 1999. Domestic Violence in the Arab American population: Transforming environmental conditions through community education. *Issues in Mental Health Nursing*, 20, 199-215. Perry, C. M. et al., Voices from an Afghan community. *Journal of Cultural Diversity*, 5, 181-205. (1998). Sorenson, S. B. 1996. Violence against women: Examining ethnic differences and commonalities. *Evaluation Review*, 20, 123-145.

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personnel will ask about her domestic violence history. She could be deported without ever having a meaningful opportunity to file for the immigration relief for which she qualifies.

If the abuser files a petition with immigration authorities seeking legal immigration status for the victim and/or her children and then retracts it or stops replying to immigration authorities' inquiries for evidence, the abused immigrant and her children can be placed in removal proceedings. If her abuser is controlling the immigrant's correspondence, she may not find out about her date to appear in court before an immigration judge, and she maybe ordered deported without her knowledge. An abuser's threats about his wife's immigration status, and the fear of being deported, decrease the possibility that she will seek help and/or refuge.

FEAR OF DEPORTATION AND IT'S IMPLICATIONS FOR SERVICE PROVIDERS

VAWA and other forms of immigration protection for battered immigrant women were created by Congress with the express intention of removing immigration status as a tool used by abusers to intimidate their spouses, children and intimate partners who are immigrants.⁴⁷ Fear of deportation is the primary deterrent to a battered immigrant woman taking steps to escape her abuser. To counter this fear it is essential that service providers make it clear to all seeking domestic violence related services that they will not be deported for seeking help. In fact, under current law, battered immigrants who seek help from the criminal justice system to stop domestic violence and hold perpetrators accountable, may have new options to attain legal immigration status open to them as immigrant crime victims.

It is very important to head off immigration/deportation concerns in the first interview with a battered woman. It is important that this be done with all battered women whether or not the advocate or an attorney suspects she may be a non-citizen.⁴⁸ As a matter of federal law⁴⁹ all services of domestic violence advocates, shelters, and other victim services are to be provided without any requirement that service providers ask questions regarding the victim's immigration status. Legal services providers can help battered immigrants who qualify for relief under VAWA's immigration provisions and any other victims abused by spouses or parents,⁵⁰ and can make referrals to other agencies that can provide services to those who may not qualify for assistance, without collecting any information about the immigration status of the domestic violence victim.

A good example of what to say to an immigrant victim of domestic violence would be,

“My name is _____. I work for _____ and am here to answer any questions you may have. My job is to help women find safety, and everything you tell me is confidential, which means no information I collect will be disclosed to anyone. All abused women can seek services and justice system help to end domestic violence without regard to immigration status. I will ask you questions to see if you are eligible for relief under the Violence Against Women Act, which was designed to help immigrant victims of domestic violence. Regardless of your immigration status, you have access to police protection, shelters, protection orders, custody, child support, hospitals, emergency medical care, and criminal prosecution of your abuser. I can help you access these services and other forms of assistance that will help you overcome the abuse. ”

⁴⁷ Congress stated that the passage of VAWA was “an essential step in forging a national consensus that our society will not tolerate violence against women.” S. Rep. No. 103-138, at 41-42 (1993). See also Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U. J. Gender Soc. Pol'y & L. 95, 109 (2001).

⁴⁸ There are many victims who are immigrants who may not have an accent, may be fluent in English, may be Caucasian and may have a higher level of education. Regardless, the victim could still be an immigrant. Thus we recommend that all advocates and attorneys should notify all who seek their services that assistance is open to all domestic violence victims without regard to immigration status.

⁴⁹ Interim Guidance: Verification of Citizenship, Qualified Alien Status, and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. 62 Fed. Reg. 61344, 61345 (1997). See also AG Order No. 2170-98. 63 Fed. Reg. 41664 (Aug. 4 1998).

⁵⁰ *Ibid.* 61346.

Economic Abuse As Power and Control Over Immigrant Victims

As for all battered women, economic stability can serve as a gateway to autonomy and independence for immigrant victims of domestic violence. Thus, it is often an issue of significant concern and vulnerability for immigrant women.⁵¹ Immigrant women still residing with their abusers list “lack of money” as a primary reason for remaining in an abusive relationship.⁵² Research has found that more than two-thirds of battered immigrant women who stayed with their abusers reported a lack of money as the primary reason for not leaving a violent home.⁵³ Economic dependence on the abuser dramatically limits an immigrant victim’s options for physical and legal separation from her abuser. She may be totally dependent upon him for economic survival. The immigrant victim of domestic violence often has less exposure to the English language and/or vocational skills than her abuser, which could be due to her husband’s isolation tactics. She may lack access to education, and she may be unsure of her ability to secure jobs that allow her to be economically independent. When immigrant victims leave abusive partners who have been financially supporting them, they often have less access to the public benefits safety net than other battered women.⁵⁴

Economic-related abuse is abuse committed by one’s spouse or intimate partner designed to exploit a victim’s economic vulnerabilities. This abuse can include:⁵⁵

- Dominating control of the family finances
- Refusing to give her money to buy clothes, food, etc.
- Harassing her while she is at work, potentially causing her to lose her job
- Harassing her at her job when her legal immigration status is based on working for a particular employer, and, losing access to this job causes her to rescind her legal immigration status.
- Forcing her to work illegally
- Preventing her from working or attaining the skills necessary for obtaining a job
- Refusing to pay child support
- Stealing money that she needed to support her family members in her home country⁵⁶

Although most immigrants ultimately succeed economically in the U S, economic success is initially challenging, even for those immigrants with permission from immigration authorities to legally reside and work in the United States. A variety of factors including discrimination, lack of vocational skills, and insufficient knowledge of American systems contribute to economic difficulty faced by new immigrants. When immigrant women come from countries that lack a public education system, that deny access to educate women, or that maintain customs that stop girls from attending school at a young age. Their earning capacity and options for economic survival apart from her abuser are limited.⁵⁷

Economic survival, however, can be easier for documented women than for undocumented immigrant women. Undocumented immigrants, if they work, do so in the underground economy often taking jobs that earn below the minimum wage, and regularly do not include benefits such as medical insurance, paid vacation, sick leave,

⁵¹ Orloff, Leslye. Lifesaving Welfare Safety Net access for Battered Immigrant Women and Children: Accomplishments and Next Steps. William and Mary Journal of Women and the Law, Vol 7, Issue 3. Spring 2001 (597-657). Page 617; Mary Ann Dutton, Leslye E. Orloff, and Giselle Aguilar Hass. Georgetown Journal of Gender, Social Policy & the Law Offering a Helping Hand Page 249

⁵² Mary Ann Dutton, Leslye E. Orloff, and Giselle Aguilar Hass. Georgetown Journal of Gender, Social Policy & the Law Offering a Helping Hand Page 271

⁵³ About a third cited lack of a place to go (35%) and lack of employment (32%) as reasons that they have not left an abusive relationship. See Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL’Y 245, 271 (2000).

⁵⁴ See Chapter 4 on Public Benefits for a fuller discussion.

⁵⁵ This document was developed at Ayuda Inc., Washington, D.C.

⁵⁶ This document was developed at Ayuda Inc., Washington, D.C.

⁵⁷ Randolph Capps et al., *A Profile of the Low-Wage Immigrant Workforce*. Brief No. 4 in Series "Immigrant Families and Workers: Facts and Perspectives" October 27, 2003

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and pensions.⁵⁸ To address this issue and to provide immigrant victims who qualify for immigration benefits with a chance to sever economic dependence from their abusers, both VAWA and U Visa immigration relief enable a battered immigrant woman to obtain legal work authorization.⁵⁹ Battered immigrants who qualify for VAWA are additionally granted special access to public benefits which they can use to help sever economic dependence on their abusers, and, which they can rely if their abuser interferes with their ability to work.

Since economic concerns, ranging from suffering economic abuse to obtaining economic independence, make it difficult for an immigrant woman to leave her abuser confidently, it is extremely important for service providers to inform a battered immigrant woman about opportunities that can help them financially independent. Service providers should be familiar with, and able to explain, the various options for battered immigrant women to survive the abuse and to support her children. Options that should be examined are:

- Obtaining child support from her abuser (including rent payments, repairs to property, payment of medical bills or health insurance)
- Accessing public benefits for which she and her children qualify
- Obtaining legal work authorization.

Many community-based programs offer battered women, including immigrant women, important lifesaving services (including shelter, food, healthcare and clothing.). It is important for advocates and attorneys to emphasize that all battered immigrant women, regardless of their qualifications for permanent public benefits, are allowed access to a plethora of services such as shelters, soup kitchens, food banks, and transitional housing for up to two years.⁶⁰

Battered immigrant women and children who qualify for immigration relief under the Violence Against Women Act can be eligible to access certain public benefits, including: housing and post secondary educational loans.⁶¹ Battered immigrants who have been in the United States since August 22, 1996, or who live in a state that has chosen to offer benefits to most immigrants may also be eligible for Medicaid, Temporary Assistance to Needy Families (TANF), and State Child Health Insurance Program (SCHIP). U. S. citizen children of immigrant victims independently qualify to receive benefits even when their parents do not.⁶²

Concerns over Custody of Children as a Barrier for Immigrant Victims

⁵⁸ Mary Ann Dutton & Giselle Aguilar Hass, *Expert Testimony Concerning Battering*, in MARY ANN DUTTON, ET AL., AMERICAN BAR ASSOCIATION, DOMESTIC VIOLENCE & IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT, Appendix C. (Bette Garlow, et al., eds., 2000).

⁵⁹ Counseling expeditiously helping battered immigrant women to file for VAWA immigration relief or the crime victim U visa can set them on a path toward obtaining legal work authorization based on deferred action status (Counseling expeditiously helping battered immigrant women to file for VAWA immigration relief or the crime victim U visa can set them on a path toward obtaining legal work authorization based on deferred action status⁵⁹ either after the VAWA self-petition or cancellation application has been approved, or after receiving deferred action status in the U visa case. A battered immigrant woman who obtains work authorization is better able to support herself and her children after separating from her abuser.) either after the VAWA self-petition or cancellation application has been approved, or after receiving deferred action status in the U visa case. A battered immigrant woman who obtains work authorization is better able to support herself and her children after separating from her abuser.

⁶⁰ See also AG Order No. 2170-98. 63 FR 41664 (Aug. 4 1998)

⁶¹ Qualified Immigrants may access certain Federal Programs; Supplemental Security Income (SSI), Food Stamps, Temporary Assistance for Needy Families (TANF), Emergency Medicaid/Full Scope Medicaid, State Children's Health Insurance Program (SCHIP), Medicare "Premium Free" Part A, Premium "Buy-in" Medicare, HUD Public Housing Section 8 Programs, Title XX Block Grants, Social Security, Other Federal Public Benefits subject to welfare law restrictions, and Benefits exempt from welfare law's restrictions. See National Immigration Law Center Fact sheet on Public Benefits at http://www.nilc.org/immspbs/special/ovrvw_imm_elig_fed_pgms_031904.pdf

⁶² Advocates and attorneys working with immigrant victims need to know that immigrant victims are entitled to apply for benefits on behalf of their children that qualify without having to apply for benefits for themselves and without having to answer any questions about their own immigration status or whether they have a social security number. Also, battered immigrants should not be sent to apply for benefits unaccompanied since state benefits workers are often uninformed about immigrant victims and their children's legal rights access about public benefits. See Chapter 4 on Public Benefits.

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Many battered immigrant women are the primary caretakers of their children⁶³ and are concerned that, if they leave their abusers, it will have a negative impact on their children. An immigrant woman may believe her abuser when he tells her that if she leaves him, he will obtain custody of the children because he has secure immigration status and she does not.⁶⁴ These threats lead immigrant victims to fear that their abusers will cut them off from any access to their children. Additionally, many battered immigrant women have worked hard to protect their children from the abuser's violence, and are rightly afraid that, if they leave the abuser and he gets custody, his violence may shift to the children, or he will use control over the children to continue to harm her and them. Even if she takes the children with her and is awarded custody by the court, she is concerned that the children will be harmed during unsupervised visitation. Her fear that her abuser will redirect the abuse towards the children is a legitimate concern since in 60% of households where women face abuse, children are also abused.⁶⁵ Many women will hesitate to leave a relationship if that decision could potentially place their children in care of the abuser.⁶⁶ Immigrant women believe they will lose custody of children to their abusers if they leave the relationship because they are unfamiliar with the family laws in the U. S. that require courts to consider domestic violence in custody cases⁶⁷ and to protect victims of domestic violence, regardless of their immigration status.⁶⁸

Battered immigrant women need to be informed about laws that create a preference for placing children in the custody of non-abusive parents. A study by the American Psychological Association concluded that "in matters of custody, preference should be given to the non-violent parent whenever possible, and unsupervised visitation and unsupervised visitation should not be granted to the perpetrator until an offender-specific treatment program is successfully completed, or the offender proves that he is no longer a threat to the physical and emotional safety to the children and the other parent."⁶⁹ The American Bar Association (ABA) Center on Children has urged courts to offer the same protection to children of immigrant parents.⁷⁰

⁶³ Mary Ann Dutton & Giselle Aguilar Hass, *Expert Testimony Concerning Battering*, in MARY ANN DUTTON, ET AL., AMERICAN BAR ASSOCIATION, DOMESTIC VIOLENCE & IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT, Appendix C. (Bette Garlow, et al., eds., 2000).

⁶⁴ When an immigrant woman comes from a country that traditionally awards custody and control over children to their fathers as a matter of law, she often believes her abuser's threats that if she leaves him he will obtain custody of the children (Leslye Orloff and Rachel Little, *Somewhere to Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women*, (AYUDA 1999). In the context of her upbringing and unfamiliarity with the United States legal system, her husband's threats may seem quite realistic and she may be legitimately concerned that she will lose custody of her children to her abusive husband (This document was developed at Ayuda Inc., Washington, D.C) Thus it is not surprising that fear of losing custody is one of the main reasons that immigrant women hesitate to leave an abusive relationship.

⁶⁵ Memoranda from the National Network on Behalf of Battered Immigrant Women to Walter Laramie at the Vermont Service Center 5 (April 25, 2001) (on file with author). The separation of the victim and batterer can enhance the danger of redirected abuse towards the children. The batterer can use the children as a way to continue abusing the victim by means of manipulation of the children and/or threatening to harm them. Concerns about the children and their safety consequently complicate a battered immigrant's decision-making about whether leaving her batterer will reduce or increase the safety of her children (Dutton and Hass, Appendix C at note 25-26).

⁶⁶ A battered immigrant woman may worry that if she tries to leave her abuser, he will kidnap her children and may take them outside of the United States to the abuser's home country, where she will have great difficulty getting them back and where there may not be legal protections against ongoing abuse. The risk of kidnapping by a batterer is a very real threat. Often times a batterer has more social connections than his victims and may be able to exploit these relationships to successfully abduct their children. If the abuser was not born in the United States he may be successful in his kidnapping attempts due to connections with the police, government, or other family members, or others he has outside of the United States who are willing to help him. (For a full discussion see Leslye Orloff and Janice Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U. J. Gender Soc. Pol'y & L. 95, 135 (2001)

⁶⁷ For example, see North Dakota's Best Interest and Welfare of Child – Court Consideration – Factors; N.D.C.C. §14-09-06.2(1)(j) (2003). See also California's Family Code, Ca. Fam. Code §3044.

⁶⁸ See Jurisdiction Chapter of this manual.

⁶⁹ Id. at note 29

⁷⁰ The ABA recognizes that information about domestic violence should be accessible by all peoples and urges legal professionals, who have dealings with battered immigrant parents and their children, to help them better understand the legal system while adequately addressing their fears and concerns. For non-English speaking battered immigrant parents, their greatest barrier to accessing legal services remains their inability to effectively communicate. The ABA further proposes that multi-lingual court reporters should be made available to help battered immigrants. See *The Impact of Domestic Violence on Children*, A report to the President of the American Bar Association (October 1994).

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Service providers should become familiar with, and inform battered immigrant women about U. S. laws aimed at protecting the best interest of children who have lived in abusive homes. Advocates and attorneys should obtain protection orders on behalf of battered immigrant women that award immigrant victim's custody, prove for safe visitation and prevent child kidnapping. Well-crafted protection orders can be an integral defense mechanism to prevent violence from shifting toward children and parental kidnapping.⁷¹ In addition to protection orders, other measures, which can help to mitigate the threat of violence towards a domestic violence victim's children, include:

- Removing the abuser from the family home
- Granting the battered immigrant custody and limiting the abuser to only supervised visitation during specified hours
- Warning the children's school about the abusive parent and giving them a copy of the protection orders that limit his access to the children
- Helping the battered immigrant get her children into counseling programs designed for children who have witnessed or experienced abuse.

Advocates for battered immigrant women need to identify domestic violence lawyers who can represent immigrant victims in custody cases. Some will work for legal services offices, or for program that receive funding from the Legal Assistance for Victims Grant Program awarded by the office on Violence Against Women of the U. S. Department of Justice. Others can be recruited and trained as pro-bono lawyers.⁷²

Language Issues

Any immigrant in the United States whose first language is not English faces substantial challenges in overcoming the language barriers in the United States. Sometimes an immigrant woman's spouse may serve as a translator or even her language teacher. Language barriers are exacerbated when the person who provides linguistic support is abusing an immigrant woman. Learning English becomes difficult when an immigrant lacks the money, time, and resources to attend English as a Second Language Classes. Immigrant women who are working and who are the primary caretaker of their children and who are the family cook and homemaker, often have little time of their own to devote to English classes. An immigrant may be able to survive within her immediate community without having to learn English. However, immigrants living in rural communities, and immigrant victims living in areas of the country where they are isolated from their own cultural community may, have a harder time encountering speakers of their native language. If an immigrant woman is abused, she may need to seek assistance beyond her immigrant community. The shelters, victim service programs, legal service offices, police departments, prosecutor's offices and courts may not have employees who can speak her native language and may not provide interpreters.⁷³ If a battered immigrant woman needs to seek work to become financially independent, her ability to speak English can affect the type of employment she can obtain. These linguistic limitations can seriously cripple a woman's ability to respond to domestic violence.

Language is particularly significant barrier to obtaining police assistance during an abusive incident. In one survey of Latina battered immigrant women, the overwhelming majority (75. 6%) of participants spoke little or no English. In the case of the women who did not speak English, two-thirds of the time, the police who responded to the domestic violence calls did not speak Spanish to the victim or use an interpreter.⁷⁴ Without

⁷¹ See chapter 5.

⁷² Lawyers with experience representing battered women need training on the special issues that can affect cases of immigrant victims. Lawyers working with battered women should be encouraged to see themselves as a valuable community resources and should consider focusing their representing battered women and battered immigrant women in more difficult contested custody cases.

⁷³ The Department of Justice recognizes that "[I]n certain circumstances, failure to ensure that LEP [limited English proficient] persons can effectively participate in or benefit from federally assisted programs and activities may violate prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d and Title VI regulations against national and origin discrimination." 67 Fed. Reg. 41455, 21 (2002).

⁷⁴ Jorge Banales. "Abuse Among Immigrants: As their Numbers Grow so Does the Need for Services." The Washington Post. 16 Oct. 1990; American Bar Association (ABA) Center on Children and the Law. "Special Groups: Immigrant Women and Children" in The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association.

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the ability to communicate safely and effectively with police, abused immigrant women are blocked from obtaining the police protection. When language barriers prevent communication with the victim, often police will speak only with the English-speaking abuser, who then has the power to twist the story to blame the victim and play down the violence, or pretend that the violence never occurred. These language barriers lead to results from police calls harmful to victims and their children, including:

- The police do not arrest abuser, despite the presence of evidence that a crime has been committed against the battered immigrant woman.⁷⁵
- Abusive behavior is condoned when police arrive and take no action against the abuser.
- Battered immigrant women and their children learn to believe their abuser's claims that no one in the United States justice system will offer them help because of their lack of legal immigration status.
- In the worst cases, the abuser is effective in convincing the police that she should be arrested either in addition to, or instead of, him. This arrest of the victim could lead to an innocent immigrant victim and a victim who has a valid self-defense claim getting poor legal advice and entering a guilty plea in her criminal case, which could result in her being deported.⁷⁶

The absence of interpreters and bilingual staff at police stations, social service organizations, courts, and lawyers' offices complicates a victim's efforts to obtain help.⁷⁷ Employing trained interpreters and bilingual police would increase access to protection for immigrant victims of domestic violence. The current lack of competent linguistic support for domestic violence victims throughout the legal and social service systems in many jurisdictions makes reporting the violence, seeking help, and leaving abusers difficult for battered immigrant women.

Service Providers as a Linguistic Bridge Between the System and the Client

All advocates and attorneys working with battered immigrants should have a system for offering interpretation services to non-English speaking victims who cannot communicate comfortably in English. Programs serving battered immigrants should not rely on the victim's friends, children, or family members for interpretation. Depending on friends or family members to interpret is often ineffective, and may even be dangerous, because it will be difficult if not impossible to determine whether the interpreter may be allied with, or likely to be contacted by, the abuser. One way to help ensure unbiased knowledgeable and accurate translations is to recruit and train a team of interpreters who are loyal to and work for your agency. Interpreters who will be working with battered immigrants should receive the same domestic violence training as provided to volunteers who work for your program. It is important that translators are not biased and can give an accurate representation of the facts.⁷⁸

In order to address the need for linguistic support, and in lieu of relying on the client to identify an interpreter, advocates and attorneys working with battered women should plan and implement a strategy for securing and training persons who can provide interpretive services. Appropriate steps that the staff can take are to hire bilingual and bicultural staff from language minority communities living in the area they serve. Relationships should be established with churches and local social services, or community-based agencies serving the various immigrant populations living in your area. Staff from these organizations could be trained and hired to serve as interpreters for your clients, and could perhaps serve as on-call interpreters.

ABA 1994, 20; Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43 (2003).

⁷⁵ Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 70-71 (2003).

⁷⁶ See Criminal chapter of this manual for how to effectively assist immigrant victims who have been arrested.

⁷⁷ Daniel Klaidman, *Courts Stumble in Serving Latinos*, LEGAL TIMES, Aug. 26, 1991; United States Department Susan M. Breall and Deborah A. Adler. *Working with Battered Immigrant Women: A Guidebook for Prosecutors* at 8. Hereafter Breall

⁷⁸ Loke, Tien Li, note, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. Pub. Int. L.J. 589, 624 (1997) (citation omitted); Susan M. Breall and Deborah A. Adler. *Working with Battered Immigrant Women: A Guidebook for Prosecutors*

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Another good source for finding interpreters and particularly persons who are speakers of less common languages⁷⁹ are students and/or faculty from local universities.⁸⁰

When setting up language interpretation services it is also important for advocates and attorneys to keep in mind political, class, and social distinctions that may serve as a barrier for an interpreter to successfully understand a victim. If there are distinctions in social class or dialect, these can come between the victim and interpreter, and can pose an impediment to the interpreter's ability to translate. Similarly, ideological and political differences may also pose challenges for interpreters.

Domestic violence and legal service programs can help women from diverse cultures feel comfortable receiving services by hiring bilingual and culturally fluent staff. These programs should collaborate with other services in the community that work with immigrant populations in order to provide as comprehensive a service as possible. Finally, advocates and attorneys working on coordinated community response teams should work to ensure that other agencies, including the courts, police, shelters, and prosecutors include line items in their budget for interpreters.

Misconceptions About the Legal System

Battered immigrant women may see the United States legal system not as a resource to help them overcome the abuse, but as an entity that will help her abuser. If a battered immigrant woman believes that the American legal system will operate unjustly, it may be hard for her to trust law enforcement, prosecutors, and United States courts. If a battered immigrant's country of origin functions on a system in which "law enforcement, government officials, and the judiciary all function within a repressive government,"⁸¹ she may be understandably skeptical that the United States legal system will be any different, and will offer her protection. Institutional gender bias in victims' home countries can further misconceptions about the way the American legal system will treat their claims. An immigrant victim of domestic violence may come from

⁷⁹ i.e. Languages that are not prevalent within the greater community of immigrants, making finding well-trained interpreters more difficult.

⁸⁰ The approaches listed above will be useful for immigrant victims who live within a cultural community in the United States. However, there are many battered immigrant women who are totally isolated from anyone who knows their language or culture except perhaps their abuser. For this reason it is important to set up systems for providing language access to these isolated victims. One way to address the needs of isolated victims is to set up an account with the AT&T language line, which can provide interpretive services in 150 languages.⁸⁰ Having bilingual staff and a local system of paid interpreters will be significantly more cost effective than relying exclusively on AT&T language line for interpretations. However, for the purpose of using AT&T Language line and/or other teams of trained interpreters, programs in a state or region can pool resources.

⁸¹ Research of Latina immigrants found that only 27% called the police for assistance following abuse (Research of Latina immigrants found that only 27% called the police for assistance following abuse. Willingness to call was substantially related to the victim's immigration status. Among immigrant women surveyed, immigrant victims who were naturalized citizens or lawful permanent residents were the most likely to be willing to call police for help 34.4% of the time. This reporting rate appears to be significantly lower than the natural coverage (34.4% versus 53%). Fears about turning to the justice system for help continue despite attaining legal immigration status. Reporting rates among battered immigrants living in the United States with a form of non-permanent, usually time limited, legal immigration statuses are even lower (16.7%). For undocumented abused immigrants the rate at which they were willing to call the police for help dropped to 14.8%. Leslye E. Orloff, Mary Ann Dutton & Giselle Aguilar, *Battered Immigrant Women's Willingness to Call the Police for Help and Police Response* (to be published UCLA Journal on Women and the Law 2003), finding that 75.6% of the survey participants spoke little or no English, yet two-thirds of the time that officers were called to the scene of a domestic violence offense, they did not speak Spanish. Hereafter Orloff, Dutton, Aguilar Battered Immigrant Women's Willingness). Willingness to call was substantially related to the victim's immigration status. Among immigrant women surveyed, immigrant victims who were naturalized citizens or lawful permanent residents were the most likely to be willing to call police for help 34.4% of the time. This reporting rate appears to be significantly lower than the natural coverage (34.4% versus 53%). Fears about turning to the justice system for help continue despite attaining legal immigration status. Reporting rates among battered immigrants living in the United States with a form of non-permanent, usually time limited, legal immigration statuses are even lower (16.7%). For undocumented abused immigrants the rate at which they were willing to call the police for help dropped to 14.8%.

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a legal system where a woman's testimony is not considered valid evidence, or her word does not share the evidentiary weight of a man's as a matter of law.⁸²

In some countries, success in legal proceedings is determined by money and power.⁸³ As a result, battered immigrant women may fear the American legal system because they have the mistaken belief that their lack of financial and political capital, as well as lack of immigration status, prevents them from obtaining United States protection from the legal system.⁸⁴ The victim may believe that government officials in the United States will not be receptive to her claims, much less treat her with respect. When a battered immigrant comes from a country where the law enforcement officers themselves have been participants in violence against women, her belief in the potential value of calling on United States law enforcement officers is further undermined.⁸⁵

Finally, a victim of domestic violence's misconceptions of the legal system may be magnified because she maintains a view of the legal system that was shaped by her abuser. He may misinform her that law enforcement agencies will not protect her.⁸⁶ He may also tell her that she will be ignored or even deported if she approaches the authorities. Since a battered immigrant woman may be cut off from other sources of information by language barriers and by her abuser, she may believe this misinformation. A 1998 Department of Justice survey found that only 53%⁸⁷ of all domestic violence victims call the police for help. The reporting rate for immigrant victims of domestic violence appears to be significantly lower, suggesting that victims do not believe that police are sources of help.⁸⁸

Advocates and attorneys can facilitate a battered immigrant woman's rehabilitation by countering her misconceptions and educating her about how our legal system works to help battered women. In order to inform immigrant victims of their rights and make them comfortable with the legal system, advocates and attorneys must be familiar with the full range of services and legal options available to immigrant domestic violence victims.

An advocate or attorney should work to make a client more comfortable with the United States legal system, which may understandably differ from the legal system in her home country. A lawyer or advocate working with a battered immigrant woman who will be testifying in court or filing affidavits in an immigration case should make it especially clear to her that her testimony has value in this country. To alleviate the immigrant victim's fears about testifying and the court process, the advocate or attorney should take her to court to observe the proceedings so she knows what to expect, and so that she can see other women obtaining orders and other relief from the court. Advocates should accompany immigrant women applying for protection orders, and lawyers should represent them, particularly when the abuser is represented by counsel.

A victim's lack of knowledge about the legal system exacerbates physical and emotional abuse, as these misconceptions become a tool for the abuser. Augmenting the victim's fear of deportation and her misconceptions about the United States legal system through immigration related threats, an abuser is able to

⁸² Racial and Ethnic Tensions in American Communities: Poverty, Inequality and Discrimination – A Report of the United States Commission on Civil Rights, 75 (January 1993). (Referencing Leslye E. Orloff's testimony before the Round Table Forum on Hispanics in the Courts, November 2, 1991.)

⁸³ The victim may come from a country in which testimony is not considered valid evidence or a legal system in which as a matter of law testimony offered by a man is valid evidence and testimony offered by a woman is not.⁸³ Immigrant victims who come from countries in which testimony particularly of a woman, is not considered valid evidence, have a very hard time believing that testimony is valid evidence in U. S. Courts and that a U. S. Judge will believe her testimony as opposed to testimony presented by her abuser. This lack of confidence can lead to her testify in a way that may not sound credible.

⁸⁴ UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, LA VIOLENCIA DUELE/VIOLENCE HURTS: SYMPOSIUM ON DOMESTIC VIOLENCE IN THE HISPANIC COMMUNITY 7 (30 DEC. 1996); Tracy Lai, *Asian women: Resisting the Violence, in THE SPEAKING PROFITS US: VIOLENCE IN THE LIVES OF WOMEN OF COLOR*, 10 (M. C. Burns ed., 1986):. 19-20

⁸⁵ Id at 20.lai

⁸⁶ Id at 20. lai

⁸⁷ CALLIE MARIE RENNISON & SARAH WELCHANS, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE 7 (2000).
HEREAFTER RENNISON AND WELCHANS IPV

⁸⁸ Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA Women's L.J. 43, 55 (2003); ROBIN L. CAMP ET AL., UNTOLD STORIES: CASES DOCUMENTING ABUSE BY U.S. CITIZENS AND LAWFUL RESIDENTS ON IMMIGRANT SPOUSES (1993).

retain control over his victim, and, in many cases, effectively prevent her from seeking help about domestic violence.

Culture Barriers Faced By Immigrant Victims

ISOLATION OF CULTURE

Domestic violence takes a tremendous emotional toll on any woman, whether the victim is a citizen, an immigrant or a refugee. Survivors are confronted with a loss of trust in the person that they may have believed in the most. Some immigrant victims are so isolated that the abuser and his family maybe the only source of support in the victim's community or in the United States.⁸⁹ Like other domestic violence survivors, in order to find support and validation, immigrant victims need to turn to sources of support outside their immediate family. This support network plays a fundamental role in victims' first efforts to seek help to address the domestic violence she has been experiencing. Immigrant women are most likely to confide in other women about domestic violence, including predominately women friends, mothers, and perhaps sisters.⁹⁰ Confiding in other women serves as a safer outlet for the sometimes-complex emotional responses that domestic violence evokes.

Immigrant victims of domestic violence are at a substantial disadvantage in building this important network of support. Battered women typically seek help first from this informal network of support, and, afterwards, they may begin to seek help from formal social, legal, and justice systems. A domestic violence survivor who has lived in the United States may be able to piece together this important informal network through a lifetime of connections. This process is often much more complex for battered immigrant victim. Battered immigrant victims who have only lived in the United States for a comparatively short time may not have made as many trustworthy personal relationships, and as a result, have a harder time seeking support outside their relationship with the abuser and his family.

In addition to threats associated with immigration status, an immigrant woman may also encounter challenges from her cultural community as she begins to explore addressing her abuser's domestic violence. Her cultural or religious community may so highly value marriage that she fears being held responsible for breaking up hr family if she tries to escape her abuser.⁹¹ Community members may not want them to take any action against their abuser. They discourage battered immigrant victim from seeking help outside the community.⁹² As a result when a battered immigrant does seek help from formal justice and social service systems, she may feel even more socially isolated than when she was with her husband.⁹³

⁸⁹ The abuser may seek to isolate his wife from her own immigrant community and/or from U. S. society, depending on the circumstances. For many victims, domestic violence aggravates the isolation and lack of social and community support mechanisms that are part of migrating to a new country. Traditionally, immigrants from the same country tend to gravitate towards each other for linguistic and cultural support within the greater US community. An abuser who removes his immigrant spouse or intimate partner from this support network makes it difficult for a domestic violence victim to feel as though she has the resources to safely leave her abuser or find help to end his violence. This problem is exacerbated in cases of immigrant victims living with their abusers in rural communities totally isolated from any immigrant population from her country of origin.

⁹⁰ Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 265 (2000).

⁹¹ In Asian and Pacific Islander communities many community and church leaders do not recognize domestic and/or sexual violence as a problem (Tracy A. Lai. *Asian Women Restricting the Violence*, in *The Speaking Profits US: Violence in the Lives of Women of Color* 10-11 (Maryviolet C. Burns & M. Div. eds., 1986).

⁹² Edna Erez & Carolyn Copps Harley. *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, 2003 W. Criminology Rev. 161.

⁹³ Dutton and Hass Appendix at Pg. 8. Wives who met their husbands through international match-making organizations or who married military personnel stationed abroad may be at an even greater risk of social isolation due to the fact that the victim's husband may be the only person she knows in this country. Instead of having friends or other family members in her immediate immigrant community, a military or internationally matched wife will most likely have no community network in the United States.

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The tension between a domestic violence victim's traditional upbringing and the United States' new social system often cause immigrants feel caught between two cultural environments. Culture is most appropriately "based on the region of origin." ⁹⁴ While a domestic violence survivor may find support, assistance, and acceptance of her plight in America, she may also face tremendous pressure from her cultural upbringing, family, friends and her cultural community in the United States. The American notion of "independence" may have a different meaning for immigrant women, and levels of tolerance for violence may change from culture to culture. In many cultures, domestic violence is seen as a private issue, one that should be resolved within the household, not in public using the justice system or law enforcement assistance. ⁹⁵

Seeking refuge in a shelter means leaving the home environment, a place of comfort, albeit abusive. The mere action of relocating to a shelter and leaving roots within the immigrant community may compound the trauma and loneliness a battered immigrant faces. ⁹⁶ Elements of tradition, such as food, sleeping accommodations, and religious observance may not be preserved nor understood by shelter staff and other residents. ⁹⁷ It is important to understand that some immigrant women will be more comfortable seeking social support from persons in their own cultural community while others will prefer obtaining help from persons outside their cultural community. Some battered immigrant women feel that they cannot safely access support in their own cultural community and seek help identifying programs that can connect them with women outside their communities, thereby establishing a support system not connected to the cultural community. Everyone is better able to heal and recover from trauma when familiar things surround them. Providing bilingual staff, options to cook, familiar foods, and sleeping arrangements that are more familiar can make the shelter a more welcoming place and more of a healing opportunity for immigrant victims. A battered immigrant woman is especially vulnerable after fleeing her husband and every effort to keep her comfortable should be made at the moment of transition.

HOW SERVICE PROVIDERS CAN HELP EASE IMMIGRANT VICTIMS FIND CULTURAL SUPPORT

Although there may be cultural differences between an immigrant culture and United States society as a whole, it is important not to make any stereotypical assumptions about any immigrant victim's culture because members of that culture accept the abuse, or because domestic violence is a cultural norm. Just as with situations of other battered women, leaving an abusive relationship can be difficult⁹⁸ and dangerous. ⁹⁹ Yet battered immigrant women encounter barriers including language, immigration status, and culture that make it even more challenging for them to leave.

Service providers should work with clients to help them break their isolation by developing support networks they can trust. One of the best ways to do this is to identify and connect them with women's groups in their own cultural community.¹⁰⁰ Since the early-to-mid 1990s several groups have developed in immigrant communities across the United States that have included providing assistance and support to battered immigrant women in their communities. ¹⁰¹

⁹⁴ Raj, Anita, and Jay Silverman, "Violence Against Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence," *Violence Against Women* Vol. 8 No. 3, March 2002, 369.

⁹⁵ Edna Erez. *Immigration, Culture Conflict and Domestic Violence/Woman Battering*. 12(1) *Crime Prevention and Community Safety: An Int'l Journal*. 30 (2002).

⁹⁶ Rennison and Welchans IPV at 9, at 9; Orloff, Dutton, Aguilar Battered Immigrant Women's Willingness.

⁹⁷ Lai, *supra* note 14, at 10; Julia L. Perilla, *Violence en La Familia: An exploration of the Ecology and Dynamics of Domestic Abuse in a Latino Population* 4, presented at National Coalition of Hispanic Health and Human Services Organizations Biennial Conference (September 1996).

⁹⁸ It is difficult for an immigrant woman to report her husband's abuse because she may fear that her family and community in her country of origin will condemn her for publicly announcing the abuse and breaking apart the traditional family structure. If she leaves her husband and returns back to her country of origin, the woman may be penalized by the community for leaving her abusive husband. Leslye E. Orloff & Janice Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10(1) *J. Gender, Soc. Pol'Y & The Law*, 135 (2002)

⁹⁹ INA OKUN?? 2-5 separation attempts

¹⁰⁰ Research data (2002) is pending publication, available from Dr. Rachel Rodriguez, University of Wisconsin Madison, School of Nursing.

¹⁰¹ In making referrals to women's groups in immigrant communities it is important to determine whether they have experience working with domestic violence victims. If not, the victim should also become involved in other programs in the

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Another successful approach can be for your agency to introduce clients from the same cultural community to one another. These efforts in some instances have led to clients choosing to share housing together. Such efforts have also served as catalysts for immigrant women to work together on domestic violence issues in their communities, leading to the formation of more immigrant women's groups.

Advocates and attorneys should assist immigrant victims in gaining acceptable counseling and support groups. Support groups for the battered women serve as a vehicle for emotional rehabilitation and also establish social relationships with other battered women that play a critical role in each woman's healing and survival. Support groups are an important complement to individual therapy sessions for overcoming the emotional strain of domestic abuse. When battered immigrant women have children who have witnessed or experienced abuse, it is important to connect the children with culturally and linguistically competent support groups, counselors, and counseling programs that can help resulting psychological injuries, and help make it less likely that the children will repeat the cycle of violence as adults.

Cultural Differences

Immigrant domestic violence victims often face cultural stigmatization for having revealed domestic violence. The myth that immigration to America will translate into instant success exacerbates this problem. Though seen as a cliché by many Americans, the notion of the American Dream is still very alive in immigrant communities, both abroad and in the United States. Friends and relatives may not understand that it is possible to have anything short of an ideal experience in the United States, because America has been billed for so long as the "land of opportunity." A domestic violence victim who speaks publicly about her experiences may be rejected from her community and viewed as having "failed," because her experience challenges the myth and deviates from the accepted cultural norm.¹⁰²

When battered immigrants begin to explore or attempt to leave abusive relationships, they encounter systemic barriers, and face enhanced isolation that can come from having to leave or being ostracized from their cultural community.¹⁰³ In recent years, many immigrant women have begun to be able to utilize alternative sources of support from other immigrant women.¹⁰⁴

THE NEED TO OFFER HELP AND PROTECTION TO IMMIGRANT VICTIMS WHO DO NOT SEPARATE FROM OR RETURN TO THEIR ABUSER

A multitude of factors influence a battered immigrant's response to domestic violence. These factors include:

- Immigration related abuse,
- Fear of deportation,
- Economic dependence on her abuser,
- Concerns over loss of custody of her children,

community specifically designed for battered women and the two groups should be encouraged to collaborate. If these programs are conducted only in English, advocates will need to identify interpreters who can help immigrant victims participate in these programs and activities.

¹⁰² MARY ANN DUTTON & GISELLE AGUILAR HASS, *EXPERT TESTIMONY CONCERNING BATTERING*, IN MARY ANN DUTTON, ET AL., AMERICAN BAR ASSOCIATION, DOMESTIC VIOLENCE & IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT, APPENDIX C, PAGE 8. (Bette Garlow, et al., eds., 2000).

¹⁰³ See Raj, Anita, and Jay Silverman, "Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence," *Violence Against Women*, Vol. 8 No. 3, Thousand Oaks: Sage, March 2002, 384.

¹⁰⁴ Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 265 (2000); An important barrier to keep in mind when working with battered immigrant victims is the inability to communicate effectively. Interpreters are substantial to better help the battered immigrant woman when working with service providers. Leslye E. Orloff & Minty Siu Chang, *supra* note 128, at 10

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- Language barriers,
- Lack of Understanding about the U. S. legal systems help for battered women,
- Cultural barriers,
- Lack of culturally competent social support and,
- Isolation

It may be difficult for an outside observer to understand that for many battered immigrant women, the response to the abuse may not necessarily be to leave her abuser, but rather to stay with him for personal safety reasons.¹⁰⁵ A battered immigrant woman who is in an intimidating and unfamiliar culture may find comfort and continuity with an abuser, however physically oppressive he may be.¹⁰⁶ As with all battered women, a battered immigrant woman may hesitate to leave her abuser because she does not want to give up the positive, nurturing parts of their relationship. Research indicates that it takes 2 to 5 attempts before battered women in the U. S. permanently separate from their abusers. It is critical that attorneys and advocates offer assistance to all battered women, including battered immigrant women, whether they are currently choosing to leave their abusers, or choose to return to their abuser. For battered immigrants, culture, language, immigration status, unfamiliarity with United States society, and religious concerns make leaving even more difficult. Service providers need to be aware of the range of services that they can provide that offer real assistance to battered immigrants when they choose not to separate from their abusers. These victims can:

- Obtain full-contact protection orders that order the abuser not to molest, assault, threaten, abuse, or harass the victim in the future; order the abuser into counseling, order him to turn over the children's passports, and order him to turn over immigration documents and important papers to the victim.
- File for VAWA immigration relief
- Participate in counseling programs for battered women
- Participate in immigrant women's community based organizations
- Enroll in English as a Second Language programs
- Receive help accessing health care
- Access public benefits for which their citizen children qualify
- Verify their qualification for accessing public benefits for themselves before they have separated from their abuser. However, women who qualify for public benefits must *show proof of separation* from husband and *apply* for VAWA-related benefits in order to claim benefits for themselves.¹⁰⁷

Conclusion

Victims of domestic violence face a complicated set of challenges, compounded by the multifaceted struggles of being an immigrant concerned about how her options might be affected by her immigrant status. Due to their abuser's control over the information they have about their legal rights, many immigrant victims may fear deportation even when they have legal permanent residence. Battered immigrants who have temporary or undocumented immigration status will face even greater hurdles. The problem of domestic violence must be addressed in immigrant communities as well as in the country at large. Immigrant victims need improved access to the legal, social services, and health care systems that help battered women, and systematic barriers to access them must be eliminated.

¹⁰⁵ Lifetime Incidences at footnote, pages 29-30

¹⁰⁶ MARY ANN DUTTON & GISELLE AGUILAR HASS, *EXPERT TESTIMONY CONCERNING BATTERING*, IN MARY ANN DUTTON, ET AL., AMERICAN BAR ASSOCIATION, *DOMESTIC VIOLENCE & IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT*, APPENDIX C, PAGE 8. (Bette Garlow, et al., eds., 2000).

¹⁰⁷ Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 62 Fed. Reg. 61, 366. (1997); This criterion can be satisfied in a number of ways. One recommended approach is that adopted by Illinois, which finds that this requirement is satisfied as long as the applicant has separated from her abuser within 30 days of her first receipt of benefits. She is not required to present evidence of separation before receiving her first payment benefits. Letter from Dan Lesser, National Center on Poverty Law, June 18, 2000.

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Advocates, attorneys, immigrant community-based organizations, and other service providers are the key to combating domestic violence because of their proximity both to the systems, that are designed to improve the lives of battered women, and to the women themselves. To make program services most accessible to immigrant victims, collaboration among professionals is key.

It is critical for immigration attorneys, domestic violence advocates, legal services and domestic violence lawyers, shelter programs, and immigrant community-based organizations to establish formal collaborations to effectively serve battered immigrant women. By collaborating, organizations can help provide support for allied organizations that may have less expertise on immigrant victim's legal rights or domestic violence. Immigrant rights organizations can train domestic violence staff on immigration laws and cultural issues; while domestic violence program staff can train immigrant rights and community groups on domestic violence issues. Each provider should offer frequent trainings about the relevant issues in their field. The advantages of collaboration include the creation of a comprehensive support network for immigrant victims of domestic violence that addresses the concerns facing immigrant victims of domestic violence.¹⁰⁸

A network of service providers can help to ease the struggles that battered immigrant and refugee women endure. The support of collaborating professionals enables advocates and attorneys to assist battered immigrant and refugee women in overcoming the abuse they have suffered and in countering the many systemic barriers detailed in this chapter. This section has outlined some of the specific strategies that advocates and attorneys can employ to help the battered immigrant women and children with whom they work. Other strategies will be discussed in the chapters that follow.

¹⁰⁸ See Chapter 1 of this manual for a fuller discussion of collaboration.

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1.2

Collaboration, Confidentiality and Expanding Advocacy¹²

By Leslye Orloff and Laurie DePalo

Understanding Immigrant Communities³

The first step to improving the services available to immigrant victims is learning about the immigrant populations in a given area.⁴ A network of collaborators can be more successful if there is a concerted effort to reach out to and understand the immigrant community. This can be demonstrated by asking questions that

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² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/cultural-competency>

⁴ See Gail Pendelton, et. al., *Building the Rhythm of Change: Developing Leadership and Improving Services Within the Battered Rural Immigrant Women’s Community*, produced by the Family Violence Prevention Fund, available at <http://endabuse.org/programs/immigrant/files/Rhythm.pdf>; See also SUSAN BREALL & DEBORAH A. ADLER, *WORKING WITH BATTERED IMMIGRANT WOMEN: A GUIDEBOOK FOR PROSECUTORS*, Volcano, California: Volcano Press (2000).

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help advocates⁵ understand the immigrant experience. Agencies might also identify local and national resources that can provide culturally competent information about the immigrant communities they hope to serve.

Advocates should work with others in their communities to answer the following questions:

- What are the demographics of immigrant population(s) in the community and state?⁶
- What are the countries of origin of the immigrant women in the community?
- What factors may have caused these immigrant women to move to the United States? Are they fleeing civil war, persecution, or economic despair? Did they come to the United States to reunite with relatives in an established immigrant community? Did they come as wives who met their spouses through international matchmaking organizations, as wives of servicemen, or through arranged marriage to someone living in the United States from their home country?
- Do they reside permanently in the community? Do they annually migrate to the community to do seasonal work?
- Where do immigrant populations generally reside in the city, county, or township?
- Is the immigrant population isolated from the rest of the community?
- Are immigrant women isolated from the rest of the immigrant community?
- Which individuals are considered immigrant women community leaders?
- Is there a community center for immigrants?
- Where do immigrant women congregate (i.e. work, shop, worship, seek services, and organize)?
- What information about cultural or religious beliefs in the immigrant population might affect the way agencies might try to reach immigrant women?
- What are the significant immigrant populations in the area, and what language(s) do they speak?
- What attitude toward domestic violence does the immigrant community hold?
- Where can an agency find statistics or materials, either national or local, on dynamics of domestic violence experienced by this population?
- What services do non-profit or faith-based organizations offer in the immigrant community?
- Which, if any, organizations are in contact with isolated immigrant women? Do these organizations have any resources that would help educate difficult-to-reach populations? Such organizations might include Family Support Centers on military bases, women's centers at universities, or health clinics in rural communities.⁷

Seeking out the expertise of service providers and leaders in immigrant communities in a given area can help agencies gather this information. Agencies might also consider tapping into resources available through national advocacy groups that work on issues pertaining to battered immigrant women,⁸ city government offices, and public libraries. Undertaking this research will help advocates form relationships with agencies that could be potential collaborative partners, while, at the same time informing their communities that their services are open to immigrants. Collaborating with other programs will benefit agencies in the end because some immigrant women are more likely to trust agencies that have a positive relationship with respected and established community leaders and other trusted community-based or faith-based organizations that work

⁵ The term advocate will be used throughout the chapter in reference to an attorney or advocate who serves as a guide for the battered immigrant victim.

⁶ Demographic and other information about the immigrant communities in a given area can be found at <http://www.census.gov/>.

⁷ LESLYE ORLOFF, ET AL., LEGAL MOMENTUM, LESLYE ORLOFF ET AL., AYUDA SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN 96-111 (LEGAL MOMENTUM, 1999). PLEASE CHECK FULL CITATION WITH LESLYE: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN 96-111 (1999). This publication is available through the Legal Momentum website at <http://www.iwp.legalmomentum.org> (publication number G.I.2.).

⁸ Materials are available through the National Immigrant Women's Advocacy Project (NIWAP), 4910 Massachusetts Ave NW, Suite 16 Lower Level, Washington D.C. 20016, (202) 274-4457, www.wcl.american.edu/niwap, niwap@wcl.american.edu; Advanced Special Immigrant Survivors Technical Assistance (ASISTA), (515) 244-2469; questions@asistahelp.org, <http://www.asistahelp.org/>; or Futures Without Violence, 100 Montgomery Street, The Presidio, San Francisco, CA 94129; (415) 678-5500; info@futureswithoutviolence.org, <http://www.futureswithoutviolence.org>

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with the immigrant community.⁹ Agencies can begin to build the kind of trust and willingness that will lead individuals to seek assistance from them by getting involved in the immigrant community, by participating in and observing meetings, by interacting with immigrant community members, by working with trusted community based organizations, or by attending religious services. Immigrant victims are more likely to seek services of from agencies they hear about through their community leaders and others within their community.¹⁰

Improving an Agency's Capacity to Serve Immigrant Victims

After learning about immigrant communities in the area and their needs, the next step is to turn the focus of an agency's efforts inward. Internal program assessment identifies the services that a particular agency offers to all battered women and helps assess how it can make these services accessible to battered immigrant women.¹¹

STEP 1: CHANGING THE WAY AN AGENCY WORKS TO MAKE ITS SERVICES MORE ACCESSIBLE

An agency can begin by building relationships with service providers working with cultural and linguistic minority communities in the following ways:

- Making a list of organizations that work with linguistic, racial and cultural minority populations;
- Adding bilingual/bicultural professionals who work with organizations and government agencies to the list;
- Inviting these individuals and organizational representatives to a meeting to help the agency develop a plan for expanding its services to diverse communities
- Developing a plan for the cross-agency collaboration in serving battered women who are immigrants and/or from diverse cultures;
- Training professionals and staff of other agencies on domestic violence,
- Having agency staff participate in a training conducted by organizations working with diverse populations on specific issues that affect those populations;
- Identifying a liaison who will facilitate communication between an organization and other agencies and professionals so that they can collectively coordinate client services in the future;
- Working out the procedures that agencies will use to contact each other to help serve domestic violence victims;
- Working together as a team on domestic violence cases so that women from diverse cultures will have an advocate who is an expert on domestic violence, and one who has a thorough understanding of her cultural needs;
- Inviting staff members of organizations serving diverse cultural communities to join a local domestic violence coordinating council;

The Need for a Core of Qualified Interpreters Trained on Domestic Violence

To ensure that immigrant women receive effective and sensitive services, the best approach is to contract with interpreters who provide services in each of the languages represented in your community who will work with your office as needed to help you offer a full range of services. Skilled interpreters provide

⁹ DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN (Deeana L. Jang, et al., Family Violence Prevention Fund, eds, 2d ed. 1997); Del-An BryAnn Chen, "We Just Got Together and We Enjoyed It:" An Analysis of the Georgia Coalition for Battered Refugee and Immigrant Women as a Social Movement (1998) (unpublished M.A. thesis, Georgia State University) (on file with author); Sonia Parras Konrad et. al., Rompiendo el Silencio, Manual de Entrenamiento para Activistas, Consejeras y Organizadoras Latinas, Family Violence Prevention Fund. p. 35 (October 2003).

¹⁰ Some battered women prefer to seek help from a domestic violence program that is completely disconnected from their cultural community. These immigrant women may express their preference for this type of service to protect their confidentiality and to avoid being judged by the cultural standards of their community.

¹¹ Sonia Parras Konrad, Women Empowering Women: An Exciting Journey, (on file with author) (June 2003).

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invaluable assistance in providing meaningful aid to immigrant victims. Formal contracting with interpreters who provide services in each of the languages represented in a given community offers the best assurance that an agency will be able to offer its full range of services to battered immigrant women. These interpreters complete domestic violence training, and ally themselves with a given agency. In progressing toward this ideal approach agencies should keep in mind the following considerations:

- Agencies should include a line item in their budgets to address this need;
- Hiring a corps of interpreters avoids conflicts that arise in small ethnic communities where the interpreter may be a friend of the abuser or the abuser's family and may not respect confidentiality;
- An interim approach might include working with bilingual staff at other agencies who will assist by offering both interpretation and support for battered immigrant women; and
- An agency might also recruit a group of volunteer interpreters. These individuals may have more time constraints than contract interpreters.

It is DANGEROUS and inappropriate to use the battered immigrant woman's companions or children as interpreters.

- A companion may be the abuser himself;
- Victim may edit their conversation, because they fear that their words will be spread in the community or reach their abuser. In cases where children serve as interpreters, victims may censor themselves in order to protect their children; and
- Knowledge of the details of abuse may traumatize children or endanger them

Recruiting Bilingual/Bicultural Volunteers

Agencies might keep in mind the following suggestions when trying to recruit bilingual/bicultural volunteers:

- Community-based organizations that serve immigrant communities can help recruit volunteers;
- Because bilinguals often read newspapers in both English and another language, placing ads in local non-English newspapers and newsletters will often yield results;
- Internship programs often attract bilingual/bicultural students. Upon graduation, these students often continue to work with battered women or immigrants, and become a group of trained persons from whom agencies can recruit staff in the future.

Developing the Basic Language Skills of Agency Staff

The following actions can help agencies cultivate the language skills of their existing staffs: Paying for language-training classes for current staff members, bringing a language instructor to the agency's office to provide classes during work hours, and providing paid leave time to staff to take language classes.

STEP 2: HIRING MULTI-LINGUAL/MULTI-CULTURAL STAFF

Agencies that place a priority on hiring bilingual/bicultural staff each time they have an openings will eventually become better providers. Attaining as much cultural diversity as possible allows an organization to better serve all members of a community in several different ways:

- Bilingual/bicultural staff supplement the work of contract employees and volunteers, and offer continuity;
- Having a multi-lingual staff offers much more than interpretation. Some clients will be more able to talk easily with someone who is more like them, from their own culture;
- Some immigrant women fear interacting with members of the majority culture whom they expect to be unfriendly or impatient. They expect to be treated as they have been by others in the community at large;
- If interpretation is to be part of their jobs, the contracts of bilingual/bicultural employees reduce other job responsibilities to allow time within the normal working day for interpretation. In that

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way, bilingual/bicultural employees are not penalized for not completing other job responsibilities as other employees; and

- Bilingual staff must have the same promotional possibilities as other staff members. Successful agencies are willing to replace bilingual staff who are promoted with new bilingual/bicultural staff members.

Hiring Bilingual/Bicultural Staff

These simple adjustments can make it easier for an agency to successfully hire bilingual/bicultural staff:

- Immediately changing the way staff members are recruited so that the next time an opening becomes available, hiring a bilingual/bicultural staff member is a priority
- Mailing job announcements to organizations and professionals who serve diverse communities
- Developing a list of ethnic language minority newspapers and newsletters in which to advertise
- Mailing job announcements to language departments and Latin/Asian/Afro-American studies departments of local universities
- Increasing the hiring time-frame in order to create an applicant pool that will contain significant numbers of diverse candidates
- Measuring cultural competency and language proficiency as discrete job skills.

Agencies might continually evaluate existing services that are offered to immigrant women for effectiveness. To accomplish these goals, it might be helpful for agencies to meet periodically with directors of domestic violence and immigrants' rights agencies in their areas to discuss outreach proposals, service delivery ideas, and the systemic barriers that immigrant women encounter when they seek help.¹² State domestic violence coalitions can also be a good resource to help individual organizations create and share successful solutions.

When working with immigrant victims, agencies might also convene focus groups with current and former immigrant clients asking them about the effectiveness of their services and obtaining their suggestions for improvements.¹³ Some appropriate questions for focus group participants and program staff include:

- What work should be undertaken to advance the agency's attentiveness and dedication to serving battered immigrants?
- Does the agency have an ongoing culturally sensitive training program in place that teaches staff about the special legal and social service needs of battered immigrant women and the systemic barriers that immigrant victims encounter when they seek services?
- How often does agency staff discuss diversity issues?
- Are staff/volunteers recruited from the significant immigrant populations in the area that the agency seeks to assist?
- What, if any, incentives does the agency have for current staff to take foreign language classes?
- Does the agency have adequate interpretation services?
- Has the agency subscribed to a telephonic interpretation service such as the AT&T language line, so that it can be prepared to address the language needs of isolated victims who may have language needs different from the majority of immigrants in the agency's community?¹⁴
- Has the agency designed a culturally sensitive protocol specifically for battered immigrant women?
- Does the focus of the agency's overall outreach campaign include the immigrant community?
- To what extent do the multicultural services provided by the organization, such as volunteer interpreters and educational materials, succeed in assisting battered immigrants?
- What services does the organization offer immigrant women?

¹² LESLYE ORLOFF, ET AL., LEGAL MOMENTUM, LESLYE ORLOFF ET AL., AYUDA SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN 96-111 (LEGAL MOMENTUM, 1999).

¹³ GAIL PENDLETON, FAMILY VIOLENCE PREVENTION FUND, BUILDING THE RHYTHM OF CHANGE: DEVELOPING LEADERSHIP AND IMPROVING SERVICES WITHIN THE BATTERED RURAL IMMIGRANT WOMEN'S COMMUNITY (2000).

¹⁴ A telephonic interpretation is where a bilingual representative may serve as an interpreter between two (or more) parties via telephone for a small fee. There are a variety of telephonic interpretation service agencies available in a array of languages.

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- What services do immigrant clients need that the organization does not offer, and what steps can be taken to address these needs?
- How can the agency better meet the needs of immigrant victims?
- Does the agency have any rules or practices that can impede immigrant access to the full range of its services?¹⁵

STEP 3: DEVELOPING A COMMUNITY EDUCATION & OUTREACH CAMPAIGN ON DOMESTIC VIOLENCE

In addition to improving their abilities to serve immigrant and culturally diverse communities, it is essential that agencies develop plans to educate members of the diverse communities in their areas that:

- Domestic violence is a crime
- Many professionals are willing to help abused women and children, including doctors, nurses, police, judges, attorneys, shelter workers, social workers
- Abuse victims can safely seek help without risking deportation
- Abuse victims can get help even if they plan to continue living with their abusers
- Victims can receive custody of their children and child support
- Organizations and individuals will listen to them and support them through the process of ending domestic violence in their lives.¹⁶

Working to make an agency more culturally sensitive is an ongoing process. For immigrant women to muster the courage to leave abusive relationships, they must understand their legal rights in the United States and have effective and culturally sensitive support services available to them. While battered immigrants are learning about services, staffers should take steps to increase their cultural sensitivity and to develop working relationships with organizations serving the immigrant community.

The Need for Collaboration

Advocates with little knowledge about immigration laws and attorneys with limited domestic violence experience may be unprepared to respond to the range of problems that battered immigrant women face. A domestic violence advocate may be unaware of possible protections for immigrants under VAWA, while a family violence attorney may encourage the woman to file for divorce without informing her that she qualifies for immigration benefits that she must request within two years of divorce. Through collaboration, service providers will be fully equipped to help battered immigrant women overcome the many justice and social system barriers they encounter when they seek help.¹⁷

Domestic violence has a long history in the United States. It is a crime that crosses all race, class, and cultural lines, and it is particularly insidious because the abuser has continued access to his victim. Further, for domestic violence survivors, deciding if and how they want to use the justice system can be difficult. Questions such as, “Can I leave my batterer?,” “Can I get justice system protection to try to stop the violence without leaving my partner and breaking up the family?,” “How can I support myself?,” “Can I maintain custody of my children?,” and others race through the minds of battered women. Information on shelters, domestic violence programs, victim advocates, lawyers, and justice system relief can make a difference as women struggle to decide how to try to get protection against the violence, and whether or not this will

¹⁵ *Providing Materials to Non-English Speaking Communities*, 1 MICH. COALITION AGAINST DOMESTIC & SEXUAL VIOLENCE REV. 14 (1998).

¹⁶ This document was developed at Ayuda Inc., Washington, D.C.

¹⁷ Debbie Lee & Chris Hogeland, *Accessibility: Serving a Changing Community*, in DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN 18, 18 (Deeana L. Jang et al., Family Violence Prevention Fund, eds., 2d ed. 1997); THE SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE DOMESTIC VIOLENCE FELONY AND MISDEMEANOR PROSECUTION PROTOCOL 2 (1997).

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require leaving their abuser. When agencies collaborate, battered women and their children have the best chance to obtain the help they need from the justice- and social service-systems.¹⁸

For immigrant women, domestic violence becomes an even more complex issue. The problems and difficult choices all battered women face are complicated by the fact that battered immigrant women stand at the intersection of several different identities including being immigrants, being women, being domestic violence victims, and, often, being women of color.¹⁹ When battered immigrants turn to the justice, health, and social service systems for help, they often encounter barriers that go beyond those experienced by women and domestic violence victims generally. Legal advocates, health care providers, and social service providers may make assumptions about an immigrant victim's immigration status or cultural background. These assumptions may impede a victim's access to assistance. Language barriers emerge in the judicial, social services, and healthcare sectors particularly when adequate funds for interpreters have not been allocated, or when agencies have not hired sufficient numbers of bilingual, bicultural staff.²⁰ Battered immigrant women in the United States need access to the full range of culturally competent services available to all battered women in U.S. communities including shelter, transitional housing, health care, counseling, supportive advocates, family lawyers, protection orders, criminal prosecution of their abusers, and financial assistance. In order to provide multi-lingual and multi-cultural services to battered immigrant women, service providers should be trained in providing culturally competent assistance.²¹ Additionally, immigrant victims need access to attorneys and advocates who know the laws governing special access to legal immigration status and public benefits for battered immigrants and are prepared to counter abusers' efforts to use immigration status against victims in family and criminal court cases and through involvement of law enforcement. Rarely can an immigrant victim of domestic violence receive all the assistance she needs from one program.

When seeking legal and economic assistance, a battered immigrant woman may face many systemic obstacles, including sexism, racism, cultural prejudices, and anti-immigrant attitudes.²² By combining their efforts, lawyers, victim advocates, justice and social service system personnel, and other professionals can help battered immigrant women overcome systemic barriers that impede a survivor's ability to access the assistance necessary to reduce the violence, to escape her abuser, and to create a safe and economically secure life for her family independent of the abuser. The multitude of problems battered immigrant women face require that advocates and attorneys identify collaborators in the immigrant communities with whom they can work to facilitate the immigrant survivor's access to justice, health care, and social services.²³

New National Institute of Justice-funded research conducted by Dr. Rachel Rodriguez, a Network Advisory Committee member, finds that the best models for providing effective services and interventions for immigrant domestic violence victims are true collaborations between staff from two types of programs: one partner must have expertise helping women and children who have experienced family violence, while the other must have a trusting relationship with women in immigrant communities—whether a grassroots women's group, an immigrant community organization, a health care provider, faith-based organization or

¹⁸ Marti Kovener, et al., *Making Collaboration Work: The Experiences of Denver Victim Services 2000*, OVC BULLETIN (Dec. 2002).

¹⁹ The "intersectional theory" examines how multiple identities compound discrimination. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1242 n.3 (1991) (discussing the "intersectionality theory" and listing sources that explore the intersection of race and gender); see also SUJATA BARAI, NEGOTIATING THE INTERSECTION: HOW AND WHY PROVISIONS FOR BATTERED IMMIGRANT WOMEN HAVE BECOME A PART OF U.S. IMMIGRATION POLICY 12 (1998); Margaret Abraham, *Speaking the Unspeakable: Marital Violence Against South Asian Immigrant Women in the United States*, in 5 INDIAN J. OF GENDER STUD. 2 (1997); Kimberle Crenshaw, *Beyond Racism and Mysogyny: Black Feminism and 2 Live Crew*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 114 (1993); .

²⁰ GAIL PENDLETON, FAMILY VIOLENCE PREVENTION FUND, BUILDING THE RHYTHM OF CHANGE: DEVELOPING LEADERSHIP AND IMPROVING SERVICES WITHIN THE BATTERED RURAL IMMIGRANT WOMEN'S COMMUNITY (2000).

²¹ WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, WOMEN'S RIGHTS IN THEORY AND PRACTICE: EMPLOYMENT, VIOLENCE AND POVERTY (2002), 48.

²² Sudha Shetty & Janice Kaguyutan, *Immigrant Victims of Domestic Violence: Cultural Challenges and Available Legal Protections* (2002), available at <http://www.vaw.umn.edu/FinalDocuments/vawnet/arimmigrant.asp>.

²³ LEGAL MOMENTUM & ORGANIZACION EN CALIFORNIA DE LIDERES CAMPESINAS, INC., ADVOCACY TO IMPROVE SERVICES FOR BATTERED MIGRANT AND IMMIGRANT WOMEN LIVING IN RURAL COMMUNITIES: A MANUAL 70-77 (2003).

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legal or social service provider with a lengthy track record working with women in the target immigrant community.²⁴

While collaboration and a coordinated community response are critical for all battered women, for immigrant victims, that collaborative team must include battered immigrant survivor victims, individuals who are knowledgeable about immigrant victims' legal rights, and agencies with expertise in working with immigrant populations.

Each service provider has a specialization that qualifies him or her to assist battered immigrants in a unique way. For example, shelters offer a short-term refuge from violent relationships.²⁵ However, without collaboration between groups of service providers, a battered woman might become stuck in a cycle of moving from the abusive relationship²⁶ to the shelter and back again because she was never made aware of the full range of legal and social support options open to her. On the other hand, without full information, she may pursue a legal option that could eliminate eligibility for legal relief necessary to obtain economic security and independence from the abuser for immigration status.

While each program working with a battered immigrant will have its area of specialization, collaboration between groups would increase efficiency and help to better serve the diverse needs of each individual battered immigrant. Without collaboration, a family law attorney may be unaware that by obtaining a divorce, the attorney has started a time-clock setting a two-year limit on when an immigrant victim must file a VAWA self-petition.²⁷ Family lawyers who leave domestic violence out of divorce cases, or who settle cases in a manner that denies the existence of domestic violence in the relationship cut off immigrant victims from VAWA immigration relief. A battered women's advocate could be unaware that she is in the best position to help the victim collect the evidence she will need to file her VAWA self-petition. An immigration attorney may be unaware that immigrant clients can be awarded legal custody of their children in court without regard to their immigration status.

Collaboration helps victims benefit from comprehensive services provided by diverse specialists. It also prevents specialists from becoming overwhelmed while attempting to single-handedly provide the variety of services that their battered immigrant clients need. Through collaboration, professionals can work together to provide a battered immigrant women with a full range of services that one program alone may not otherwise offer.²⁸

Increasingly, both government and private organizations have relied upon collaborative arrangements to improve their services to domestic violence victims.²⁹ Organizations participating in a collaborative network will have a broader reach and will be able to offer more culturally appropriate and more comprehensive assistance than what had previously existed in their communities.³⁰ When collaborations incorporate community-based organizations with expertise in the language, culture, and legal rights of immigrant victims, these collaborative efforts can remove systemic barriers that hinder battered immigrants' efforts to receive culturally sensitive assistance from both the justice system and service providers.³¹ A successful

²⁴ Research data (2002) is pending publication, available from Dr. Rachel Rodriguez, University of Wisconsin Madison, School of Nursing.

²⁵ Richard A. Berk & Phyllis J. Newton, *What a Difference a Day Makes: An Empirical Study of the Impact of Shelters for Battered Women*, 48 J. OF MARRIAGE AND THE FAM. 482 (1986).

²⁶ The process of leaving an abusive partner is a long and difficult one. It is not safe to assume that the woman is out of danger after she leaves. Even if the woman establishes a new living arrangement, there is still a possibility that she will suffer continuing violence at the hands of her abuser. For further information on this subject, see Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000); The National Advisory Council on Violence Against Women and the Office on Violence Against Women of the U.S. Department Justice, *Strengthening Community-Based Services and Advocacy for Victims*, in TOOLKIT TO END VIOLENCE AGAINST WOMEN pp 2-3, available at <http://toolkit.ncjrs.org>

²⁷ INA § 204(a)(1)(A)(iii)(II)(cc), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(cc); INA § 204(a)(1)(B)(ii)(II)(cc), 8 U.S.C. 1154 (a)(1)(A)(iii)(II)(cc).

²⁸ Rachel Rodriguez. Community-based evaluation in a Latina immigrant community in Wisconsin. July 2004.

²⁹ Myrna Mandell, *Community Collaborations: Working through Network Structures*, 16 POL'Y STUD. REV. 43 (1999).

³⁰ LARRY COHEN ET AL., DEVELOPING EFFECTIVE COALITIONS: AN EIGHT-STEP GUIDE 1 (1994).

³¹ WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, WOMEN'S RIGHTS IN THEORY AND PRACTICE: EMPLOYMENT, VIOLENCE AND POVERTY (2002), 49.

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coordinated community response ideally can raise an immigrant community's awareness about domestic violence. It will also educate the general community population about the immigrant community – its assets to the community as a whole and its special needs. Involving immigrant community members and the organizations that serve immigrant communities in coordinated community response teams has the added advantage of uniting immigrant community leaders, including immigrant women leaders, with leaders of the larger community in a commitment to ending domestic violence for all populations.³²

Culturally Competent Collaborations

Collaboration is necessary to help battered immigrant women because each collaborative organization can offer women something unique. Each member in the collaboration offers important services to the immigrant victim. Some professionals and other support persons will see a victim as she tries to leave, encounters problems in receiving services and legal relief, and returns to her abuser. These professionals might include health-care workers, clergy, school social workers, mental health professionals, and other professionals with whom a battered woman may be more likely to remain in contact before, during, and after she seeks help with regard to domestic violence. She may remain in touch with some or all of these professionals even if she chooses to remain with her abuser or return to him. Police, courts, battered women's advocates, attorneys, and prosecutors may only see battered immigrants when they are trying to leave their abusers or to take legal action to curb the abuse.³³

One benefit of collaboration is that it allows a survivor to maximize her opportunities, without having to retell her story unnecessarily and encounter conflicting suggestions from different service providers. All service providers working with immigrant victims and partner organizations can benefit from developing good culturally competent interviewing and note-taking skills. It is important to exercise careful listening skills. While listening to a victim's story, some advocates take notes by creating two separate columns on the page. One column lists the problems and needs the immigrant victim has identified. As the victim tells her story, an advocate notes problems he or she identifies at that time. Then, as the advocate reviews the story both on his or her own and with the victim, he or she elaborates upon and expands this list of problems, issues, and needs. The second column is used to develop a list of remedies. This list is developed with the client.

After a survivor has told her story, an advocate goes over potential remedies. Every agency involved in helping a battered woman needs to remember it is most important to find solutions that best fit the woman's desires.³⁴ By effectively listening to a woman and working with her through the process of identifying needs and problems and helping her understand all of the potential remedies she may pursue, she will be better able to make informed decisions about what legal, social service, and self-help avenues to pursue. In most cases, battered women should be encouraged to first develop self-help and safety planning solutions and then move on to identify and focus on legal and social services that can help them. Women should be provided information and explanations about potential legal options: family, immigration, benefits, civil, and criminal. Keeping the kind of records discussed above³⁵ and gaining legal permission from clients to share them with other collaborating professionals working on her case can help insure that immigrant victims obtain all of the assistance they need in a consistent manner without requiring them to repeat painful stories over and over to many providers. Working together, these groups of professionals can help support battered immigrant women who return to or continue to live with their abusers.

³² JOAN ZORZA & LESLYE ORLOFF, AMERICAN MEDICAL ASSOCIATION, FAMILY VIOLENCE: BUILDING A COORDINATED COMMUNITY RESPONSE: A GUIDE FOR COMMUNITIES (1994), pp. 73.

³³ Leslye Orloff, *Effective Advocacy For Domestic Violence Victims: Role of the Nurse-Midwife*, 41 J. OF NURSE MIDWIFERY 6 (1996).

³⁴ Woodrow Wilson International Center for Scholars, *Women's Rights in Theory and Practice: Employment, Violence and Poverty* (2002), 49.

³⁵ LESLYE ORLOFF ET AL., LEGAL MOMENTUM, LESLYE ORLOFF ET AL., AYUDA SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN 96-111 (LEGAL MOMENTUM, 1999). PLEASE CHECK FULL CITATION WITH LESLYE: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN 96-111 (1999).

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Many immigrant battered women, in particular, seek solutions to domestic violence that do not require them to leave their abusers. Some women stay because they see no other option and return to their abusers in order to survive.³⁶ Support persons who continue to keep in contact with battered women who return to or stay with their abusers have a special duty to continue providing support, encouragement, and assistance.³⁷ They can continue to help the women by:

- Informing victims about protective legal options, including civil protection orders available for women who do not separate from their abusers, or who return to them;
- Providing knowledge about available legal and social services in the community;
- Providing knowledge about the community-based organizations that serve culturally diverse populations in the community; and
- Identifying programs with legal expertise in working with immigrant victims.

When a range of groups agree to come to the table and agree to combine efforts to help battered immigrant women, the outcome will best fit the personal and cultural needs of battered immigrant victims.

Building Collaborations

There is no one universal way to form partnerships between immigrant survivors and community-based organizations, shelters; immigrant-rights groups, advocates, attorneys and justice, social service; or healthcare professionals. Each partnership must be defined by the unique characteristics of the community. A combination of approaches might be helpful depending on the size, structure, and accessibility of the local immigrant population in a given area. Each method, however, includes the indispensable component of outreach. This section will discuss different ways to create successful collaborative partnerships of community members, immigrant women leaders, professionals, and advocates. This section will also discuss how professionals and organizations can work together to train each other on domestic violence and develop culturally competent services, and how programs can coordinate case management. Developing a network of accessible sensitive services is particularly helpful for battered women who have migrated from places in the U S or other countries where comparable services were not accessible or offered.

Outreach is an indispensable component of service-provision. Immigrant victims might not know that shelters, domestic violence programs, legal services, police domestic violence units, or court protection orders exist, especially if they live in rural areas or they are isolated from information coming from sources other than the abuser.³⁸ Often battered immigrant women do not know that domestic violence is a crime, that there is legal protection open to them, and that there are social and legal services programs willing to help.

The Importance of Involving Immigrant Women in Collaborations

The key to success in developing effective, culturally competent collaboration, is involving immigrant women themselves as leaders and respected partners in the collaboration.³⁹ Generally, battered women in the United States use shelters and community agencies as their main means of intervention and support.⁴⁰ Battered immigrant women, however, may turn first to women friends in the community, trusted church groups, or immigrants' rights groups that can offer support and can link them to domestic violence experts.

³⁶ Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000); Giselle Aguilar Hass et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in DOMESTIC VIOLENCE: GLOBAL RESPONSES 93(2000).

³⁷ Leslye Orloff, *Effective Advocacy For Domestic Violence Victims: Role of the Nurse-Midwife*, 41 J. OF NURSE MIDWIFERY 6 (1996).

³⁸ See SUSAN BREALL AND DEOBRAH ADLER. WORKING WITH BATTERED IMMIGRANT WOMEN: A GUIDEBOOK FOR PROSECUTORS, VOLCANO, CALIFORNIA: VOLCANO PRESS (2000); DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN (Deeana L. Jang, et al., Family Violence Prevention Fund, eds., 2d ed. 1997);GAIL PENDLETON, FAMILY VIOLENCE PREVENTION FUND, BUILDING THE RHYTHM OF CHANGE: DEVELOPING LEADERSHIP AND IMPROVING SERVICES WITHIN THE BATTERED RURAL IMMIGRANT WOMEN'S COMMUNITY (2000).

³⁹ Sonia Parras Konrad, *Women Empowering Women: An Exciting Journey*, (on file with author) (June 2003).

⁴⁰ Lesile M. Tutty et al., *Support Groups for Battered Women: Research on Their Efficacy*, 8 J. OF FAM. VIOLENCE 325 (1993).

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Within immigrant communities, the names of helpful and trustworthy organizations spread quickly from woman to woman through word-of-mouth. Immigrant battered women are substantially more likely to talk about domestic violence to their female friends, mothers, sisters, or other battered immigrant women in their communities before they speak to anyone else. Furthermore, those who talk to others about the domestic violence are the ones most likely to ultimately to seek help. Breaking the silence is the first step.⁴¹

Immigrant survivor involvement is the critical link without which few immigrant victims will actually use the services that a community offers to assist them. Collaborations between agencies, the presence of bilingual and bicultural staff and cross-trained professionals, and culturally sensitive services all make it more likely that an agency will be able to reach more battered immigrants. Building good collaborations and a culturally competent program alone will not necessarily result in battered immigrants coming to use those services, however; even outreach will not necessarily change this equation. Involving immigrant women community members, immigrant organizations, or faith-based organizations with long-term track records of working in immigrant communities, as partners in collaborative efforts will break down barriers. It will also effectively communicate the availability of services and justice-system assistance to immigrant women through persons whom they trust.⁴²

When involving immigrant community-based organizations that immigrant communities trust, agencies ought to understand and evaluate who within the immigrant community accesses the services that those organizations provide. Many organizations may provide services mostly to immigrant families for whom immigrant men are the families' primary representatives in working with the agencies. Advocates ought to identify community-based organizations, immigrant women's organizations, and faith-based organizations working in immigrant communities that offer services also, or primarily, to immigrant women, and involve these organizations in collaboration. If most of the immigrant community-based organizations involved in collaborations serve the immigrant community generally, as opposed to specializing in serving immigrant women, advocates should encourage these groups to work with immigrant women survivors.

Domestic violence service providers, legal services agencies, and immigrants' rights organizations can all reach out to immigrant women in a given community and involve women community members in working on domestic violence issues. Organizations can also support the leadership of immigrant women in this work, as staff or as volunteers, and encourage immigrant survivors to form their own community-based organizations.⁴³ Through collaboration, agencies can offer to provide development assistance and support for battered and non-battered immigrant women community leaders serving their own community, including helping them form their own supporting organizations aimed at serving the needs of, and creating links to, immigrant women in the community.

Cross Training

One of the most effective forms of assistance that a collaborative network can provide is cross-training. Through cross-trainings, advocates and attorneys in every field can expand their knowledge about the value of issues affecting battered immigrant women. Some of the organizations that might participate in such trainings include:

- Domestic violence shelters
- Domestic violence hotlines

⁴¹ Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000); Giselle Aguilar Hass et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, DOMESTIC VIOLENCE: GLOBAL RESPONSES 93 (2000)

⁴² Sonia Parras Konrad, *Women Empowering Women: An Exciting Journey*, (on file with author) (June 2003).

⁴³ LEGAL MOMENTUM & ORGANIZACION EN CALIFORNIA DE LIDERES CAMPESINAS, INC., *ADVOCACY TO IMPROVE SERVICES FOR BATTERED MIGRANT AND IMMIGRANT WOMEN LIVING IN RURAL COMMUNITIES: A MANUAL* (2003); GAIL PENDLETON, FAMILY VIOLENCE PREVENTION FUND, *BUILDING THE RHYTHM OF CHANGE: DEVELOPING LEADERSHIP AND IMPROVING SERVICES WITHIN THE BATTERED RURAL IMMIGRANT WOMEN'S COMMUNITY* (2000).

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- Police units with domestic violence specialization
- Legal service organizations and experienced domestic violence attorneys
- Immigration lawyers with experience working on domestic violence cases
- Immigrant women's groups
- Immigrant community-based organizations, including immigrants' and refugee rights advocates
- Immigration law bar association members
- Faith-based organizations serving immigrant communities
- Counseling programs
- Domestic violence court programs
- Domestic violence prosecution programs

Immigrant survivors should be included in community-wide cross trainings as teachers about immigrant victims' experiences with domestic violence and as experts on outreach to immigrant women.⁴⁴ A broad array of professionals – shelter advocates, attorneys, social workers, immigrants' rights organizations' staffs, clergy, and justice system professionals – all need knowledge about battered immigrants' legal rights. Each of these professionals in a community will have critical forms of expertise, but will need training on other issues so that together they can form an effective, coordinated effort to help battered immigrant women. Without cross-trainings, domestic violence advocates cannot know what documents a battered woman needs for her immigration case. Immigration attorneys need contact with advocates to understand civil protection orders and safety-planning. Domestic violence attorneys and advocates might attend trainings on basic immigration law, while immigration attorneys might benefit from a training session on the issues that arise in domestic violence cases in family court. Since the details of immigration law and public benefits options for immigrant victims are constantly shifting, cross-trainings must be ongoing.

Trainings should also be held with, and, ideally, sponsored or co-sponsored by, local immigrant-service organizations so that those groups may become better prepared to address domestic violence within their immigrant communities. The attendees should be encouraged to serve as faculty in their area of expertise. Domestic violence advocates might explain safety-planning and prevention techniques, while attorneys might clarify local laws against domestic violence, the process for self-petitioning under VAWA,⁴⁵ and forms of immigration relief and public benefits that may be awarded to immigrant victims.

Service providers benefit from trainings run by immigrant communities because trainings expand their cultural knowledge, helping them work with immigrant clients in a more culturally appropriate manner.⁴⁶ Such collaboration also links service providers with community-based organizations, university-based organizations, and church groups that could possibly offer links to potential interpreters.⁴⁷

Trainings may also deter domestic violence by changing immigrant community attitudes. Attendees at cross-trainings should be provided with training materials on a variety of topics. Topics might include:

- Domestic violence
- Immigration options for battered immigrants
- Social services available to battered immigrants
- Public benefits options for battered immigrants and their children
- Demographic information about the culture and the needs of immigrant communities in the area

⁴⁴ LESLYE ORLOFF ET AL., AYUDA SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN 96-111 (LEGAL MOMENTUM, 1999).

⁴⁵ LEGAL MOMENTUM & ORGANIZACION EN CALIFORNIA DE LIDERES CAMPESINAS, INC., ADVOCACY TO IMPROVE SERVICES FOR BATTERED MIGRANT AND IMMIGRANT WOMEN LIVING IN RURAL COMMUNITIES: A MANUAL (2003); GAIL PENDLETON, FAMILY VIOLENCE PREVENTION FUND, BUILDING THE RHYTHM OF CHANGE: DEVELOPING LEADERSHIP AND IMPROVING SERVICES WITHIN THE BATTERED RURAL IMMIGRANT WOMEN'S COMMUNITY (2000).

⁴⁶ NANCY K.D. LEMON & PETER JAFFE, FAMILY VIOLENCE PREVENTION FUND, DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES 165-66 (Janet Carter et al. eds., 1995).

⁴⁷ Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43 (2003).

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- Needs of immigrant women in your community
- Cultural competency
- Working effectively with interpreters

Many organizations will already have developed some of the training material listed above.⁴⁸ In addition to materials, cross-training attendees can be provided with lists of local organizations with which they can collaborate on battered immigrant cases. They might also receive a list of national organizations that provide state, local, and regional referrals to service providers and experts that work with immigrant victims. These organizations can provide technical assistance and links to others working with similar immigrant populations in other parts of the country. This list might include:

- Immigrant Women Program of Legal Momentum:
1522 K Street, NW, Suite 550, Washington, DC 20005; (202) 326-0040; iwp@legalmomentum.org
- National Immigration Project of the National Lawyer's Guild:
14 Beacon Street, Suite 602, Boston, MA 02108; (617) 227-9727;
sandy@nationalimmigrationproject.org
- Family Violence Prevention Fund:
383 Rhode Island St. Suite #304, San Francisco, CA 94103; (415) 252-8900; info@endabuse.org
- National Domestic Violence Hotline:
(800) 799-SAFE, TTY: (800) 787-3224; ndvh@ndvh.org

Case Coordination

One of the key benefits that battered immigrants ideally receive from collaborative networks is a coordinated handling of their legal and social service needs by various professionals. The collaboration of service providers can ensure that any steps that various professionals take to help an immigrant victim will not impede any other advocate's or attorney's efforts. For example, family lawyers should contact an immigration expert to determine what information can be obtained through the family court case that can help the victim's immigration case. Family lawyers also need to know the findings that are needed when an immigrant victim obtains a divorce so as not to harm her immigration case. It is also important to know under what circumstances a survivor's immigration case could be harmed by receipt of certain public benefits. By contacting an immigration attorney, domestic violence advocates can learn about the types of immigration relief for which a battered immigrant qualifies.

By creating partnerships with an attorney, advocates can learn how to help battered immigrants obtain protection orders that can also help her immigration case. When advocates assist attorneys in collecting evidence for VAWA self-petitioners' cases, attorneys can offer legal assistance to many more immigrant victims. Collaboration can help promote swift approval of the VAWA self-petition. Advocates often have a closer, more trusting, relationship with victims than lawyers and therefore are often better at learning the victim's detailed story. Advocates can also help battered immigrant clients do safety-planning to enhance their safety, whether they choose to leave or stay with their abusers.

⁴⁸ If organizations do not already have these materials, they need not invest resources in developing such materials as many can be obtained from national organizations and can be used locally. To obtain training materials on many of the topics listed above, contact the National Immigrant Women's Advocacy Project, 4910 Massachusetts Ave NW, Suite 16 Lower Level, Washington, DC 20016; (202) 274-4457; info@niwap.org; <http://wcl.american.edu/niwap>; or Futures Without Violence, 100 Montgomery Street, The Presidio, San Francisco, CA 94129; (415) 678-5500; <http://www.futureswithoutviolence.org> for more general information.

How Collaboration Can Improve Access to VAWA Self-Petitions – A Model Approach

Beginning in 1999, Mirna Torres, an immigration attorney in New Mexico, established a model collaborative network of service providers working with battered immigrant women.⁴⁹ “I would go to any shelter,” says Mirna. She recounts that she put 100,000 miles on her car driving across the state of New Mexico training service providers, teachers, district attorneys, police officers, and social workers— basically anyone willing to attend the training.

Her first step was to contact shelters and offer to train their staff. The training included information on the options available to battered immigrant women, information on the self-petition and the self-petitioning process, and a list of the evidence needed for a successful self-petition. She also included bilingual information packets with samples of every document needed to file the self-petition and lists of documents that would be beneficial to include. Now, shelters often contact Mirna when they take a new client. She also receives requests from individual women who are not at a shelter. In such cases she connects these individual women with a shelter so that the immigrant victim will have access to support and resources of which she may have had no prior knowledge. The shelter can also serve as a safe address for women receiving correspondence about their self-petition.

Throughout the application process, Mirna is on hand to answer any questions that shelter workers may have. Once the self-petition is complete, it is sent to her to organize and translate. In most cases, she does not meet with the client, working instead through the trained legal advocate at the shelter, who is the most important contact with the client. She reminds attorneys that shelters and service providers are essential in this process, and that attorneys should seek assistance of shelter workers and other collaborators for case management. Mirna’s approach offers the following helpful tips:

- Organizations should keep track of anyone they train so that contact information can be distributed to battered immigrant women;
- Organizations should provide multi-lingual training and training materials;
- If an organization conducts trainings, it should be prepared to offer services
- An organization’s entire staff must be trained. Receptionists are particularly critical because they serve as the first contact with battered immigrants;
- Training staff on a regular basis accounts for turnover and any changes in policy or approach;
- Attorneys should assign a point person/case manager who will serve as the specialist in the needs of immigrant women. The case manager may also choose to take on the role of translator. Creating a case manager position allows an attorney to carry more cases because the case manager can share the workload and be the main contact with a client; and
- Organizations can create partnerships with local universities and offer internships to students to help with translation work and with organizing self-petitions.

Many of the people that Mirna initially trained have become trainers themselves after continuing their education through conferences and national training sessions. This type of collaboration is an excellent use of resources. It results in many high-quality self-petitions that are readily approved by immigration authorities and spreads precious, limited, resources so that they can be used to benefit greater numbers of battered immigrant women. It is also a very effective approach for helping battered immigrants living in rural areas or in communities lacking immigration or legal services lawyers. If one or two lawyers in each state adapted this approach, it would make a dramatic difference in battered immigrants’ ability to access help filing VAWA self-petitions.

⁴⁹ This approach was developed by Catholic Charities of Albuquerque New Mexico. For more information, contact Mirna Torres at the Catholic Charities of Central New Mexico, 2010 Bridge SW, Albuquerque NM 87105. For sample materials on the subject, contact NIWAP, 4910 Massachusetts Ave NW, Suite 16 Lower Level, Washington, DC 20016; (202) 274-4457; info@niwap.org.

Outreach

Steps toward improving services to battered immigrants in your community may involve:

- Identifying significant linguistic minorities and immigrant populations in the community
- Assessing a program's capacity to serve immigrant victims
- Identifying agencies in the community that can collaborate to serve immigrant victims
- Holding trainings and cross-trainings for program staff and staff at collaborating organizations on legal rights of immigrant victims and provision of culturally competent services to them
- Identifying training materials on battered immigrant women's legal rights that an organization can use to train professionals in the community, and identifying technical assistance providers who can help on individual cases
- Working with immigrant survivors and conducting outreach campaigns to inform immigrant victims about the options open to them

Once an agency has identified immigrant communities in its area and trained program staff to serve immigrant victims, it can begin a collaborative outreach effort to inform immigrant battered women of their legal rights and to inform them of the programs and services available to help victims of domestic violence.⁵⁰ Battered immigrant clients will not start coming to seek services just because agency staff have been trained and are now ready to serve them. For this reason, it is important to partner development of culturally competent services with an outreach and education campaign to inform immigrant women about their legal rights and the services available to immigrant victims of domestic violence and sexual assault.

Immigrant women are most likely to talk about domestic violence to other immigrant women who may be their female friends, mothers, or sisters.⁵¹ For this reason, outreach efforts should be sufficiently targeted to reach immigrant women – both those who are abused themselves and the persons to whom they turn for support. Reaching the target audience requires collaboration with immigrant survivors and immigrant women's groups who are best-situated to reach the target audience, and speak to them about domestic violence.

Immigrant women should be involved from the beginning in designing an outreach campaign. Some of the objectives of an outreach campaign should include:

- Informing the immigrant community that domestic violence is a crime and explain what domestic violence is
- Raising awareness about legal relief, shelter, and social services available to help victims
- Bringing in men as a part of the solution and making them accountable for their behavior
- Strengthening girls' and women's confidence levels to resist violence in their relationships
- Being aware of the needs and perspectives of the immigrant population when presenting information
- Presenting the information in a respectful way that is tailored to the audience

Being aware of possible barriers, e.g. racism or anti-immigrant sentiment, that exist in the community⁵²

⁵⁰ LEGAL MOMENTUM & ORGANIZACION EN CALIFORNIA DE LIDERES CAMPESINAS, INC., ADVOCACY TO IMPROVE SERVICES FOR BATTERED MIGRANT AND IMMIGRANT WOMEN LIVING IN RURAL COMMUNITIES: A MANUAL (2003).

⁵¹ Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000); Giselle Aguilar Hass et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, DOMESTIC VIOLENCE: GLOBAL RESPONSES, 93 (2000).

⁵² LESLYE ORLOFF ET AL., LEGAL MOMENTUM, LESLYE ORLOFF ET AL., AYUDA SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN 96-111 (LEGAL MOMENTUM, 1999). PLEASE CHECK FULL CITATION WITH LESLYE: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN 96-111 (1999).

Working Effectively

Effective communication with the survivor is an essential precursor to deciding which collaborations will be helpful in her particular case. The goals of working cross-culturally are to obtain information from the survivor and to help her achieve ownership of her own solutions. Advocates, attorneys, service providers, and justice system personnel who work with battered women are constantly called upon to help people who may come from backgrounds different than their own. The victim seeking help may come from a different economic background, country of origin, culture, ethnicity, or religion than that of the advocate, attorney, or other worker.⁵³ To provide culturally competent services to all victims, it is essential that service providers approach their work in a manner that ensures that all battered women are given a safe place in which to tell their stories and articulate their needs, fears, and concerns.⁵⁴

Gathering Information

Because workers in domestic violence programs are typically among the first to meet with battered immigrant women, they are in a prime position to help battered immigrants begin gathering documents and information necessary for VAWA self-petitions and cancellation of removal application. In some communities, it may be difficult to identify an immigration attorney to represent the battered immigrant. In such instances, the victim advocate can provide direct assistance with the battered immigrant's VAWA case and consult with an immigration attorney elsewhere in the state during the information-gathering process in order to ensure proper preparation of the self-petition. Even in VAWA cases where a battered immigrant is represented by an immigration attorney, victim advocates can use their expertise of domestic violence to help the battered immigrant develop her case affidavit and to document the full history of domestic violence, controlling behaviors, and emotional abuse in the relationship. Battered women advocates and staff do extremely well in identifying the elements of abuse, power, and control that can be so important in building a VAWA case.

Assisting the Battered Immigrant to Articulate her Needs

Battered women are inclined to minimize abuse as a survival mechanism but will volunteer more information if they receive culturally sensitive encouragement.⁵⁵ An effective style of inquiry often includes asking open-ended questions that encourage a battered woman to tell her story and express her needs, fears, and concerns from her own cultural perspective, without limitations. If she is encouraged, supported, and is made to feel safe, an immigrant victim is more likely to tell the advocate, attorney, or worker what she needs⁵⁶ from within the victim's own cultural context.⁵⁷ She should be encouraged to tell an advocate or attorney each of the things of which she is afraid and each type of help that she would need or find useful. The advocate or attorney should work with her to create a list of her needs, wants, and concerns. This list should be developed without regard to, and should not be limited by, what the advocate or the attorney might think that the legal, social service, or health care systems typically offer. The list also should be developed without regard to the advocate's or attorney's assumptions about what a particular immigrant client will need, or the course of action she should undertake. Further, it should be developed without being restricted by what the advocate or attorney thinks a victim might ultimately be able to obtain in court, from the advocate's own agency, from other programs, or through public benefits.

⁵³ SUSAN BREALL & DEBORAH A. ADLER, *WORKING WITH BATTERED IMMIGRANT WOMEN: A GUIDEBOOK FOR PROSECUTORS* (2000).

⁵⁴ LETI VOLPP, FAMILY VIOLENCE PREVENTION FUND, *WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE* (1995); WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, *WOMEN'S RIGHTS IN THEORY AND PRACTICE: EMPLOYMENT, VIOLENCE AND POVERTY* (2002), 48; Leslye Orloff, Address Before the American Medical Association (Mar. 11-13, 1994), *in* NATIONAL CONFERENCE ON FAMILY VIOLENCE: HEALTH AND JUSTICE (1994).

⁵⁵ DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN (Deeana L. Jang, et al., Family Violence Prevention Fund, eds., 2d ed. 1997); LETI VOLPP, FAMILY VIOLENCE PREVENTION FUND, *WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE* (1995).

⁵⁶ WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, *WOMEN'S RIGHTS IN THEORY AND PRACTICE: EMPLOYMENT, VIOLENCE AND POVERTY* (2002), 49-50; Leslye Orloff, Address Before the American Medical Association, (Mar. 11-13, 1994), *in* NATIONAL CONFERENCE ON FAMILY VIOLENCE: HEALTH AND JUSTICE (1994).

⁵⁷ Brittany McCarthy Barnes, *Family Violence Knows No Cultural Boundaries*, (93, no.1) *J. OF FAM. AND CONSUMER SCI.* pp 11-14 (2001).

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If a battered immigrant believes that she can only list those services or benefits she might be able to receive from one agency or in court, she may not include critical information that could help her qualify for other forms of relief or assistance and may miss key opportunities to free herself from the abuser's continued exertion of power and control over her.

Advocates and service providers should work with clients jointly to develop creative strategies to effectively address each of the items that battered immigrants include on their lists. Some of the issues survivors raise may be addressed through traditional legal or social services remedies; others may require advocates or attorneys to use the justice or social services systems more creatively. Still others may prompt battered immigrants and advocates to work together to identify which of the listed needs or concerns that might be addressed using the immigrant community programs, battered women's own resources, or those of community or faith-based organizations.⁵⁸

When meeting with a domestic violence survivor, a list of appropriate questions might include:

- What are you afraid of?
- What are your concerns about your partner's reaction?
- Are you interested in staying with or leaving your abuser?
- What are your safety needs, fears, and concerns while you continue to live with your partner?
- What are your needs, fears, or concerns if you are considering separating from your abuser?
- What are your safety needs if you plan to leave your partner?
- Under what conditions do you think it will be safest to leave?
- What are the methods that your partner might use to keep you from leaving him, or to get you to return to him?
- What are the means your partner might use to continue controlling your life?
- What do you want?
- What kinds of things would help you be able to do what you want?⁵⁹

Some Specific Questions for Working with Survivors of Emotional Abuse

Many battered women and battered immigrant women do not think of themselves as domestic violence victims. Although they have suffered abuse, they may not recognize it, or they may believe that emotional abuse is not truly abuse.⁶⁰ Advocates should encourage survivors to discuss their complete experiences, and explore what assistance, help, protections, or remedies they might be interested in seeking. Often times using labels such as "spouse abuse," "domestic violence," "battered woman," "rape," "sexual assault," or "emotional abuse" to identify the victim's experience can actually stump the relationship between the advocate and the victim because this does not relate to such terms. Rather, more effective questions might include:

- Have you ever been told that you were stupid, or that no one else would have you?
- Did your partner ever destroy things, or cause harm to pets?
- Did your partner ever destroy or threaten to destroy things that were important to you, including special things from your country of origin?
- Has your partner ever shoved you, or used or threatened to use a weapon?
- Has your partner ever threatened to have you deported?

⁵⁸ Leslye Orloff, Address Before the American Medical Association (Mar. 11-13, 1994), in NATIONAL CONFERENCE ON FAMILY VIOLENCE: HEALTH AND JUSTICE (1994).

⁵⁹ LESLYE ORLOFF LEGAL MOMENTUM, OVERCOMING CULTURAL BARRIERS IN WORKING WITH IMMIGRANT BATTERED WOMEN (1998).

⁶⁰ Mary Ann Dutton & Giselle Aguilar Hass, *Expert Testimony Concerning Battering*, in MARY ANN DUTTON, ET AL., AMERICAN BAR ASSOCIATION, DOMESTIC VIOLENCE & IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT, Appendix C. (Bette Garlow, et al., eds., 2000).

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- Has your partner ever threatened not to file immigration papers for you, not to follow through on immigration papers he had already filed, or threatened to take away an immigration visa he had already helped you to obtain?
- Has your partner ever threatened to tell the CIS that you only married him to obtain immigration papers?
- Has your partner even threatened to take your children away?
- Has your partner ever threatened to take the children so that you would never be able to see them again?
- Has your partner ever threatened to harm your children?
- Has your partner ever hit you, hurt you, or pulled your hair?
- Has your partner ever forced you to have sex when you did not want to?
- Are you, or have you ever been, afraid of your partner?

Storing Information

Shelters and domestic violence programs can also provide a safe storage place for the collected information and documentation that will be needed in VAWA cases. Most battered women cannot keep important documents at home for fear that the papers will be found and destroyed by the abuser, or could result in a greater intensity of abuse. While women can be encouraged to leave important papers with a neighbor or friend, storage of documents and information crucial to a VAWA case with such individuals can be unsafe. The abuser may discover the location of the documents and force those individuals to turn over the documents to him, thus robbing the victim of all access to the documentation necessary to prove her VAWA case. As a result, battered women's advocates need to be able to provide these life-saving services without restrictions on what can be documented or stored in shelter records. If a victim retains an attorney as well as the help of a victim advocate, there will be at least some period of time that documents will be kept in the domestic violence program files until they are forwarded to the attorney.

Obtaining evidence for VAWA cases can be problematic if shelters and other domestic violence programs have policies against the collection and recording of written documentation in shelter records. These policies exist to protect the privacy and confidentiality of the information provided to and by domestic violence victims so that batterers cannot access this information and use it against a victim in court. While these policies generally offer added protection to battered women, battered immigrants need shelters and domestic violence programs to make exceptions to those policies. Without the help of shelter advocates in creating, collecting, and storing documents needed for a VAWA immigration case, battered immigrants will be disconnected from critical assistance. Statistics from the USCIS indicate that a significant majority of VAWA cases that are denied are those of battered immigrant women who attempt to file VAWA cases without the assistance of an attorney or a trained battered women's advocate.

Concerns about State Confidentiality Rules⁶¹

Advocates and attorneys working with battered immigrants should refer battered immigrants to other collaborating professionals and seek confidentiality waivers that will allow professionals to share information about the victim's various legal cases. This helps to ensure better case coordination, to reduce victim trauma associated with having to repeat the story of abuse over and over again, and limits the time that each professional has to devote to investigating the case.

The majority of the information needed to build a VAWA case involves the collection and maintenance of documents that verify various aspects of the petitioner's life such as:

⁶¹ For information about federal immigration VAWA Confidentiality rules that apply to protect immigrant victims of domestic violence, sexual assault, human trafficking or other U-visa listed crime see, Leslye Orloff, "VAWA Confidentiality: history, Purpose and Violations of VAWA Confidentiality Protections" in Leslye Orloff, Ed., *Empowering Survivors: The Legal Rights of Immigrant Victims of Sexual Assault* (Legal Momentum, 2010) available at: <http://iwj.legalmomentum.org/reference/manuals/sexual-assault>

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- Records and statements that attest to the marriage between the immigrant and abuser
- Documents that certify the abuser's citizenship or legal residency
- Information about violence committed against the immigrant woman and/or her children. (For more information, please see the Model Approach on page 36)

Domestic violence victim advocates may be concerned that program records will be subpoenaed and used against battered immigrant women. However, in the majority of VAWA cases, the benefits to battered immigrant women far outweigh the risks that shelters encounter. Battered immigrant victims should have the opportunity to decide if they prefer that the shelters or other domestic violence program to maintain information needed for their VAWA cases. It is important to note that documentation should be kept for all battered immigrant women, not just for those a shelter thinks may be currently eligible for self-petitioning under VAWA. This should be done because a woman may be eligible for this or other immigration relief at a later time.

Concerns about maintaining information in VAWA cases may be alleviated if a shelter's or domestic violence program's records are protected by victim-advocate or victim-counselor confidentiality provisions under state law. Several states have statutes in place that protect all forms of communication between domestic violence counselors and victims. If a domestic violence program is in a state with these privilege laws,⁶² it is in a battered immigrant client's best interests for an agency to help her collect and maintain extensive files, especially if the client is considering self-petitioning. Under a privilege statute, neither the victim nor the domestic violence counselor can be forced by courts to reveal information unless the victim waives her privilege. Privilege generally lasts until after the death of a victim.

Under very limited circumstances, some states will allow a court to order release of otherwise privileged information. The major circumstances are:

- A court finds that the probative value of the information outweighs the harm⁶³
- Reports are received relating to child neglect or abuse⁶⁴
- Criminal, mental health, or perjury proceeding are initiated against the victim⁶⁵
- Court actions are brought against the counselor⁶⁶
- Information in the records is exculpatory evidence about the abuser/defendant.⁶⁷

A few of the states allow these limited exceptions only after the court privately examines the information to verify the necessity of the evidence to the hearing.⁶⁸ Even in those instances where all communications are not privileged, some states have laws making any information that may identify a victim confidential.⁶⁹ A

⁶² Alaska (ALASKA STAT. § 18.66.200); California (CAL. EVID. CODE §§ 1037.5 & .6); Colorado (COLO. REV. STAT. § 13-90-107); Connecticut (CONN. GEN. STAT. § 52-146K); Florida (FLA. STAT. ch. 90.5036.1(d)); Hawaii (HAW. REV. STAT. ANN. § 626-1, R505.5); Illinois (750 ILL. COMP. STAT. § 60/227); Indiana (IND. CODE ANN § 31-12-1-15); Iowa (IOWA CODE § 236A.1); Kentucky (KY. R. EVID. Rule 506); Massachusetts (MASS. GEN. LAWS ch. 233, § 20K); Michigan (MICH. COMP. LAWS ANN. § 600.2157a); New Hampshire (N.H. REV. STAT. ANN. § 173-C:1 & 2); New Jersey (N.J. STAT. § 2A:84A-22.15); New Mexico (N.M. STAT. ANN. § 31-25-3); North Dakota (N.D. CENT. CODE § 14-07.1-18); Pennsylvania (PA. CONS. STAT. § 6116); Wyoming (WYO. STAT. ANN. § 1-12-116). In at least one state, a party has attempted to use the Freedom of Information Act to gain access to information. The court denied access, holding that confidentiality must be protected. Domestic Violence Servs. of Greater New Haven, Inc. v. Freedom of Information Comm'n, 47 Conn. App. 466 (1998).

⁶³ Iowa (IOWA CODE § 236A.1); Michigan (MICH. COMP. LAWS ANN. § 600.2157a).

⁶⁴ Alaska (ALASKA STAT. § 18.66.210); Hawaii (HAW. REV. STAT. ANN. § 626-1).

⁶⁵ Alaska (ALASKA STAT. § 18.66.210); Hawaii (HAW. REV. STAT. ANN. § 626-1).

⁶⁶ Alaska (ALASKA STAT. § 18.66.210); Hawaii (HAW. REV. STAT. ANN. § 626-1).

⁶⁷ Massachusetts (MASS. GEN. LAWS ch. 233, § 20K).

⁶⁸ Massachusetts (MASS. GEN. LAWS ch. 233, § 20K); Tennessee (TENN. CODE ANN. § 36-3-621(e)(1)) (reported information is confidential unless a court finds "good cause"); Washington (WASH. REV. CODE § 70.123.075).

⁶⁹ Alabama (ALA. CODE § 15-23-69) (based on apprehension about violence or intimidation, a prosecutor may petition the court to not compel the victim or any other witnesses testify about facts that could identify the victim unless necessary for prosecution. Any hearing as to the merits of a petition are held in camera. No such facts will be public record); Florida (FLA. STAT. ch. 39.908) (information about domestic violence clients may not be disclosed without the victim's permission except for purposes of law enforcement (for criminal violation by the victim), firefighting, medical, or suspected child abuse); Mississippi (MISS. CODE ANN. § 93-21-107(7)); North Dakota (N.D. CENT. CODE § 14-07.1-18) (domestic violence staff shall maintain the confidentiality of identifying information except where it directly relates to determination of child abuse)

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few states also maintain confidentiality of identifying information as a requirement for domestic violence program funding.⁷⁰ When communications between domestic violence counselors and clients are not protected, many states provide protection for communications to professionals who provide counseling or other needed services to victims. The various protections for communications may be between clients and social workers,⁷¹ licensed counselors,⁷² mental health professionals,⁷³ marriage/family counselors,⁷⁴ psychiatrists,⁷⁵ psychologists/mental health therapists,⁷⁶ registered nurses,⁷⁷ or school counselors.⁷⁸ As is the case with privileged communications between domestic violence counselors and victims, depending upon the state, an exception to confidentiality can apply to limited situations where:

- The client or client's legal guardian gives consent;⁷⁹
- The client could commit a crime or hurt a third party;⁸⁰
- There is suspicion of child abuse or a minor being the victim of a crime;⁸¹
- The client waives the privilege by filing charges against the counselor;⁸²
- The client uses the privileged information as a defense claim in a judicial administrative, agency, controlled substance, or mental illness proceeding;⁸³
- A court determines the probative value outweighs the harm;⁸⁴

The presence of a third party is necessary to assist during interviews with the client (e.g. interpreters and other counselors).⁸⁵

Potential Documentation Problems and Solutions

or where the staff determines that the information is necessary for safety or protective reasons); Tennessee (TENN. CODE ANN. § 36-3-621) (unless court finds "good cause"); Texas (TEX. HUM. RES. CODE ANN. § 51.007).

⁷⁰Arizona (ARIZ. REV. STAT. § 36-3005A(3)); Idaho (IDAHO CODE § 39-5211(4)); Ohio (OHIO REV. CODE ANN. § 3113.36)); Iowa (IOWA CODE § 915.20.A.7).

⁷¹Arkansas (ARK. CODE ANN. § 17-103-107); Maine (ME. REV. STAT. ANN. tit. 32, § 7005); Maryland (MD. CODE ANN., CTS. & JUD. PRO. § 9-121); Michigan (MICH. COMP. LAWS ANN. § 333.18513); Minnesota (MINN. STAT. § 595.02); Nevada (NEV. REV. STAT. § 49.246); New York (N.Y. C.P.L.R. § 4508); Oregon (OR. REV. STAT. § 675.765); Vermont (VT. R. EVID. 503); Wisconsin (WIS. STAT. § 905.04).

⁷²Kentucky (KY. R. EVID. Rule 506); Maine (ME. REV. STAT. ANN. tit. 32, § 13862); Montana (MONT. CODE ANN. § 37-23-301); Nebraska (NEB. REV. STAT. § 27-504); Oklahoma (OKLA. STAT. tit. 59, § 1910); Oregon (OR. REV. STAT. § 675.765); South Dakota (S.D. CODIFIED LAWS § 36-32-27); Vermont (VT. R. EVID. 503); West Virginia (W. VA. CODE § 30-31-13); Wisconsin (WIS. STAT. § 905.04).

⁷³Vermont (VT. R. EVID. 503).

⁷⁴Maine (ME. REV. STAT. ANN. tit. 32, § 13862); Nevada (NEV. REV. STAT. § 49.246); Oregon (OR. REV. STAT. § 675.765); Wisconsin (WIS. STAT. § 905.04).

⁷⁵Maryland (MD. CODE ANN., CTS. & JUD. PRO. § 9-109); Minnesota (MINN. STAT. § 595.02).

⁷⁶Maryland (MD. CODE ANN., CTS. & JUD. PRO. § 9-121); Minnesota (MINN. STAT. § 595.02); Vermont (VT. R. EVID. 503);

Wisconsin (WIS. STAT. § 905.04).

⁷⁷Wisconsin (WIS. STAT. § 905.04).

⁷⁸Kentucky (KY. R. EVID. Rule 506).

⁷⁹Arkansas (ARK. CODE ANN. § 17-103-107); Maine (ME. REV. STAT. ANN. tit. 32, § 7005); Maryland (MD. CODE ANN. CTS. & JUD. PRO. § 9-121); Michigan (MICH. COMP. LAWS ANN. § 333.18513); Montana (MONT. CODE ANN. § 37-23-301); New York (N.Y. C.P.L.R. § 4508); Oklahoma (OKLA. STAT. tit. 59, § 1910); Oregon (OR. REV. STAT. § 675.765); South Dakota (S.D. CODIFIED LAWS § 36-32-27); Vermont (VT. R. EVID. 503); West Virginia (W. VA. CODE § 30-31-13); Wisconsin (WIS. STAT. § 905.04).

⁸⁰Arkansas (ARK. CODE ANN. § 17-46-107), Montana (MONT. CODE ANN. § 37-23-301), New York (N.Y. C.P.L.R. § 4508), Oregon (OR. REV. STAT. § 675.765), South Dakota (S.D. CODIFIED LAWS § 86-32-27), Vermont (VT. STAT. REV. Rule 503), West Virginia (W. VA. CODE § 30-31-13).

⁸¹Arkansas (ARK. CODE ANN. § 17-46-107), Maryland (MD. CODE ANN., CTS. & JUD. PRO. § 9-121), Montana (MONT. CODE ANN. § 37-23-301), New York (N.Y. C.P.L.R. § 4508), Oklahoma (OKLA. STAT. tit. 59, § 1910), Oregon (OR. REV. STAT. § 675.765), South Dakota (S.D. CODIFIED LAWS § 86-32-27), Vermont (VT. STAT. REV. Rule 503), Wisconsin (WIS. STAT. § 905.04).

⁸²Arkansas (ARK. CODE ANN. § 17-103-107); Maryland (MD. CODE ANN., CTS. & JUD. PRO. § 9-121); Montana (MONT. CODE ANN. § 37-23-301); New York (N.Y. C.P.L.R. § 4508); Oklahoma (OKLA. STAT. tit. 59, § 1910); Oregon (OR. REV. STAT. § 675.765); South Dakota (S.D. CODIFIED LAWS § 36-32-27); West Virginia (W. VA. CODE § 30-31-13).

⁸³Kentucky (KY. R. EVID. Rule 506); Maryland (MD. CODE ANN., CTS. & JUD. PRO. § 9-121); (MICH. COMP. LAWS ANN. § 333.18513); Nebraska (NEB. REV. STAT. § 27-504).

⁸⁴Kentucky (KY. R. EVID. 506); Maine (ME. REV. STAT. ANN. tit. 32, § 7005); Nebraska (NEB. REV. STAT. § 27-504); Nevada (NEV. REV. STAT. § 49.246); Vermont (VT. R. EVID. 503); Wisconsin (WIS. STAT. § 905.04).

⁸⁵United States v. Kovel, 296 F.2d 918, 922 (2d Cir.1961).

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CONFIDENTIALITY

There is certain information that advocates may discover in preparing a VAWA case that should trigger the referral of immigrant victim to an immigration attorney and possibly also a family law attorney. Whether or not a state provides confidentiality protections to victim advocates, advocates should refer victims to attorneys when a battered immigrant client reveals information about:

- Drug or alcohol abuse
- Potential child abuse
- Mental health issues
- Criminal court involvement

If an immigrant client has been or is currently a defendant in criminal proceedings, omit this step and contact an immigration attorney with criminal law experience immediately. A conviction and any criminal history may prevent the client from successfully obtaining VAWA relief.⁸⁶

When no confidentiality protection exists in a given state, advocates may consider using the following options when assisting a battered immigrant:

- Discussing and assessing with the battered immigrant whether any information collected could be used to harm her or her children if discovered by the opposing party;
- Helping the battered immigrant woman identify information that may have potentially harmful repercussions for a custody case if her abuser obtained that information from shelter records; and
- Discussing this possibility with the battered immigrant and allowing her to make an informed choice about whether she wants the domestic violence program to maintain that information for her.

In many cases, information that initially appears to be damaging may not be if the advocate collects this information and helps the client file for VAWA immigration relief. Once the information supporting the VAWA, T-Visa or U-Visa case is submitted to the immigration authorities, it is important to store the information in a location that can be kept confidential. If your state does not have victim-advocate confidentiality laws and an attorney has been assisting your client in filing for VAWA immigration relief, it is best for copies of the materials collected and developed for the client's immigration case to be kept by the lawyer in files protected by attorney-client privilege. It is also important for advocates and attorneys to know that abusers can be stopped from using Family court proceedings and discovery to obtain VAWA confidentiality protected information about both the existence of a VAWA, T or U-Visa case and any information submitted by the victim to the Department of Homeland Security in such a case.⁸⁷ Under federal law and the abuser cannot obtain it from immigration authorities and should not be able to circumvent VAWA confidentiality protections in state court proceedings.⁸⁸

The information that may be most damaging is information regarding home-country conditions that are unfavorable to the victim or her children. Fortunately, this information will only need to be collected in VAWA cancellation of removal cases, which require the aid of a lawyer. An advocate can help a battered immigrant obtain a lawyer and keep country-condition information in the lawyer's files where it is protected by attorney-client privilege. Her abuser may use country condition information or information about the impact the domestic violence has had on the victim, coupled with information about the victim's immigration status, to convince a court to award him custody of children, arguing that the victim could be deported to a country considered to be an unhealthy environment for the children.

⁸⁶ See Self Petitioning Chapter of this manual

⁸⁷ For a full discussion of VAWA confidentiality protections including sample motions and responses that can be filed in family court see Leslye Orloff, "VAWA Confidentiality: history, Purpose and Violations of VAWA Confidentiality Protections" in Leslye Orloff, Ed., *Empowering Survivors: The Legal Rights of Immigrant Victims of Sexual Assault* (Legal Momentum, 2010) available at: <http://iwp.legalmomentum.org/reference/manuals/sexual-assault>

⁸⁸ 11R.A.I.R.A. § 384; 8 U.S.C. § 1367 (1996). . See *Hawke v. Dep't of Homeland Sec.*, No. C-07-03456 RMW (N.D. Cal. Sept. 29, 2008), Order Denying First Amended Petition at 8-9 (denying criminal defendant's request to produce wife's immigration records for use in criminal battery proceedings).

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Any information that advocates help victims collect may be included as evidence in their VAWA or U-Visa immigration cases allowing victims to gain access to legal immigration status. When immigration authorities approve immigrants' VAWA immigration cases based on the information collected, victims are granted legal permission to live and work in the United States. The benefits of this legal immigration status for most victims will far outweigh any risks associated with the domestic violence advocate keeping information being collected for their VAWA cases in the domestic violence program records.

Once her self-petition is approved, a victim will be able to demonstrate to a family court judge in a custody case that there is no likelihood that she will be deported to her home country. Any information her abuser may have obtained from shelter records concerning conditions in her home country or her immigration status will no longer be harmful to her or the children, since she will have protection from deportation. The advocate should take the following steps relations to the information that battered immigrants may need shelter advocates to collect for VAWA cases:

- Inform battered immigrant women about any state domestic violence counselor- privilege laws;
- Inform battered immigrant women of the potential risks should the collected information be subpoenaed. Battered immigrants must then be allowed to decide whether to risk the possibility of disclosure;
- In cases where battered immigrants decide they need to have the information protected, secure representation by an attorney and transfer all relevant information and files to the attorney so that they will be protected by attorney-client privilege,
- Be creative. There will be cases in which it may be best to have records covered by attorney-client privilege, but an attorney cannot be located. In these cases, advocates might consider taking encoded notes, storing records in another location besides the domestic violence program,⁸⁹ or identifying a mental health provider who can keep the records confidential; and
- Use common sense and be sensitive when working battered immigrant women. By assisting in collecting information for VAWA cases, domestic violence advocates and shelter staff help battered immigrant women liberate themselves from their abusers. Advocates must realize that their help is greatly needed to assist battered immigrant women, many of whom will have few other options.

We recommend that all potential VAWA applicants should start preparing documentation for their self-petitioning cases as soon as possible. In addition, advocates should obtain civil protection order for all clients where orders are available under state law, given the circumstances of the particular client's case. Protection orders can provide helpful evidence for the battered immigrant's case (See Chapter ** of this manual for a full discussion of protection order issues).

When working with battered immigrants, advocates should keep in mind the following points:

- No one should apply for either self-petitioning or cancellation of removal without the assistance of a trained immigration advocate or attorney who understands VAWA immigration provisions;
- Advocates helping immigrant victims to file self-petitions should secure the assistance of an attorney to review the proposed package of materials and to identify any missing items;⁹⁰
- Successful VAWA applications result from collaborations between battered women's advocates and immigration advocates/attorneys;
- Poor representation or self-representation could result in denial of the self-petition;
- Clients in removal proceedings need the assistance of an immigration attorney who has experience in working with battered immigrants to assist them;⁹¹ and

⁸⁹ Depending on state case law, shelter records may still be subject to subpoena even if they are located outside of the shelter. Consult with an attorney in the relevant state to clarify this.

⁹⁰ For a referral to an immigration attorney who can help advocates by reviewing materials, contact NIWAP, 4910 Massachusetts Ave NW, Suite 16 Lower Level, Washington, DC 20016; (202) 274-4457; info@niwap.org

⁹¹ Contact NIWAP, 4910 Massachusetts Ave NW, Suite 16 Lower Level, Washington, DC 20016; (202) 274-4457; info@niwap.org or ASISTA at (515) 244-2469; questions@asistahelp.org; <http://www.asistahelp.org>

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- It is recommended that clients anticipating divorce should file their self-petitions prior to and if possible receive approval prior to the final hearing the divorce case. VAWA approval can help battered immigrants in divorce cases to secure custody of children and counter a range of immigration status related issues the abuser might raise at trial.

Tips on Keeping Information Confidential

It is important that an immigrant victim have a safe address to receive mail concerning her immigration case and other correspondence. Many immigration attorneys and advocates allow the immigrant to use their office address for all immigration applications so that the mail will not end up in the hands of an abuser. Other ways to prevent this from happening, whether the victim still resides with the abuser or not, include the following:

- Do not provide the Post Office with a forwarding address. After one year of forwarding, any additional mail will be returned to the sender with a sticker showing the new address.
- Submit a copy of the protective order to the Post Office so that only government officials, law enforcement officers, and individuals with a court order are permitted to obtain the domestic violence victim's address.
- Obtain a post office box. The post office cannot reveal the residential address of a post office box owner.
- If employed, ask the employer if correspondence with the court can be mailed to the work address.
- Request an unlisted phone number and address from the local telephone company.

Using Collaborative Relationships to Reform Systemic Practices that Harm Battered Immigrants: Two Examples

Problems in the legal and social service systems frequently deter battered immigrant women from accessing vital lifesaving services.⁹² United States law provides that domestic violence services are to be made available to all domestic violence victims, without regard to their immigration status.⁹³ Unfortunately, many immigrant women do not know their rights or that understand domestic violence is a crime. Obstacles that immigrant victims encounter may be different in urban and rural communities.⁹⁴ Immigrants living in communities with a significant population of immigrants from the same country of origin will have a different experience accessing services than immigrants living alone with their abusers in communities where no one else, or very few others, speak their language. Some of the problems immigrant victims experience in

⁹² DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN (Deeana L. Jang, et al., Family Violence Prevention Fund, eds., 2d ed. 1997); Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000);

Del-An BryAnn Chen, "We Just Got Together and We Enjoyed It." An Analysis of the Georgia Coalition for Battered Refugee and Immigrant Women as a Social Movement (1998) (unpublished M.A. thesis, Georgia State University) (on file with author).

⁹³ Department of Justice, Attorney General Order No. 2129-97, 62 Fed. Reg. 61344 (Nov. 17, 1997).

⁹⁴ The above information was adapted from: LEGAL MOMENTUM & ORGANIZACION EN CALIFORNIA DE LIDERES CAMPESINAS, INC., ADVOCACY TO IMPROVE SERVICES FOR BATTERED MIGRANT AND IMMIGRANT WOMEN LIVING IN RURAL COMMUNITIES: A MANUAL 18-19 (2003).

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many communities, both urban and rural, when they turn for help to the U.S. courts and social services systems can include:

- Problems with the police response to domestic violence calls from non-English-speaking immigrant victims
- Problems in accessing shelters and other domestic violence services, particularly if the victim is undocumented;
- Lack of interpreter services for the courts, the police, and/or social services programs
- Judges who turn immigrant victims away when they seek protection orders
- Court officials who are unwilling to help immigrant victims or explain the process by which the courts can offer them protection
- Immigrant victims who are turned away from public benefits offices when they and/or their children legally qualify for benefits

Generally, advocates and attorneys can take a four-step approach to advocacy and systems reform to address problems that immigrant victims may encounter when seeking help from legal, social services and health care systems.

- **First**, advocates must assess and document the problem.
- **Second**, grassroots advocacy is necessary in all immigrant communities to notify women about their legal rights and options. Advocates should identify others in the community who can work as allies with immigrant women's advocates in seeking the systemic reforms needed. This should include other professionals in the community, and, where possible, allies within the problematic agency who wish to help officially or unofficially in remedying the problem.
- **Third**, advocates and allies should request a meeting and participate in a series of meetings with representatives from the problem agency to craft and implement a plan that will help solve the problem that has been identified.
- **Fourth**, advocates should monitor ongoing implementation efforts and document both improvements and ongoing problems. This may require that advocates and other professionals who are offering assistance to accompany immigrant victims seeking services and documenting victims' experiences with agency personnel, so that continuing problems and future problems can be remedied.

Ideally, this process will lead to development of a collaboration and building of trust relationships between professionals working for the police, shelters, and the courts. Advocates for immigrant victims should seek to become actively involved in coordinated community responses to domestic violence that exist or may be developed. Immigrant community advocates, advocates who participate in these coalitions representing the immigrant populations, other advocates, and attorneys with experience in serving immigrant victims in the communities in which they live and work serve a critical function of ensuring that the work of these collaborative teams will offer effective assistance to all battered women. Where such coordinated community responses do not yet exist, advocates should be aware that the work they will do to improve services for immigrant victims could serve as a basis for the development of a coordinated community response team that could assist all battered women in the community.⁹⁵ This chapter will outline two examples of how collaborations can be used to resolve problems in a community.

EXAMPLE 1: LACK OF POLICE RESPONSE

One of the primary problems that immigrant victims of domestic violence face, particularly in rural communities, is lack of police response or appropriate police response to calls for help from domestic violence victims.⁹⁶ Problems range from the police never responding at all or never arriving at the home

⁹⁵ Marti Kovener, et al., *Making Collaboration Work: The Experiences of Denver Victim Services 2000*, OVC BULLETIN (2002).

⁹⁶ Edna Erez & Joanne Belknap, *Battered Women and the Criminal Justice System: The Service Providers Perspective*, 6 EUR. J. ON CRIM. POL'Y & RES. 37-57 (1998); Del-An BryAnn Chen, "We Just Got Together and We Enjoyed It." An Analysis

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from which the victim called for help, to police arriving but speaking only to the abuser and never speaking to the victim.⁹⁷ Many programs working with immigrant domestic violence victims have had significant success in working with their local police departments to improve police response to immigrant victims of domestic violence. Additionally, recent changes in immigration laws have significantly improved options of attaining legal immigration status for immigrant victims of domestic violence and sexual assault, particularly those who report domestic violence or other crimes to police and who are willing to cooperate in the prosecution of their abusers or perpetrators. Thus, there are new opportunities for police to offer improved assistance in cases of immigrant victims. Police, prosecutors, and/or other justice system personnel, however, need to learn about these new laws and the important role they as justice system professionals can play in helping battered immigrants access legal immigration protections.

STEP 1: Assessing the Problem:

Advocates can document the problems that immigrant women in the community have when they seek help from the police by undertaking the following activities:

- Interviewing women who have had problems and write down their stories. For each call to the police for help, or for each time they went to a police station and had a problem, advocates should obtain the following information in writing:
- Time, date, and location from which the call was made
- Why the police were called, and by whom
- Exactly what happened the day that the police were called, including a summary of the history of violence, physical, sexual, and emotional, in the relationship;
- Any visible physical injuries or impairment of movement from internal injuries that the victim or the children suffered;
- Whether any children were harmed or witnessed or heard any of the abuse and how they were affected;
- Whether the abuser had any visible physical injuries. If so, where they occurred and how he sustained them (for example, if the battered woman trying to defend herself or he sustained the injury because of how he was hitting her);
- Visible evidence of the violence was present at the home (e.g., destroyed property, torn clothing, turned-over furniture, children very upset);
- The names of any witnesses to the incident, including children, family members, friends, neighbors;
- Names and badge numbers of any officers who responded to the call;
- Whether the police responded to the call and how long it took for them to arrive;
- The effect that any delay in arriving or the fact that the police did not arrive, had on the immigrant women and her children or inattention the police had on the immigrant woman and her children (e.g., Did the violence increase? were there additional injuries caused after the call? Did the children become more upset or did the violence shift to the children?);
- What the police did when they arrived at the location of the call -- with whom they spoke and in what language, how they communicated with a non-English speaking victim, and how they communicated with the abuser;
- How the response of the police affected the victim, particularly whether she feel more endangered;
- Whether the response she received from the police led her to be willing to call the police again if she or her children are abused in the future, what response she would have preferred, and what she was expecting when she called; Whether the abuser was arrested if there was physical evidence of the abuse at the scene of the crime; and

of the Georgia Coalition for Battered Refugee and Immigrant Women as a Social Movement (1998) (unpublished M.A. thesis, Georgia State University) (on file with author).

⁹⁷LESLEY ORLOFF ET AL., LEGAL MOMENTUM, LESLEY ORLOFF ET AL., AYUDA SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN 96-111 (LEGAL MOMENTUM, 1999). PLEASE CHECK FULL CITATION WITH LESLEY: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN 96-111 (1999); Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L. J. 43 (2003).

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- Any additional information the police provided the victim, particularly whether they discussed her legal rights, protection orders, shelter, domestic violence, or hospital services available to her.

If an organization has been able to gather several stories from women in the community, these can be arranged into a booklet by type of problem.⁹⁸ This booklet can be used to help both gather support from allied organizations and to present to the police so that they can better understand exactly what happened and the effects of their actions on victims, and identify how the problem can be corrected.

Collecting data from migrant and immigrant women in the community documents the nature of the problems and how widespread the problems are. Documentation can be gathered in a variety of ways. Advocates can interview group members. They can survey women in the community who attend a particular health clinic, who send their children to a particular school, or who attend particular community events where a booth providing information and conducting the survey can be set up. Gathering data through surveys will collect less information in each case than can be collected through stories.

Gathering general data through a survey should supplement writing up personal stories of women. Data can help demonstrate how big the problem is (one officer or department-wide); however, stories will often be the most effective tool in getting police and other professionals to want to solve the problem. This is because the stories can demonstrate the harm that is being caused to the women, and children in the community, and how changes in policies and practices can improve victim safety. Additional Data to be collected in addition to stories might include⁹⁹

- Number of calls made to the police
- Response time, or lack of response
- How often the police communicated with the victim when they arrived
- How often the police spoke the victim's language
- Who the police used as interpreters
- Evidence of abuse at the home that the police could see
- Nature of the police response
- Whether the abuser was arrested

Combining stories and data can sometimes be the most effective approach. For example, if women in the community identify three problems with the police response (the police do not come, they come and only speak to the abuser in English, and they come to see evidence but do not arrest the abuser), then an agency might collect data documenting how often these problems are occurring and gather one or two good stories to illustrate each problem.¹⁰⁰

STEP 2: Identifying and Building Relationships With Allies:

Once advocates for migrant and immigrant women have documented the problem they want to work to resolve, the next step is determining whether there are others in the community who are willing to help advocate for changes with the police. Building alliances with others in the community has many benefits. It provides advocates with an important opportunity to educate professionals who come in contact with immigrant victims about the special needs and special legal rights of migrant and immigrant victims of domestic violence. Often allied professionals are not fully educated about application of state and federal

⁹⁸ ROBIN L. CAMPO ET AL., *UNTOLD STORIES: CASES DOCUMENTING ABUSE BY U.S. CITIZENS AND LAWFUL RESIDENTS ON IMMIGRANT SPOUSES* (Leni Marin ed., 1993). For more examples of these please see the National Network to End Violence Against Immigrant Women website at <http://www.endabuse.org>; LEGAL MOMENTUM IMMIGRANT WOMEN PROGRAM, *CROSSING THE THRESHOLD TO SAFETY: STORIES OF IMMIGRANT CRIME VICTIMS WHO WILL BENEFIT FROM ATTAINING U-VISAS* (2001); Mary Ann Dutton & Giselle Aguilar Hass, *Expert Testimony Concerning Battering*, in MARY ANN DUTTON ET AL., *AMERICAN BAR ASSOCIATION, DOMESTIC VIOLENCE & IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT* (APPENDIX C) (Bette Garlow et al. eds., 2000).

⁹⁹ Sample interview questions on police response to calls for help from immigrant battered women are available from NIWAP, 4910 Massachusetts Ave NW, Suite 16 Lower Level, Washington, DC 20016; (202) 274-4457; info@niwap.org.

¹⁰⁰ ROBIN L. CAMPO, ET AL., *UNTOLD STORIES: CASES DOCUMENTING ABUSE BY U.S. CITIZENS AND LAWFUL RESIDENTS ON IMMIGRANT SPOUSES* (Leni Marin, ed., 1993).

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laws to help immigrant victims, and do not offer the full range of assistance they could to immigrant victims because of misunderstandings about the law or immigrant culture, or because of language barriers. Involving other professionals in the community in advocacy efforts also increases the effectiveness of any strategy because other professionals who work with battered immigrants become invested in assuring effective policy reforms.¹⁰¹ Finally, contacting allied groups working on domestic violence issues can provide an opportunity for advocates to become involved in representing migrant and immigrant community issues and perspectives on coordinated community response teams operating in the advocates' communities. To identify potential allies, advocates should:

- Identify, contact, and ask to meet with domestic violence organizations working in the community and your state domestic violence coalition. To find programs working in a given area, advocates can call state domestic violence and/or sexual assault coalitions who can provide a list of organizations that should be serving domestic violence or sexual assault victims in the target community;
- Explore with other battered women's advocates working in the area whether the police treatment that migrant women are receiving in the community is the same or different from the problems that all battered women encounter. Agencies should investigate whether other groups have already undertaken action to improve police response in domestic violence cases. Those other groups should be able to help identify allies both within and outside of the police department who can be consulted about strategy;
- Identify other professionals who encounter battered women and migrant and immigrant women who could join efforts to meet with the police. These persons might include health professionals, counselors, therapists, teachers, clergy, social workers, prosecutors, judges, lawyers, or others;¹⁰²
- Work with other battered women's advocates and other professionals to determine whether there are individual police officers in the community who care about and have been helpful in domestic violence cases or who interact well in their dealings with the migrant or immigrant community, who can help formally or informally to develop the best strategy for approaching the police department seeking reforms.
- These officers may be able to provide information about who they believe will be the best person to approach, and what information that person will need in order for an initial meeting to be most successful. Some friendly officers may be willing to meet with advocates and allies to develop a strategy. However, many more may be more willing to provide necessary information off the record and work from the inside on behalf of advocates without having any formal meetings or official relationship. If an officer provides information off-the-record, their trust be protected, or an agency may undermine the ability of that friendly officer to be helpful in the future on other battered women's issues.
- Once an agency has identified allies, it can set up a meeting with them to discuss strategy on approaching the police about the problems identified. It can distribute the stories and data collected to all persons who will be attending, in advance of the meeting. As the strategy is developed at this meeting, advocates for immigrant and migrant women may need to ensure that they maintain a key leadership role in the group. While allied groups may have more experience working with the police and other justice system officials, immigrant and migrant women's advocates bring with them the key community and cultural competency expertise, and must play a leadership role in the advocacy strategies, although they can share leadership of meetings and strategy sessions equally with other allies.

STEP 3: Developing Solutions

¹⁰¹ SUSAN BREALL & DEBORAH A. ADLER, WORKING WITH BATTERED IMMIGRANT WOMEN: A GUIDEBOOK FOR PROSECUTORS (2000); DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN (Deeana L. Jang, et al., Family Violence Prevention Fund eds, 2d ed. 1997); U.S. Department Of Justice, *Training for VAWA Grantees: The Legal Rights of Immigrant Victims of Domestic Violence and Sexual Assault*, ADVOCACY ON BEHALF OF BATTERED IMMIGRANT VICTIMS 96-107 (2002).

¹⁰² Legal Momentum, *Building the Capacity for Services Addressing the Needs of Battered Immigrants*, REPORT ON A FIVE-STATE CAPACITY BUILDING SUMMIT JULY 30- AUGUST 2, 2000 (2000).

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- Once allies have been identified, the next step is to set up a meeting to begin the process of working with the police to develop workable solutions to the problem. To accomplish this, advocates should:
- Join together with allies to request a meeting with the police chief or sheriff, or the person who has been identified as the best person to approach about the problem that has been identified;
- Request the meeting in writing, and include the stories collected as an attachment. The tone of the letter should be cordial. It should state that the agency wishes a meeting to discuss particular problems with police response to domestic violence calls placed by immigrant and migrant women, and that the advocates seek their advice and help in addressing the problem. The letter should clearly state that the advocates and allies requesting the meeting want to work together with the police to craft a solution that will work well both for victims and the police; and
- At meetings with the police advocates should:
 - Outline the problem for the police, emphasizing the human impact on women and children of the problem;
 - Work with police and allies to try to identify what may be the source or sources of each problem. These could include
 - No interpreters available and no plans for how police should secure assistance of appropriate interpreters;
 - Need for police officer training aimed at dispelling myths about battered immigrants' rights to assistance from the legal system;
 - Lack of information on undocumented battered immigrants' rights and training that police need to help all victims without regard to the victim's immigration status;
 - Need for training on VAWA and U-Visas and other; legal immigration options for battered immigrants;
 - Need for training generally on domestic violence issues; and
 - Particular officer indifference to the needs of battered, migrant, or immigrant women and children.
 - Discuss with police officials the goals of the immigration relief open to immigrant victims and how problem policies undermine the victim's ability to obtain immigration relief created by Congress for immigrant victims under VAWA; and
 - Discuss how police, advocates, and allies can work together to craft and implement solutions to the identified problems. Potential solutions may include
 - Working with the police to identify a pool of trained interpreters who can be paid to assist police on domestic violence calls and investigations;
 - Conducting a domestic violence training for police on domestic violence and battered immigrant's legal rights in criminal, family law, benefits, and immigration matters;
 - Offering to provide police with access to experts on VAWA immigration cases including crime victims' visas (U-visas). These experts, who may be in other parts of the state or country, can provide to police information on laws, strategies and immigrant women's rights, on an as-needed basis to police;¹⁰³
 - Asking that a liaison officer be designated to work with migrant and immigrant women's advocates as policies designed to implement changes are put in place in the community; and
 - Having bilingual officers with special training on domestic violence and immigrant victims assigned to respond to domestic violence calls.

STEP 4: Monitoring Change:

Once advocates and allies have met with the police and developed a plan to reform police practices to be more responsive to the needs of immigrant victims, advocates will need to develop an approach to

¹⁰³ For names of programs in your state working with these specific immigration issues, please contact NIWAP, 4910 Massachusetts Ave NW, Suite 16 Lower Level, Washington, DC 20016; (202) 274-4457; info@niwap.org; <http://wcl.american.edu/niwap> or see the Directory of Programs Serving Battered Immigrant Women distributed by Legal Momentum available at <http://iwp.legalmomentum.org/reference/service-providers-directory>.

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monitoring implementation of the plan to ensure that the needed improvements take place.¹⁰⁴ Advocates should:

- Meet on a monthly basis with a member of the police force who has been designated to work with advocates on the plan, so that police and advocates can update each other on successes and problems in implementing the plan. This will provide an opportunity for police to seek the advice of advocates on how they might best address unanticipated problems that arise from the police perspective with the plan. It will also provide advocates with a forum to update police on ongoing problems;
- Develop together with the police a bilingual commendation/complaint form. This form can be used by migrant and immigrant women to inform police officials about how officers handle domestic violence calls. The form should ask victims who call for help to tell the police about cases in which they felt that the police response was very good as well as inform police of ongoing problems. In many communities, commendations that draw the attention of supervisors to officers, giving them recognition for a job well done are most effective in reforming the response of all officers. The forms should also be used to identify for police ongoing violations of new policies so that department officials can take steps to correct these problems, and be made aware of problems with individual officers. This will help superior officers identify when additional training may be needed; and
- Continue to collect stories that document immigrant women's experience with the police as part of advocates work in monitoring police implementation of the policy reforms agreed to by the police. Collecting stories is essential to documenting how the policy reforms have helped immigrant and migrant victims of domestic violence.¹⁰⁵ These success stories can be used to encourage ongoing cooperation between advocates and the police. It is also important to document ongoing problems that migrant and immigrant women experience with the police so that implementation problems can be addressed. In collecting stories on successful police interventions and implementation problems, advocates should seek answers to many of the same questions described above in the section on "Assessing the Problem."

EXAMPLE 2: ACCESS TO SHELTER AND DOMESTIC VIOLENCE SERVICES

A second important problem that immigrant and migrant women encounter in both rural and urban communities is the inability to access services that are supposed to be available to offer protection for all battered women. These include domestic violence shelters and other service offered by domestic violence organizations. It is important for advocates for battered women, migrants, and immigrants to know that immigrants who are victims of domestic violence, child abuse, sexual assault and other violent crimes must be able to access victim services in the same manner as all other crime victims.¹⁰⁶ As a matter of federal law, battered immigrants cannot be legally turned away from shelters or other domestic violence services based on their immigration status, lack of legal immigration status, or their inability to speak English.¹⁰⁷ Programs that discriminate against immigrant or migrant victims could risk their government funding.¹⁰⁸ In many instances, advocates seeking to stop domestic violence programs from turning away immigrant victims have been successful in changing these practices by educating shelter advocates, staff, and boards about immigrant victims, including undocumented immigrant victims' legal rights to access shelters and domestic violence services.

¹⁰⁴ Adapted from: LEGAL MOMENTUM & ORGANIZACION EN CALIFORNIA DE LIDERES CAMPESINAS, INC., ADVOCACY TO IMPROVE SERVICES FOR BATTERED MIGRANT AND IMMIGRANT WOMEN LIVING IN RURAL COMMUNITIES: A MANUAL (2003).

¹⁰⁵ ROBIN L. CAMPO, ET AL., UNTOLD STORIES: CASES DOCUMENTING ABUSE BY U.S. CITIZENS AND LAWFUL RESIDENTS ON IMMIGRANT SPOUSES (Leni Marin ed., 1993); LEGAL MOMENTUM IMMIGRANT WOMEN PROGRAM, CROSSING THE THRESHOLD TO SAFETY: STORIES OF IMMIGRANT CRIME VICTIMS WHO WILL BENEFIT FROM ATTAINING U-VISAS (2001); Legal Momentum, *Building the Capacity for Services Addressing the Needs of Battered Immigrants*, REPORT ON A FIVE-STATE CAPACITY BUILDING SUMMIT JULY 30- AUGUST 2, 2000 (2000).

¹⁰⁶ Department of Justice, Attorney General Order No. 2129-97, 62 Fed. Reg. 61344 (Nov. 17, 1997).

¹⁰⁷ Office for Civil Rights, U.S. Department of Health & Human Services, Fact Sheet: Access to HHS-Funded Services For Immigrant Survivors of Domestic Violence (Jan. 19, 2001), available at <http://www.hhs.gov/ocr/immigration/bifsltr.html>.

¹⁰⁸ See LESLYE E. ORLOFF, ET AL., FACILITATING ACCESS TO TANF FOR BATTERED IMMIGRANTS: A PILOT TRAINING MANUAL FOR TANF ELIGIBILITY WORKS; Legal Momentum, (on file with author).

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Advocates should undertake strategies similar to those discussed in detail above for advocacy with the police to secure reforms in domestic violence service programs that will ensure that battered migrant and immigrant women can access shelters and domestic violence services. The advocacy strategy below provides an outline for advocates of how they can secure better access for immigrant victims to domestic violence services. This outline will not be provided in as much detail as the outline for police advocacy discussed above. Since the four-part strategy is similar, this outline will highlight how the first two steps in the strategy can be amended effectively to devise solutions to difficulties in accessing shelter and domestic violence services.

STEP 1: Assessing the Problem:

In many instances, collecting stories of one or two immigrant victims turned away from shelter or services may be sufficient documentation to collect before approaching a domestic violence program about this problem, as the problem often arises from shelter staff and advocates who do not have sufficient information about immigrant victims' legal rights. In some communities, advocates are influenced by those in the community who seek to encourage discrimination against immigrants. In most instances, problems of shelter access may be remedied by educating both shelter staff and board members on immigrant victims' legal rights.

When these problems exist, advocates should document the problems that migrant and immigrant women in the community have when they seek help from domestic violence shelters, homeless shelters, and other domestic violence programs by

- Interviewing women who have had problems accessing domestic violence services and writing down their stories. It is useful to include
 - Time, date, and location of the program from which the victim sought services;
 - A description of what happened, and what the victim was told when she sought services;
 - How and why she came to seek domestic violence services, including a summary of the history of violence, physical, sexual, and emotional, in the relationship;
 - Any visible physical injuries or impairment of movement from internal injuries on the victim or the children;
 - A description of the children she had with her, their ages and genders, and whether the children were harmed by experiencing or witnessing the abuse;
 - The names of any persons who helped her or referred her for assistance to the local shelter or domestic violence program;
 - With whom did the victim spoke at the shelter, and in what language, and generally how the program communicates with a non-English speaking victim; and
 - How the response of the domestic violence program affected the victim, what she did after being turned away from the shelter, and whether she or her children re-injured.

In cases in which a battered migrant or immigrant woman has been turned away from a domestic violence program and was told that it was because she did not have legal immigration documentation or citizenship, or because she was non-English-speaking, collecting stories and approaching the program directly with the stories and information about their legal obligations should be sufficient to correct the problem.

However, there will be cases in which immigrant and migrant victims turned away from services are provided with other reasons. They may be told that the shelter is full. This may be true, and the shelter may be telling this to all who seek their services, not just to immigrants and migrants. Most domestic violence programs do not have sufficient resources to serve all who need their help.¹⁰⁹ However, in some communities, only immigrants or migrants seeking services are turned away. To document this problem, advocates will need to collect data on how often immigrant women are turned away. Data should be collected using the same approach discussed above for addressing problems with the police.

STEP 2: Identifying and Building Relationships With Allies and Developing Solutions:

¹⁰⁹ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection For Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

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Generally, advocates for battered immigrant and migrant women should be able to approach shelters and other domestic violence service providers directly to raise problems immigrant victims are having with shelter and domestic violence service program access. In approaching battered women's advocacy organizations, advocates for battered migrants and immigrants should seek a meeting to discuss building a relationship that will help the domestic violence, and the immigrant women's programs work together to better serve migrant and immigrant victims of domestic violence. These meetings should have two purposes: first, they seek to remedy the immediate shelter access problem, and, second they begin to build a collaborative relationship that will enable both organizations to better serve battered immigrants and migrants.

Advocates for immigrant and migrant women should bring to the meeting written copies of the stories they have collected, copies of the U.S. Attorney General's Order, and other training materials on services necessary to protect life and safety that must, as a matter of law, be provided to all persons without regard to immigration status.¹¹⁰ At the meeting, advocates should educate the shelter director or domestic violence program director about the legal requirements of offering services equally to all victims, and the potential implications for government funding of the program if immigrants continue to be turned away from services. The rest of the meeting and future meetings should:

- Address concerns that the domestic violence program staff and/or board may have about immigrant victim's legal rights
- Offer training on cultural competency in serving immigrant victims and on the special legal rights of battered immigrants
- Develop collaborative solutions to problems that the shelter may raise as posing barriers to the domestic violence program offering the full range of domestic violence services to immigrant victims.

Recognizing and Working to Avoid Problems with Collaboration

Despite the fact that collaborations benefit both advocates and survivors, a successful collaboration is not always easily obtained. Forming successful collaborations takes time, patience, and commitment. Where domestic violence advocates and attorneys have had little or no contact in the past, establishing connections among these groups may be difficult. Asking questions, listening well, maintaining an open mind, and preserving multiple types of program flexibility allows groups to work together in order to support battered immigrant women.¹¹¹ Advocates will have to actively seek out attorneys willing to be trained and educated about domestic violence and immigrant women's needs with whom advocates can work in a collaborative respectful relationship. Similarly, attorneys must continually reach out to advocates in the community that they are trying to serve and should build strong working relationships with advocates who can be trained to help the attorney obtain documentation for a battered immigrant's immigration case.

Unfortunately, conflict may arise as advocates, attorneys, and others try to work together. For example, because domestic violence advocates see safety as the most important issue, they may not realize that fears about immigration status prevent immigrant victims from even talking to advocates because victims believe doing so may lead to their deportations.¹¹² Immigration attorneys may believe that immigration status should be the main focus of all efforts and may not understand the importance of also addressing a victim's safety needs. Family lawyers may focus on helping a woman obtain custody, child support, and a protection order, but may miss an important opportunity to collect evidence for her immigration case through protection order or family court discovery. Domestic violence advocates may want a woman to pursue criminal charges that

¹¹⁰ See Department of Justice, Attorney General Order No. 2353-2001, 66 Fed. Reg. 3613 (Jan. 16, 2001).

¹¹¹ DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN (Deeana L. Jang et al., Family Violence Prevention Fund eds., 2d ed. 1997).

¹¹² Del-An BryAnn Chen, "We Just Got Together and We Enjoyed It:" An Analysis of the Georgia Coalition for Battered Refugee and Immigrant Women as a Social Movement (1998) (unpublished M.A. thesis, Georgia State University) (on file with author).

Overview of Domestic Violence

could lead to an abuser's deportation before a victim advocate has been able to work with the immigrant victim to determine whether the abuser's deportation will enhance a victim's safety, or enhance the danger to her and her family members living abroad.

Often times, collaborations are not as successful as they could be because not everyone is at the table. Immigrants' rights groups need to be part of the collaboration working to end domestic violence. Immigrants' advocates can offer services and insight to the immigrant community that they work with on a daily basis. Immigrant women leaders and representatives from the community-and faith-based organizations working in immigrant communities must also be included in collaborations so that the needs of immigrant populations are taken into account.¹¹³

Confusion may arise from the different terminologies used by various collaborations. Even after collaboration and group education, a group may find itself being confused, or disagreeing, because the different professions might use the same word to convey somewhat different concepts. Different professions or the same profession in different states have various meanings for words such as "competency" and "confidentiality". This can be easily overcome by keeping a running glossary of terms and abbreviations listing the various meanings assigned by different members of a collaborative group.¹¹⁴ A similar problem arises because of differing ethical principles and statutory requirements that govern the professional conduct of different collaborators. This is very important to discuss in a group because of the effect that issues of confidentiality and reporting can have on domestic violence victims and immigrant women.¹¹⁵

Hypothetical cases will help individuals within a group understand the other members' views and issues. Different confidentiality standards that govern the wide range of professions in a collaborative group will, in some cases, make it difficult, if not impossible, for a group to discuss specific cases.¹¹⁶ In these cases, a group can often discuss pertinent issues in terms of hypothetical cases.¹¹⁷ Hypothetical cases are also useful when different professions have radically different perspectives that can create a lack of respect or trust. This can easily happen when differences are not acknowledged, or the group does not fully use the skills, insights, and knowledge of its members.¹¹⁸ When groups are divided, hypothetical cases might provide each member of the group with a better understanding of the other professions' perspectives. Respect for each others contributions can increase once a case is discussed. Hypothetical cases also allow each professional to discuss what is ethical for him or her and his or her professional limitations, so that the group can find an advantageous way to resolve problems without compromising any professional's ethical principles.¹¹⁹

Many community collaborators face two apparently contradictory problems during their formation: the first the important need to bring in community representatives to help and the second is having too many volunteers wanting to be included in a coordinating group. Those not included may feel excluded.¹²⁰ It may be effective to appoint community volunteers to subcommittees, or develop them as other resources. This will allow the collaboration to benefit from all volunteers' good intentions and energy. At other times, some community leaders that collaborators might feel are necessary to include will have little personal interest or commitment in participating. A group must then decide if there is a general interest in helping these individuals to educate themselves about domestic violence, in order to, persuade them to become genuinely committed to improving the community's response to domestic violence.¹²¹

¹¹³ Research data (2002) is pending publication, available from Dr. Rachel Rodriguez, University of Wisconsin Madison, School of Nursing.

¹¹⁴ JOAN ZORZA & LESLYE ORLOFF, AMERICAN MEDICAL ASSOCIATION, FAMILY VIOLENCE: BUILDING A COORDINATED COMMUNITY RESPONSE: A GUIDE FOR COMMUNITIES (1994).

¹¹⁵ The definition of "domestic violence" and mandatory reporting requirements differ in each state. To access the different definitions of domestic violence by state, see <http://www.womenslaw.org/definitions.htm>.

¹¹⁶ JOAN ZORZA & LESLYE ORLOFF, AMERICAN MEDICAL ASSOCIATION, FAMILY VIOLENCE: BUILDING A COORDINATED COMMUNITY RESPONSE: A GUIDE FOR COMMUNITIES (1996).

¹¹⁷ *Id.* Some groups have created their own confidentiality requirements to prevent discussion of specific cases outside the group.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Judge Leonard P. Edwards, *Reducing Family Violence: The Role of the Family Violence Council*, 43 JUV. & FAM. CT. J. 1, 3 (1992).

¹²¹ JOAN ZORZA & LESLYE ORLOFF, AMERICAN MEDICAL ASSOCIATION, FAMILY VIOLENCE: BUILDING A COORDINATED COMMUNITY RESPONSE: A GUIDE FOR COMMUNITIES (1994).

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Despite the problems that can arise in developing collaborative community responses to domestic violence that include representatives of groups knowledgeable about the needs of immigrant victims, there is much that each member of a community collaboration and immigrant victims can gain. Many of the obstacles that could mar collaboration and participation by immigrant survivors and immigrant community organizations can be overcome with patience, understanding, and learning about each other. The benefits of such collaborations, both for service providers and the community, far outweigh any of the difficulties. As will be discussed in the concluding section of this chapter, many of the laws, policies, and protections available to battered immigrant women and children today were developed as a result of similar collaborations.

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Interviewing and Safety Planning for Immigrant Victims of Domestic Violence¹²

By Leslye E. Orloff

Women all over the world are subjected to violence at the hands of their family members and intimate partners. The United States Surgeon General has warned continually that family violence poses the single greatest health threat to adult women.³ For women who immigrate to the United States, the problems of domestic violence are “terribly exacerbated in marriages where one spouse is not a citizen and the non-citizen’s legal status depends on his or her marriage to the abuser.”⁴ In addition to this immigration-status power disparity, immigrant women encounter language barriers, economic insecurity, pressures to assimilate,

¹ “This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.” We gratefully acknowledge the contributions of Katherine Atkinson, Georgetown University; Stephanie Schumann, Duke University, Gleibys Buchanan, American University’s Washington College of Law, Sophia Hudson, University of Michigan Law School, and Mandeep Grewal, University of Michigan in the preparation of this chapter.

² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ “Violence Against Women”, A Majority Staff Report, Committee on the Judiciary, United States Senate, 102nd Congress, October 1992, p.3).

⁴ H.R. REP. NO. 103-395, at 29 (1993).

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pressures to maintain their own cultural traditions, and discrimination due to gender, race, or ethnicity.⁵ It is important for advocates and attorneys and legal professionals who assist immigrant victims of domestic violence to take each of these barriers into account when interviewing and doing safety planning with their clients.

This chapter will discuss the best ways for advocates and attorneys to communicate with battered immigrant clients.⁶ It will detail effective methods of identifying, interviewing, assisting, and ensuring the safety of domestic violence victims. It will teach advocates and attorneys how to interact with clients in a manner that diminishes the pain involved with discussing the abuse and how to be sensitive to cultural differences.

Identifying Victims

COMMON WARNING SIGNS OF DOMESTIC VIOLENCE

It is important that all professionals who work with clients be aware of common warning signs that indicate that the client may be a victim of domestic violence. Regardless of the client's current or future decision regarding her relationship, there are steps that advocates and attorneys can take throughout the duration of their relationship with the client, to enhance the client's safety and empowerment. Advocates and attorneys should make note of specific signs that are often evidence of domestic violence. (Note: domestic violence is also prevalent in same-sex couples.) These indicators include:

- Evidence of broken bones or bruises, particularly if they are recurring;
- The client seems to be very isolated, with no access to transportation, to money, to family or friends, or to activities such as a job or school;
- The client asks her spouse/partner for permission to make decisions.
- The client complains of her spouse/partner's anger or temper;
- The client follows rules set by her spouse/partner about what she and/or her children can do;
- The client's spouse/partner continuously degrades the client;
- The client has difficulty making or keeping appointments because of the spouse/partner;
- The spouse/partner always accompanies the client to appointments and/or speaks for the client;
- The client complains that her spouse/partner drinks excessively or has a change of personality when he drinks;
- The spouse/partner constantly calls or stalks the client;
- The client reports that her spouse/partner accuses her of infidelity;
- The spouse/partner prevents the client from keeping a job.⁷

DOMESTIC VIOLENCE SCREENING AND INTERVIEWING CLIENTS

Domestic violence screenings can identify those persons who live with a violent family member. Screenings should be conducted with every potential client.

As a survival mechanism, many women minimize the abuse they have suffered at the hands of their spouse or partner. However, if a battered immigrant woman receives culturally sensitive encouragement, she is more likely to reveal information to the interviewer. Therefore, it is important for advocates and attorneys to create a space in which the client feels that she can express her fears and needs within her own cultural context.⁸ Advocates and attorneys should ask their battered immigrant clients open-ended questions that allow the

⁵ Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 97 (2001).

⁶ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/language-access> and <http://niwaplibrary.wcl.american.edu/cultural-competency>.

⁷ DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN 7 (Deeana L. Jang, Esq., et al. eds., Family Violence Prevention Fund et al., 2nd ed. 1997).

⁸ A.B.A. COMM'N ON DOMESTIC VIOLENCE, 2000-01, DOMESTIC VIOLENCE AND IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (2001).

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client to explain the abuse she has suffered in her own words and from her own cultural perspective. Advocates and attorneys should also avoid using specific terms that the client may not be able to understand, such as “harass,” “assault,” or “rape.”⁹ The following questions can be used to screen for domestic violence and to identify the physical, emotional, economic, psychological, and sexual elements of the abuse:¹⁰

1. Do you feel that your spouse/partner treats you well? Do you feel that your spouse/partner treats your children well?
2. Has your spouse/partner ever hurt or threatened you and/or your children?
3. Are you afraid of anything that goes on in your house?
4. Are you afraid of your partner?
5. Do you and your spouse/partner argue? If so, how often?
6. Describe what happens when you and your spouse/partner argue or fight.
7. Do you ever change your behavior because you are afraid of your spouse/partner or of the consequences of a fight?
8. Has your spouse/partner ever forced you to do something that you did not want to do?
9. Has your spouse/partner ever put his or her hands on you against your will?
10. Does your spouse/partner ever throw or break objects in the home or damage your home itself?
11. Has your spouse/partner ever hurt your pets or destroyed your possessions?
12. Has your spouse/partner threatened to harm someone or something that you care about?
13. Has your spouse/partner ever threatened to use a weapon against you?
14. Does your spouse/partner say that it is your fault that he is violent towards you?
15. Has your spouse/partner told you that no one would believe you if you reported that he hurts you?
16. Has your spouse/partner ever threatened to kill himself if you did not do what he wanted?
17. Has your spouse/partner ever tried to prevent you from seeking medical attention or from taking medication?
18. Does your spouse/partner ever prevent you from sleeping?
19. Does your spouse/partner frequently criticize you or your children?
20. Has your spouse/partner told you that no one would ever want you?
21. Has your spouse/partner told you that you could never make it on your own?
22. Does your spouse/partner make it hard for you to find/keep a job or go to school?
23. Does your spouse/partner withhold money from you when you need it? Do you know what your family’s assets are? Do you know where important documents such as bankbooks, checkbooks, financial statements, lease or mortgage documents, birth certificates, and passports for you and other members of your family are kept? If you wanted to see any of them, would your spouse/partner make it difficult for you to do so?
24. Does your spouse/partner ever threaten to take your children away?
25. Does your spouse/partner act jealously? For example, does he always call you at work or at home to check up on you? Is it difficult for you to maintain relationships with your friends, relatives, neighbors, or co-workers because your spouse/partner disapproves of them? Does your spouse/partner accuse you of flirting with others or of having affairs? Has your spouse/partner ever tried to prevent you from leaving the house?
26. Has your spouse/partner ever forced you to have sex or made you do things during sex that made you uncomfortable? Does he demand sex when you are tired, sick, or sleeping?
27. Has your spouse/partner ever forced you to have sex with another person when you did not want to?
28. Has your spouse/partner ever threatened to have you deported?
29. Has your spouse/partner ever threatened not to file immigration papers on your behalf?

Safe Communication

⁹ *Id.* at 23.

¹⁰ LESLYE E. ORLOFF & RACHEL LITTLE, *SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN: A “HOW TO” MANUAL FOR BATTERED WOMEN’S ADVOCATES AND SERVICE PROVIDERS* 58-59 (1999).

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In any interview conducted with an immigrant battered woman attorneys and advocates should ensure that they know of a safe means to communicate with the client. In many cases, the safety of the client will be compromised if the abuser finds out that she is meeting with an attorney or advocate. Advocates and attorneys should take the following steps to ensure that they do not further endanger their clients:

- The advocate/attorney should ask the client if there are safe times when to call her and if it is safe to send her mail or e-mail? If a new client fails to attend appointments or return calls, the advocate/attorney should write the client a simple letter (on non-letterhead paper) requesting a response without disclosing her identity as a legal advocate or lawyer.
- When calling the client, the advocate/attorney should ask for the client without identifying herself and should speak only to the client about the case. The advocate/attorney should not leave messages with other family members or on an answering machine or voice-mail unless the client has informed her that this is safe. If the person who answers the phone starts to ask the advocate/attorney to identify herself, she should not reveal that she is a domestic violence advocate or lawyer.
- The advocate/attorney should always first ask the client if it is safe to talk and whether she should call the police. Even if the abuser no longer lives with the victim, he may be present when the advocate/attorney calls. Thus, the advocate/attorney and client should develop a system of coded messages that the client can use to signal that she is in danger or the abuser is present.
- The advocate/attorney should block identification of her number when calling the client to prevent an abuser from using Caller ID to discover that the client is seeking legal or victim assistance. The local phone company can provide information on how to do this.
- If necessary, the advocate/attorney should remind the client to have an explanation for the time spent at appointments with the advocate or lawyer and to limit the children's knowledge so that the abuser does not find out about legal actions or an upcoming separation ahead of time.
- The advocate/attorney should allow clients to use the office phone, if necessary, or offer to initiate calls at the client's request.
- The advocate/attorney should inform her clients that they have certain rights detained by immigration authorities. For example, immigrants have the right to remain silent, to not answer any questions, and to speak to their attorney.¹¹
- Advocates and attorneys must be careful to respect their clients' trust and keep their clients' information confidential.

Transportation and Childcare

Issues of transportation and childcare may become serious barriers to battered immigrant women's ability to meet with an advocate/attorney. Before setting up an appointment with a client, advocates and attorneys should be aware that the client may have concerns about getting to the appointment and what to do with her children during that time. Even if the client has access to a vehicle, she may be reluctant to use it if her abuser regularly checks the mileage as a way of keeping track of where she goes.

In addition, the client may have some anxiety about bringing her children to the appointment. The advocate or attorney should be aware that if the child is in the room during interviews, the client may feel that it would not be appropriate to discuss the abuse in front of the children or she may be too embarrassed to be completely candid about certain instances of abuse, particularly those involving sexual abuse. Any

¹¹ ORLOFF & LITTLE at 279-87.

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apprehension that the client may have about the children being present during the interview may inhibit the client's ability to be completely open about what has happened to her.

The following are some ways an advocate or attorney may help alleviate client's worries about transportation and childcare:

- Providing clients with public transportation options. Working through the route with her, helping her choose safe transportation options, and offering her financial assistance if possible.
- Asking client if she has a friend or relative whom she can trust who can drive her to the appointment.
- Considering telephone appointments with the client if they can be set at a time that is safe for her.
- Offering to meet the client at or close to her home.
- Offering to pick up the client and return her home.
- Keeping a box of toys, books, and drawing materials available to keep children occupied during the appointment.

Language Barriers

One of the primary goals of the anti-domestic violence movement is to encourage battered women to report and escape abuse.¹² However, language barriers prevent battered immigrant women who want help from accessing needed assistance.¹³ A domestic violence victim who knows little English will have difficulty making calls for assistance to the police, shelters, counseling centers, or attorneys. For example, according to the District of Columbia Advisory Committee, a rape victim attempted to report her attack to the Metropolitan Police Department in July of 1992. The language barrier between the victim and the 911 operators resulted in the operators reportedly hanging up on the victim three times.¹⁴ Additionally, English deficiencies often prevent victims from showing up for court dates because they cannot read the summons.¹⁵ One method of avoiding this problem is to have all of the client's mail regarding the case sent to her attorney or advocate who can then safely communicate to the client necessary appointment times and updates.

When a battered immigrant woman is not able to obtain assistance due to language barriers, she may instead rely on her family and/or her abuser's family or friends to cope with the violence.¹⁶ This is often an ineffective and potentially dangerous option, as these persons may be unfairly biased, may fail to interpret the situation correctly, or may provide the abuser with information about the victim that further endangers her.¹⁷ The victim may also falsely communicate the reality of her experiences for fear of gossip or due to concerns that what she says will be repeated to the abuser.

GAINING ACCESS TO AND TRAINING INTERPRETERS

¹² Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 *ASIAN L.J.* 151, 165 (1996).

¹³ *Id.* at 163 (noting that it may be difficult for battered women to speak of the abuse that they have suffered with someone who does not speak their native language).

¹⁴ UNITED STATES COMMISSION ON CIVIL RIGHTS, *RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION, VOLUME I: THE MOUNT PLEASANT REPORT* 42 (January, 1993).

¹⁵ MARIA D. RAMOS, ESQ., *CULTURAL CONSIDERATIONS IN DOMESTIC VIOLENCE CASES: A NATIONAL JUDGES BENCHBOOK* 6-5 (1999).

¹⁶ Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 *Asian L.J.* 151, 165 (1996).

¹⁷ LESLYE E. ORLOFF & RACHEL LITTLE, *SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN: A "HOW TO" MANUAL FOR BATTERED WOMEN'S ADVOCATES AND SERVICE PROVIDERS* 63 (1999).

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Advocates and attorneys who cannot communicate with a client due to language barriers should seek out the services of an interpreter. It is important to ensure that the client trusts her interpreter. Advocates and attorneys should advise clients to be open and honest when they do not understand something the interpreter says. They should inform the client that interviews with an interpreter will take a substantial amount of time; and they should make sure the client knows that if she has to explain something several times, it is not to question the validity of her statement, but to ensure that both the advocate or attorney and she understand everything that is being said.

Interpreters should be reminded of the necessity of keeping information confidential. An advocate or attorney may ask the interpreter to sign a statement to that effect.

It is useful for advocates and attorneys to identify several interpreters for each of the language minority populations within the community and establish relationships with them so they may be available when needed. Providing domestic violence training for interpreters will not only ensure proper communication between the victim and the advocate, but will also allow clients to feel more comfortable when relating their stories.

The first step in developing an interpreter program within the advocate's or attorney's office, is to make funds available to pay a core staff of professional interpreters or a staff of native speakers to be recruited and paid as needed on an hourly basis.¹⁸ If there are no funds available, the program should retain the use of volunteer interpreters. A list of volunteer interpreters may be obtained by calling professional interpreting services in the community to see if staff members would be willing to do volunteer work for the program.

Next, programs should investigate the language resources of local community-based agencies serving immigrant populations, universities, law schools, community colleges, and the local American Red Cross. It is important to make a list of all community and state organizations that work with linguistic, racial, and cultural minority populations, including churches and religious organizations, cultural organizations, language organizations/associations, community medical clinics, pregnancy programs, high-risk family programs, youth programs, ESL classes, legal advocacy agencies, women's organizations affiliated with religious congregations or cultural/ethnic community centers, immigrant associations, homeless shelters, GED programs, mental health programs, and community organizations. Another language resource that advocates and attorneys should consider are individuals who have technical or specific language expertise such as nurses, police officers, emergency dispatch staff, child and adult protection services staff, social workers, educators, and attorneys.

To ensure that interpreters are familiar with the vocabulary and laws applicable to domestic violence and are comfortable in a shelter or agency setting, interpreters should receive the same intensive training on domestic violence issues as provided to agency staff and volunteers. Interpreters should also receive some training in basic immigration law provisions that affect battered immigrants and be knowledgeable about community resources used by the agency to supplement its services to battered women. Because interpreters may be asked to accompany immigrant clients to social services and counseling appointments, it is helpful for them to understand how these programs function.

The following is a list of actions that the advocate or attorney should take before and during client interviews:¹⁹

- Attempt to choose an interpreter from the interpreter pool who has been trained and who is appropriate in terms of gender, age, class, etc.;
- Look for interpreters who speak the same dialect as the client in order to avoid misunderstandings;
- Make it clear to the client that both advocates/attorneys and interpreters are bound by agency confidentiality rules;
- Speak through the interpreter using simple, jargon-free sentences;
- Avoid colloquialism, idioms, slang, and similes since they can be confusing and often impossible to translate;

¹⁸ ORLOFF & LITTLE at 62.

¹⁹ *Id.* at 64-65.

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- Speak directly to and look at the client as the interpreter translates and actively look at and listen to the client as she speaks. Listening to the client shows the client respect and ensures that the attorney or advocate does not ignore her body language.
- Give the interpreter time to interpret by framing questions in short sentences, speaking slowly, and pausing often.
- Ask the client to answer questions slowly, to break after every few sentences, and to concentrate on what she plans to say next while the interpreter translates.
- Inform the client to ask for clarifications when she needs them.
- Give the interpreter one or two short breaks if the session is long.
- Have the interpreter ask the client to repeat the information communicated if clarification is necessary. Allow plenty of time for interviews and testimony presented in court with interpreters.²⁰
- In court, encourage the judge to be realistic about how long the case will take using the interpreter. Take the time to present the case in the same manner as in a case not using interpreters. Do not succumb to pressure from opposing counsel or the court to shorten the case because interpretation takes longer. The client has the right to a fair trial.

ALTERNATIVE INTERPRETATION RESOURCES

If there are a limited number of resources in an advocate or attorney's area, or if the battered woman seeking assistance speaks a language that is not common within the community, the advocate or attorney may contact state domestic violence immigrant organizations or coalitions, local university language departments, or professional interpretation companies for assistance. Some professional interpreters or professional interpretation companies will do pro bono or reduced cost work in cases of victims of domestic violence. If the attorney or advocate has no other options, interpreters may be accessed through the AT&T Language Line, which provides interpretation services in 160 different languages, 24 hours a day. The Language Line can be used on a speakerphone during intake sessions and meetings or during hotline calls or in-person interviews. Some courts will use these services for emergency hearings. AT&T charges by the minute and it can be very expensive. For more information, or to discuss specific interpretation needs, the Language Line account manager may be reached by calling (800) 752-0093. For a free recorded demonstration of AT&T's Language Line services call (800) 321-0301.

The National Domestic Violence Hotline has bilingual Spanish-speaking advocates and attorneys who take calls at all times, as well as a contract with the AT&T Language Line to help translate for non-English and non-Spanish speaking women. If an advocate or attorney's organization provides shelter services and has a client with whom the staff absolutely cannot communicate, the operator at the National Domestic Violence Hotline will speak directly to that client and provide her with basic information in her native language. The Hotline can also help make referrals to the client and provide brief interpretation in order to help the advocate or attorney identify the emergency needs of the client. However, the Hotline is not equipped to offer professional interpreting services and it cannot translate entire intake sessions or client meetings. Clients, advocates and attorneys can reach the Hotline at (800) 799-SAFE (7233).

INTERPRETERS TO AVOID

It is important to make sure that the interpreter is a neutral third party. Using the client's children or companion as an interpreter is extremely dangerous for the client, particularly if her companion is her abuser, her abuser's friend or her abuser's family member. The client may be too intimidated to speak openly in front of a friend or child in order to protect them from the truth or out of embarrassment. Additionally, children of abuse victims may be traumatized by the abuse or fear that the abuser may punish them if they were to help the victimized parent. If the client has brought someone with her to the interview to do the interpreting, the advocate or attorney should consider calling the National Domestic Violence Hotline for brief interpretation services. The person working the Hotline can play an important role in uncovering whether the victim feels comfortable and safe using a friend or family member as an interpreter.

²⁰ See, ROHINI ANAND & LAURA K. SHIPLER, CULTURAL CONSIDERATIONS IN ASSISTING VICTIMS OF CRIME (1999).

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Service agencies should bear in mind that interpretation is a difficult skill, and just because a person is bilingual does not mean that he or she has the necessary skills to effectively interpret for clients and advocates/attorneys. Those who are not appropriately trained may filter what they hear and interpret main concepts instead of actual words spoken, which can change the meaning of what is being said. Untrained interpreters may also ignore much of the client's answer to a question and translate only that portion of the client's response that they deem directly answers the question asked. When this happens, much important information that the attorney or advocate needs from the client is lost. Another problem that may arise is that statements may lose meaning if the interpreter is not conscious of differences in vocabulary. Spanish speakers from different countries, for example, may use different words to express the same object, occurrence, or idea. Using professional interpreters and repeating back to the client key information can minimize all of these problems.

All potential interpreters should be screened to determine that they are sensitive to domestic violence issues, are impartial, and are willing to sign a confidentiality agreement. Screening interpreters is particularly important in small communities or if an agency is using volunteer interpreters. Advocates and attorneys should also check for conflicts of interests by determining, on a case-by-case basis, whether the interpreter has any relationships with the victim, the batterer, or their community. This is another instance in which brief assistance from the National Domestic Violence Hotline can be helpful by providing an opportunity, after the client has met the interpreter, to privately interview the client without the interpreter present to discover if the client has any concerns about the interpreter.

Well-trained interpreters who support the work of an agency are valuable resources. They provide important services when working in conjunction with advocates and attorneys. Interpreters also ensure that the needs of clients are being met, offer support to immigrant victims, and protect them from further violence. Finally, the presence of interpreters sends the message to the immigrant community that their domestic violence needs can be addressed and are recognized by the advocate or attorney's organization.

Interacting with the Client – Empathize, Educate, Empower

While the client tells her story the advocate or attorney should listen carefully and empathetically and demonstrating to her that both interest and desire to help. One useful method is reflective listening. This involves clarifying what the client has said by repeating what you heard her say, rephrasing statements, and reflecting ideas and values. The advocate or attorney should also pay attention to, and be aware of, nonverbal cues displayed by the client. If the client needs a break, the advocate/attorney should take time to sit in silence until the client can continue with the interview.

Advocates and attorneys should allow the client to vent her emotions. This is especially important if the client has had to repress these feelings for a long time. After listening to her vent, the advocate/attorney should help the client calm down since it may be more difficult to understand her if she is upset. The advocate/attorney should be sensitive toward the client's feelings, pay attention to the manner in which she speaks and try to understand the client's needs, fears, and concerns so that appropriate forms of relief can be easily identified. .

Attorneys and advocates should be aware of their own prejudices regarding immigrants and avoid acting on them. It is important not to be judgmental, to allow the client to choose options she wants to pursue, and to respect the client's wishes. Furthermore, the client may be apprehensive about revealing information that she considers to be private or that she is ashamed of. Therefore, the client should be reassured that anything she says to the advocate/attorney or the interpreter will be kept confidential.

During the interview, the client may sit and listen to the advocate or attorney without asking any questions. This should not be presumed to be a sign of understanding on her part. Attorneys and advocates should remember that the attorney/advocate – client relationship may be different in the client's culture, and certain behaviors may have different connotations. The goal is to understand and appreciate different communication styles while, at the same time, recognizing one's own individual style and using it as a basis

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for comparing styles used by others. The client may refrain from asking questions or expressing her lack of understanding out of politeness or fear. She may be coming from a relationship, culture, or family in which she is not allowed to ask questions or in which questioning authority is inappropriate. Therefore, the advocate/attorney should gauge the client's comprehension by stopping frequently and asking her to repeat what was just said.

Attorneys and advocates should bear in mind that they may be the first person with whom their client has shared information about her abuse, and they should therefore assure their client that what happened to her was not her fault and that she is not to blame in any way.²¹ There are several messages that are important for attorneys and advocates to communicate:²²

- The abuse that she has been through is unjust, unfair, and illegal, and because of that, she is eligible for protection under United States law.
- She is not to blame. There was most likely very little that she could have done to prevent the abuse.
- She is very strong and courageous for having survived and for seeking help.
- The worst is behind her.
- She should repeat to herself, "I am a strong woman. What happened to me does not change who I am. The best is yet to come."

In addition, the client should be encouraged to speak to a mental health professional. Advocates and attorneys should develop and provide clients with an updated mental health referral list that includes organizations experienced in working with immigrants and with victims of domestic violence or sexual assault. The list should include the names and phone numbers for the following:

- National Domestic Violence Hotline (800-799-SAFE, TDD: 800-787-3224);
- Local domestic violence or rape crisis hotlines;
- Counseling programs for victims;
- Children's counseling programs;
- Counseling programs for immigrants and refugees.

If the client seems unable to feel hopeful or positive about her future, or if she talks about harming herself, the advocate/attorney should give her the number of a suicide hotline (800-SUICIDE) and instruct her to call it if she ever feels hopeless, as though she has no way of escaping her abusive partner, or if she is considering hurting herself.²³ The advocate/attorney should help her develop a plan so that she will have a safe place from which she can make such a call.

After the client has told her story, the advocate should educate the client regarding her options and help her to explore them. Discuss the client's resources and explain to her any potential remedies that are available, including civil and criminal legal options, social services, community-based services, faith-based programs, and women's groups. As always, it is important to avoid jargon and to state alternative scenarios and options in simple, layperson language.

The U.S. legal system may be very different from the legal system in a client's home country. Thus, when explaining legal rights advocates and attorneys should make certain that the client understands everything being said. The client should be encouraged to obtain an emergency or temporary protection order and a full civil protection order if she feels that she is in immediate danger. If she wishes to obtain a protection order, the advocate or attorney should help the client create a list of remedies she would like included in her order so

²¹ LESLYE E. ORLOFF & RACHEL LITTLE, *SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN: A "HOW TO" MANUAL FOR BATTERED WOMEN'S ADVOCATES AND SERVICE PROVIDERS* 59 (1999).

²² See, ATHENA VISCUSI & GWEN FORREST-BRAKE, *PRE-INTAKE INFORMATION FOR WOMEN SEEKING ASSISTANCE FROM ABUSE* (2002).

²³ ORLOFF & LITTLE at 52-67.

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as to ensure that the protection order addresses as many potential areas of conflict between the client and her abuser as possible.²⁴

The advocate or attorney should counsel his or her client about ways of coping with a painful interview. If she has no friends or family members living close by, one idea is to provide her with a long-distance calling card so that she can communicate with a person with whom she is close. Other options to suggest to the client may be:

- Scheduling a pleasant activity for after the interview. Activities may include watching a movie or meeting up with a close friend.
- Bringing a friend to the interview so that she has support after the interview is over.
- Informing her friends about the interview beforehand and asking them to contact her later to check up on her.
- Scheduling an appointment with a mental health professional (if she is seeing one) to help her process the interview.
- Writing her thoughts and feelings in a journal. The client should be advised to be completely honest about her feelings even if she has negative thoughts about those who are trying to help her.
- Attending a service or meeting with a religious person if religion is a significant part of her life.²⁵
- Repeating to herself constantly that she is a strong person, that what happened to her will not change who she is, and that the best is yet to come.

It is important to involve the client in coming up with solutions to reduce or end the abuse against her. It is possible that she has never had the opportunity to make decisions on her own. Providing her with such an opportunity will not only be challenging for her but will also encourage her to take charge of her future. Advocates and attorneys should remember that a client who understands her own case will gain confidence in herself, will feel trusted and respected, and will be better able to assist the advocate/attorney in collecting information useful to her case. After the client chooses a method of action, the advocate/attorney should explain to her, as much as she is able to understand, each element of her case.²⁶

The advocate or attorney should assure the client that she does not have to endure her partner's beatings in silence and that his violence is against the law in this country. The advocate/attorney should inform her that she is not alone. There are many women in the United States from her cultural community as well as other cultural communities who have suffered domestic violence in similar situations. The advocate/attorney should explain to the client that there are many people who are able to help her and should offer her specific information and a few numbers to call, even if she is not immediately ready to accept or use them. The advocate or attorney should also discuss with the client whether she has a safe place to keep this information so that she can access it when she needs it. (Some women may decline to take the information out of fear that their abusers will find it.) The following services can assist the survivor in building her life outside the abusive relationship:

- Mental health professionals;
- Local domestic violence shelters, and rape crisis centers;
- Victim advocacy programs;
- Specialized domestic violence units (police department, court, prosecutor's office);
- Legal services providers;
- Emergency financial assistance programs;
- Immigrant rights organizations;
- Social service organizations that serve the immigrant community;

²⁴ Leslye E. Orloff, *Effective Advocacy for Domestic Violence Victims: Role of the Nurse-Midwife*, 41 J. NURSE-MIDWIFERY 473, 484 (1996). See Chapter 9 of this manual for a full discussion of the types of traditional and creative protection order remedies that can be helpful to immigrant victims.

²⁵ Some clergy may need additional training or information about domestic violence so that their counsel is most helpful to your client. For training materials for faith-based groups on domestic violence, contact Rev. Dr. Marie M. Fortune (Center for the Prevention of Sexual and Domestic Violence) at 206-634-1903 or cpsdv@cpsdv.org

²⁶ ORLOFF & LITTLE at 55.

- Batterer’s intervention programs to which the court should refer her abuser.

Help Clients to Make Informed Choices

Domestic violence is a pattern of coercive behavior that can include sexual, physical, psychological, economic, and social elements of abuse. Abusers of immigrant women employ specific tactics that are unique to immigrants in their assertions of control over their victims. Advocates and attorneys should understand the many challenges that battered immigrant women face in making the decision to leave their abusers.

There are several factors that may dissuade a battered immigrant woman from leaving her violent partner. First, she may fear being stigmatized or ostracized by her community for leaving her partner, even if he is abusing her. She may also be advised by friends and family members whom she trusts to endure her suffering and be a “better wife.” The battered immigrant woman may be dependent on her abuser for immigration status. If the abuser has legal immigration status in the United States as a U.S. citizen, a lawful permanent resident, or as an immigrant visa holder, she may believe that she is totally dependent on him for immigration status.²⁷ She may also fear that if she leaves her abuser he will obtain legal custody of and/or will cut her off from seeing her children.²⁸ Additionally, as with non-immigrant battered women, she may be financially dependent on her abuser or may fear further or escalated violence once she leaves.

Attorneys and advocates should be aware of all of the difficulties faced by the client, validate the client’s concerns, help her decide upon options to pursue that will enhance her safety, and respect her ultimate decision. It is as important to offer meaningful help to the clients who choose to stay with their abusers as to those who choose to leave their abusers. If the client has children and is considering moving with the children, the advocate or attorney should identify existing court orders and statutes to find out how moving to another state or county with the children may affect a custody case.

Safety Planning

Safety planning is crucial for all battered women, both women separating from their abusers and women who are not ready to leave their abusers. The violence can escalate exponentially at any time. Thus, women who initially choose to stay may decide to leave and should be prepared to do so. Safety planning is equally important for women in the process of leaving their abusers because an attempt to leave often increases the danger of violence, including the risk of death.²⁹ When a victim seeks help she is taking the first step towards independence. The abuser may view this act as a threat to his sense of control, thus placing the victim and/or her children in more danger. An abuser may begin stalking the victim and/or her children or take other violent action against the woman who successfully left him.

The advocate or attorney should be prepared to help the client strategize to make her life better, regardless of whether she ultimately decides to stay or leave her batterer. If the client decides to remain with her batterer, the advocate or attorney should work on safety-planning strategies with her and remind her that the agency’s services are available to her now and at any time she needs help in the future, whether or not another incident of abuse occurs. Battered immigrants who are not separating from their abusers should be helped to obtain a full contact protection order, which can significantly enhance safety in most cases.³⁰ Those who qualify should also be helped to file for VAWA-related immigration relief, for which they can apply without the abuser’s knowledge or assistance.³¹

²⁷ A.B.A. COMM’N ON DOMESTIC VIOLENCE, 2000-2001, DOMESTIC VIOLENCE AND IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT: A TRAINING MANUAL FOR ATTORNEYS AND ADVOCATES 13 (2001).

²⁸ *Id.*

²⁹ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993-2001, 2 (Feb, 2003). In the year 2000, 33.5% of female murder victims were killed by an intimate partner.

³⁰ See Chapter 9 in this manual for a full discussion of protection orders and immigrant victims.

³¹ See Chapter 4 of this manual for VAWA-related immigration relief information.

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Discussing safety planning with the client is an important part of the interview process between the battered immigrant woman and the advocate/attorney. Safety planning is a step-by-step process through which the attorney or advocate and the client discuss various actions that the client can take to remain safe and plan for emergency situations. Safety planning may also serve as an empowering exercise for the client who may feel as if she has lost control of her life. Attorneys and advocates should be aware that the client knows best when it is safest to leave an abuser, what actions may be most likely to put her at risk, and what her needs are at any particular time. Clients may be better equipped to protect themselves while they are in the process of getting legal and financial assistance if they have developed a safety plan.

Attorneys and advocates should read through the following Safety Plan with their clients and assist them in completing it. They should remind clients that it is crucial to their safety that they keep this guide in a safe place, away from their abusers.

SAFETY MEASURES:³²

1. Contact a domestic violence hotline in your area and find out information about laws, shelters, and other resources that are available to you before you need them in a crisis. If you are considering staying at a local shelter for battered women, you should know the phone number of the shelter so you can call them if and when you decide to leave.
2. Create a safety exit from your place of residence. Practice a safety escape plan with your children. What doors, windows, elevators, stairwells or fire escapes would you use?
3. Plan the safest time to get away.
4. Tell someone what is happening to you. If possible, inform your neighbors of your situation and tell them to call the police if they hear any suspicious noises coming from your home. You can also arrange a signal with neighbors to let them know you are in danger, i.e., flashing lights, and have them call the police when they are signaled. You might also have a code word with your children or friends so they can call for help.
5. Know where you can go for help. Check with close friends and/or relatives if you can stay with them in an emergency until you can find a more permanent residence, or you can obtain a temporary protection order that removes the abuser from your home and protects you and your children while you continue living in your home.³³
6. Prepare a suitcase with important items and documents that you will need if you decide to leave your abuser in the future. Make sure to prepare this suitcase in advance and keep it at the home of a trusted friend or relative. Some of the documents can be stored with a domestic violence lawyer or with a battered women's advocate. The following should be kept in the suitcase:
 - a spare set of house keys;
 - a set of clothes for you and your children;
 - prescriptions;
 - some money;
 - social security cards for you and your children;
 - children's school records;
 - children's immunization records;

³² NOW LEGAL DEF. AND EDUC. FUND AND ORGANIZACIÓN EN CAL. DE LÍDERES CAMPESINAS, INC., ADVOCACY TO IMPROVE SERVICES FOR BATTERED MIGRANT AND IMMIGRANT WOMEN LIVING IN RURAL COMMUNITIES: A MANUAL 41-53 (2003).

³³ The disruption of having to leave their houses makes it hard for many victims to choose to separate. A victim may be more willing to make the choice to separate if she can remain in her home with the protection offered by a protection order that removes the abuser from the home and orders him to stay away. Advocates and attorneys should work with the victim to do a lethality assessment. If it appears that it is too dangerous for the victim to remain in a location known to the abuser, options for safe housing should be explored, including a domestic violence shelter or the homes of friends or family members (with the protection of a protection order).

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- children's special toys;
 - phone numbers of friends and relatives;
 - phone numbers of domestic violence programs that you can call for help;
 - a copy of your civil protection order (and any other court orders);
 - copies of important papers, including those you might need for your immigration case, such as any immigration papers, e.g.:
 - I-94
 - copies of visa applications
 - work permits
 - marriage certificate
 - photographs of your wedding
 - wedding invitations
 - love letters from your husband
 - copies of police reports and medical records
 - photographs of your injuries
 - copies of your husband's birth certificate, social security card, green card or certificate of naturalization
 - divorce papers from your previous marriages or from your spouse's previous marriages
 - papers that show you have lived with your husband in the United States (e.g., copies of your lease/rental agreement, utility bills, mortgage payment book, etc.)
 - papers that you might need in order to prove the abuse, to get a protection order or prosecute the abuser, to take care of your children, or to obtain child custody and child support.
 - any other important materials for you and your children's daily activities.
7. In an emergency escape, you must take your children with you, if at all possible. Check with a friend/relative with whom you plan to stay with in an emergency whether you can bring your children with you. Although domestic violence shelters generally allow you to bring children, some homeless shelters do not accept children. You should investigate rules before you leave. Although it may seem more sensible to leave school-age children at home if you do not know where you are escaping to, or for what length of time, failing to take the children with you could make it more difficult to regain custody of your children should you decide not to return. The overwhelming majority of battered women who flee with their children receive legal custody of their children from the courts. Further, if you leave your children with your partner, you will also leave your partner with a very effective tool he can use to continue to control your life.
 8. Teach your children to dial 911 in an emergency.
 9. Plan with your children and identify a safe place for them if another domestic violence incident should occur -- a room with a strong lock or a neighbor's house where they can go for help. Reassure them that their job is to stay safe, not to protect you.
 10. Inform school personnel about who can pick up children from school. If you obtain a protection order, give them a copy so that they can call the police in case they have any problems with the abuser. Also, provide child-care workers and staff at your children's school with a copy of the protection order and a list of people who are allowed to pick up the children.
 11. In case your abuser is able to abduct your children, plan with the children how they can try and prevent the abduction. Teach them how to call out for help if they are abducted from a public place. Instruct them to call the police or to place a collect call to you, a trusted friend, your religious leader, or a family member if they are abducted by the abuser.
 12. Have an easily accessible place to keep car keys, purse/wallet and any other essential items should you have to leave in a hurry.

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13. Take photographs of any injuries you sustain. Also, take photographs of torn clothing, broken property, and furniture in disarray. Take these photographs when it is safe to do so and leave copies of the photographs and the negatives in a safe place outside the home. Preserve any evidence of abuse (ripped clothes, photos of bruises, and injuries, etc.). Should you ever decide to take legal action against your abuser, seek legal custody of your children, or seek legal immigration status as a battered immigrant, you will need these items and documents. Remember to keep this evidence and photographs in a safe place, away from your abuser.
14. Open a savings account in order to have access to money you may need if you decide to leave your abuser. Make sure to have account statements sent to a safe place.
15. Keep change for phone calls at all times so that you can make phone calls from outside your home. If you are living with your abuser and you call from your home phone for help, information, or assistance related to the abuse, be sure to dial another phone number that your abuser will not consider suspicious or that he would not question after this call so that he cannot discover what number you last called. Examples might include the church, a store you call regularly, a family member, etc.

To keep your telephone communications confidential you must either use coins or get a friend to permit you to use his or her telephone credit card for a limited time when you first leave. Alternatively, you could purchase a telephone card with a limited number of minutes and leave it in a safe place to use in making calls for advice or assistance. These purchases should be made with cash. Make sure the card company does not send any bill to the house you share with your abuser. If you use your telephone credit card billed to your home, your abuser will be able to discover the numbers that you have called if he has access to your phone bill.

16. If you could not escape a recent violent incident, or if the violence seems to be escalating, you can have your abuser removed from the family home by getting a temporary protection order. This protection order can also require that your abuser: not re-enter the home, give his house keys over to the police, and not contact you. A battered women's advocate can help you in getting a temporary protection order.
17. Learn about the cycle of violence and learn to recognize when a violent episode may occur. If you can, leave the house before an attack takes place.
18. If you foresee an outbreak of violence, try to move away from weapons to a low-risk place, i.e., a place where there is an exit to the outside (avoid bathrooms, kitchens and the garage.)
19. Use your judgment and intuition. If the situation is very serious, try to find a way to give your partner what he wants, to calm him down. You have to protect yourself until you and your children are out of danger.
20. Do not use any weapons to defend yourself against your abuser. If at all possible, do not fight back against your abuser. You could be arrested if the police are called and you are unable to convince the police that you were defending yourself, particularly if the abuser can show injuries you caused him. Your best approach is to try to escape the violence, call the police, or have someone call the police for you.³⁴
21. Call the police if you are in danger and need help. The police will help you if you are a victim of domestic violence or any other crime, even if you are undocumented. The police should not ask you any questions about your immigration status, and you are not required to answer if they do ask. In such a case, tell them that you want to speak with a lawyer.

³⁴ If the police arrest you, do not plead guilty to anything. Be sure that your criminal lawyer consults with an expert on criminal and immigration law. See the Criminal Chapter of this manual for a discussion of issues that arise for battered immigrants who enter the justice system as defendants in criminal cases.

22. If you are injured, go to a hospital emergency room or doctor and report what has happened to you. Ask that they document your visit. If your abuser insists on taking you to the hospital, ask that you be interviewed in private, if it is safe to do so. Hospitals are supposed to separate you from any one who brings you to the hospital so that they will not interview you in front of your abuser and further endanger you.

Considering Shelter as Part of Safety Planning

Advocates and attorneys should inform their clients that both documented AND undocumented battered immigrants are entitled to emergency and short-term shelter programs and that shelters and short-term transitional housing programs cannot ask them questions about their immigration status in order to offer them services. Advocates/attorneys can also advise their clients to let the shelter know of any special food she eats and ask them to cook food that is familiar to her and her children. The client can also let the shelter know what sleeping arrangements are comfortable for her and if she has any special religious needs.

Another issue that the advocate/attorney and a client should consider, when assessing the client's case and making plans for her safety, is the possibility that she may need language assistance when seeking refuge at a shelter, especially if the shelter does not employ a multilingual or multicultural staff. Under these circumstances, the attorney/advocate should accompany the client to the shelter to help translate during the intake interview and explain the shelter rules to the client. The advocate or attorney should also assist the shelter in locating an impartial translator who can help the client communicate throughout her stay in the shelter.

Finally, the advocate or attorney should discuss the shelter rules with shelter workers, and identify those rules that may pose a problem for the client. The attorney/advocate should negotiate arrangements with the shelter that will make your client feel more comfortable. The arrangements can often include amendments in application of certain shelter rules and procedures to your client.³⁵

SAFETY AFTER THE SURVIVOR LEAVES HER ABUSER:

- Once the abuser is removed, change all the locks in your house. If possible, obtain locks or bars installed on your windows, a security system, and door wedges. If you live on an upper story, install rope ladders. Also make sure to install smoke detectors and fire extinguishers. If necessary, the abuser can be ordered, in the protection order, to cover these costs.
- If you have a rented home, ask the landlord if you can change to another unit. Have the name on the lease changed to yours. Request that building employees be notified that your abuser has been barred from the building and provide the building management with a copy of the protection order for their records. Let them know that they can call the police if they see your abuser near or inside the building.
- Tell neighbors, close friends, co-workers, and family members that you have separated from your abuser. Ask them to inform you if they see your abuser around your house, workplace, or car.
- If you are moving out of the home you share with your abuser, make sure you do so when the abuser is at work or not at home.
- Once in your own home, make sure you get an unlisted telephone number. You can arrange, with the phone company, to have all information regarding your phone number and billing address only accessible to people with a certain password. If you and your abuser have a large outstanding bill

³⁵ For a full discussion of how shelter rules can be amended to be more culturally sensitive to the needs of immigrant women, see "Somewhere to Turn" Chapter 5: Shelter Protocols.

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due to the phone company, you will have difficulty getting a new number. Ask your lawyer or advocate to negotiate with the phone company for a payment plan that will allow you to get a new phone number quickly. Local churches (and other faith-based organizations), charities, and victims of crime assistance associations, may be able to help you pay off the phone bill in order for you to have a phone to use to call 911 for police assistance.

- If you are living in a hidden location, you should have your mail sent to a post office box or to the home of a trusted friend, family member or your attorney so that your abuser cannot find you. When going to pick up your mail, make sure that your abuser is not following you. Make sure to provide the post office with a copy of your protection order and tell them not to provide the abuser with any information about your forwarding address.
- In order to further protect yourself, you might consider changing your name.

SAFETY AT WORK:

- If you work for an employer that has several locations and if you are in grave danger in your current town, consider asking that you be relocated.
- If you have a good relationship with your employer, let your supervisors know about the abuse so that they can be supportive of you if you need time off work in order to go to a training on safety measures for battered immigrant women or to court proceedings, etc. Ask your employer if you can vary the times you work so that the abuser is not able easily to follow you to and from work.
- Get a protection order that would require that your abuser stay away from you, and not contact you, at your workplace. Give a copy of the protection order to your employer in order to show them that you are taking steps to protect them and yourself from the abuser.
- Make sure to keep a copy of the protection order with you at work in case of an emergency.
- Let your supervisor, employer, and building security officers at work know that you have, or are planning to, leave your abuser and that you do not want to receive phone calls from him or have him allowed into your workplace.
- In case your abuser tries to contact you at work, arrange to have caller id on your phone or to have your calls screened by someone.
- Inform co-workers of danger from your abuser. Make sure that you specially inform receptionists and employees that have offices near the stairwells, large windows, or entry doors. Show them a picture of your abuser and ask them to call security if they see him around or inside the building.

ECONOMIC ASSISTANCE:

- Economic assistance can help you and your children support yourselves when you leave your batterer. You can receive assistance from government and non-governmental organizations. Contact your local domestic violence program for further information about resources available to you. These resources could include:
- *Rent, mortgage, or utility bills:* Local churches, community groups, and the Red Cross may have emergency funds that can help you for a month or two. However, this is not long-term assistance. For long-term assistance consider getting a roommate, living with a family member, or pursuing a protection order that requires your abuser to pay the rent, spousal support or child support.

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- *Food:* No matter what your immigration status, you and your children are entitled to receive food from local food banks. If your children are citizens, they qualify for food stamps and you can file on their behalf.³⁶
- *Money to cover changes made for security:* You can sometimes have these costs covered through the Red Cross. You can also arrange for the abuser to be ordered to pay for the costs in your protection order.
- *Money to pay medical bills:* You may be eligible for the local crime-victims compensation program to pay for your medical bills. You can also have your abuser ordered to pay your medical bills as part of your protection order or through his insurance plan.

³⁶ See the Public Benefits chapter 4 of this manual for a full discussion of public benefits you and your children may qualify for.

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3.1

Introduction to Immigration Relief for Immigrant Victims of Domestic Violence and Sexual Assault and Glossary of Terms¹²

By Leslye E. Orloff, Rebecca Story, Joanne Lin, Carole Angel, and Deborah Birnbaum

Since 1990 there have been dramatic changes in the immigration options available for immigrant³ victims of violence against women. Between 1990 and 2007 a number of legal immigration options were created that helped immigrant victims of domestic violence, sexual assault, trafficking and other criminal activity. Women who were undocumented and had no option to attain legal immigration status became eligible to file for legal

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² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ For the purposes of this manual, an "immigrant" is defined as an individual born outside of the United States who is now present in the United States with the intention of remaining here indefinitely. Immigrants can be either documented or undocumented. (See glossary of terms).

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immigration status due to her victimization.⁴ In 1994, Congress passed the Violence Against Women Act (VAWA), which included specific provisions to help immigrants abused by their U.S. citizen or lawful permanent resident spouses or parents to obtain immigration relief.⁵ This relief was designed to remove dependency on the abusive U.S. citizen or permanent resident for immigration status. The Battered Immigrant Women Protection Act of 2000 (VAWA 2000) created new forms of immigration relief for other immigrant victims of violent crime, including victims of sexual assault or trafficking where the perpetrator was either a family member or a non-family member. The Violence Against Women Act of 2005 (VAWA 2005) then expanded protections to include, among others, some victims of elder abuse.⁶

It is crucial to have a basic understanding of immigration law when assisting immigrant victims of domestic violence and sexual assault. Access to legal immigration status enhances a victim's safety, economic security, and the range of options available to her that can help her survive after abuse. Victims should be informed about every option for immigration relief available to them as early as possible, including violence against women relief they may be entitled to receive. Moreover, failure to identify and address issues affecting a victim's immigration status leaves victims who qualify for immigration relief protection vulnerable to deportation. All victims must be screened for facts that could either make their immigration case more complex or result in their deportation.⁷ (See *Red Flags List* at the end of the chapter).

This chapter will provide a brief overview of the immigration laws and potential immigration options available to immigrant victims of domestic violence and sexual assault.⁸ Other chapters of this manual will discuss specific forms of immigration relief in more detail.

A key goal of this manual is to help advocates and attorneys identify the various forms of immigration relief that may be available to help immigrant victims of domestic violence and sexual assault. Victims of domestic violence and sexual assault may qualify for forms of immigration relief based on their victimization by a family member who is a citizen or lawful permanent resident, they may qualify for other forms of relief based on victimization by a non-family member, and/or they may qualify for other legal immigration status wholly unrelated to the abuse or victimization (e.g. student visas, work visas). Which options they qualify for is a complex determination and the decision to file for relief must include analysis of the risk of deportation resulting from the filing. For these reasons, advocates and attorneys working with immigrant domestic violence and sexual assault victims should consult an immigration legal expert who is experienced in working with immigrant victims and who can help identify complexities that exist in your client's case, as well as the range of immigration relief available to her.⁹ Victims should be informed about every option of immigration relief available to them as early as possible.

⁴ For a history of the evolution of legal immigration relief for immigrant victims of violence against women and an explanation of the purpose of the legislation, see Leslye E. Orloff & Janice V. Kaguyutan, *Offering a helping hand: Legal protections for battered immigrant women: A history of legislative responses*. 10 AM. U. J. GENDER SOC. POL'Y & L. 95-183 (2002).

⁵ See Violent Crime Control and Law Enforcement Act ("VAWA 1994"), Pub. L. No. 103-322, §§ 40701-40703, 108 Stat. 1796 (1994).

⁶ See Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), [Pub. L. No. 109-162](#), Title II, §205, 119 Stat. 2960 (2006).

⁷ The immigration laws are administered and enforced by the Department of Homeland Security (DHS). On March 1, 2003, the agency formerly known as the Immigration and Naturalization Service (INS) was divided into three separate agencies and became part of the DHS. The U.S. Citizenship and Immigration Services (USCIS or CIS) is the agency responsible for affirmative applications including VAWA self-petitions. The two other agencies are U.S. Immigration and Customs and Enforcement (ICE), which handles immigration enforcement, detention, and removal; and U.S. Customs and Border Protection (CBP), which oversees the borders and ports.

⁸ The information in this chapter also applies for immigrant victims of domestic violence, trafficking and other crimes.

⁹ To identify an expert on immigrant victims in your state and to obtain technical assistance on cases of immigrant victims contact: National Immigrant Women's Advocacy Project at niwap@wcl.american.edu or call (202) 274-4457; or ASISTA. Once victims have been screened, if it is determined that she qualifies for a U-Visa or a VAWA self-petition and that no complex (Red Flags) issues exist in her case, the victim can be assisted in her application by an advocate or an attorney who is not an immigration expert using the information in this manual. We recommend that advocates and attorneys helping immigrant victims in VAWA and U-Visa cases identify an immigration attorney in their state experienced in working with immigrant victims who can help screening and who can offer advice and answer questions. The technical assistance providers located above can help you identify these resources.

There is a range of relief and assistance that immigrant victims are legally entitled to receive whether or not they have or qualify to attain legal immigration status. Both documented and undocumented immigrant victims are for example entitled to access victim services, emergency health care, police protection, protection orders, custody, child support and a range of services necessary to protect their health and safety.¹⁰

Overview of Immigration Options for Immigrant Victims of Sexual Assault and Domestic Violence

The following is an introduction to potential immigration options for immigrant women who are victims of domestic violence and sexual assault.¹¹ These brief descriptions are not meant to provide an exhaustive list of all possible immigration options, but rather to serve as an issue-spotting guide for advocates and attorneys working with immigrant domestic violence and sexual assault victims. Each of these options is discussed further in another chapter of this manual. An attorney should weigh all of the above-mentioned remedies in light of specific facts of the client's case to determine the best strategy in the individual victim. Importantly, most of these remedies may be used alone or in combination with one another. For example, an immigrant victim of sexual assault who has also been a trafficking victim who attains a U-Visa may also qualify for and later receive a T-Visa.

Options Related Primarily to Crime Victimization

U-VISA – Crime Victim Visa¹²

The U-visa provides immigration relief for immigrants who suffer substantial physical or mental abuse as a result of criminal activity perpetrated against them.¹³ A U-visa grants victims a temporary four-year visa, employment authorization, and protection against removal from the United States.

The U-visa is an important option available to immigrant victims of domestic violence and sexual assault. A victim's qualification to receive a U visa is not affected by –

- Whether or not the victim has any prior relationship with the perpetrator; or
- The citizenship or immigration status of the perpetrator.

The sexual assault perpetrator may be an intimate partner, non-intimate partner, acquaintance, family member or a stranger. U visas are useful to immigrants who are ineligible to file VAWA self-petitions (described later in this chapter), especially immigrant victims not married to U.S. citizens or lawful permanent residents, because the perpetrator's immigration status and relationship to the victim is irrelevant. Moreover, the U-visa provisions give DHS the discretion to waive many of the grounds of inadmissibility that might otherwise prevent a victim from attaining lawful immigration status (See inadmissibility in the glossary section of this chapter). For example, in U visa cases, DHS has the discretion to grant lawful permanent residency to an immigrant victim who may have plead guilty to a criminal conviction for shoplifting baby food needed to feed her children when she was fleeing abuse or a victim who plead guilty in a domestic violence case when she was acting in self-defense.

In order to qualify for a U visa, the immigrant must be a victim of one of the crimes listed in the statute or of a similar crime. The crimes covered under the U-visa are:

- rape

¹⁰ See also Chapter 16, "Access to Programs and Services That Can Help Immigrant Victims: Public Benefits Access for Immigrant Victims of SA," and Chapter 17, "Critical Issues in Healthcare for Immigrant Victims of Sexual Assault," of this Manual for further information

¹¹ There is a range of relief and assistance to which immigrant victims are legally entitled whether or not they have or qualify to obtain legal immigration status. Both documented and undocumented immigrant victims are for example entitled to access victims' services protections, emergency health care, police protection, protection orders, custody orders, child support and a range of services necessary to protect their health and safety.

¹² See also Chapter 10 of this Manual "U Visa Victims of Criminal Activity "

¹³ INA § 101(a)(15) (U) (i); 8 U.S.C. § 1101(a)(15)(U) (i).

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- torture,
- trafficking
- incest
- domestic violence
- sexual assault
- abusive sexual contact
- prostitution
- sexual exploitation
- 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
- obstruction of justice
- perjury
- attempt, conspiracy, or solicitation to commit any of above mentioned crimes.¹⁴

The criminal activity must have occurred within the United States or must have been in violation of U.S. law.

To apply, the immigrant victim must obtain certification from a law enforcement agency that the victim is being, will be, or is likely to be helpful in criminal investigation and prosecution. Victims are eligible whether or not the perpetrator is convicted, whether or not criminal prosecution is initiated, whether or not the perpetrator is served with a warrant, and whether or not they are called as a witness in the prosecution as long as they are helpful in an investigation. For an immigrant under 21 years of age, the spouse, children, unmarried siblings under 18, and parents can receive U Visas based upon the immigrant crime victim's receipt of U visa. For an immigrant 21 years of age or older, the spouse and children of the immigrant can also receive U-visas.¹⁵

When a U-Visa application is approved by DHS, the victim receives a "U-Visa." The U-Visa grants the victim legal permission to live and work in the United States. It also by operation of law results in the dismissal of any case in immigrant court filed against the immigrant.¹⁶ The U-Visa lasts for four years.¹⁷ A U-Visa grants victims temporary legal immigration status, employment authorization and protection against removal from the United States. A U-visa holder who has been physically present in the U.S. for three years can attain lawful permanent residency if they can prove that remaining in the U.S. is connected to humanitarian need, will promote family unity, or is in the public interest.

The DHS regulations implementing the U-visa program were published on September 17, 2007 and went into effect on October 17, 2007. Prior to the effective date of the regulations, Citizenship and Immigration Services

¹⁴ INA § 101(a)(15)(U) (iii); 8 U.S.C. § 1101(a)(15)(U) (iii)

¹⁵ INA § 101(a)(15) (U) (ii)(II); 8 U.S.C. § 1101(a)(15)(U)(ii)(II).

¹⁶ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53016 (Sept. 17, 2007).

¹⁷ The application filed by the immigrant victim can be revoked in limited circumstances including the withdrawal of the certifying official, error in the approval or evidence of fraud in the application. In the case of a family member whose application is dependent on the immigrant victim, the family member's application will be revoked if the family relationship is terminated or immigrant victim's application is revoked. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53016 (Sept. 17, 2007).

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(CIS) was issuing interim relief to victims who qualify to receive U visas. This provided them with some protection until CIS published U visa regulations and could grant victims a U visa. The primary status granted under interim relief was deferred action, which offered protection from deportation and access to employment authorization. U-visa interim relief was valid for one year and had to be renewed annually. As of October 17, 2007, DHS is accepting and adjudicating U-visa petitions.

T VISA ¹⁸

The T visa was created to provide immigration relief to victims of severe forms of trafficking in persons. A “severe form of trafficking” is defined as –

- (1) Sex trafficking in which a commercial sex act is induced by fraud, force, coercion, or in which the victim has not attained 18 years of age; or
- (2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude or slavery.¹⁹

Many trafficking victims are also victims of sexual assault or domestic violence either as a consequence or independent of the incidents of trafficking. Trafficking involves both labor and sex exploitation. Sex trafficking victims are forced to perform commercial sex acts and thus by nature are sexual assault victims. In labor exploitation, victims perform labor under force, fraud, or coercion and the methods of control may include sexual assault.

Immigrants will be eligible for T-visas if they:

- Are a victim of a severe form of trafficking in persons;
- Are physically present in the U.S.²⁰ on account of the trafficking²¹;
- Assist law enforcement officials in the investigation or prosecution of their traffickers (unless they are under the age of 18, in which case they are exempted from this requirement); and
- Can demonstrate that they will suffer extreme hardship involving unusual and severe harm upon removal.

In adjudicating applications for T-visa, DHS is statutorily granted the ability to waive a broad range of factors that would, in an immigration case not involving a trafficking victim, result in denial of lawful immigration status on “inadmissibility” grounds (e.g. health related, public charge)²² (See glossary discussion on inadmissibility). Attaining a DHS waiver of some inadmissibility factors (e.g. criminal grounds) may require proof that the crime was caused by or incident to the trafficking.²³

T-visa recipients are protected from removal and are given work authorization. T visa holders are entitled to apply for T-visa benefits for their spouse and children. T visa holders under the age of 21 may also apply for T-visas for their unmarried siblings under 18 and their parents.

One advantage of applying for a T-visa versus other forms of immigration relief is the expanded access to social service benefits that are available to trafficking victims. *Bona fide* T-visa applicants are statutorily

¹⁸ See also Chapter 11 of this Manual, “Human Trafficking and the T Visa”

¹⁹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 103, 114 Stat 1464, (2000).

²⁰ This includes presence in American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port of entry. INA §101(a)(15)(T)(i)(II), 8 U.S.C. § 1101(a)(15)(T)(i)(II).

²¹ DHS regulations recognize that some victims are brought into the United States as part of the trafficking scheme and that some individuals are already in the United States when they are victimized. DHS interprets the requirement that the victim be in the United States on account of the trafficking to reach both categories of victims where: (1) the individual is currently being held in some sort of trafficking situation; (2) was recently liberated; or (3) was subject to severe forms of trafficking in persons at some point in the past and remains in the United States for reasons directly related to the trafficking. The regulation cites trauma, injury, lack of resources, and lack of travel documents as the kinds of circumstances that might be attributable to the trafficking. 8 C.F.R. 214.11(g).

²² INA § 245(l)(2), 8 U.S.C. § 1255(l)(2).

²³ INA §212(d)(13)(B)(ii). 8 U.S.C. §1182(d)(13)(B)(ii).

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granted access to the same benefits as refugees. These benefits can include cash assistance, food stamps, job training, and a host of other benefits and services. DHS reviews T visa applications and issues a *bona fide* determination when they believe the victim has filed a valid case. Upon determining that a case is *bona fide*, DHS directly notifies the Department of Health and Human Services, Office of Refugee Resettlement (ORR) and ORR sends the applicant a certification letter, which allows access to benefits.

Another advantage of a T-visa over some other forms of immigration relief is that T visa holders are eligible to become lawful permanent residents. They can apply for this status as early as the conclusion to the investigation or prosecution and as late as after four years of holding a T visa. In order to be eligible they must:

- be physically present for a three-year continuous period,
- maintain good moral character, and
 - have continued to comply with requests from law enforcement; or
 - demonstrate that they would suffer extreme hardship if they were removed from the United States.²⁴

Continued Presence

In order to provide immediate assistance to trafficking victims, federal law enforcement officers may request that DHS authorize “Continued Presence” for a trafficking victim who is cooperating with their investigation or prosecution. Continued presence is technically not an immigration status, but rather refers to the government’s use of a variety of mechanisms to protect a victim from removal in the short-term. It provides access to deferred action or parole, both of which allow the victim to remain in the United States while they are cooperating with law enforcement. It also allows the victim to receive work authorization during the period they have “Continued Presence”. Like *bona fide* T visa applicants, victims with Continued Presence are eligible for public benefits and other trafficking victim services through certification from the Department of Health and Human Services. As noted above, Continued Presence may only be requested by a federal law enforcement official -- an individual may not apply for continued presence directly. Many victims for whom federal law enforcement has obtained “Continued Presence” go on to later file an application for a T-visa.

VAWA IMMIGRATION RELIEF²⁵ – Battered Spouse Waivers, VAWA Self-petitioning, VAWA Cancellation of Removal

In addition to the legal remedies discussed above that are available for immigrant victims of sexual assault and trafficking who may not have been victimized by a spouse, parent or adult child, individuals whose victimization occurred within the family context may have additional options through which they can attain legal immigration status. In order to understand these options, a brief description of family-based petitioning is helpful.

The most common form of obtaining lawful permanent residence in the U.S. is through sponsorship by certain citizen and permanent resident family members. The citizen or permanent resident relative, also known as the petitioner, files a family-based petition on behalf of the relative (also known as the beneficiary) who wants to immigrate to the U.S.

After the family-based petition is filed and approved, the next step is for the beneficiary to apply for lawful permanent resident status. However, Congress only allows a certain number of family members to apply for lawful permanent resident status in any given year. Beneficiaries who are immediate relatives of U.S. Citizens

²⁴ INA §245(l), 8 U.S.C. § 1255(l).

²⁵ For an overview on VAWA immigration relief, see Chapter 7 of this Manual “Preparing the VAWA Self-petition and Applying for Residence”. See also Gail Pendleton & Ann Block, “Applications for Immigration Status Under the Violence Against Women Act,” in *Immigration and Nationality Law Handbook* (2001-02 ed.), Vol. 1, American Immigration Lawyers Association, 2001.

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may apply for lawful permanent resident status immediately.²⁶ Relatives of lawful permanent residents and adult sons and daughters and siblings of U.S. Citizens are assigned a priority date on a waitlist and must wait until an immigrant visa becomes available in order to apply for permanent residence. This can take five years, and for some categories much longer.²⁷

Under normal circumstances, a citizen or lawful permanent resident petitioner will generally file a family-based petition on behalf of their beneficiaries without delay so that the family members can reside and work in the U.S. as soon as possible. However, some abusive petitioners delay, revoke, or never file these family-based petitions. Because of the petitioner's total control over the family-based petitioning process, many beneficiaries in this situation remain trapped and isolated in violent homes, afraid to turn to anyone for help.

Congress recognized the problems that could result when an abusive spouse has complete control over a victim's immigration status and since 1990 has passed a series of reforms to immigration laws that reflect an evolving understanding of the dangers that domestic violence poses to society as a whole, and to all individual victims -- citizens, and non-citizens alike. This has led to the passage of critical legal immigration protections for a broad array of battered immigrant women and their children who have been or are being abused in the United States.²⁸

Battered Spouse Waiver²⁹

To ensure that lawful permanent resident status is granted only when there is a valid marriage, federal law requires applicants who have been married less than two years at the time DHS grants their application to fulfill a two year conditional residence requirement before being granted full lawful permanent residence.³⁰ In order to convert the conditional status to permanent status, both spouses must file a joint petition with DHS ninety days before the expiration of the two-year conditional resident status, and be prepared to appear for a joint interview with a CIS official.³¹

For immigrant victims of domestic violence, the joint filing requirement proved problematic. Some immigrant victims felt compelled to stay in dangerous and abusive relationships in order to fulfill the joint filing requirement and some abusers refused to sign the joint petition as a means of control. In 1990, Congress enacted the "battered spouse waiver."³² The waiver allows the battered immigrant to file an application for the purpose of removing the conditions on her permanent residence without the assistance of her abusive spouse.

VAWA Self-Petition³³

To qualify for a VAWA self-petition an immigrant victim must have suffered from battery or extreme cruelty, which includes sexual assault, incest, and child abuse, perpetrated by an abusive U.S. citizen or lawful permanent resident spouse, parent, or adult son or daughter. The VAWA self-petition enables an immigrant victim of domestic violence and/or sexual assault to obtain lawful permanent resident status without the cooperation of his or her abusive spouse, parent, or adult son or daughter. The abused immigrant spouse, child or parent must have resided with the abuser at one time to be able to file the self-petition. However, they do not have to currently be residing with the abuser in order to file. Conversely, the VAWA self-petition was designed to not require separation. It allows the immigrant victim to confidentially file the self-petition and attain lawful permanent residency based upon the self-petition, without separating from the abuser. This promotes victim

²⁶ Immediate relatives include, in general, parents, spouses, and children under 21 of a U.S. Citizen, including step-children. See INA § 201(b)(2)(A)(i); 8 U.S.C. § 1151(b)(2)(A)(i).

²⁷ INA § 203(a); 8 U.S.C. § 1153(a); See Glossary for definition of children; See also United States Department of State's Visa Bulletin, <http://travel.state.gov/visa/frvi/bulletin/bulletin1360.html> (Click on "Current Bulletin").

²⁸ Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 99 (2002).

²⁹ See also Chapter 3.5 of the Breaking Barriers Manual, "Additional Remedies Under VAWA: Battered Spouse Waiver"

³⁰ Immigration and Nationality Act (INA) § 216(a), 8 U.S.C. § 1186a(a).

³¹ Immigration and Nationality Act (INA) § 216(c), 8 U.S.C. § 1186a(c).

³² Immigration Act of 1009, Pub. L. No. 101-69, § 701(a)(4), 104 Stat. 4989 (1990) (codified as amended at 8 U.S.C. § 1186a),

³³ See also Chapter 7 of this Manual "Preparing the VAWA Self-petition and Applying for Residence"

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safety by allowing the victim to attain legal immigration status and then to later explore when and whether they can safely leave their abuser.

A VAWA self-petition is available to spouses, former spouses, and intended spouses³⁴ of abusive U.S. citizens or lawful permanent residents. Termination of the marriage (through divorce or annulment) will not hinder an abused spouse's ability to file a VAWA self-petition so long as the termination was related to the abuse. The self-petition, however, must be filed within two years of the termination of the marriage. Moreover, self-petitioners have up to two years to file a self-petition after an abusive U.S. citizen or Lawful Permanent Resident spouse has lost status due to an incident of domestic violence. Children of abused spouses are eligible to receive deferred action and an immigrant visa because they are included in their parent's application, as long as they are under 21 years, regardless of their relationship to the perpetrator.

Children of abusive citizens or lawful permanent residents are also eligible to self-petition. Victims of child abuse, battering or extreme cruelty (including incest) must file their VAWA self-petitions before they turn age 25. Under immigration law a child includes a naturally born child (in or out of wedlock, whether or not legitimated), an adopted child, and a step-child (the child of a person's spouse even when not adopted; marriage to the child's other parent is sufficient).³⁵ Thus a child abuse victim whose perpetrator is their U.S. citizen step-parent (their mother's new husband) can self-petition, but must file their self-petition before the child's mother and their abusive step-father divorce.

An immigrant parent whose citizen or lawful permanent resident spouse abuses the immigrant parent's child may file a self-petition even when the immigrant parent is not themselves abused. The immigrant parent of an abused child may self-petition without regard to the immigration status of the abused child. That child may be a citizen, a lawful permanent resident, may have another form of legal immigration status or may be undocumented. A self-petition may also be filed by an immigrant parent if a step-child is being abused. The goal is to allow the immigrant parent to come forward and help protect the child without risking deportation. If an immigrant parent files a self-petition based on abuse of one of their children, their other immigrant children may be included in the petition.

In addition to proving abuse, a self-petitioner must also prove --

- good faith marriage if the abuser is a spouse or step-parent,
- the spousal, parental, or parent-child relationship;
- the immigration status of the citizen or lawful permanent resident spouse, parent, son or daughter;
- good moral character, and
- that they have resided with the abusive family member.

The adjudicators review applications using the *all credible evidence* standard of proof. This standard is purposely broad and is not limited to specific forms of documentation traditionally required in immigration cases. This standard was designed to preclude DHS or immigration judges from denying a victim's immigration case because she cannot access a particular document or form of proof that may be in an abuser's control. Victims are allowed to provide any form of credible evidence in support of each element of required proof in their VAWA immigration case. This standard improves victim safety by not requiring her to confront her abuser or travel to his city or state to obtain evidence in his possession.

An approved self-petition entitles a person to work authorization, deferred action, and an approved immigrant petition. The approved immigrant petition makes the petitioner eligible to apply for lawful permanent residence status. The timing of when an approved self-petitioner will be able to file for lawful permanent residency varies based on the type of family relationship and the immigration status of the abuser. Spouses and children of citizens may apply immediately. Spouses and children of lawful permanent residents are placed on a waitlist along with spouses and children of lawful permanent residents who were sponsored by a non-abusive

³⁴An intended spouse is someone who believed she was married but was not because of the bigamy of her abuser whom she believed to be her spouse. See INA § 101(a)(50), 8 U.S.C. §1101(a)(50).

³⁵ INA § 101 (b)(1), 8 U.S.C. § 1101(b)(1).

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family member and have gone through the standard family based petitioning process. This wait can be as long as 7 years.

VAWA Cancellation of Removal and Suspension of Deportation³⁶

VAWA cancellation of removal (prior to 1996 this remedy was called suspension of deportation) is a form of humanitarian immigration relief designed to keep battered immigrants abused by citizen or lawful permanent resident spouse or parents from being deported or removed from the United States. It is a defense that immigrant victims raise in immigration court after they have been placed in removal (deportation) proceedings before an immigration judge. VAWA cancellation of removal and suspension of deportation, if granted, results in lawful permanent resident status for the immigrant victim. If an immigrant victim is granted cancellation of removal, their children can receive parole into the United States and can ultimately receive lawful permanent residency through their abused parent.

If the immigration judge does not grant cancellation of removal or suspension of deportation and there is no alternative form of relief, the immigrant will be ordered removed (deported) from the United States.

To qualify for VAWA cancellation of removal a victim must prove:³⁷

- That they (or their child) has been battered or subjected to extreme cruelty by a U.S. citizen or lawful permanent resident spouse or parent;
- That they have been physically present in the United States for 3 years (some limited absences are allowed);
- That they are of good moral character;
- That their deportation would cause extreme hardship; and
- That certain specific inadmissibility grounds do not apply to them, or that they qualify for a waiver of inadmissibility.³⁸

VAWA cancellation is an important remedy because it is available to some categories of people who are not eligible to file VAWA self-petitions. In addition to the relationships covered under VAWA self-petition, cancellation provides relief to the following people:

- The parent of a child abused by the child's other lawful permanent resident or U.S. citizen parent where the parents are not married;
- An abused spouse or the stepchild whose marriage from the abuser has been terminated for over two years;
- An abused spouse of a lawful permanent resident or an abused spouse or child of a citizen or lawful permanent resident who has died;
- A spouse or child of an abusive citizen or lawful permanent resident who lost or gave up status over two years before; and
- An abused child who did not live with the abusive citizen or lawful permanent resident parent.

A person who is not eligible to self-petition but is eligible for VAWA cancellation and is not already in removal proceedings, can request to be put in removal proceedings. However, it is important that an expert in VAWA immigration relief be consulted and involved in the case because denial of relief will automatically result in removal from the United States.

VAWA HRIFA, VAWA NACARA, VAWA Cuban Adjustment Act – Self-Petitioners

There are several eligible VAWA self-petition applicant categories. Those who otherwise would have been eligible to attain lawful permanent residency under HRIFA, NACARA and Cuban adjustment, are also eligible

³⁶ See also Chapter 9 of this Manual "VAWA Cancellation of Removal"

³⁷ INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2).

³⁸ For more information see Chapter 9 of this Manual "VAWA Cancellation of Removal".

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to self-petition for that status without the support of their abusive spouse or parent. The end result of a VAWA self-petition is deferred action and an approved immigrant petition creating eligibility to apply for lawful permanent residency.³⁹

VAWA HRIFA

VAWA allows battered spouses and children (or those who have been subjected to extreme cruelty) who would be eligible for lawful permanent residency under the Haitian Refugee Immigration Fairness Act (HRIFA) but have been unable to attain lawful permanent residency due to the abuser's failure or refusal file for lawful permanent residency under HRIFA, to file their own self-petitions. In order to be eligible, the battered spouse or child must be a Haitian national, and must have been physically present in the United States for a continuous period from before December 1, 1995 up until the date the application is filed. (See Appendix A).

VAWA NACARA⁴⁰

VAWA NACARA 203: Under section 203 of NACARA there are three categories of people who are eligible for NACARA suspension of deportation: (1) Salvadorans who entered the United States before September 20th, 1990, and registered for benefits⁴¹ on or before October 31, 1991 or applied for temporary protected status within the same time period; (2) Guatemalans who entered on or before October 1, 1990 and registered for benefits on or before December 31, 1991; and (3) nationals from certain Eastern European countries⁴² who filed for asylum before December 1991. The spouse or children of such immigrants are also eligible. Unmarried sons or daughters over 21 are eligible as long as they entered the United States before October 2, 1990.

Under VAWA, spouses or children subjected to battering or extreme cruelty by an abusive Guatemalan, El Salvadoran or Eastern European NACARA 203 applicant may directly apply for NACARA 203 benefits. To qualify, the petitioner must be a spouse or child of the NACARA 203 applicant at the time the NACARA 203 applicant –

- was granted suspension of deportation or cancellation of removal;
- filed an application for suspension of deportation or cancellation of removal; or
- registered for benefits under the settlement agreement in *American Baptist Churches, et. al. v. Thornburgh (ABC)*, applied for temporary protected status, or applied for asylum.

VAWA NACARA 203⁴³ provides battered spouses, children, and children of the battered spouse temporary protection from removal even if the spouse is no longer married to the abuser, as long as they were married at

³⁹ Memo from Leslye Orloff, Janice Kaguyutan, Cecilia Olavarria, Legal Momentum, March 2001, *Documentary Requirements for VAWA immigration cases*;

http://legalmomentum.org/IWPpubs/PubBank_Immigration/VAWA/wwwVAWADocRequirements.pdf

⁴⁰ See Appendix B.

⁴¹ Pursuant to the settlement agreement in *American Baptist Churches, v. Thornburgh (ABC)*, 760 F. Supp. 796 (N.D. Cal. 1991)

⁴² A national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia.

⁴³ Please note that VAWA NACARA 202 has now expired as a form of relief. The deadline for applying for VAWA NACARA Section 202 has passed; this is only a summary of the past law. Section 202 of NACARA provided for adjustment of status to lawful permanent residency for all Nicaraguans and Cubans who have been in the United States continuously since December 1, 1995 through the date of filing their NACARA application. NACARA 202 applicants were permitted up to 180 days absence from the United States without losing their ability to prove continuous presence. They also had to fulfill the general requirements for lawful permanent residency. Under NACARA, unmarried sons and daughters who were continuously present before December 1, 1995 were also eligible to apply for lawful permanent residency under NACARA if they were Nicaraguan or Cuban and physically present in the United States on the date of the filing. They were also permitted

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the time that the immigrant or the spouse or child filed an application to suspend to cancel the removal. Spouses or children do not have to demonstrate that they are residing with the principle filer to receive temporary protection from removal. Relief is also available under NACARA 203 for battered immigrants who applied for VAWA suspension of deportation and against whom deportation proceedings were initiated before April 1, 1997.

VAWA Cubans

VAWA provides relief for spouses and children who have been battered or subjected to extreme cruelty by an abuser who is eligible for relief under the Cuban Adjustment Act of 1966 (CAA). Where the abuser has failed to attain lawful permanent residence, the spouse or children are allowed to file their own petitions for residency directly with DHS. Spouses and children of Cuban abusers can receive protection even when they are not themselves Cuban. The battered spouse or child does not have to be residing in the United States with their abusive Cuban spouse or parent in order to receive lawful permanent residency as VAWA CAA self-petitioners. This allows immigrant victims to separate from, stop residing with and divorce abusers without losing access to Cuban Adjustment Act relief. Where there has been a divorce or the abuser has died, the battered spouse or child must file the petition for permanent residency within two years. (See Appendix C)

Gender-Based Asylum, Withholding of Removal and Convention Against Torture Claims and Withholding of Removal ⁴⁴

Victims of domestic violence, sexual assault, or other gender-based violence may also apply for asylum. Asylum is an immigration remedy that can be granted when the applicant shows a well-founded fear of persecution in their home country. The fear must be on account of race/ethnicity, religion, nationality, political opinion or membership in a particular social group.⁴⁵ Successful asylum applicants may remain in the United States in asylum status and may obtain asylum status and benefits for their spouse and/or children. Asylees are eligible to apply for lawful permanent resident status after one year.

Asylum applicants must file within one year of arriving in the United States unless they can demonstrate extraordinary circumstances causing the filing delay or a change in circumstances creating a basis for filing. Therefore, it is important to determine quickly, whether or not a client may be eligible for asylum.

Gender is not a protected category under asylum law and currently, there are no final regulations on how to interpret gender-based asylum claims in the context of the other protected categories. As such, asylum law is interpreted differently across the U.S, and a claim should not be filed without enlisting the help of an immigration attorney experienced in gender asylum cases. Some courts have granted asylum in cases involving domestic violence, sexual assault, and other forms of violence against women, but others have rejected such asylum claims.

Victims of domestic violence and sexual assault may also file for withholding of removal. Withholding of removal has higher standards of proof than asylum. It requires the petitioner to prove that her “life or freedom would be threatened” on account of membership in the above listed protected categories.⁴⁶ Unlike asylum, there is no one-year filing deadline. This form of relief, however, does not provide an opportunity to apply for lawful permanent residence in the United States.

up to 180 days of absence from the United States. Spouses and children are not required to demonstrate continuous presence. Under VAWA, spouses and children subjected to battering or extreme cruelty were eligible to apply for NACARA 202 adjustment if the abuser was eligible for NACARA 202 benefits, even if he never filed for benefits. (See VAWA section at end of this chapter).

⁴⁴ See Chapter 12 of this Manual “Sexual Assault Survivors and Gender Based Asylum”

⁴⁵ See INA § 101(a)(42)(A), 8 U.S.C. §1101(a)(42)(A); INA § 208(b)(1), 8 U.S.C. § 1158(b)(1). 1158(b)(1)

⁴⁶ 8 C.F.R. § 208.26(b).

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Where asylum or withholding relief are not a viable options, a second option may be a claim under the Convention Against Torture (CAT). The treaty prohibits a person's return to a country where there are substantial grounds to believe that person would be in danger of being subjected to torture.⁴⁷ A victim can make a CAT claim along with her asylum claim, but the benefits that can be obtained are different. While an approved asylum claim gives the applicant the opportunity to later apply for lawful permanent resident status in the United States, an approved CAT claim only ensures that the applicant is not returned to the country where the torture would occur.⁴⁸ People whose CAT claims are approved do not become lawful permanent residents. CAT relief may, however, be available to persons who cannot qualify for asylum for various reasons, including the commission of certain crimes or failure to apply within the one-year filing deadline⁵⁰.

Special Immigrant Juvenile

Domestic violence and sexual assault victims may also be eligible to apply for Special Immigrant Juvenile Status. As the term implies, this status is available to those who have been declared to be a dependent in a juvenile court because of abandonment.⁵¹ In order to qualify, the applicant must have a court finding that it is not in her best interests to be returned to her home country⁵². This visa is typically used in situations where the minor is unaccompanied in the United States or the parents have abandoned or abused the minor. Since family members often enter the United States at different times, minors often find themselves in the position of making an unlawful entry across the border alone. Women and girls are vulnerable to sexual assault during unlawful border crossings. As such, Special Immigrant Juvenile applications may be the logical option for minors sexually assaulted while entering the United States.

CONFIDENTIALITY CONCERNS

Advocates for immigrant women should emphasize the confidential nature of the relationship with their clients and work to create a relationship of trust and security. Lack of immigration status often deters many immigrant women who are victims of domestic violence and sexual assault from seeking assistance and support.

Non-profit and charitable organizations are under no legal obligation to inquire about the immigration status of persons who seek their services, nor do they have a legal obligation to report this information to the DHS.⁵³ Regardless of their immigration status, immigrant women who are victims of sexual assault, domestic abuse, stalking, dating violence, and trafficking are eligible to receive services and support from rape crisis centers, women's shelters, victim's services programs and to receive assistance in criminal prosecution.⁵⁴ In addition, service agencies can protect a survivor from being detained or put in removal proceedings by doing immediate screening for immigration issues and by working with an immigration attorney to address the legal needs of a victim. Immigrant victims are also entitled to VAWA confidentiality protections.⁵⁵

⁴⁷ [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985) (entered into force June 26, 1987).

⁴⁸ *See generally* 64 Fed. Reg. 8478 (Feb. 19, 1999).

⁴⁹ *See generally* 64 Fed. Reg. 8478 (Feb. 19, 1999).

⁵⁰ Advocates and attorneys should consult with an immigration attorney experienced in violence against women issues. Contact Legal Momentum or ASISTA for assistance and references for your state. An attorney should weigh all of the above-mentioned remedies in the context of specific facts in their client's case to determine the best strategy. Importantly, most of these remedies may be used alone or in combination with one another.

⁵¹ I.N.A. §101(a)(27)(J), 8 U.S.C. 1101(a)(27)(J).

⁵² This includes the applicant's or the parent's previous country of nationality or last habitual residence. *See* I.N.A. §101(a)(27)(J)(ii), 8 U.S.C. 1101(a)(27)(J)(ii).

⁵³ *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), § 201(e)(1) Pub. L. No. 104-208, §384, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1367 (1996)).

⁵⁴ AG Order No. 2049-96, 61 Fed. Reg. 45,985 (Aug. 30, 1996).

⁵⁵ For a complete discussion of VAWA confidentiality see Chapter 3 of this Manual "VAWA Confidentiality: History, Purpose and Violations VAWA Confidentiality Protections "

DETERMINING A CLIENT'S IMMIGRATION STATUS

Before deciding on which immigration option to pursue, an attorney or advocate should attempt to determine the individual's immigration status. Sometimes the individual will have a Resident Alien Card ("green card"), passport stamp, or other document that clearly establishes her legal immigration status. In other cases, the immigrant victim will not be certain of her status and the advocate or attorney must ask a series of detailed questions and review all available immigration papers, such as filing receipts or copies of applications filed. If your client does not have access to these documents the abuser may be ordered to turn them over to her as part of a protection order or the police can help her retrieve immigration documents during a stand by and exchange of property. The safety of these interventions should be assessed with the victim before they are undertaken as this could provide the abuser with information that she may be pursuing independent immigration status. This could increase the danger of retaliation against her.

It is important to remember that anyone who is not a U.S. citizen or U.S. national may be subject to permanent removal from the United States, including lawful permanent residents. For this reason it is extremely important to screen all immigrant victims to determine any prior immigration history or contact in their case and to specifically identify whether any "red flag" problem issues may make their case more complicated. Filing for a VAWA self-petition, U-Visa, T-Visa or any other form of immigration relief without identifying "red flag" issues could trigger removal proceedings against the victim. However, not filing for legal immigration status that a victim is entitled to receive may also lead to detention and removal. This is particularly true if an abuser or crime perpetrator is threatening to have the victim deported. For most victims identifying problematic issues early in the case will allow an immigration attorney the ability to identify and address issues in a manner that will help many immigrant victims access VAWA's immigration protections.

The following questions can be asked to try to ascertain an individual's immigration status and eligibility for VAWA relief. An advocate or attorney, though, should always reassure the immigrant victim that the following questions are merely being asked to better understand the situation. Many immigrants may fear disclosing their immigration status, so an advocate or attorney should make every effort to calm those fears.

*Questions to ask to help determine immigration status and next steps after interviewing a client include the following:*⁵⁶

- Where were you born?
- What is your full birth name?
- Have you ever used a different name?
- Why did you leave your country?
- Where did you enter the United States?
- When did you enter the United States?
- How did you enter the United States?
- When you entered the United States, did you speak to or see an immigration official?
- What kind of visa did you come over under? (for example, a tourist visa⁵⁷, student visa⁵⁸, H1-B temporary worker visa⁵⁹)
- Did you receive a small card (Form I-94) when you entered the United States?
- Do you still have the I-94 card (it may be stapled in your passport)?
- Do you know if you or someone else has filed papers on your behalf with the U.S. Citizenship and Immigration Services?
- Have you ever been to an interview at U.S. Citizenship and Immigration Services? Or appeared in Immigration Court in front of a judge?

⁵⁶ Adapted from: Ann Benson, *Getting Technical Assistance on Immigration Issues* (unpublished manuscript, on file with the Washington Defenders Immigration Project). Not all clients will be able to answer all questions, these are suggested questions to help evaluate an individual's case.

⁵⁷ See INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B).

⁵⁸ See INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F).

⁵⁹ See INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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- Where were your parents born?
- Was either of your parents a U.S. citizen at the time of your birth abroad?
- Did either or both of your parents become U.S. citizens through naturalization prior to your 18th birthday?
- Do you work in the United States?
- If you have a job, do you have a card that you presented when you began your job?
- Are you married?
- If yes, when did you get married?
- Did you come to the United States with your husband?
- What's your spouse's immigration status?
- Do you have children?
- If yes, were the children born in the United States?

VAWA Red Flags⁶⁰

Although your client may have a qualifying family relationship to a United States citizen or lawful permanent resident and may further qualify for VAWA relief because of battery or extreme cruelty, the following “red flags” are grounds for concern. Any of the following may be cause for denial of a self-petition, a bar to attaining lawful permanent residency, a ground for removal or a bar to cancellation of removal. Identifying these “red flags” early will also help an immigrant victim who qualifies for a T or U visa who will need to request waivers early in their case for identified issues. If any of the “red flags” apply to your client, consultation with an immigration attorney who is experienced with VAWA immigration relief is very important and strongly recommended.

Questions to ask that may be grounds for concern:

- Have you ever been a stowaway?
- Have you entered as an international exchange visitor (for example, scholars, teachers, professors, leaders in a field, among others, coming to the United States temporarily)?
- Have you ever been in deportation or removal proceedings?
- Have you ever been previously deported or removed?
- Have you committed marriage fraud, possibly by paying a U.S. citizen to marry you?
- Are you evading a draft?
- Are you unlawfully present here?
- Have you committed domestic violence, stalking or have you violated a protection order?
- Do you have any criminal convictions?
- Have you committed prostitution?
- Have you misrepresented your immigration status?
- Have you abused drugs or do you have a drug addiction?
- Has child protective services ever come in and intervened with your childcare?
- Have you ever committed child abuse?
- Have you committed espionage and sabotage?
- Have you ever committed acts of torture, severe violations of religious freedom, or genocide?
- Are you a public charge?
- Have you ever voted unlawfully?
- Do you have a physical or mental disorder?
- Are you habitually drunk?
- Do you have a communicable disease?
- Are you polygamous?
- Have you gambled illegally?
- Do you lack a vaccination record?
- Have you falsely claimed citizenship?

⁶⁰ See the VAWA Red Flags Section of this manual for a complete list of grounds for concern and legislative citations.

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- Have you laundered money?
- Have you ever been a member of the communist party?
- Have you been involved with international child abduction?

Glossary of Terms ⁶¹

To understand immigration law, it is crucial for an attorney or advocate to understand the most commonly used terminology. The following brief descriptions of terms are relevant to assisting battered immigrants. Terms are organized alphabetically.

Adjustment of Status – An individual with an approved immigrant visa (family, employment, diversity lottery, special immigrant juvenile, special immigrant religious worker), or an approved self-petition under VAWA may, under certain circumstances, file an application (Form I-485) for permanent resident status without leaving the United States. This process is called adjustment of status. In all cases, DHS has discretion whether or not to grant lawful permanent residence. If DHS grants adjustment of status, the individual will then receive a Resident Alien Card (*commonly referred to as a “green card”, see definition below*) and will become a lawful permanent resident.

A-File – This is the immigration case file created by DHS. It contains the immigrant’s “Alien Registration Number.” which is the immigration case file number. This number always starts with the letter “A”. All foreign born persons who have attained legal immigration status, naturalized or ever been detained or placed in immigration court proceedings will have “A” numbers. Finding a safe way to attain or copy down this number can be very helpful when an immigrant victim is abused by an immigrant spouse, parent or family member.

Alien – This is a term that is offensive to some, but should be understood in the context of how the term is used in the Immigration and Nationality Act, other statutes, the code of federal regulations, and the Department of Homeland Security or other government policy memoranda. The Immigration and Nationality Act defines the term ‘alien’ as any person who is not a citizen or national of the United States. Practically speaking, this term covers a broad group of people including but not limited to permanent residents, refugees, asylees, people granted other forms of legal immigration visas, people who enter with visas and then overstay, and people who enter the U.S. without inspection.

Asylum – Asylum is humanitarian immigration relief given to individuals present in the United States who meet the requirements for “refugee” status. (*See “Refugee” definition below.*) In general, asylum seekers must file within one year of first entering the U.S. although an applicant may qualify for an exception to this rule. If an asylum seeker’s application is not approved by DHS, she will automatically be referred to immigration enforcement authorities and placed in removal proceedings where she will have the opportunity to renew her asylum application before an immigration judge. Denial of an asylum application by an immigration judge results in an order of removal from the United States. See Chapter____ on Asylum.

Attorney General – A reference that may, in fact, actually mean the Secretary of Homeland Security. While the Homeland Security Act of 2002⁶² transferred functions of the Immigration and Naturalization Service (INS) from the Department of Justice to the Department of Homeland Security, it did not change every authority-delegation reference in the Immigration and Nationality Act (INA) and other laws. Instead, it included a savings provision⁶³ stating that statutory, regulatory, and other references relating to an agency that is transferred to DHS, or delegations of authority that precede such transfer shall be deemed to refer, as appropriate, to DHS (and its officers), or to its corresponding organizational units.

Battered Spouse Waiver – Conditional permanent residents who are victims of abuse may be able to get a waiver to exempt them from needing their spouse’s signature on their petition to remove the conditions on their status and become a lawful permanent resident. The applicant must also prove that their marriage to a United States citizen was entered into in good faith. They must submit an affidavit containing information about their relationship and a declaration regarding the abuse. They should also submit any other evidentiary support for the abuse that they may have.⁶⁴ [See “Conditional Permanent Residence”].

⁶¹ Some of the entries on this list were adapted from and reprinted with the permission of the Immigrant Legal Resource Center.

⁶² Pub. L. No. 107-296, 116 Stat. 2135 (2002) See INA §245, 8 USC §1255 with respect to bases of eligibility and ineligibility.

⁶³ Homeland Security Act at §1512(d)

⁶⁴ See also Chapter 3.5 of the Breaking Barriers Manual, “Additional Remedies Under VAWA: Battered Spouse Waiver”

Battery or Extreme Cruelty – This is the term used in United States immigration law to define domestic violence. Victims of battery or extreme cruelty can be eligible to receive the special immigration relief available to victims of domestic violence. “*Battery or extreme cruelty*” is a form of abuse inflicted upon another person that includes, but is not limited to, any actions that cause or threaten to cause physical, mental, psychological, or emotional harm, and any actions or inaction that is a part of an overall pattern of abuse, power, or control.⁶⁵ These include acts that destroy the peace of mind and happiness of the injured party or cause distress and humiliation to the injured party. Rape, molestation, forced prostitution, incest, and other forms of sexual abuse are also considered forms of battery.⁶⁶

Bona Fide T-Visa⁶⁷ -- The bona fide determination is a DHS determination that a T-visa application is complete and establishes prima facie eligibility for a T visa. DHS makes this determination early on in the adjudication. Receipt of a bona fide determination allows T visa applicants to obtain certification from HHS which allows them to access public benefits.

Cancellation of Removal – Cancellation of removal is a discretionary form of relief that certain non-citizens in removal proceedings may request.⁶⁸ If granted, cancellation of removal accords the applicant permanent resident status. Under VAWA, certain abused spouses, children, and parents of abused children are eligible for a special form of cancellation of removal when the abuser is a U.S. citizen or a lawful permanent resident.

Child – Under immigration laws the definition of child is different than under many state family law statutes. The immigration law definition of child is important because children can be eligible to receive legal immigration status based upon their relationship to a parent who is a citizen or lawful permanent resident or who received legal immigration status. Under immigration law a person qualifies as a child of someone if they are:

- Under the age of 21;
- Unmarried; and
- Biologically the child, whether legitimated or not;
- A stepchild as long as the marriage creating the step-relationship occurred before the child attained 18 years of age; or
- A child adopted while under the age of 16; or when the child was an orphan.⁶⁹

Civil Protection Order (CPO) – A justice system family court remedy initiated by a victim to protect herself/himself from future abuse. All persons are entitled to this protection regardless of immigration status. It is a particularly valuable remedy for battered immigrant women because it can be crafted to uniquely address and counter abuse, power, and control in her relationship.⁷⁰ Since the victim initiates the process, she need not rely on the criminal courts and may obtain a CPO regardless of whether there is a criminal prosecution of her abuser. Protection orders may contain a wide range of remedies aimed at reducing ongoing abuse, control, and harassment. These may include: granting the victim custody of children and ordering the abuser to pay child support, ordering that the abuser leave the family home, prohibiting the abuser from contacting or harassing the victim’s other family members, directing him to hand over important documents, including immigration documents to the victim, and not interfering with her immigration application. A victim can obtain an emergency or temporary protection order (also called TPO) that typically lasts 14- 30 days, as well as a full protection order that usually lasts 1-3 years and is renewable. (Please note: law differs by state).

Conditional Permanent Residence – When immigrants who are spouses of U.S. citizens are married for less than two years at the time of their interview with DHS to receive permanent residency, DHS grants them

⁶⁵ See *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003) (holding any act of physical abuse constitutes domestic violence while “extreme cruelty” refers to “all other nonphysical manifestations of domestic abuse”)

⁶⁶ See 8 C.F.R. § 204.2(c)(1)(vi) for CIS regulations defining “battery and extreme cruelty”. See also Chapter 3.5 of the Breaking Barriers Manual, “Additional Remedies Under VAWA: Battered Spouse Waiver”

⁶⁷ 8 C.F.R. §214.11

⁶⁸ ICE is the agency charged with the enforcement of immigration laws.

⁶⁹ INA §101(b)(1), 8 U.S.C. §1101(b)(1) Not only are these terms of art as defined in the statute, but there is substantial case law interpretation with respect to these different categories.

⁷⁰ See also Chapter 14 of this Manual “Protection Orders for Immigrant Victims of Sexual Assault.”

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conditional permanent residency instead of full, unrestricted lawful permanent residency. This requirement was created to prevent marriage fraud. While most conditional permanent residents immigrate to the U.S. through marriage to a U.S. citizen, some immigrant investors are also given conditional permanent residence and are also subject to the two-year filing requirement.

A conditional permanent resident has all the privileges of a lawful permanent resident, but has only a temporary status for two years. A conditional permanent resident must file a petition to remove conditions two years after becoming a conditional permanent resident. This petition is filed using Form I-751. Generally the petition to remove conditions must be filed jointly with both spouses signing the form. However, if a joint petition is not possible due to divorce, domestic violence, or extreme hardship, the conditional permanent resident may file a request for a waiver of the joint-petition filing requirement.⁷¹ (See “battered spouse waiver”). Spouses of lawful permanent residents generally do not receive conditional permanent status because by the time their priority date comes up (see definition below), they usually have been married for more than two years, and thus receive full lawful permanent residency.

Continuous Physical Presence – This term refers to the requirement that an immigrant must show that they have continuously lived in the United States, without leaving the country, for a specified period of time in order to qualify for certain forms of relief. Continuous Physical Presence must be proven in order to establish eligibility for various forms of immigration relief, including adjustment of status to a lawful permanent resident based on a T visa, U visa, and cancellation of removal (including VAWA cancellation of removal).

Continued Presence – Continued Presence is a temporary form of protection provided to certain victims of a severe form of trafficking. Continued presence is technically not an immigration status, but rather refers to the government’s use of a variety of mechanisms, such as deferred action and parole, to protect a victim from removal in the short-term. Victims can not directly request Continued Presence, but rather it must be requested by federal law enforcement officials on behalf of the victim. Continued Presence allows the victim to receive work authorization as well as certification through HHS for access to public benefits and social services.

Cuban Adjustment Act of 1966 – The Cuban Adjustment Act (CAA) allows for Cubans (both natives and Cuban citizens) to file and change their immigration status to lawful permanent residents as long as they were inspected and admitted or paroled into the United States after January 1, 1959. They must have been physically present in the U.S. for at least one year, and the general requirements for lawful permanent residency must be met. Spouses and children are also eligible to receive lawful permanent residency through the Cuban Adjustment Act, regardless of their citizenship and/or place of birth provided that they are residing with their spouse or parent who is a Cuban Adjustment Act applicant in the United States. Special relief is available under VAWA for spouses and children who were battered or subject to extreme cruelty by an eligible Cuban even if he never applied for lawful permanent residency under the Cuban Adjustment Act. VAWA CAA self-petitioners are not required to show that they are currently residing with the spouse or parent in the United States.⁷² (See VAWA section at end of this chapter).

Customs and Border Patrol (CPB) – This is the division of the Department of Homeland Security that oversees borders and ports.

Deferred Action Status – Deferred Action Status is an agreement by Department of Homeland Security personnel that they will not take action to remove (deport) an individual from the United States. It is an exercise of prosecutorial discretion making the immigrant’s case a lower priority for removal. Deferred action does not however, give the immigrant victim any form of legal immigration status.⁷³ In VAWA self-petitioning cases this status is often granted along with approval of the VAWA self-petition. U visa victims receiving

⁷¹ INA § 216(c)(4), 8 U.S.C. § 1186(c)(4).

⁷² “An alien who was the spouse of any Cuban alien described in this section and has resided with such spouse shall continue to be treated as such a spouse for 2 years after the date on which the Cuban alien dies (or 2 years after the date of enactment of VAWA 2005, whichever is later), or for 2 years after the date of termination of the marriage (or 2 years after the date of enactment of VAWA of 2005, whichever is later) if there is demonstrated a connection between the termination of the marriage and the battering or extreme cruelty by the Cuban alien. VAWA 2005, §823.

⁷³ “New Classification for Victims of Criminal Activity: Eligibility for “U” Nonimmigrant Status.” New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53016 (Sept. 17, 2007).

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interim relief are also granted deferred action status. In trafficking cases deferred action is assessed as part of continued presence. Once a victim obtains their U visa, T visa or their lawful permanent residency based on their approved VAWA self-petition, they no longer need deferred action status to avoid deportation and remain legally in the United States. Deferred action status in cases of VAWA, T and U visa victims is granted by the VAWA unit at the Vermont Service Center. (See VAWA Unit).

Department of Homeland Security – Formerly the Immigration and Nationality Service, this agency administers and enforces immigration laws. United States Citizenship and Immigration Service (“USCIS”), a division of DHS, oversees adjudications of immigration benefits. Another division of DHS, called the United States Immigration and Customs Enforcement (“ICE”), handles immigration enforcement, detention, and removal. United States Customs and Border Patrol (“CBP”) is the division that oversees borders and ports.

Derivative – The “derivative” is a term describing specified family members that an applicant for immigration relief can as a matter of law ask DHS to grant legal immigration status as part of the immigrant’s application. These family members are able to obtain lawful immigration status by virtue of the immigrant applicant’s qualification for immigration relief. Each type of immigration benefit specifies in the statute which family relationships, if any, can gain legal immigration status based on the immigration application being filed. Which family members can apply varies depending on the type of immigration benefit or benefits that a victim qualifies to receive. The family relationships that often qualify for immigration benefits as “derivatives” typically include the applicant’s spouse or child. If the applicant is under 21 years old, the family members they most often could include in their applications are their parent and/or their siblings who are under 21 years of age and unmarried. VAWA self-petitioners and T and U visa applicants can help certain family members attain legal immigration status through their immigration case. When victims qualify for multiple forms of immigration benefits, which family members can apply along with the victim can be a factor in the victim’s decision about which immigration benefit to apply for.

Department of Homeland Security (DHS) – This department administers and enforces the immigration laws. There are seventeen components to the department, including Immigration and Customs Enforcement (ICE), Citizen and Immigration Services, (CIS), and Customs and Border Protection (CBP).

Deportation – This term was used prior to 1996 to describe what is now called removal. (*See “removal” explanation below*).

Documented immigrants – They reside in the U.S. pursuant to a valid visa, and either entered the U.S. with valid visas or obtained status after entry. Those entering on immigrant visas are often petitioned for by a family member or an employer. Some obtain visas to become lawful permanent residents. Other examples of documented immigrants⁷⁴ include individuals holding tourist visas, student visas, exchange visitor visas, or employment visas.

Emergency Medicaid – Emergency Medicaid is available in all cases where a person needs treatment for medical conditions with acute symptoms that could place a patient's health in serious jeopardy, result in serious impairment of bodily functions, or cause dysfunction of any bodily organ or part.⁷⁵ This definition includes all labor and delivery during childbirth. Emergency medical assistance must be provided to all immigrants regardless of their immigrant status.

⁷⁴ Immigration experts may refer to immigrants with these visas as “non-immigrants.”

⁷⁵ Social Security Act, Title XIX § 103(v)(3), 42 U.S.C. § 1396b(v)(3).

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Employment Authorization – All non-U.S. citizens and those who are not lawful permanent residents are required to receive permission from the Department of Homeland Security in order to accept employment. Some temporary forms of legal immigration statuses, such as H-1B visas, T-visas, and U-visas allow the status holder to work. Some other forms of temporary legal immigrant statuses, such as tourist visas and student visas, do not allow for employment. If an immigrant is in a status that allows for work only with a specific employer, he or she will not need anything other than the visa approval notice as evidence of employment authorization. If he or she is in a status that allows for work without restrictions, he or she generally may obtain an employment authorization card by filing a request on a Form I-765. Employment authorization documents are normally valid for one year. Employment authorization is not a “stand alone” benefit. It is only granted to a person who has demonstrated eligibility for some type of temporary or pending immigrant status. There is special employment authorization available for battered spouses of immigrants who come to the United States under specified work related visas – “A” visas (diplomats); “E(iii)” visas (Australian Investor); “G” visas (international organization); or “H” visas (temporary workers).⁷⁶

Employment Based Petitions⁷⁷ – The eligible categories based on employment, as described by USCIS,⁷⁸ are:

EB-1 Priority workers

- Foreign nationals of extraordinary ability in the sciences, arts, education, business or athletics
- Foreign national that are outstanding professors or researchers
- Foreign nationals that are managers and executives subject to international transfer to the United States

EB-2 Professionals with advanced degrees or persons with exceptional ability

- Foreign nationals of exceptional ability in the sciences, arts or business
- Foreign nationals that are advanced degree professionals
- Qualified alien physicians who will practice medicine in an area of the U.S. which is underserved. Read more about this particular program.

EB-3 Skilled or professional workers

- Foreign national professionals with bachelor’s degrees (not qualifying for a higher preference category)
- Foreign national skilled workers (minimum two years training and experience)
- Foreign national unskilled workers

EB-4 Special Immigrants

- Foreign national religious workers
- Employees and former employees of the U.S. Government abroad

From the USCIS website “Immigration Through Employment”⁷⁹”

Only a limited number of employment visas can be issued each year. Applicants may therefore have to wait several years between filing the application and the issuance of an employment based visa.

Executive Office for Immigration Review (EOIR) – A branch of the Department of Justice that includes the Board of Immigration Appeals (BIA), Office of the Chief Immigration Judge (and all the immigration judges), and the Office of the Chief Administrative Hearing Office (CAHO).

Extreme Hardship – Suffering extreme hardship is a requirement to obtain several different types of immigration relief,⁸⁰ such as cancellation of removal under VAWA. These forms of relief require proof of hardship over and above the general economic and social disruptions in an immigrant’s home country. The

⁷⁶ INA § 106, 8 U.S.C. § 1106.

⁷⁷ INA §101(a)(15)(E), 8 U.S.C. §1101(a)(15)(E) (2008).

⁷⁸ USCIS website: “Immigration through Employment” (last visited August 13, 2008).
<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=84096138f898d010VgnVC M10000048f3d6a1RCRD&vgnnextchannel=4f719c7755cb9010VgnVCM10000045f3d6a1RCRD>

⁷⁹ *Id.*

⁸⁰ E.g. hardship waiver of the two-year joint filing requirement INA §216(c)(4), 8 U.S.C. § 1186a(c)(4); See also Chapter 9 of this Manual “VAWA Cancellation of Removal”

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applicant must show that they would suffer extreme hardship if removed from the United States.⁸¹ Victimization related factors can be used as proof of extreme hardship for immigrant victims.⁸² Proof of extreme hardship is needed before an immigration judge will grant cancellation of removal under VAWA.

Family-Based Petition – A U.S. citizen or lawful permanent resident files a family-based visa petition to start the process that will enable his or her family member (spouse, child, parent, adult son or daughter, sibling) to immigrate, or lawfully remain, in the United States and become a lawful permanent resident. Family and employment based immigration applications have long processing times. When an application is filed for an immigrant visa the applicants are assigned a priority date for the immigration case (usually the date they filed). They must wait for their priority date to become current before they can apply for lawful permanent residency.

Fiancé(e)s of U.S. Citizen (K-1 visa) – An immigrant granted a fiancé visa (K-1 visa) is allowed to come to the United States to conclude a valid marriage with a U.S. citizen within 90 days after entry.⁸³

Food Stamps – The Food Stamps program provides vouchers to low-income individuals so that they can use the benefits to buy food. Food Stamps eligibility for most non-citizens was eliminated by PRWORA as of August 22, 1996. Battered immigrants who entered after August 22, 1996 must be in “qualified immigrant” status for five years in order to receive food stamps. All “qualified immigrant” children under 18 are immediately eligible for food stamps regardless of date of entry. It is important to note that for immigrant victim self-petitioners this means that undocumented children included in their mother’s self-petition are eligible to receive food stamps once their mother’s VAWA self-petition has received a prima facie determination.

Freedom of Information Act – The U.S. Freedom of Information Act (FOIA) is a law ensuring public access to U.S. government records. FOIA carries a presumption of disclosure. If the government refuses to disclose information, it has the burden of explaining why that information may not be released. Upon written request, agencies of the United States government are required to disclose those records, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in the FOIA. This right of access is ultimately enforceable in federal court. As part of a protection order, a family court case, or a bond order, courts can order an abuser who has filed immigration papers for his spouse, child, or parent to complete a FOIA request that releases information in the immigration case that was filed on the victim’s behalf by the abuser to the victim, her representative or lawyer.

Good Moral Character (GMC) – For many immigration remedies, it is necessary to show that a person has “good moral character” and has not committed certain crimes or engaged in other activities such as prostitution or illegal gambling. Good moral character is not precisely defined in the immigration laws, but Section 101(f) of the Immigration and Nationality Act lists certain acts that preclude someone from establishing good moral character.

Green Card (Lawful Permanent Resident Card) – Popular term for the I-551, the card that shows a person is a lawful permanent resident. Lawful permanent residency cards may be permanent “10-years”. Although these cards on their face state that they end in 10 years, lawful permanent residency does not end at that time.

⁸¹ See Chapter 9 of this Manual “VAWA Cancellation of Removal” for more information including the factors that can prove extreme hardship non-VAWA immigration cases.

⁸² The following list of abuse related factors is provided in the VAWA cancellation regulations. 8 C.F.R. §§ 1240.20(c) and 1240.58(c): The nature and extent of the physical and psychological consequences of abuse ; the impact of the loss of access to the U.S. courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation); The applicant's or applicant's child's need for social, medical, mental health, or other supportive services, which would not be available or reasonably accessible in the foreign country; The existence of laws and social practices in the home country that would penalize the applicant or applicant's child for having been victims of domestic violence or have taken steps to leave an abusive household; The abuser's ability to travel to the home country, and the ability and willingness of authorities in the home country to protect the applicant and/or the applicant's child from future abuse; The likelihood that the abuser's family, friends, or others acting on the abuser's behalf in the home country would physically or psychologically harm the applicant or the applicant's children. Other factors can also contribute to Extreme Hardship (See Cancellation of Removal Chapter) See also INS Memorandum from Paul Virtue, INS General Counsel, *Extreme Hardship and Documentary Requirements Involving Battered Spouses and Children* (October 16, 1998).

⁸³ INA §101(a)(15)(K)(i), 8 U.S.C. § 1101(a)(15)(K)(i); 8 CFR §214.2(k).

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The immigrant with lawful permanent residency needs only to file to receive a new card once every 10 years. The application for a new card needs to be filed before the old card expires. Some immigrant victims seeking help will have a lawful permanent residency card with an end date two years after the card was issued. These immigrant victims have “conditional permanent residency”, and may qualify for a “battered spouse waiver” and will not need to file a “VAWA self-petition.” See “adjustment of status,” “conditional permanent residency,” “Self-petition,” and “battered spouse waiver.”

Haitian Refugee Immigration Fairness Act of 1998 (HRIFA) – HRIFA provides that Haitians (natives, citizens, and nationals) who were continuously physically present in the United States since before December 1, 1995, can adjust their status to become lawful permanent residents as long as their applications were filed before April 1, 2000 and the general requirements for lawful permanent residency are met. Spouses, children under 21 years, and unmarried sons and daughters of an eligible immigrant can also receive lawful permanent residency under HRIFA if they are Haitian and in the United States on the date the application is filed. HRIFA allows applicants to prove continuous presence even when they were absent from the United States for a time period of up to 180 days. (See “continuous presence”). Special relief is available under VAWA for spouses and children who were battered or subject to extreme cruelty by an eligible Haitian even if the abusive Haitian spouse or parent never applied for lawful permanent residency under HRIFA. (See VAWA section at end of this chapter).

The Hague Convention on the Civil Aspects of International Child Abduction Convention⁸⁴ - the “Hague Convention” is a treaty that was created to assist in the prevention of *international* child abduction and the return of abducted children. Currently, at least 54 member countries have signed the Convention.⁸⁵ The treaty only applies between countries when both countries are parties to the Convention. If a country has not formally joined the Hague convention, the treaty does not apply, and a parent must use alternate methods to have the child returned. Parents, rather than governments, must institute legal proceedings on their own to seek the safe return of their children. To invoke the convention, a child must be “wrongfully removed or retained” from his or her “habitual residence”, the abduction must be reported within one year of the abduction, and the child must be below the age of sixteen. The parent must then file an application seeking the return of the child with authorities of the foreign country and seek legal representation in the country where the child has been abducted to pursue legal action through that country’s legal system.

Immediate Relative – For the purposes of a family-based visa petition and a self-petition under VAWA, this term means the children under 21 years, spouse and parent of a U.S. citizen, or the parents of an adult U.S. citizen (21 years and over). Because of their close relationship to U.S. citizens, they are allowed to immediately file for lawful permanent residence once they have an approved immigrant visa, and are exempt from the numerical limitations (that cause waiting lists) imposed on immigration to the United States.

Immigration and Customs Enforcement (ICE) – This is the largest investigative arm of the Department of Homeland Security. Its officers are involved with immigration enforcement, detention, and removal within the interior of the nation. Composed of functions of the former Customs Service, Federal Protective Service, and the investigative and enforcement functions of the former INS (other than those border functions assumed by CUSTOMS AND BORDER PROTECTION (CBP), ICE is a subdivision of the Directorate of BORDER AND TRANSPORTATION SECURITY, the other two being CBP and the Transportation Security Administration. Additionally, trial attorneys who represent DHS in removal proceedings before immigration judges are ICE employees.

⁸⁴ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S.

⁸⁹

⁸⁵ For an up-to-date list, see http://travel.state.gov/family/abduction/hague_issues_1487.html. . Member States include: Argentina, Australia, Austria, Bahamas, Belgium, Belize, Bosnia & Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, China (Hong Kong and Macau only), Columbia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Mauritius, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, Romania, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom (Bermuda, Cayman Islands), United States, Uruguay, Venezuela, and Zimbabwe.

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Immigrant Visa –An individual born outside of the United States, who is eligible, may apply for an immigrant visa, allowing him or her to legally enter the U.S. and remain here indefinitely as a permanent resident. (See “non-immigrant visa” for legal immigration status to remain temporarily).

Immigration and Nationality Act (INA) – The primary federal statute that governs the process of immigration and the treatment of immigrants in the United States.

Immigration Judge (IJ) – The person responsible for presiding over immigration court proceedings.⁸⁶ Immigration judges are employed by the Executive Office for Immigration Review (EOIR); a division of the Department of Justice.

Inadmissibility (INA section 212(a)); Grounds of – An individual who seeks admission into the United States or to receive lawful permanent residency must meet certain eligibility requirements to receive a visa and eventually be legally *admitted* into the United States. Grounds for *inadmissibility* include health related grounds, criminal and related grounds, security and related grounds, likelihood of becoming a public charge, not meeting labor certification and qualifications, and illegally entering the country. The Attorney General, through an immigration judge, will make a ruling when admissibility/inadmissibility is a factor in a case that is in immigration court. An immigration officer deciding cases (e.g. visa applications, VAWA self-petitions) for the Department of Homeland Security will make inadmissibility determinations on cases they are adjudicating.

Inspection – The process that all persons must go through when they arrive at the U.S. border, at airports, at seaports and at pre-flight inspection stations. A person is questioned and asked to present proof of his or her right to enter the country. At the end of the process of inspection, a person is either ADMITTED, REMOVED, PAROLED into the country, or allowed to withdraw their application for admission and depart voluntarily.

Lawful Permanent Residency (LPR) – A lawful permanent resident is a foreign-born individual who has the right under U.S. immigration law, to live and work permanently in the United States. Lawful permanent residents can still be put in removal proceedings and deported, particularly if they are convicted of crimes. Naturalization protects against deportation and therefore victims should be encouraged to naturalize as soon as eligible. An individual who has a green card is either a lawful permanent resident or a conditional permanent resident. See “adjustment of status.”

Legacy INS – A reference to the Immigration and Naturalization Service (e.g., “a legacy INS memo”) that acknowledges its status as the predecessor to the DEPARTMENT OF HOMELAND SECURITY.⁸⁷

Medicaid and State Child Health Insurance Program (SCHIP)⁸⁸ – The Medicaid program provides health insurance to low-income individuals. The State Child Health Insurance Program (SCHIP) provides health care to low-income children. Under PRWORA, most individuals who entered the United States after August 22, 1996, are barred from receiving all non-emergency Medicaid for the first five years after they become qualified immigrants.⁸⁹

⁸⁶ INA §101(b)(4), , 8 U.S.C. § 1101(b)(4); INA § 240, 8 U.S.C. §1229a.

⁸⁷ New Jargon Alert: “Legacy INS” posted on AILA Info-Net. Doc. No. 03060442 (June 4, 2003).

⁸⁸ See 8 U.S.C. § 1641 (2004) for the definition of Qualified Alien, Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, A.G. Order No. 2353-2001. 66 Fed. Reg. 3,613 (Jan. 16, 2001) (specifying emergency Medicaid Eligibility)

⁸⁹ Whether an immigrant victim of sexual assault or domestic violence will qualify for Medicaid covered health care services will depend on the victim’s immigration status, when they attained any legal immigration status, their state of residence and date of first entry into the United States. Persons who attained “qualified alien” including legal permanent resident status before August 22, 1996 will have the most access to Medicaid funded health care services. VAWA self-petitioners are an example of persons who may qualify but may have to wait 5 years if they entered the U.S. after 1996. Some states have chosen to offer access to funded health care to “qualified immigrants” who otherwise would have to wait 5 years. Other states offer funded health care to persons “permanently residing in the United States under color of law” which would include immigrant victims of sexual assault who have received interim relief in U visa cases. For further information and state-by-state charts on health care options for immigrant victims, see chapter 17 of this manual “Access to Health Care for Immigrant Victims of Sexual Assault”. For state-by state chart on access to a range of public benefits see NATIONAL IMMIGRATION LAW CENTER, *Temporary Assistance for Needy Families: Welfare Reform and Immigrants*, in IMMIGRATION & WELFARE RESOURCE MANUAL: 1998 EDITION, Tab 3E-1 (1998).

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NACARA (Nicaraguan Adjustment and Central American Relief Act) of 1997⁹⁰

VAWA NACARA 202 creates self-petitioning for Nicaraguan or Cuban battered spouses and children who have been subjected to extreme cruelty by Nicaraguan or Cuban abusers who are unable to adjust their status to lawful permanent residency due to their abuser's failure to file for lawful permanent residency for himself. The battered spouse or child must have been physically present in the United States on the date the application is filed (which must have been before July 5, 2007).

VAWA NACARA 203 self-petitioning offers protection from deportation and access to lawful permanent residence for abused immigrants who were the spouses and children of El Salvadoran, Guatemalan and Eastern European abusers at the time the abusive spouse or parent filed for or received suspension of deportation, cancellation of removal, asylum, or temporary protected status under NACARA 203. VAWA NACARA 203 also allows battered spouses, children, and children of the battered spouse temporary protection from removal even if the spouse is no longer married to the abuser, as long as they were married at the time that the immigrant or the spouse or child filed an application to suspend or cancel the removal.

Naturalization – This is the process by which foreign-born persons, including lawful permanent residents, obtain citizenship. Requirements include a period of continuous residence in the U.S. and physical presence in the United States, an ability to read, write, and speak English, and good moral character. Some requirements can be waived depending on the circumstances. Immigrants married to U.S. citizens can apply for Naturalization after 3 years in lawful permanent residency. Other immigrants have to wait 5 years to file for naturalization. Immigrant victims who attain lawful permanent residency through VAWA can file to naturalize after 3 years (3 years only applies to petitioners who had USC abusers and LPR abusers).

Non-immigrant Visas – “Non-immigrant” visas are issued to persons granted permission to remain temporarily (not permanently) in the United States. If an immigrant is granted permission to live permanently in the United States they will receive an “immigrant” visa. (See “immigrant visa.”) Many different classes of non-immigrant visas are available to individuals intending to enter the United States temporarily. (See *examples and explanations below under “visa”*).

Notice to Appear (NTA) – A document issued by the Department of Homeland Security to commence immigration removal proceedings against an immigrant in immigration court.⁹¹ The Notice to Appear⁹² is usually issued by an immigration enforcement official and served on the immigrant who DHS believes is not legally present in the United States. If an immigrant victim has been arrested or detained by immigration officials, the NTA will often be issued and served on the immigrant before the immigrant victim is released from DHS custody. Once the NTA has been issued it has to be filed with the immigration court for removal proceedings to be opened against an immigrant.⁹³

ORR – Department of Health and Human Services Office of Refugee Resettlement (ORR). The Office of Refugee Resettlement oversees refugee resettlement assistance programs and programs for victims of trafficking. This assistance includes, among other things, cash and medical assistance, employment preparation and job placement, skills training, English language training, legal services, social adjustment and aid for victims of torture.⁹⁴

Parental Kidnapping Prevention Act (PKPA)⁹⁵ – The Parental Kidnapping Protection Act (PKPA) was designed to discourage interstate conflicts, deter interstate abductions, and promote cooperation between states about interstate custody matters. As part of the Violence Against Women Act of 2000, the PKPA's definition of “emergency jurisdiction” was broadened to cover domestic violence cases consistent with the UCCJEA,

⁹⁰ See Appendix B.

⁹¹ INA §239, 8 U.S.C. § 1229.

⁹² The Notice to Appear replaced the Order to Show Cause previously used to initiate deportation cases.

⁹³ Notices to Appear that have been issued in violation of VAWA confidentiality statutory protections can be cancelled. See Chapter 3 of this Manual “VAWA Confidentiality: History, Purpose and Violations VAWA Confidentiality Protections “

⁹⁴ For more information, please see <http://www.acf.hhs.gov/programs/orr/mission/functional.htm>.

⁹⁵ See 28 U.S.C. § 1738A (2000).

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which is the Uniform Child Custody Jurisdiction and Enforcement Act⁹⁶ (see explanation below under this term). The PKPA tells courts when to honor and enforce custody determinations issued by courts in other states or Native American tribal jurisdictions. Unlike the UCCJEA, the PKPA does not instruct courts as to when they should exercise jurisdiction over a new custody matter. Instead, the court must follow the PKPA when 1) they are deciding whether to enforce a custody determination made by a court in another state or tribe; 2) they are deciding whether to exercise jurisdiction even though there is a custody proceeding already pending in another jurisdiction, and 3) they are asked to modify an existing custody or visitation order from another jurisdiction.

Parole – Parole is permission by the Department of Homeland Security that allows an immigrant to physically enter the United States temporarily for urgent humanitarian reasons or for significant public benefit. The entry is not a formal admission to the United States.⁹⁷ VAWA victims applying from abroad can receive parole into the United States once their application has been approved. This provision can also be used to help bring their children or other family members who qualify for VAWA relief into the country.

Permanent Resident – See “Lawful Permanent Resident.”

Prima Facie Determination – Battered immigrants filing VAWA self-petitions who can establish a "prima facie" case are considered "qualified aliens" for the purpose of eligibility for public benefits. The VAWA Unit of the Vermont Service Center at the Department of Homeland Security reviews each petition initially to determine whether the self-petitioner has addressed each of the requirements necessary to receive a self-petition. If DHS officials believe she has set forth a valid case they issued an order that is called a prima facie determination. If DHS makes a prima facie determination, the self-petitioner will receive a Notice of Prima Facie Determination. The notice provides evidence of immigration status that may be presented to state and federal agencies that provide public benefits.

Priority Date – The date that the application for an immigrant visa is filed becomes the priority date to establish an immigrant’s place in line to wait for a visa and to determine when the person can apply for lawful permanent residency. This means the date on which a person submitted documentation establishing prima facie eligibility for an immigrant visa. For family-based immigrants, a person’s priority date is the date on which he or she filed the family-based visa petition.⁹⁸ If the immigrant relative has a priority date on or before the date listed in the Visa Bulletin, then he or she is currently eligible for an immigrant visa. For employment-based cases, it is the date of the filing of the LABOR CERTIFICATION application, or if no labor certification is required, the date the immigrant visa petition is filed.⁹⁹ In VAWA self-petitioning cases immigrant victims can use as their priority date the date that their abusive citizen or lawful permanent resident spouse or parent filed any prior family based visa petition for them, whether or not that case was ever decided and whether or not that case was withdrawn by the abuser. This allows the immigrant victim to resume the place in line they would have had if their abuser had not withdrawn or had followed through on the original family-based visa petition.

PRUCOL¹⁰⁰ – PRUCOL stands for "permanently residing in the United States under color of law." PRUCOL is a term that generally describes immigrants whom the Department of Homeland Security (DHS) knows are in

⁹⁶ The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is newer legislation enacted in many states to update the prior Uniform Child Custody Jurisdiction Act. As of June 2007, the UCCJEA has been enacted in 46 states, the District of Columbia, and U.S. Virgin Islands. As of June 2007, four states have not yet adopted the UCCJEA: Massachusetts, Missouri, New Hampshire and Vermont. Uniform Family Law Update, June 2007, <http://nccusl.org/Update/Docs/JEBUFL/Jun%2007%20JEB%20Newsletter.pdf>. These states instead continue to use their prior version of the Uniform Child Custody Jurisdiction Act.

⁹⁷ INA §212(d)(5)(A); 8 USC §1182(d)(5)(A); 8 C.F.R. § 212.5.; New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53016 (Sept. 17, 2007).

⁹⁸ 8 C.F.R. §204.1(c).

⁹⁹ 8 C.F.R. §204.5(d).

¹⁰⁰ “Permanently Residing Under Color Of Law”-Prior to the passage of the Personality Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.) those who were permanently residing in the United States under color of law (PRUCOL’s) were eligible to receive federal public benefits. This group consisted of immigrants whom CIS was aware of their presence in the United States. The PRWORA cut off access to federal public benefits for this group of immigrants, but several states have passed laws providing access to state-funded Temporary Assistance for Needy Families (TANF) for PRUCOL’s. See NATIONAL

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the United States, but whom the DHS is not taking steps to deport or remove from the country. Some states extend access to health care and some other public benefits to PRUCOL immigrants.¹⁰¹

PRWORA and IIRAIRA – The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA or Welfare Reform Act)¹⁰² and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA)¹⁰³ substantially altered most immigrants’ eligibility to receive many public benefits. These laws eliminated eligibility for most immigrants for Supplemental Security Income (SSI)¹⁰⁴ and Federal Food Stamps, limited access to certain other federal programs (including Medicaid funded health care), and gave states the discretion to determine whether immigrants can qualify for state and local public benefits programs.

Public Charge – This term describes immigrants who at the time of admission are likely to become primarily dependent on the U.S. government for financial support because of their health, education, assets, or family status.¹⁰⁵ If an immigrant is deemed likely to become a public charge they are thereby inadmissible.¹⁰⁶ Immigration officials and immigration judges are barred from considering any public benefits received by immigrant victims who attained immigration relief through VAWA or victims eligible for immigration benefits related to their having been victims of family violence in making public charge determinations.¹⁰⁷ Likewise, DHS does not consider public benefits received by trafficking victims when making public charge determinations.

Qualified Immigrant – Category created by PRWORA solely to assess eligibility for public benefits purposes. Inclusion in this category is determined by immigration status. Qualified immigrants have more access to federal public benefits than many other immigrants, but less access than citizens. Which federal or state funded public benefits they are eligible to receive depends on their: immigration status, state, date of first entry into the United States, and the specific benefit they are seeking. The most difficult benefits to access are federal means tested public benefits that not all qualified immigrants can access – Temporary Aid to Needy Families, Medicaid, State Child Health Insurance Program (SCHIP), Food Stamps and Supplemental Security Income (SSI). Under the statute qualified immigrants are called “qualified aliens.”

Refugee – An individual who is unable or unwilling to return to her country because of past persecution or a well-founded fear of future persecution on account of her race/ethnicity, religion, nationality, membership in a particular social group, or political opinion. An individual who is outside the U.S. and meets this definition can be admitted to the United States as a refugee. An individual already in the United States must apply for and be granted asylum to receive protection as a refugee. (*See “asylum” above*).

Removal – Removal, also known as deportation, is the process through which a non-citizen who is determined to be unlawfully in the U.S. is ordered to leave the United States and is returned to his or her country of origin by U.S. immigration officials. In some cases the person is removed to a third country that agrees to accept them.

Removal Proceedings – Formerly known as deportation proceedings, this is the process by which immigrants are required to appear before an immigration judge. The immigrant has an opportunity to request relief if eligible. The proceedings may result in an immigrant obtaining status or being ordered removed (deported). The judge can make other procedural orders as well.

IMMIGRATION LAW CENTER, *States Providing Benefits to Immigrants Under 1996 Welfare & Immigration Laws -- State Responses*, in IMMIGRATION & WELFARE RESOURCE MANUAL: 1998 EDITION, Tab 2-1, 14 (1998).

¹⁰¹ See chapter 17 of this manual “Access to Health Care for Immigrant Victims of Sexual Assault”.

¹⁰² PRWORA see supra note 95.

¹⁰³ Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 8 U.S.C. § 1101 et seq.)

¹⁰⁴ SSI is a cash benefit program for low-income disabled, blind and elderly individuals.

¹⁰⁵ INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(4)(B). See also 64 Fed. Reg. 28689-01 (May 26, 1999).

¹⁰⁶ INA § 212(a)(4)(B), 8 U.S.C. § 1182(a)(15)(F). See also 64 Fed. Reg. 28689-01 (May 26, 1999).

¹⁰⁷ INA § 212 (p); See also field Guidance on Deportability and Inadmissibility on Public Charge Grounds, INS, 64 Fed. Reg. 28,689 (May 26, 1999).

Second Preference – This refers to the immigrant visa category for family-based petitions of spouses, children, and unmarried sons or daughters of lawful permanent residents.

Section 245(i) – Congress first enacted INA §245(i) in 1994 to allow non-citizens who were present in the United States without lawful immigration status and who were otherwise eligible for permanent residence (through a family or employment-based petition) to apply to adjust their status to that of a lawful permanent resident without requiring them to physically leave the United States.¹⁰⁸ The section imposed a penalty fee (up to \$1,000) in addition to the normal fees for processing the applications from. The provision initially expired in January 1998, but was extended in 2000 and expired again on April 30, 2001. Upon expiration of this provision, most non-citizens who are out of legal immigration status are ineligible to adjust status and must leave the country, unless their immigrant visa petition or application for labor certification was filed prior to April 30, 2001. VAWA self-petitioners, however are eligible to adjust status to that of a lawful permanent resident even if they are undocumented.

Self-Petition – Under the Violence Against Women Act, certain abused spouses, children, or parents or parents of abused children can file their own petitions to obtain lawful permanent resident status confidentially and without the cooperation of an abusive spouse, parent, or son or daughter if the abuser is a U.S. citizen or lawful permanent resident. Victims of elder abuse, battered spouse waiver applicants, VAWA Cuban adjustment applicants, VAWA HRIFA (Haitian), VAWA NACARA (Nicaraguans, Cubans, Salvadorans, Guatemalans, Former Soviet Union nationals) are included in the category of VAWA self-petitioners. Children of the self-petitioner can also obtain legal immigration status by being included in their parent’s self-petition. Undocumented immigrant children included in their parent’s self-petition are called “derivatives” because they derive a benefit from their parent’s application for legal immigration status. (See *VAWA Immigration Relief* at end of chapter).

SSI – Supplemental Security Income (SSI) is a program that provides cash assistance to low-income individuals who are aged, blind, or disabled. After the enactment of PRWORA, an otherwise eligible person could be denied SSI cash assistance solely on the basis of his/her immigration status. The only battered immigrants who are currently eligible to receive SSI are those who were lawful permanent residents and were receiving SSI on August 22, 1996, or those who fit into one of the other categories of eligible immigrants.

State Child Health Insurance Program – See Medicaid

State Parental Kidnapping Statutes – Parental kidnapping statutes are generally designed to ensure parents equal access to their children by criminally sanctioning a parent who hides the child from the other parent. Currently almost every state makes custodial interference by parents or relatives of the child a crime. While these statutes may share similarities in name, purpose, and structure, statutory provisions concerning the definition of lawful custodian, the availability of statutory exceptions or defenses, and the severity of the criminal penalties vary greatly between states. In counseling, a survivor who has already left or wishes to leave that state with her children should carefully consult the state statutes in the client’s home state and the state to which the client is considering moving to best inform the client of the potential legal ramifications of her decision to flee. For immigrant victims it is particularly important to avoid any criminal convictions that can complicate a victim’s ability to attain VAWA or U visa related immigration relief.¹⁰⁹

Stay of Deportation/Stay of Removal – A stay of removal is an administrative decision by the government to stop temporarily the deportation or removal of an immigrant who has been ordered removed or deported from the United States.¹¹⁰ Victims who were granted U-visa interim relief were granted stays of removal.¹¹¹

¹⁰⁸Under immigration law, leaving and returning to the United States whether required as part of a visa application or not, often has harsh consequences. Leaving the United States after having been unlawfully in the United States can trigger application of multi-year bars to reentry (e.g. 3, 10 or more years). Immigrants who remain in the United States and have not left or are not required to leave can attain lawful permanent residency without risking separation from children and family members in the United States. For this reason, it is important to advise victims for VAWA immigration benefits against international travel.

¹⁰⁹ See Chapter 6.6 of Breaking Barriers “Appendix” for further information and the state criminal parental kidnapping statutes charts.

¹¹⁰ See 8 §CFR 241.6, 1241.6.

¹¹¹ “New Classification for Victims of Criminal Activity: Eligibility for “U” Nonimmigrant Status.” New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53016 (Sept. 17, 2007).

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Suspension of Deportation – Suspension of deportation is terminology that was used prior to 1996, to refer to what is now called “cancellation of removal” (see above). Some immigrant victims will have old deportation orders, in cases initiated prior to 1992 and will need to file motions to reopen those immigration cases. For this reason post 1996 VAWA related immigration laws continue to refer to, cite to, and make amendments to VAWA suspension of deportation. Citations to Immigration and Naturalization Act Section 244 (a)(3) (“as in effect on March 31, 1997” or “as in effect before the Title III-A effective date of section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996”) are references in statute to VAWA suspension of deportation and NOT “temporary protected status.”¹¹²

TANF – Temporary Assistance for Needy Families (TANF) provides cash payments, vouchers, social services, and other types of assistance to families in need. PRWORA gives states the option to grant TANF to immigrant families. Most states have decided to provide assistance to qualified immigrants who were in the United States before August 22, 1996, and many are also providing access to TANF for those who entered after August 22, 1996, following the expiration of the five-year bar.¹¹³ Other states have decided to offer state-funded TANF to certain categories of immigrants or battered immigrants who would otherwise have no access to benefits, regardless of immigration status. (See “PRUCOL”)

Undocumented – Undocumented immigrants are individuals that do not have lawful immigration status granting them permission to reside in the United States. Some are individuals who entered the United States without being inspected by immigration authorities (i.e. illegally crossed the border). Others entered the U.S. on valid immigration visas but they stayed beyond their period of authorized stay. Some forms of temporary legal immigration status (See “non-immigrant visas.”) also place restrictions on the holder’s activities while in the United States, such as barring them from working in the U.S. or requiring them to attend a particular school or maintain employment with a particular employer. Individuals who fail to comply with the terms of their visa (i.e. working when they are not allowed or failing to attend school when they are required) become undocumented.

Unlawful Entrants – Individuals who entered the U.S. without admission are unlawful entrants and may be inadmissible. Depending on their date of entry and the relief they apply for, applicants, such as victims of domestic violence, may qualify for an exception to this inadmissibility criteria for unlawful entry.¹¹⁴

U.S. Citizen (USC) – An individual may become a U.S. citizen through several means. An individual born in the United States or in certain U.S. territories such as Guam, U.S. Virgin Islands, and Puerto Rico is automatically a citizen at birth. Additionally, an individual born abroad may acquire or derive U.S. citizenship through a U.S. citizen parent or parents. Many lawful permanent residents apply through the naturalization process to become a U.S. citizen. Finally, certain people serving in active-duty status for the U.S. military may qualify for expedited U.S. citizenship.

United States Citizenship and Immigration Services (CIS) –The division of the Department of Homeland Security (DHS) responsible for adjudicating immigration benefits. CIS adjudicates a range of applications filed for immigrants seeking legal immigration status including: visas, asylum, and naturalization applications. Cases of immigrant victims filing VAWA self-petitions, U and T visa applications, battered spouse waivers and battered spouse work authorizations are all adjudicated by CIS.

Uniform Child Custody Jurisdiction Act (UCCJA)¹¹⁵ – Original state laws governing jurisdictional determinations in interstate custody cases. The UCCJA, or its successor statute the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), discussed next, must be considered anytime a victim is considering moving across state lines with her children.

¹¹² Many codifications of the Immigration and Nationality Act are incorrect with regard to this section.

¹¹³ NATIONAL IMMIGRATION LAW CENTER, *Temporary Assistance for Needy Families: Welfare Reform and Immigrants*, in IMMIGRATION & WELFARE RESOURCE MANUAL: 1998 EDITION, Tab 3E-1 (1998).

¹¹⁴ INA § 212(a)(6)(A); 8 U.S.C. § 1182(a)(6)(A).

¹¹⁵ Drafted by the National Conference of Commissioners on Uniform State Laws, and by it approved and recommended for enactment in all the states at its conference meeting July 22-Aug. 1, 1968; see also 28 U.S.C. § 1738A(c).

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The UCCJA was created to promote common practices among the states with regard to jurisdiction over, and enforcement of child custody determinations. The goal was to foster a uniform approach that would result in fewer conflicting court rulings regarding the same children; minimizing or preventing parental kidnapping, jurisdictional conflicts, and re-litigation of custody decisions issued by courts in other states. The UCCJA's primary purpose is to help determine which court has appropriate jurisdiction over a custody matter by using the four following bases as a guide: home state, significant connection, emergency, and more appropriate forum. The UCCJA was not as effective in achieving these goals as expected and it contained few protections for battered women. As a result many jurisdictions began to replace the UCCJA with improved UCCJEA protections. The versions of the UCCJA or UCCJEA adopted in each state can vary slightly from the model code, but all state family laws include either a UCCJA or UCCJEA.

Uniform Child Custody Uniform and Enforcement Act (UCCJEA)¹¹⁶ This is the successor statute to the UCCJA and is designed to be more helpful in preventing abductions of children. Like the UCCJA, the UCCJEA also utilizes the four jurisdictional bases of home state, significant connection, emergency, and more appropriate forum. However, unlike the UCCJA, the UCCJEA prioritizes home state jurisdiction. It also expands the basis for emergency jurisdiction to more fully include and protect a battered parent's decision to escape from her abuser with her children. While a temporary emergency jurisdiction order that a battered woman receives is still subject to the actual "home" state's issuance of a final custody order, the factors a "home" state must consider in declining jurisdiction offer greater protection for survivors of domestic violence. For example, a court may consider whether domestic violence had occurred, and is likely to continue, and which state could best protect the parties and the child.

Violence Against Women Act (VAWA) – In 1994, Congress enacted the Violence Against Women Act. This was the first piece of federal legislation that articulated the role of the federal government in stopping violence against women. VAWA brought about far-reaching reforms in the criminal and civil justice system's approach to domestic violence, sexual assault, stalking, dating violence and trafficking. VAWA's dual goals were to enhance protection and help for victims and to hold perpetrators accountable for their crimes. VAWA provides grants to governmental and non-governmental programs helping victims, creates federal crimes, enforces state issued protection orders, provides immigration relief and offers confidentiality and privacy protections to victims. VAWA was designed to offer protection to all victims of violence against women, explicitly including underserved victims (e.g. immigrants, women of color, disabled, rural victims). To further this goal and remove control over immigration status and threats of deportation as tools that could be used by abusers, traffickers and crime perpetrators to avoid or undermine criminal investigations and prosecutions, VAWA 1994, 2000 and 2005 each contained immigration relief.

VAWA Unit of the Vermont Service Center – The Citizenship and Immigration Services (CIS) Vermont Service Center, houses the specially trained unit at the Department of Homeland Security that is responsible for adjudicating VAWA cases filed by immigrant victims of violence against women. The VAWA Unit adjudicates a wide range of violence against women related applications including: VAWA self-petitions, T-visas, U-visas, adjustments (lawful permanent residency applications), and employment authorizations related to VAWA cases (VAWA Cuban, VAWA NACARA, VAWA HRIFA petitions, battered spouse waivers, parole of VAWA petitioners and their children, children of victims who have received VAWA cancellation). Spouses who have been battered or subjected to extreme cruelty perpetrated by their non-immigrant A visa holder, E iii visa holder, or G visa holder, or H visa holder spouse, and children of the battered spouses can also receive employment authorization from the VAWA Unit.¹¹⁷

VAWA Confidentiality – VAWA created this provision to prevent batterers and crime perpetrators from accessing VAWA self-petitioners' information through DHS. Under VAWA confidentiality, immigration enforcement agents are also prohibited from using information from an abuser to act against an immigrant victim. Additionally, VAWA confidentiality bars enforcement actions at protected locations including

¹¹⁶ Uniform Child-Custody Jurisdiction and Enforcement Act (1997), 9(1A) U.L.A. 657 (1999); See also 28 U.S.C. § 1738A(c)(2)(C).

¹¹⁷ INA § 106(a); 8 U.S.C. § 1105(a)

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shelters, victim services programs, rape crisis centers, courthouses, family justice centers, supervised visitation centers and community based organizations.¹¹⁸

Visa – The term visa has two meanings. A person who has attained legal immigration status in the United States is colloquially called a “visa” holder. A “visa” is also an official document issued by the U.S. Department of State at an embassy or consulate abroad. A visa grants an individual permission to request entry into the United States at a port of entry. If permission is granted, the applicant is admitted into the United States in a particular status, such as a U-visa. Visas may be *immigrant* visas that allow the individual who qualifies to live and work permanently in the United States – lawful permanent residency. An individual having a residence in a foreign country that he or she has no intention of abandoning, who wishes to enter the United States temporarily, will be issued a temporary visa referred to in immigration law as a *non-immigrant* visa. Nonimmigrant visas include, but are not limited to:

A Visa –This temporary visa is issued to diplomats, ambassadors, public ministers, employees or consular officers who have been accredited by a foreign government that is recognized by the United States and accepted by the President or the secretary of state. The A-visa includes the immigrant’s immediate family. The immigrant’s personal employees, such as nannies, also receive an A-visa.¹¹⁹

B Visa – This temporary visa is issued to tourists (business or pleasure). Tourists are generally admitted to the U.S. for no longer than six months.¹²⁰

F Visa –This temporary visa is available to bona fide students who are coming to the United States temporarily and who are pursuing a full course of study at an established college, university, or other academic institution. The spouse and minor children of the student also receive F-visas.¹²¹

G Visa – The G visa is available to representatives and employees of international organizations. The visa is also available to members of the individuals’ immediate family, personal employees of the individual, and the immediate families (e.g. spouses and children) of the personal employees.¹²²

H Visa – This is the temporary visa available to individuals who come to the United States temporarily to perform services or labor. This also includes a range of workers from technology industry workers to fashion models. The spouse and minor children of the immigrant also receive a specific type of H-Visa.¹²³

J Visa – This temporary visa is issued to exchange visitors and foreign physicians. J visa holders can include scholars, teachers, professors, leaders in a field, among others, coming to the United States temporarily. Some J visa holders are subject to a two-year foreign residency requirement. They are required to leave the United States for two years and are barred from seeking H-Visa status or lawful permanent residency before complying with this requirement. The visa holder’s spouse and minor children can also receive J-Visas.¹²⁴

T Visa – This visa is available to individuals who are victims of severe forms of trafficking in persons and who are willing to assist in the investigation and prosecution of their traffickers. Severe forms of trafficking include sex trafficking and transporting, harboring, or obtaining a person for labor by force, fraud, or coercion. A T-visa applicant under 21 years of age can apply for T-visas for their spouse, children, parents, and unmarried siblings under 18. T Visa applicants 21 years of age or older can apply

¹¹⁸ For a full discussion of VAWA confidentiality protections See Chapter 3 of this Manual “VAWA Confidentiality: History, Purpose and Violations VAWA Confidentiality Protections “.

¹¹⁹ INA § 101(a)(15)(A), 8 U.S.C. § 1101(a)(15)(A).

¹²⁰ INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B)

¹²¹ INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F).

¹²² INA § 101(a)(15)(G), 8 U.S.C. § 1101(a)(15)(G).

¹²³ INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H).

¹²⁴ INA § 101(a)(15)(J), 8 U.S.C. § 1101(a)(15)(J).

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for T-visas for their spouse and children.¹²⁵ The T Visa lasts for four years. After three years, T visa recipients can apply for lawful permanent residency. If the Attorney General certifies that the investigation has concluded, T visa recipients can apply for lawful permanent residency sooner than three years.

U Visa – This visa is available to individuals who are victims of substantial physical or mental harm as a result of having been a victim of criminal activity. In order to receive a U visa, victims must provide a certification from a federal, state, or local law enforcement official, prosecutor, or judge establishing that the victim has been helpful, is being helpful or is likely to be helpful in the investigation or prosecution of criminal activity. Victims are eligible whether or not the perpetrator is convicted, whether or not criminal prosecution is initiated, whether or not the perpetrator is served with a warrant, and whether or not they are called as a witness in the prosecution as long as they are helpful in an investigation. For an immigrant under 21 years of age, the spouse, children, unmarried siblings under 18, and parents can receive U Visas based upon the immigrant crime victim's receipt of U visa. U-Visa applicants 21 years or older can apply for U Visas for their spouse and children.¹²⁶

¹²⁵ INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T).

¹²⁶ INA § 101(a)(15) (U), 8 U.S.C. § 1101(a)(15)(U).

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3.2

VAWA Confidentiality¹²

By Leslye Orloff

In 1994, the Violence Against Women Act was signed into law and has been expanded over the years to include human trafficking and other violent crimes.³ In 1996, President Clinton signed into law sweeping immigration legislation known as (IIRAIRA).⁴ Section 384 of this law provides protection to battered immigrants and has been expanded to protect other immigrant crime victims. Congress created the VAWA confidentiality provisions to prevent abusers and other crime perpetrators from using the immigration system as a tool of power and control over their victims or as a means to track and stalk their victim. Practitioners continue to report instances in which the perpetrator attempts to discredit a victim in order to deport her or deny her access to legal immigration status. In other instances, perpetrators obtain information about a victim's court case or shelter location as a way to stalk and control their victim. VAWA confidentiality violations create serious, even life-threatening dangers to individuals.

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² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/vawa-confidentiality>.

⁴ Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 § 384; 8 U.S.C. § 1367 (2001). In October 2000, Congress amended § 384 to include confidentiality protection for cases filed under INA §101(a)(15)(U), immigrant crime victim cases (U nonimmigrant visas) and T visas.

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They also compromise the trust that immigrant victims place in victim services protections. While these laws are not new, in May 2008 the Department of Homeland Security (DHS) published instructions for filing violations complaints.⁵

The Three Prongs

VAWA Confidentiality prevents the Department of Homeland Security (DHS), the Department of State (DOS) and the Department of Justice (DOJ) from releasing information contained in a protected immigration file to the abuser or others.⁶ This information includes the existence of a VAWA confidentiality protected immigration filing, locational information, and information about the victimization. The protected immigration cases include the VAWA self-petition, VAWA cancellation or suspension, battered spouse waiver, T visa, U visa or battered spouse waiver, VAWA Cuban adjustment applicants, VAWA Haitian Refugee Immigration Fairness Act or VAWA Nicaraguan Adjustment and Central American Relief Act Protections.

The second prong prohibits the Department of Homeland Security, the Department of Justice and the Department of State (DOS) from using information provided by perpetrator or family member to make take any action or make any adverse immigration determination against the crime victim.⁷ This protection extends to those who do not qualify to file, as well as those who have not yet filed cases for immigration relief as long as they are victims of the enumerated crimes, namely VAWA physical abuse or extreme cruelty, a severe form of trafficking in persons under the T-visa, or any of the U-visa qualifying crimes.⁸

Finally, VAWA Confidentiality prevents enforcement actions at shelters, rape crisis centers, victim services programs, community based organizations, courthouses, supervised visitation center or family justice centers.⁹ If DHS undertakes any part of an enforcement action at a protected location, it must disclose this fact in the Notice to Appear and to the immigration court, and must certify that such action did not violate VAWA confidentiality provisions.¹⁰ If the action is not certified, DHS officers face violation penalties.¹¹

Anticipating Violations

Though legal protections exist, DHS is the only federal agency that has developed procedures for receiving and processing VAWA Confidentiality complaints. Immigration attorneys and legal advocates should include a VAWA Confidentiality §384 advisory on every eligible application that is statutorily eligible to receive VAWA confidentiality protection that is filed on behalf of an immigrant victim with DHS, DOJ and DOS. Attorneys can also file a G-28 or EOIR-28 in advance of any filing that advises both DHS and any Immigration Court that the client is eligible for VAWA Confidentiality protections. Notice that the case is covered by VAWA Confidentiality protections should be clearly written on both the envelope and cover letter. Without clearly marking filings with an advisory on VAWA Confidentiality, mailroom clerks could easily miss direct the filing in a manner that could lead to lead to VAWA confidentiality violations. This is particularly important when a victim is filing papers in an immigration court proceeding or in an adjustment case or family based visa petition case that is being adjudicated at a local DHS district office. Immigration Courts and Citizenship and Immigration Services of DHS District Offices are less likely to be familiar with VAWA Confidentiality protections than the specially-trained VAWA unit at Vermont Service Center, which processes the majority of the applications eligible for VAWA Confidentiality protections. Common violations include copying the perpetrator on a DHS interview notice, including confidential hearing information in the court's electronic notification system, or failing to close immigration court proceedings.

It is important to assess a victim's safety under the assumption that confidentiality may be breached. If the victim is working with a social service provider, inform that person of potential safety risks and confidentiality violations. In

⁵ "Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security", The Department of Homeland Security, undated.

⁶ IIRAIRA §384 (a)(2); 8 U.S.C. §1367(a)(2).

⁷ IIRAIRA §384 (a)(1); 8 U.S.C. §1367(a)(1).

⁸ Id.

⁹ INA § 239(e); 8 U.S.C. §1229(e)

¹⁰ Id.

¹¹ IIRAIRA §384 (a)(2); 8 U.S.C. §1367(c).

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practice, Vermont Service Center allows VAWA self-petitions, T-visas, and U-visas applications to list only the immigration practitioner's or another safe address on the application. Still, most applicants will require a safety plan which the immigration practitioner should design with the social service provider and the victim. The plan should include all the possible locations where safety could be compromised including an interview at DHS, a biometrics appointment, an immigration court appearance, or any other location identified in the immigration application. Upon violation, practitioners should also request a change in appointment date, time, or even location.

If a victim is undocumented, that individual should be prepared that DHS enforcement actions often triggered by the perpetrator may occur. Therefore, victims should be advised about the fact that they qualify for VAWA confidentiality protection. They should carry materials documenting eligibility with them and provide them should DHS apprehend them. While a victim need not have filed an application to be eligible for VAWA Confidentiality protection, it can be more difficult to counter enforcement actions when the victim has nothing on file with DHS documenting eligibility. Attorneys and advocates working with immigrant victims should adopt a practice of filing applications for immigrant victims as soon as possible, even if the applications are merely skeletal filings, so that the victim has a receipt notice to protect her against any DHS enforcement action. It is critical to work with social service agencies to identify undocumented victims move quickly to initiate applications for VAWA, T or U visa immigration relief.

Victim advocates assisting immigrant victims with applications should screen for VAWA immigration relief eligibility and complex “red flag” immigration issues.¹² While victim advocates may help immigrant victims file VAWA self-petition cases, it is important to identify an attorney with expertise on VAWA, T and U-visa immigration cases who will take cases of immigrant victims with Red Flag issues. Advocates should work with attorneys representing immigrant victims in preparing the victim’s statement for the immigration case and in the collection of evidence needed to support the victim’s application for VAWA, T or U visa immigration relief. Advocates and attorneys should work together to advise immigrant victims of the danger for undocumented victims of encountering DHS on buses, on trains, at courts, at hospitals and in other public locations. Immigration practitioners should provide all the appropriate social service partners with adequate information about VAWA Confidentiality protections in the event that ICE attempts an enforcement action at a protected location.

Because VAWA Confidentiality protections are less known outside of the DHS VAWA Unit, practitioners should leverage existing relationships with local DHS offices, Service Centers, Immigration Courts, criminal courts, protection order courts and family courts, to incorporate VAWA Confidentiality protections into collaborations, discussions, trainings, and advocacy with these agencies. Each of these agencies should develop protocols to ensure immigrant victim protection. DHS is required to train staff of VAWA Confidentiality but it would also be helpful for other agencies to adopt similar policies.

Immediate Advocacy Enforcing the Statute

If a victim becomes subject of a DHS enforcement action, VAWA Confidentiality can be used to protect the victim against detention, issuance of a Notice to Appear, or service of the notice to appear on the immigration court. VAWA Confidentiality can be used to convince DHS to exercise prosecutorial discretion in the course of immigration proceedings and to dismiss or not pursue any immigration enforcement action against an immigrant victim. In immigration court, request a DHS certification under INA section 239(e) and establish that DHS has the burden to prove that no part of the DHS enforcement action was not in violation of VAWA confidentiality. When VAWA Confidentiality violations exist, counsel for the victim should move to terminate proceedings. Subpoena any relevant witnesses including DHS enforcement agents to testify if the motion is contested. When perpetrators try to obtain information about or contained in an immigration case through discover in a family or criminal court case use the same arguments to oppose the discovery request that you would use the perpetrator were attempting to secure that documentation from DHS. Include arguments related to the Congressional history of this provision and why disclosure of VAWA confidentiality protected information in any context contravenes Congressional intent

Documenting Violations and Filing Complaints

¹² For a Red Flag Screening tool go to: http://iwp.legalmomentum.org/immigration/vawa-self-petition-and-cancellation/tools/VAWA_Red%20Flags.pdf/view?searchterm=red+flag

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In order to report VAWA Confidentiality violations, advocates and attorneys should include important facts such as names, dates, locations, and other details of the violation. Details should include the gravity of any violation and the potential lethality to the victim when the abuser, trafficker, or other criminal perpetrator knows how to find his or her victim. Danger to the victim can increase if the perpetrator learns that the victim is in the process of attaining legal immigration status, particularly when the perpetrator has been using deportation threats and power over the victim's immigration status to control her.

Documentation that a victim qualifies for VAWA Confidentiality protection may include receipt and approval forms from USCIS and an immigration judge or proof of qualifying victimization. If the violation was DHS arrest in a prohibited location, notes should include conversations with the agent concerning the enforcement action and the VAWA confidentiality violation. If it seems unlikely that DHS would have known about the victim, but for the perpetrator having provided the information, practitioners should note details about any potential communications with the perpetrator, particularly knowledge DHS has that only the perpetrator would have.

In order to make a formal complaint, DHS protocols require practitioners to first speak to supervisors up the chain of command of the officer committing VAWA confidentiality violations. This includes filing a formal complaint letter with accompanying documentation to the supervisor of the local DHS office involved in the VAWA Confidentiality violation to whom the DHS office committing the violation reports. This complaint should also urge that the supervisor to act swiftly to take steps to mitigate any harm to the victim or the victim's family members that has occurred as a result of the VAWA confidentiality violation. These remedies can include but not be limited to cancellation of a notice to appear, release of the victim and her family members from DHS detention, or dismissal of any immigration enforcement action filed against the victim. The letter should also request that the supervisor assess penalties as provided for under the law against the official committing the VAWA Confidentiality violation including a \$5000 fine and disciplinary action.¹³ Unanswered complaints should be pursued by filing the some complaint with the District Director or other equivalent head of the office in which the DHS official committing the violation works.

Make a Formal Complaint

If a practitioner has filed a complaint locally and has not received a timely response or the DHS office in which the VAWA confidentiality violation is unreceptive, practitioners should file a formal complaint. DHS has set up procedures for receiving VAWA confidentiality violation complaints.¹⁴ Complaints are to be filed with the DHS Office of Civil Rights and Civil Liberties. (CRCL) Upon receiving complaints of VAWA confidentiality violations, CRCL assigns the case to a DHS investigator who will be responsible for investigating the complaint, reviewing documentary evidence and interviewing witnesses in connection with the complaint. Providing detailed information to CRCL will facilitate a more effective investigation of the complaint.

Complaints should include appropriate case identifying information including the client's name, date of birth and A number (if the victim has one), information about how the client can be safely contacted, and the practitioner's contact information. The complaint should also briefly outline a procedural history of the case, the facts making the victim eligible for VAWA immigration relief or protection under VAWA confidentiality provisions, a description of the VAWA Confidentiality violation that occurred and the status of any pending family, immigration, or criminal law cases. Practitioners should include as much detail as possible including name(s) and office of the DHS official(s) or employees involved; the date, time and location of violation; what was said or done and by whom; and the names and contact information of witnesses present.

Documentation supporting the complaint may include: copies of DHS filings, approval notices, and other documentation from DHS, documentation of victimization (e.g., medical records, photos, civil protection orders, witness affidavits), and information documenting the violation including summaries of witnesses statements. Finally, the complaint should document efforts to address the complaint through local channels.

¹³ Id.

¹⁴ See "Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security", The Department of Homeland Security, undated.

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Complaints should be addressed to: The Department of Homeland Security, The Office of Civil Rights and Civil Liberties, Review & Compliance Unit, 245 Murray Lane, SW, Building 410, Mail Stop #0800 Washington, DC 20528 or via email at civil.liberties@dhs.gov.

For assistance with urgent advocacy to help immigrant victims subjected to VAWA Confidentiality violations, help developing protocols, litigating in family or criminal court, or filing formal complaints, please contact The National Immigrant Women's Advocacy Project (NIWAP) at info@niwap.org or (202) 274-4457.¹⁵ NIWAP provides sample briefs and materials, and provides technical assistance on VAWA Confidentiality Violations. In addition, NIWAP acts as the NGO liaison with DHS on formal complaints. Please inform NIWAP of any violations and complaints filed so we can ensure improved enforcement of these protections. Further information regarding VAWA confidentiality is available at: www.niwaplibrary.wcl.american.edu

¹⁵ Assistance regarding VAWA Confidentiality violations can be directed to Rócio Molina, Associate Director, National Immigrant Women's Advocacy Project, (molina@wcl.american.edu).

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3.3

Preparing the VAWA Self-Petition and Applying for Residence¹²

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Introduction

This chapter provides practical tips for filing a self-petition under the Violence Against Women Act of 1994 (VAWA) as revised in 2005.³ Under VAWA 2005, the VAWA self-petitions now cover a broader range of victim applicants. Attorneys and advocates unfamiliar with the complex changes that have occurred with VAWA in recent years should seek further assistance before helping victims file a self-

¹ “This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.” This chapter was most recently updated and edited in 2010 with assistance from Caitlin Oyler, and Miriam Bamberger of University of Miami School of Law. We gratefully acknowledge the contributions of Kelly E. Hyland of Washington College of Law, American University, Nura Maznavi of George Washington University School of Law, Nadia Firozvi of the University of Baltimore School of Law, David Cheng of Boalt School of Law, and Jessica Shpall of the University of California, San Diego in preparing this chapter.

² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/vawa-confidentiality>.

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petition.⁴ This chapter is not an exhaustive list of recommendations,⁵ but rather a guide to filing a VAWA self-petition. Before filing a self-petition, review the “VAWA Red-Flags” listed at the beginning of this manual. If your client has any one of the inadmissibility red-flags, contact an immigration attorney or technical assistance provider with significant experience representing immigrant victims in VAWA cases.

This guide provides information on the following VAWA self-petition topics listed below.

- Eligibility Requirements for Filing a Self-Petition
- General Filing Procedures and Practice Pointers
- The Self-Petitioner’s Affidavit
- Affidavits from Witnesses and Advocates
- Checklist of Suggested Evidentiary Documents
- Obtaining Lawful Permanent Residence under VAWA

Collaboration between immigration attorneys and domestic violence/sexual assault advocates is vital to a successful VAWA self-petition.⁶ Advocates can assist victims in collecting and organizing documentation that will help immigration officials understand the type and extent of battery or extreme cruelty that gave rise to the VAWA self-petition.

This chapter is geared towards advocates and attorneys with little or no immigration law experience. Immigration attorneys looking for more information should contact the National Immigrant Women’s Advocacy Project at 202-274-4457 or Advanced Special Immigrant Survivors Technical Assistance (ASISTA) by phone at (617) 227-9727 or visit their website at www.asistaonline.org.

HISTORY OF THE VIOLENCE AGAINST WOMEN ACT AND SELF-PETITIONING

VAWA, which was enacted as part of the Violent Crime Control Act of 1994, was the first piece of federal legislation in the United States specifically designed to help curb domestic violence.⁷ In enacting VAWA, Congress’ clear, overarching intent was to strengthen the protections available to battered women, as well as to expand collaboration and cooperation between battered women’s support services and the criminal and civil justice systems.

VAWA recognized that immigration laws were being used as tools of power and control over immigrant victims of domestic violence. It also included special protections for immigrants abused by U.S. citizen or lawful permanent resident spouses or parents. In many cases, the legal immigration status of non-citizen victims depends upon their relationships to their U.S. citizen or lawful permanent resident abusers.⁸ Abuse often includes various forms of sexual assault. For example: rape, forced or coerced sexual contact, molestation, child abuse. Abusers use their power over their spouse’s, children’s, or parent’s (of an over 21-year old US citizen) immigration status to control, threaten, isolate, harass, and coerce the immigrant victims. The battered spouse, child, or elderly parent would likely be deterred from taking action to protect herself (such as seeking a civil protection order, filing criminal charges, or calling the police) because of the threat or fear of deportation by the immigration officials.⁹ Sexual assault within a marriage is a crime in every state in the United States.¹⁰ Victims of marital sexual assault who come from other countries may

⁴ Reading the statutes and regulations is not enough. Statues have overturned regulations, some new regulations are still pending, and policy directives fill in important gaps.

⁵ New attorneys and advocates are strongly encouraged to seek additional information on self-petitions from the National Immigrant Women’s Advocacy Project (info@niwap.org) or the Advanced Special Immigrant Survivors Technical Assistance (ASISTA) project (questions@asistaonline.org). Expert referrals are available through NIWAP at (202) 274-4457 or niwap@wcl.american.edu.

⁶ Pendleton and Block, *Applications for Immigration Status Under the Violence Against Women Act; from the IMMIGRATION AND NATIONALITY LAW HANDBOOK* (Randy P. Auerbach ed., 2001-02).

⁷ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40001-702, 108 Stat. 1796, 1902-55 (1994).

⁸ H.R. REP. NO. 103-395 at 26-27 (1993).

⁹ *Id.*

¹⁰ National Clearinghouse on Marital and Date Rape, State Law Chart (2005), http://www.ncmdr.org/state_law_chart.html (last visited Feb. 14, 2008).

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not know that this is criminal behavior in the United States.¹¹ Abusers may play upon this ignorance to isolate, further abuse, and prevent the victim (or her family) from seeking help from the authorities.

VAWA contains provisions that limit the ability of an abuser to misuse United States immigration laws, immigration officials, and law enforcement agencies to threaten and control his or her immigrant spouse or child. Specifically, VAWA remedies this situation by enabling battered immigrants to attain *lawful permanent residence* (a “green card”) without the cooperation of their abusive spouse or parent. In providing for relief, VAWA has provisions by which to obtain lawful permanent residence including VAWA self-petitions and VAWA cancellation of removal (formerly called “suspension of deportation”). These provisions ensure that immigrant victims of domestic violence have access to lawful immigration status without having to depend upon the cooperation or participation of their batterer.

VAWA also has provisions designed to restore and expand access to a variety of legal protections for battered immigrants by addressing immigration law obstacles still standing in the path of battered immigrants seeking to free themselves from abusive relationships after the first VAWA. For example, VAWA self-petitioning includes adults who are abused by their U.S. citizen children.¹² Likewise, it ensures that children who were abused do not lose their chance to self-petition as they grow older (they now have until age 25 to file).¹³ VAWA 2005 ensures that a survivor who files a VAWA self-petition, or receives any other form of VAWA immigration relief, cannot later file for immigration relief on the abuser’s behalf. It also includes increased confidentiality protections for those who self-petition.¹⁴ The following section provides a brief overview the VAWA self-petition.¹⁵

VAWA Self-Petitions

Certain immigrants may obtain lawful permanent resident status (a green card) without the participation or cooperation of their United States citizen or legal permanent resident abusive spouse, parent, or over 21 year old U.S. citizen child by filing a VAWA self-petition. Use the VAWA Self-petitioning flow charts (adult and child) in the appendix to this chapter to help you determine your client’s and her children’s eligibility for a self-petition. Self-petitions were created by Congress as an alternate safe route to lawful permanent residence, for victims of violence who were eligible for a green card but would have to rely on an abusive U.S. citizen or lawful permanent resident family member to file the application with DHS. VAWA created a route to lawful permanent residency for victims, which was safe and confidential, that they could pursue without their abusive family member’s knowledge or cooperation. Attaining lawful permanent residency through a VAWA self-petition is a two-step process. First, an eligible applicant must file a VAWA self-petition, which must be approved by the Department of Homeland Security (DHS) formerly known as the Immigration and Naturalization Service (INS). Second, the applicant must apply for lawful permanent residence either through the “adjustment of status” process in the United States or at a consulate abroad.

WHO IS ELIGIBLE TO FILE A VAWA SELF-PETITION?

Under the Violence Against Women Act, certain abused spouses, children, parents abused by their over 21-year old U.S. citizen children, or parents of abused children can file their own petitions to obtain lawful permanent resident status. These victims can file in a way that is confidential and without the abuser’s cooperation if the abuser is a U.S. citizen or lawful permanent resident. Examples of individuals covered by VAWA include:

¹¹ United Nations Development Programme, Gender and Legislation in Latin America and the Caribbean (not dated), <http://www.undp.org/rblac/gender/legislation/violence.htm>.

¹² Immigration and Nationality Act of 1952 § 204(a)(1)(A)(vii) [hereinafter INA], 8 U.S.C. § 1154(a)(1)(A)(vii) (2000).

¹³ INA § 204(a)(1)(D)(v), 8 U.S.C. § 1154(a)(1)(D)(v) (2000).

¹⁴ 8 U.S.C. § 1367(a)-(d) (2000). The VAWA confidentiality statute is not part of the Immigration and Nationality Act.

¹⁵ For more information on the battered immigrant provisions of VAWA 2000 see LEGAL MOMENTUM, SECTION BY SECTION CHART OF THE BATTERED IMMIGRANT PROVISIONS OF VAWA 2000 (2000). Copies are available from NIWAP. Contact NIWAP by phone at (202) 274-4457, or by email at niwap@wcl.american.edu.

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- Abused spouses or former spouses of U.S. citizens or lawful permanent residents may file a VAWA self-petition. They may also include their children, even if the children are not abused or are not related to the U.S. citizen or the lawful permanent resident.¹⁶
- Abused children of a U.S. citizen or lawful permanent resident may file a VAWA self-petition.¹⁷
- Spouses or former spouses (whether abused or not) whose children are abused by their U.S. citizen or lawful permanent resident spouse may apply for themselves.¹⁸
- Parents who are victims of elder abuse by a U.S. citizen son or daughter are eligible.¹⁹
- Battered spouse waiver applicants,
- VAWA Cuban adjustment applicants,²⁰
- VAWA HRIFA (Haitian) applicants,²¹ and
- VAWA NACARA applicants (Nicaraguans, Cubans, Salvadorans, Guatemalans, Former Soviet Union nationals) are included in the category of VAWA self-petitioners, under VAWA 2005²²

WHAT ARE THE REQUIREMENTS FOR ESTABLISHING ELIGIBILITY FOR A VAWA SELF-PETITION?²³

A self-petitioning spouse must satisfy **seven requirements** to establish eligibility for a VAWA self-petition.

1. Relationship to the abuser: Generally, self-petitioning spouses can demonstrate the existence of a marital relationship with a valid marriage certificate. A self-petitioning child must prove that s/he is the natural child, stepchild, or adopted child of a citizen or lawful permanent resident.²⁴ A self-petitioning parent must prove a parental relationship to their U.S. citizen son or daughter.²⁵

If the self-petitioner is currently not married to the abuser by reason of the abuser's bigamy, death, or divorce, the self-petitioner may still qualify if she can prove that:

- She believed that she has legally married the abuser, but the marriage was invalid due to her abuser's bigamy. Abused spouses who did not know they married a bigamist need to provide evidence that their marriage ceremony was actually performed.²⁶
- She was the spouse of a U.S. citizen who died within the past two years. The self-petitioner must prove that she was the spouse of an abusive citizen and that her spouse died within the past two

¹⁶ INA §§ 204(a)(1)(A)(iii) and (B)(ii), 8 U.S.C. §§ 1154(a)(1)(A)(iii) and (B)(ii) (2000). Children included in their parent's VAWA self-petition are known as derivative children. To be included in the parent's self-petition, derivative children must be under twenty one at the time of filing. These children are "derivatives" or "derivative beneficiaries" because they derive a benefit from the parent's application for legal immigration status.

¹⁷ INA §§ 204(a)(1)(A)(iv) and (B)(iii), 8 U.S.C. §§ 1154(a)(1)(A)(iv) and (B)(iii) (2000). A self-petitioning child must prove he or she is the child (natural, step, or adopted) of a citizen or lawful permanent resident. Self-petitioning stepchildren must file while the mother and father are still married.

¹⁸ INA §§ 204(a)(1)(A)(iii) and (B)(ii), 8 U.S.C. §§ 1154(a)(1)(A)(iii) and (B)(ii) (2000).

¹⁹ See "Introduction to Immigration Relief" in this manual for more information.

²⁰ See "Introduction to Immigration Relief" in this manual for more information.

²¹ See "Introduction to Immigration Relief" in this manual for more information.

²² See "Introduction to Immigration Relief" in this manual for more information.

²³ For more information on evidence to prove VAWA cases, please consult the reading, VAWA DOCUMENTARY EVIDENCE MEMO. Copies may be obtained by contacting NIWAP by phone at (202) 274-4457 or by e-mail at niwap@wcl.american.edu.

²⁴ INA §§ 204(a)(1)(A)(iv) and (B)(iii), 8 U.S.C. §§ 1154(a)(1)(A)(iv) and (B)(iii) (2000).

²⁵ INA § 204(a)(1)(A)(vii), 8 U.S.C. § 1154(a)(1)(A)(vii) (2000).

²⁶ H.R. CONF. REP. NO. 106-939, at 112-13 (2000) (Conf. Rep.).

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years.

- She was divorced from the abuser within the past two years. The self-petitioner must demonstrate that she was divorced from the abuser within the past two years, and that there was a connection between the divorce and the battery or extreme cruelty by the abusive spouse.²⁷

In the case of a self-petitioning child, the applicant must prove that s/he is the natural child, stepchild, or adopted child of a citizen or lawful permanent resident.²⁸ Further, a self-petitioning parent must prove a parental relationship to their U.S. citizen son or daughter.²⁹

2. The abusive spouse or parent is a U.S. citizen or Lawful Permanent Resident: A self-petitioner must prove that his or her spouse or parent is a U.S. citizen or lawful permanent resident.

- Loss of citizenship or lawful permanent resident status: In cases where the abuser has lost or renounced his immigration or citizenship status within the past two years, the self-petitioner must demonstrate that the loss of status (for example being found deportable under 237(a)(2)(E) or renunciation of citizenship is related to an incident of domestic violence.³⁰

3. Residence within the United States: Generally, self-petitioners must currently reside in the United States at the time of application. Some self-petitioners may file from abroad if they meet one of three requirements:

- The abusive spouse or parent is an employee of the U.S. government;³¹
- The abusive spouse or parent is a member of the uniformed services;³² or
- The abusive spouse or parent has subjected the immigrant spouse to battery or extreme cruelty while physically present in the United States.

4. Residence with the abuser: A self-petitioner does not have to reside with the abuser at the time of filing, but must still prove that she at one time resided with the abuser. Self-petitioners **DO NOT** have to separate from the abuser in order to file a self-petition.³³

5. Battery or extreme cruelty:³⁴ The Department of Homeland Security will consider any credible evidence, including civil protection orders, police and court records, medical reports, and affidavits of school officials, social workers, and shelter workers. Examples of “battery” or “extreme cruelty” include:

- Any act or threatened act of violence (including forceful detention) which results or threatens to result in physical or mental injury
- Psychological or sexual abuse or exploitation, including rape, molestation incest (if the victim is a minor) or forced prostitution

²⁷ Id. at § 1503(b)(1).

²⁸ INA §§ 204(a)(1)(A)(iv) and (B)(iii), 8 U.S.C. §§ 1154(a)(1)(A)(iv) and (B)(iii) (2000).

²⁹ INA § 204(a)(1)(A)(vii); 8 U.S.C. § 1154(a)(1)(A)(vii) (2000).

³⁰ H.R. CONF. REP. NO. 106-939 § 1503(b)(1) (2000) (Conf. Rep.).

³¹ The abuse can occur in the United States or abroad.

³² The abuse can occur in the United States or abroad.

³³ Self-petitioners planning to remain with the abuser should have a safe address not accessible to the abuser where the Department of Homeland Security can reach them.

³⁴ It is recognized that abuse is a pattern. (8 C.F.R. 204.2(c) (1) (i) (H) (vi); *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003) Some portion of the pattern of abuse must have occurred while in one of the following relationships: *In marriage based petitions*: some portion of the abuse must have occurred during the time a couple was married. *In parent to child relationship based petitions*: some portion of the abuse must have occurred during the parental relationship; however, termination of parental rights does not end the relationship for VAWA immigration relief. *In step-parent to child based petitions*: Some portion of the abuse must have occurred while the marriage creating the step-parent relationship existed. Other abusive actions may also be acts of violence under this rule. For example, individual acts or threatened acts that may not initially appear violent may be part of an overall pattern of violence. 8 C.F.R. § 204.2(c)(1)(vi) (2007).

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According to VAWA regulations, **sexual assault is a form of battery and extreme cruelty.**³⁵ The Department of Justice defines sexual assault, including sexual assault in a marriage or family relationship, as any type of non-consensual sexual contact or behavior.³⁶ This includes forced sexual intercourse, sodomy, child molestation, incest, fondling, and attempted rape. Other examples of sexual assault include³⁷:

- Unwanted vaginal, anal, or oral penetration with any object
- Forcing an individual to perform or receive oral sex
- Forcing an individual to masturbate, or to masturbate someone else
- Forcing an individual to look at sexually explicit material or forcing an individual to pose for sexually explicit pictures
- Touching, fondling, kissing, and any other unwanted sexual contact with an individual's body
- Exposure and/or flashing of sexual body parts

The Department of Justice website says that in general, state law presumes there is no consent if a person is forced, threatened, unconscious, drugged, a minor, developmentally disabled, chronically mentally ill, or believes he/she is undergoing a medical procedure.³⁸

The website notes that perpetrators could be anyone - strangers, friends, acquaintances, or family members. Perpetrators commit sexual assault using violence, threats, coercion, manipulation, pressure, or tricks.³⁹ In extreme cases, sexual assault may involve the use of force, including but not limited to⁴⁰:

- Physical violence
- Use or display of a weapon
- Immobilization of victim

As the Department of Justice notes, sexual assault more often involves psychological coercion – “taking advantage of an individual who is incapacitated or under duress and, therefore, is incapable of making a decision on his or her own.”⁴¹

6. Good moral character: “Good moral character,” as described below, is a term of art in immigration law. To show good moral character, a self-petitioner should submit a local police clearance or state-issued criminal background check from each locality or state, within or outside the United States, in which she has lived for six or more months during the three years immediately preceding the filing of the self-petition.

7. Marriage in good faith: Self-petitioners, whose petition is based on a marriage relationship,⁴² need to demonstrate that they married or intended to marry (in cases of bigamy) in “good faith,” and not for the purpose of evading immigration laws. Note that self-petitioning elder parents do not need to satisfy this requirement to be eligible to receive a VAWA self-petition. Step-children will have to satisfy this requirement.

³⁵ 8 C.F.R. §204.2(c)(1)(vi) (2007).

³⁶ U.S. Dep’t of Justice, <http://www.usdoj.gov/ovw/sexassault.htm> (last visited February 15, 2008).

³⁷ *Id.*

³⁸ *Id.*

³⁹ U.S. Dep’t of Justice, <http://www.usdoj.gov/ovw/sexassault.htm> (last visited February 15, 2008).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² These include those: 1) between a husband and wife in a marriage, 2) between a child and a step-parent, 3) between an intended spouse and a bigamist U.S. citizen or legal permanent resident spouse, where the marriage ceremony was actually performed (INA 204(a)(1)(A)(iii) codified at 8 USC 1154).

Divorce & VAWA Self-Petitioners

Prior to October 2000, battered immigrants who were divorced from their abusers could not file VAWA self-petitions. VAWA 2000 enabled divorced immigrants who had been battered during marriage to file VAWA self-petitions “if the marriage was legally terminated during the two-year period immediately preceding the filing of the self-petition for a reason connected to the battering or extreme mental cruelty.”⁴³ This change is effective for all VAWA self-petitions pending or filed on or after October 28, 2000.⁴⁴

The VAWA applicant must provide evidence that the battering or extreme mental cruelty, which can include sexual assault, led to or caused the divorce. The evidence submitted must demonstrate that the abuse occurred during the marriage, that the abuser was a citizen or permanent resident when the abuse occurred, and that the divorce took place within the two-year period immediately preceding the filing of the VAWA self-petition.⁴⁵ The divorce decree does not have to state specifically that the marriage was terminated due to domestic violence.⁴⁶

When an immigrant victim seeks help after a divorce has become final, the advocate or attorney should gather pre-divorce evidence demonstrating domestic violence. Such evidence may include protection orders, police reports, medical records, and affidavits of advocates, neighbors, family members, shelter workers or social workers who have knowledge about the domestic violence and its connection to the divorce. In some cases, when the immigrant victim flees or goes into hiding, the abuser may obtain a divorce by publication in her absence. In such cases, although the decree will not state that the divorce is domestic violence-related, counsel for the victim can demonstrate that the divorce was part of the ongoing pattern of battery and extreme cruelty.

If a battered immigrant seeks help after the abuser files for divorce but before the divorce decree is final, advocates and attorneys working with the immigrant victim should, if possible, file the VAWA self-petition before the divorce becomes final. This is the safest approach for immigrant victims and eliminates the need to establish that the divorce was causally related to the battery or extreme cruelty. Also, if the divorce action is ongoing, counsel for the victim can use discovery in the divorce case to obtain information and documentation that can be submitted in support of the self-petition.

“Good Moral Character”

At the time of the filing of the initial VAWA self-petition, a petitioner (or a child self-petitioner who is fourteen years of age or older) must demonstrate that she or he is a person of “good moral character.”⁴⁷ The most significant factor that can undermine an immigrant victim’s ability to prove good moral character is a criminal history. Battered immigrant victims can end up as defendants in criminal cases for a variety of reasons. Examples include:

- The police made a dual arrest rather than determining who was the predominant perpetrator;
- The perpetrator spoke English with the police and the police could not or did not communicate with the victim when the police arrived and the abuser convinced the police to arrest her;
- The victim was forced into criminal behavior by her abuser;
- The victim shoplifted essential survival items while escaping abuse.

When a potential VAWA applicant is a defendant in a criminal case that could lead to a finding of bad moral character, consult with an immigration expert immediately. Without appropriate counsel,

⁴³ U.S. DEPT OF JUSTICE, IMMIGRATION & NATURALIZATION SERV. MEMORANDUM HQADN/70/8, ELIGIBILITY TO SELF-PETITION AS A BATTERED SPOUSE OF A U.S. CITIZEN OR LAWFUL PERMANENT RESIDENT WITHIN TWO YEARS OF DIVORCE (2002), available at http://www.uscis.gov/files/pressrelease/VAWA82102_pub.pdf.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 8 C.F.R. § 204.2(c)(1)(i)(F) (2007).

the victim may plead guilty to charges that will render her ineligible for VAWA relief, and could lead to her deportation.⁴⁸

While there is no statutory definition of good moral character, the Immigration and Naturalization Act (INA) lists actions which presumptively bar an individual from demonstrating good moral character.⁴⁹ It is not always easy to determine whether a specific crime established a lack of good moral character. Convictions for many crimes are statutory bars to good moral character, but other crimes, such as involuntary manslaughter or lesser offenses such as simple possession of a controlled substance, driving under the influence, or petty theft do not always bar a showing of good moral character. A prior removal order, in and of itself, does not constitute a bar to establishing good moral character.⁵⁰

PROVING GOOD MORAL CHARACTER

Moral character is evaluated by the government on a case-by-case basis, taking into consideration the standards to which the average citizen in the community is held. The petitioner must prove that she has maintained good moral character throughout the three-year period immediately preceding the filing of a self-petition.⁵¹ Prior conduct may also be examined to determine good moral character at the discretion of DHS.⁵² Self-petitioners must submit a police clearances letter from any state or locality where they have resided for at six months during the past three years. If they have been arrested during that time, they must submit copies of the arrest records and court dispositions.

Petitioners should always state in their affidavits if they have ever been arrested, and submit records of any previous arrests or convictions, or information concerning any other bad conduct (such as fraud). Before obtaining lawful permanent residence based on the self-petition, battered immigrants with approved self-petitions will need to be fingerprinted and the DHS will use these fingerprints to run a criminal records search. This search will reveal all prior arrests in the United States, regardless of when they occurred. A battered immigrant with a criminal history should consult an immigration lawyer before filing the self-petition to determine whether she is barred from showing good moral character. Keep in mind that the victim may meet the requirements for one of the domestic violence-related exceptions or waivers for criminal convictions or other ineligibility grounds.⁵³ It is better to reveal criminal or other behavior at the onset of a VAWA case, rather than to wait for DHS to discover it at a later stage. Failure to disclose an arrest can undermine a person's credibility and may lead to denial of the self-petitioner's application for permanent residence or revocation of the approved self-petition.⁵⁴ There are DHS officers who may discover a criminal record at a later step in the proceedings even if it is not brought up during the first steps of an application. Regardless, the staff members of the VAWA Unit of the DHS Vermont Service Center are trained in domestic violence and are better able to assess whether there is a connection between the domestic violence and any criminal activity and evaluating conduct within the context of the domestic violence.

STATUTORY BARS TO GOOD MORAL CHARACTER

⁴⁸ Attorneys and advocates with self-petitioners in this situation should contact NIWAP by phone at (202) 274-4457 or by email at info@niwap.org; or ASISTA at (515) 244-2469; questions@asistahelp.org.

⁴⁹ INA § 101(f), 8 U.S.C. § 1101(f) (2000). The list of acts barring findings of good moral character is discussed later in this chapter.

⁵⁰ INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2000).

⁵¹ 8 C.F.R. § 204.2(c)(2)(v) (2007).

⁵² NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, 1 IMMIGR. LAW & DEF. § 8:32 (3d ed. 2004); see also *In re Sanchez-Linn*, 20 I. & N. Dec. 362, 365 (B.I.A. 1991) (holding that past conduct is relevant in determining good moral character).

⁵³ A waivable criminal conviction or act under the immigration law will not bar a finding of good moral character for a VAWA self-petitioner if the crime or act is connected to the abuse. INA § 204(a)(1)(C); 8 U.S.C. § 1154(a)(1)(C) (2000). For more information on waivers, read the discussion on obtaining lawful permanent residence later in this section.

⁵⁴ See INA § 205; 8 U.S.C. § 1155 (2000). See also 8 C.F.R. § 205.2 (2007). An immigration or consular officer may return the petition to the Vermont Service Center for revocation if the petition was mistakenly approved.

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If the conduct of the self-petitioner falls under one of the statutory bars listed in INA Section 101(f), the DHS generally is not permitted to waive this mandatory finding of a lack of good moral character.⁵⁵ An exception may exist for VAWA self-petitioners if they can establish a connection between the conduct and the domestic violence.⁵⁶ According to INA section 101(f), a person engaging in any of the acts listed below during the requisite period presumptively lacks good moral character.

- Habitual drunkenness;
- Prostitution within ten years of the date of application for a visa, admission, or adjustment of status;
- Smuggling a person into the United States;
- Polygamy;
- Conviction of or admission to an act constituting a crime relating to a controlled substance (excluding a single offense for simple possession of thirty grams or less of marijuana);⁵⁷
- Conviction of or admission to a crime of moral turpitude (excluding petty or juvenile offenses);
- Conviction of two or more offenses resulting in a total imposed sentence of five or more years;
- Trafficking or assisting with the trafficking of any illicit substance;
- Conviction of two or more gambling offenses or deriving their principal income source from illegal gambling;
- Giving false testimony to obtain immigration benefits;
- Detention in a penal institution for an aggregate period of 180 days or more; or
- Convicted of an aggravated felony.

In many cases there will be a connection between conduct that would preclude the establishment of good moral character and the abusive relationship. For example, a self-petitioner may be found to be a person of good moral character, despite her conviction on numerous counts of petty theft, if it is revealed that she stole food for her children because her spouse would not give her enough food or money. Self-petitioners should also submit character-references and other evidence that may offset such negative factors. Any form of community involvement, such as volunteer work or participation in religious and school activities, can help counter the effects of past criminal behavior and other bad conduct.⁵⁸

“Extreme Cruelty”

VAWA’s immigration provisions define domestic violence more broadly than most state domestic violence statutes.⁵⁹ In addition to physical and sexual abuse, VAWA’s definition includes “extreme cruelty,” defined as:

being the victim of any act or a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under this rule. Acts or threatened acts that, in and of

⁵⁵ CHARLES GORDON ET AL., 6 IMMIGR. LAW & PROC. § 74.07[5][d] at 74-86 n.132 (release 119, 2007) (citing Miller v. INS, 762 F.2d 21, 24 (3d Cir. 1985)).

⁵⁶ INA § 204(a)(1)(C); 8 U.S.C. § 1154(a)(1)(C) (2000).

⁵⁷ Drug offenses are never considered petty offenses under immigration law. See INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2000). Any sale, however small, is considered trafficking under the Immigration and Nationality Act. See *id.* While some expunged drug convictions may be erased for immigration purposes, most expungements have no effect. See *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001); *In re Roldan-Santoyo*, Interim Decision 3377 (B.I.A. 1999), *vacated sub nom. Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (finding *In re Roldan* inapplicable in certain state expungements of first-time drug offenses).

⁵⁸ For a complete list please see the VAWA Red Flags list at [XXX insert link from library](#).

⁵⁹ Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 AM. U. J. GENDER SOC. POL’Y & L. 95, 106 (2002); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 870 (1993).

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*themselves, may not initially appear violent may be part of an overall pattern of violence.*⁶⁰

Practice Pointer:

Some immigrant spouse abuse victims who report various forms of extreme cruelty, but no physical abuse may in addition of extreme cruelty be victims of sexual assault within the family. It is important, particularly in these cases to work with your client to determine whether she has also been a victim of sexual assault. Many immigrant victims of spousal abuse assume that their spouse has the right force sexual relations and may not raise this as part of the abuse. Sexual assault (including sexual assault in a marriage or family relationship) is battery, not extreme cruelty. Attorneys should ensure that immigration officials do not confuse acts of battery with acts of extreme cruelty. It is harder to show “extreme cruelty” than it is to show “battery.”

Family law courts have held that many non-physical forms of abuse constitute extreme cruelty against the victim.⁶¹ Courts have examined whether acts of cruelty are “of such nature and character as to destroy the peace of mind and happiness of the injured party,”⁶² and whether the perpetrator intended to distress and humiliate the victim.⁶³ The victim’s self-esteem, dependency on the abuser, and ability to communicate are also factors abusers use to inflict and perpetuate extreme cruelty.

THE IMPORTANCE OF DOCUMENTING EXTREME CRUELTY

In preparing a VAWA self-petitioning case, advocates and attorneys should document the existence of each of the above listed factors that constitute or contribute to extreme cruelty. These issues should be addressed whether or not the immigrant victim has also suffered battering. Describing the extreme cruelty in a relationship, in addition to the abuse, gives the adjudicator a more complete description of the abuse the victim has suffered and the impact on the victim and her children. The existence of extreme cruelty, in addition to physical abuse, may also enhance the victim’s credibility and may contribute to an immigrant victim’s success in proving other elements of a VAWA case, including good faith marriage and good moral character. For example, the concept of extreme cruelty may be particularly important for survivors of sexual assault in their self-petitions. While sexual assault is battery for a self-petition, a survivor will want to document all forms of domestic violence, in addition to sexual assault, in filing their petition. In this way a survivor of sexual assault will help those adjudicating the self-petition understand how sexual assault, which may have only occurred once, was part of a larger pattern of domestic violence.

FORMS OF ABUSE

Abusers use many tactics to establish and retain control over their victims. While in some cases only one instance of abuse will be sufficient to establish a case of extreme cruelty, other situations may require a victim to establish that many different acts, when examined collectively over a period of time, constitute extreme cruelty. Extreme cruelty can include the following conduct:

- Intimidation and degradation;
- Economic and employment-related abuse (such as forced labor or unemployment);
- Social Isolation;
- Sexual Abuse, which includes rape as well as other forms of sexual behavior;
- Immigration-related abuse;

⁶⁰ 8 C.F.R. § 204.2(c)(vi) (2007).

⁶¹ See, e.g., Keenan v. Keenan, 105 N.W.2d 54 (Mich. 1960) (holding that husband’s disparaging statements to wife constituted extreme cruelty); Muhammad v. Muhammad, 622 So.2d 1239 (holding that husband’s religiously-motivated harsh treatment of wife constituted extreme cruelty) (Miss. 1993); Ormachea v. Ormachea, 217 P.2d 355 (Nev. 1950) (holding that husband’s indifferent and sometimes hostile treatment of wife constituted extreme cruelty); *but see* Carpenter v. Carpenter, 193 P.2d 196 (Kan. 1948) (holding that wife’s refusal to live with husband did not constitute extreme cruelty).

⁶² See Veach v. Veach, 392 P.2d 425, 429 (Idaho 1964); Pfalzgraf v. Pfalzgraf, No. 52-CA-80, 1981 WL 6119 (Ohio Ct. App. Feb. 11, 1981); Conner v. Conner, No. CA-1953, 1981 WL 6290 (Ohio Ct. App. June 4, 1981); Dickson v. Dickson, No. D-98306, 1982 WL 5380 (Ohio Ct. App. May 27, 1982).

⁶³ Wolf v. Wolf, 333 A.2d 138, 140 (R.I. 1975).

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- Possessiveness and harassment.

INTIMIDATION AND DEGRADATION

Experts acknowledge that batterers commonly use a variety of tactics beyond violence to keep women in abusive relationships.⁶⁴ Abusers use threats to enhance a victim's dependence on him by creating fear, stress, and humiliation, if the victim tries to leave or if she does not comply with his demands. Abusers use different forms of threats including: standing too close to victims, clenching their fists, giving "warning" looks, or displaying weapons to their intimate partners.⁶⁵ In cases where the victim is also an immigrant, abusers often threaten to report them to the immigration authorities.⁶⁶ Threats, intimidation, and degradation trap victims in abusive relationships, and can often form the basis for proving extreme cruelty.

ECONOMIC AND EMPLOYMENT RELATED ABUSE

Lack of access to economic resources is the single largest barrier to a victim who seeks to leave an abusive relationship.⁶⁷ Victims may be prevented from participating in the labor market, or sabotaged at their workplaces.⁶⁸ Abusers are known to stalk or harass victims at work, and to send threatening e-mail or voice-mail messages that may cause the immigrant victim to be fired, or force her to leave her job for safety reasons. Furthermore, many illegal and undocumented immigrant victims are forced by their abusers to work illegally without being allowed to share in the monetary compensation associated with employment.

SOCIAL ISOLATION

Abusers may attempt to isolate their victims by prohibiting them from escaping, seeking help, and developing support systems, or maintaining the victim's existing support systems.⁶⁹ The abuser may restrict the victim from using the phone,⁷⁰ prohibit her from going to work or school,⁷¹ make her depend on him for transportation, limit the victim's contact with family or friends,⁷² or prevent her from attending social activities.

Battered immigrants may be even further susceptible to social isolation due to the fact that many are far from any supportive community of family and friends.⁷³ To ensure isolation, an abuser might prevent a

⁶⁴ See K.J. WILSON, *WHEN VIOLENCE BEGINS AT HOME* 17-18 (2d ed. 2005) (listing various forms of economic, sexual, and emotional abuse, as well as the threats, intimidation, and isolation tactics used by batterers); see also JUDITH HERMAN, *TRAUMA AND RECOVERY* 77 (1997).

⁶⁵ Mary Ann Dutton, *Understanding Woman's Response to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 *HOFSTRA L. REV.* 1191, 1206 n.70 (1993).

⁶⁶ LETI VOLPP, *WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE* 6 (1995).

⁶⁷ Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *GEO. J. ON POVERTY L. & POL'Y* 245, 295-96 (2000); see generally Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 *WM. & MARY J. WOMEN & L.* 597, 617-21 (2001).

⁶⁸ A study of domestic violence survivors found that seventy four percent of employed battered women were harassed at work by their partner. FAMILY VIOLENCE PREVENTION FUND, *THE WORKPLACE GUIDE FOR EMPLOYERS, UNIONS, AND ADVOCATES* (1998), available at <http://www.endabuse.org/resources/facts/Workplace.pdf>. According to an earlier study, twenty percent of all employed battered women lose their jobs because of abuser harassment at the workplace. Susan Schechter & Lisa T. Gray, *A Framework for Understanding and Empowering Battered Women*, in *ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN* 242 (Martha Straus ed., 1988).

⁶⁹ See, e.g., *People v. Humphrey*, 921 P.2d 1 (Cal. Rptr. 2d 1996); see also Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 *GEO. L.J.* 605 (2000).

⁷⁰ See, e.g., *Harshbarger v. Harshbarger*, No. 92-CA-111, 1993 WL 221269 (Ohio Ct. App. June 11, 1993) (considering husband's prevention of wife from talking on the phone for more than twenty minutes a factor in finding that he had committed extreme cruelty).

⁷¹ FAMILY VIOLENCE PREVENTION FUND, *DOMESTIC VIOLENCE IN CIVIL COURT CASES* 23 (1992).

⁷² See CHARLES EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AND LEGAL JUSTIFICATION* 9-10 (1987). Nearly half of the women studied were forbidden by their batterers to have personal friends or have friends in the home. A husband's refusal to allow his wife to invite her relatives to visit constitutes extreme cruelty. See, e.g., *Gazzillo v. Gazzillo*, 379 A.2d 288 (N.J. 1977); *Harshbarger*, 1993 WL 221269.

⁷³ Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 *FAM. L.Q.* 313, 314 (1995).

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victim from learning English, or from having contact with people who speak English. A linguistic barrier minimizes a victim's ability to access health care, social services, domestic violence programs, immigrant rights agencies, law enforcement, and the courts.⁷⁴ Further, abusers often aggravated this sense of isolation by threatening to have their victims deported if they attempted to avail themselves of outside assistance or support.

SEXUAL ABUSE

Sexual abuse encompasses both the criminal legal definition of sexual assault, requiring elements of lack of consent, force or threat of force, and sexual penetration, as well as a broad range of behavior, including unwanted sexual conduct engendered through more subtle or implicit threats.⁷⁵

Rape, sexual assault, and any unwanted sexual contact are crimes that constitute battery. In some VAWA self-petitioning cases, immigration attorneys, advocates, judges, and DHS adjudicators make the mistake of treating cases of emotional abuse, in which sexual abuse is also present, as extreme cruelty cases and not battery cases. When sexual abuse is present and can be proven through the victim's affidavit and other evidence, the VAWA petition can be based on battery and extreme cruelty.

IMMIGRATION-RELATED ABUSE

When immigration related abuse is present in a relationship it is a key indicator of extreme cruelty.⁷⁶ Abusers of immigrant women often threaten to report their victims to the immigration authorities.⁷⁷ When immigrant women are dependent on their partners for legal immigration status, are undocumented, or have a vulnerable non-permanent immigration status,⁷⁸ the power of immigration related abuse is accentuated.⁷⁹ Immigrant women are placed in the untenable position of having to choose between living with ongoing and escalating abuse or taking action to stop the abuse and risking deportation. Others believe that they will be turned away from help by social services, health care and the justice system because they are non-citizens.⁸⁰

POSSESSIVENESS AND HARASSMENT

Possessiveness and harassment also provide important evidence of extreme cruelty. Possessiveness may or may not be apparent to those around the abuser and/or victim. An abuser may be jealous and possessive of the victim.⁸¹ The abuser might accuse the victim of infidelity and of attempts to attract other men.⁸² Courts have ruled in family law cases that such behaviors can, in certain circumstances, constitute extreme cruelty. An abuser may open the victim's mail,⁸³ call the victim frequently at home and at work or drive or loiter around the victim's home, work, or shelter;⁸⁴ constantly write letters to the victim;⁸⁵ contact the victim's friends, family, or employer;⁸⁶ interrogate children or other family members; stalk the victim or victim's

⁷⁴ *Id.* at 317.

⁷⁵ Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 FLA. B.J. 24, 25 (1994).

⁷⁶ Giselle Aguilar Hass, Mary Ann Dutton & Leslye Orloff, *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in DOMESTIC VIOLENCE: GLOBAL RESPONSES 93, 105 (2000); see also Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 108 (2002).

⁷⁷ See Leti Volpp, WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE 6 (1995).

⁷⁸ Examples include student visas that can be violated by working, and work visas tied to a particular employer.

⁷⁹ Hass et al., *supra* note 72, at 105.

⁸⁰ *Id.*

⁸¹ In a survey of 234 physically abused women, seventy-three percent experienced excessive jealousy and possessiveness. Diane R. Follingstad et al., *The Role of Emotional Abuse in Physically Abusive Relationships*, 5 J. FAM. VIOLENCE 101, 113 (1990).

⁸² Courts dealing with divorce cases have recognized false accusations of infidelity as extreme cruelty. See, e.g., *Keenan v. Keenan*, 105 N.W.2d 54 (Mich. 1960) (holding that grounds for divorce exist where a husband falsely accuses his wife of adultery); *Mark v. Mark*, 29 N.W. 2d 683 (Mich. 1947).

⁸³ *Knuth v. Knuth*, No. C1-92-482, 1992 WL 145387 (Minn. Ct. App. June 30, 1992).

⁸⁴ See *Boniek v. Boniek*, 443 N.W.2d 196, 198 (Minn. Ct. App. 1989).

⁸⁵ See *State v. Sarlund*, 407 N.W.2d 544, 546 (Wis. 1987).

⁸⁶ *Id.*

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friends, family, and co-workers;⁸⁷ chase the victim's car;⁸⁸ or file frivolous legal actions against the victim.⁸⁹

Like possessiveness, open harassment is destructive to a victim's peace of mind and security. Through open harassment, the abuser publicly demonstrates his control over the victim. Harassment can humiliate a victim by portraying her as weak and subordinate. Public humiliation may also be a culturally based form of extreme cruelty, particularly among cultural groups that highly value privacy.

General Filing Procedures and Practice Pointers

Self-petitioners must complete and file DHS Form I-360 (Petition for Amerasian, Widow or Special Immigrant) and include all supporting documentation. Forms are available at www.uscis.gov, in person at a DHS office, by phone at 1-800-870-3676, or by mail. For sample documents used in filing a VAWA self-petition, see the ASISTA website.⁹⁰

Send self-petitions by certified return receipt mail to:

U.S. Citizenship and Immigration Services
Vermont Service Center
75 Lower Welden Street
St. Albans, VT 05479-0001

Practice Pointer:

While there are no longer any filing fees for VAWA self-petitions, fees are required for work authorization and adjustment of status to lawful permanent residency applications.⁹¹ Low income victims can apply for waivers of these fees and all fees associated with a VAWA self-petition.⁹²

Self-petitioners should keep a copy of everything they submit to the DHS, including the application, accompanying documents, and the proof of mailing. **Do not send original birth certificates, legal documents, or photographs with the petition. Send copies.** Within a few weeks after mailing the application and fees, the self-petitioner should receive an acknowledgement or Notice of Receipt.

Practice Pointer:

Battered immigrant women often seek help at shelters. Therefore, shelter workers are in the best position to help battered immigrants begin gathering the necessary documents and information for their self-

⁸⁷ States have recognized stalking as a ground for issuing a civil protection order. See, e.g., N.J. STAT. ANN. §§ 2C:25-19 and 2C:12-10 (West 2005); N.M. STAT. ANN. § 40-13-2-C-9 (LexisNexis Supp. 1993); OKLA. STAT. ANN. TIT. 22, § 60.1 (West 2003); R.I. GEN. LAWS § 11-59-2 (2003). Stalking is generally defined as the intentional commission of more than one act which reasonably causes a victim to fear serious bodily injury. U.S. DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, STRENGTHENING ANTISTALKING STATUTES, NCJ 189192 (2002), available at <http://www.ovc.gov/publications/bulletins/legalseries/bulletin1/ncj189192.pdf>. Every state has passed an anti-stalking law criminalizing this behavior. *Id.* A 1996 study estimated that over one million women are stalked every year. PATRICIA TJADEN AND NACY THOENNES, STALKING IN AMERICA: NATIONAL VIOLENCE AGAINST WOMEN SURVEY (1998), available at http://www.ncvc.org/src/main.aspx?dbID=DB_NVAW587.

⁸⁸ See Christenson v. Christenson, 472 N.W.2d 279, 280 (Iowa 1991).

⁸⁹ See Johnson v. Cegielski, 393 N.W.2d 547 (Wis. Ct. App. 1986).

⁹⁰ <http://www.asistaonline.org/vawa.asp>.

⁹¹ U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS SETS FINAL FEE SCHEDULE TO BUILD AN IMMIGRATION SERVICE FOR THE 21ST CENTURY (2007), <http://www.uscis.gov/files/pressrelease/FinalFeeRulePressRelease052907.pdf> (last visited Feb. 23, 2008).

⁹² Section 201(d)(7) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 Public Law 110-457 (December 23, 2008) created fee waivers for all filings related to or arising in connection with a VAWA self-petition, VAWA cancellation, VAWA suspension of deportation, U visa or T visa case from filing through adjustment of status to lawful permanent residency. Removing mandatory non-waivable fees greatly increases access to immigration relief for immigrant victims of violence against women.

petition. Immigration attorneys helping clients with VAWA self-petitions should work with shelter workers or a domestic violence advocate. These advocates will help the attorney and client develop the case affidavit and properly document the full history of violence, controlling behavior, and emotional abuse. A shelter worker or domestic violence advocate can also help create a safety plan for your client. The plan may include providing a safe space for the collected information and documents to prevent the papers from being found and destroyed by the abuser.

An attorney working with a self-petitioner should make sure to:

- Collect all necessary details of the client’s story by asking open-ended questions through a series of interviews. Advocates can collect this information for the attorney.
- Obtain the draft affidavit the advocate developed in collaboration with the client and organize it in a format that will be most effective for the adjudicator.
- Collect affidavits and other documents corroborating the existence of domestic violence and a good faith marriage.
- Index and summarize supporting documents by elements of proof so DHS examiners may easily understand which documents support which elements of proof and how.
- Include a cover letter providing a road map through the case, using bullets or a similar technique to maximize reader-friendliness.

The Self-Petitioner’s Affidavit

The self-petitioner’s personal affidavit is the most important piece of evidence; it is the first document that most VAWA adjudicators review, and should, if done well, support a finding that the applicant is credible.

The affidavit should provide as much detail as possible in the applicant’s own words. The affidavit is essentially the story of the client’s relationship with her spouse, and should explain why she is entitled to relief pursuant to the seven factors identified above. Likewise, the affidavit should be written in a personal, humanizing manner, thus better eliciting the reader’s sympathy. The affidavit should address each element of proof. The attorney can recognize the affidavit and reword certain passages if they are unclear, but should not write the affidavit and should not use legal terminology. Attorneys and advocates should organize the victim’s affidavit in chronological order, making it easier for the adjudicator to understand the development of the relationship and the history and patterns of abuse. This can be done while still keeping the story as much as possible in the victim’s own words.

In addition to all the eligibility requirements, immigration officials look for consistency in the affidavit. It is important to include dates, places, and detailed descriptions of events only when the petitioner is certain that the information is correct. When inconsistencies arise between the affidavit and supporting documentation, the affidavit should address the inconsistency. For example, a victim might have denied to a hospital worker that her injuries were caused by domestic violence. The affidavit should acknowledge this inconsistency and explain why she did not reveal to the hospital staff the cause of her injuries. Immigration adjudicators are trained in recognizing domestic violence and should understand the legitimate safety-related reasons why a battered woman may not reveal the domestic violence to a health-care provider. However, failure to explain the inconsistency could call her credibility into question.

The affidavit should include:

- The client’s full name, place, and date of birth

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- Proof of good faith marriage: including details regarding how the client and her spouse met, how the relationship developed, why and when they decided to get married and details about the wedding. It should also provide a description about their daily lives (who paid the bills, who prepared meals, cleaned the house, took care of the children) and information about their social life together.
 - If the marriage was arranged, it should explain how the marriage was consistent with the practices of either the client's or her spouse's culture.
- Residence with the abusive spouse/parent: The affidavit should state when, where, and for how long the petitioner resided with the abuser, and the nature of the relationship while living together.
- Information about the self-petitioner's children: It should also state where and when the client had children, and any plans to have children with her husband, whether she has children from other relationships that she wants to include in her self-petition, and when and where these children were born.
- Citizenship or Lawful Permanent Resident status of abusive spouse or parent: It should also include any information she has about her abusive spouse's status, U.S. citizenship, or lawful permanent resident status. This may include a statement that she had seen his passport or green card, or information about his passport or Alien number; or statements made by the abusive spouse or parent to others about his citizenship or resident status.
- A description of how and when the physical and/or psychological abuse began, and the client's fears, hopes, and other feelings about it. Descriptions of the abuser's use of intimidation, economic abuse, isolation, immigration-related abuse, and sexual abuse to exert power and control over her and perpetuate extreme cruelty.
- A description of the incidents in which the spouse harmed the petitioner and/or her children and his tendencies to attempt to control her. Any threats should be described. So should attempts to get help and the results when she did, or her fear to ask for help. Also include observations, reactions, and physical and emotional injuries. Her fear of reporting the abuse to other people or to the police should be explained, including any attempts to seek help both through formal service providers (police, shelter, courts, hospitals, social service agencies) and informal methods (talking to friends, family members, community members, leaders, elders, or clergy).
- It should state the petitioner's relationship with his family and their role (if any) in the abuse, including whether they pressured the client not to report the abuse to the police.
- It should describe the petitioner's fears for her own personal safety, the safety of her children, or that of her family.
- Good Moral Character: A petitioner who has no arrests should clearly state this in her affidavit. She should also discuss her involvement in community, faith-based organizations, her children's school, and support groups. A petitioner with any arrests or convictions should immediately be referred to an immigration attorney with experience working on criminal law and domestic violence issues.
- At the end of the declaration, it is important to include the following phrase:

“I affirm, under penalty of perjury, that all the foregoing statements are true to the best of my knowledge.” (the Petitioner's signature and the date should follow the statement).

Affidavits from Witnesses and Advocates

1) Corroborating witness affidavits: if possible these should be obtained from:

a) Witnesses to the abuse or the effects of the abuse: The applicant should describe incidents where the witness:

- was present during the incident;
- saw or heard an assault, harassment, threat, act of humiliation, or other form of extreme cruelty;
- saw the battered immigrant's bruises or injuries; or
- was told by the battered immigrant about abusive incidents.

b) Domestic Violence Advocates, including shelter workers: Can attest to time spent in the shelter, involvement in programs or receipt of services for domestic violence victims and incidents of abuse disclosed by the woman to the advocate. Affidavits of this nature should include:

- the advocate's experience in the area of domestic violence and/or sexual assault (how long, in what capacity, how many clients served);
- what the petitioner told the advocate about the sexual assault/ domestic violence (including acts of psychological abuse);
- an assessment that the victim seemed credible to the advocate given her experience with victims of domestic violence/sexual assault;
- an explanation of why the treatment experienced by the victim amounts to domestic violence/sexual assault;
- any suggestions or recommendations the advocate provided to the petitioner (safety-planning measures, counseling resources, or any other information related to the domestic violence/sexual assault she had experienced).

c) Psychologists, counselors or mental health workers: (if the applicant attended counseling) Can explain the abuse disclosed by the applicant, and assert that the woman's behavior follows patterns to be expected of someone who has been abused by a partner. Affidavits of this nature should include:

- the number of years the mental health worker has worked in the field;
- the number of battered women the mental health worker has treated or seen;
- the number of counseling visits by the self-petitioner.

d) Co-workers, religious leaders, neighbors, and friends: Can describe any abuse they witnessed and/or describe their observations about how the abuse has affected the victim and her children. Affidavits of this nature should include:

- the length of time they have known the self-petitioner;
- any knowledge they have about the marital relationship, including documentation of the courtship and/or marriage;
- the fact that the victim and abuser resided together;
- information about any abusive (both physical and emotional) incidents they witnessed;
- a description of any injuries sustained by the self-petitioner or her children that they are aware of as well as any other effects, psychological or emotional, of the abuse on the immigrant victim and her children;
- information about any help they offered the immigrant victim, and
- any concerns/fears for themselves, the victim or her children the witness may have.

e) Affidavits of Children: When children are self-petitioners, or have witnessed abuse, they can file their own affidavit in support of their mother's self-petition. While these affidavits can be useful to the case, preparing them can traumatize the children. It is therefore recommended that only older children

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be asked to prepare affidavits. It is further recommended that children who have witnessed or experienced domestic violence be referred to counseling and treatment. Those involved in counseling can be assisted by their mental health treatment providers in preparing their affidavits.

Checklist of Suggested Supporting Documents

The regulations interpreting VAWA recommend the submission of certain types of documents with the self-petition.⁹³ However, DHS is required to consider “any credible evidence.”⁹⁴ The suggested evidentiary documents provided in this section are meant to serve as a guide. These documents are not an exhaustive list of the types of evidence that may be offered to support a petition under VAWA. Petitioners do **NOT** need to provide all the documents listed below, these are examples of evidence an applicant may provide.

1) What additional evidence should accompany the application?

In addition to properly completing the self-petition, Form I-360, and preparing the victim’s and witness’ affidavits, the petitioner should prove each element of her VAWA case through accompanying documentation whenever possible. The types of additional evidence that can be submitted to support a VAWA self-petition include the following items, listed by element of proof:

a) Marriage to the abuser:

The following documents are acceptable as proof of marriage:

- a marriage certificate;
- self-petitioner’s affidavit stating the fact of the marriage, when and where the ceremony occurred, and who performed the ceremony; and/or
- affidavits by persons with knowledge of the marriage.

i) The self-petition must be filed within two years of divorce: where the self-petitioner is divorced from the abuser, the petition must be filed within two years of the date the divorce became final. The following should be submitted:

- a divorce order establishing the date the divorce became final;
- an affidavit from the self-petitioner detailing the battery or extreme cruelty and its connection to the divorce;
- other evidence of battery and extreme cruelty, including any protection order issued for her or her children (including any court papers she filed seeking the protection order which outline the abuse in the relationship)⁹⁵ medical records, affidavits from health, mental health or domestic violence service providers documenting domestic violence in the marriage.

ii) Marriage in case of bigamy, divorce or death: If the self-petitioner is not legally married to the abuser because of the abuser’s bigamy, she may still qualify if she can prove that she believed she legally married the abuser.⁹⁶ The following forms of evidence may be used:

- marriage certificate;
- marriage license application;

⁹³ See 8 C.F.R. § 204.2(c) (2007).

⁹⁴ See 8 C.F.R. § 204.4 (2007); INA § 204(a)(1)(H), 8 U.S.C. § 1154(a)(1)(H) (2000); see also U.S. CITIZENSHIP & IMMIGRATION SERVS. MEMORANDUM FROM PAUL VIRTUE, EXTREME HARDSHIP AND DOCUMENTARY REQUIREMENTS INVOLVING BATTERED SPOUSES AND CHILDREN (Oct. 16, 1998).

⁹⁵ Review all official documents submitted in support of the self-petition for consistency with the self-petitioner’s affidavit. The self-petitioner should explain any inconsistencies with her affidavit in a cover letter prepared by an attorney.

⁹⁶ INA § 204(a)(1)(A)(iii)(II)(aa)(BB), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(BB) (2000)(relating to U.S. citizens); INA § 204(a)(1)(B)(ii)(II)(aa)(BB), 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(aa)(BB) (2000)(relating to lawful permanent residents).

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- photographs of the wedding ceremony;
- affidavits from persons attending the wedding ceremony; and/or
- an affidavit from self-petitioner stating facts supporting why she believed she legally married the abuser, and why she believed her marriage was valid.

iii) Widow of a U.S. citizen who died within the past two years: If the self-petitioner was the spouse of an abusive U.S. citizen (not permanent resident) who died within the past two years, the victim can still file a self-petition.⁹⁷ The following documents must be provided:

- marriage certificate;
- death certificate of the U.S. citizen spouse; and
- Proof of U.S. citizenship (including, U.S. passport, birth certificate, or naturalization certificate).

b) Children filing for VAWA:

i) A child who files a VAWA self-petition must prove that s/he is the natural child, stepchild, or adopted child of a U.S. citizen or permanent resident.⁹⁸ There is no longer a requirement that they reside with their abusive parent for 2 years for abused adopted children.⁹⁹ The relationship may be proven with:

- a birth certificate or other document establishing that the child is under 21 years of age listing the parents' names;
- the parents' marriage certificate;
- if the child was born out of wedlock, documents showing legitimation (legal acknowledgment or other evidence or proof that the country where the child was born does not distinguish between children born in and out of wedlock)¹⁰⁰
- for adopted children, an adoption decree, or an affidavit of adoption and evidence of the abuser's legal custody.¹⁰¹

ii) Stepchild of the abuser: In case of an abusive stepparent, the abused child's relationship with the abusive stepparent may be proven by submitting:

- if either the child's natural parent or step-parent were previously married, evidence that prior marriage or marriages have been terminated;
- child's birth certificate proving the child's relationship with his/her natural parent;
- the marriage certificate of the natural parent and the stepparent.

iii) Children included in the self-petition: A self-petitioner who wants to include her child/children in the self-petition must prove her parent/child relationship with the children. The children must also be under the age of 21 to be included in the application. The following documentation must be included for each child:

- child's birth certificate, listing the names of the child's parents along with an English translation, where applicable;

⁹⁷ INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa), 8 U.S.C. § 1154 (a)(1)(B)(ii)(II)(aa)(BB) (2000).

⁹⁸ INA § 204 (a)(1)(A)(iv) and (B)(iii), 8 U.S.C. § 1154(a)(1)(A)(iv) and (B)(iii) (2000).

⁹⁹ This requirement appears in old versions of the Immigration and Nationality Act, but no longer applies. Adopted children can also apply for lawful permanent residency directly.

¹⁰⁰ These requirements vary depending on the laws of the country where the child was born. See generally INA § 101(b)(1)(C), 8 U.S.C. § 1101(b)(1)(C) (2000); In re Obando, 16 I. & N. Dec. 278 (B.I.A. 1977); In re Cabrera, 21 I. & N. Dec. 589 (B.I.A. 1996); In re Martinez, 21 I. & N. Dec. 1035, 1038 (B.I.A. 1997).

¹⁰¹ Section 805(d) of the Violence Against Women Act of 2005 most recently modified the requirements for abused adopted children removing the two year custody and residency requirement for abused adopted children. § 101 (b) (1) (E) (i) of the INA; 8 U.S.C. 1101 (b) (1) (E) (i) (2008). PLEASE NOTE that this statutory language overrules the existing section of the Code of Federal Regulations on abused adopted children.

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- if the self-petitioner is the child's father:
 - Marriage license or certificate documenting the child's parents were married;
 - Evidence of the child's legitimation; or
 - Evidence of a bona fide parent-child relationship (pictures, letters).

c) Good-faith marriage

A self-petitioner must be able to demonstrate that her marriage to an abusive spouse was entered into in good faith and not as a means to circumvent immigration laws. In addition to the evidence listed in the "Residence with the Abuser" section below, a victim may submit the following:

- description in the self-petitioner's affidavit of courtship, wedding (include pictures), shared residence, and shared experiences (one affidavit describing this and the abuse or other relevant information can be submitted);
- insurance policies listing her spouse, joint leases, jointly filed income tax returns, bank accounts, and other evidence of shared household and financial obligations;
- birth certificates of their children;
- photographs of the wedding;
- photographs of the self-petitioner with her spouse and other family members, preferably taken on different dates and at different locations;
- letters or cards exchanged with her spouse and between her family members and spouse;
- names, addresses and phone numbers of people who knew the abuser and the applicant as a married couple;
- photo IDs with the applicant's married name;
- letters from her employer or healthcare provider stating that she changed her name or listed the abuser as an emergency contact.

d) Residence with the abuser

A self-petitioner is not required to be residing with the abuser at the time of filing, but she must prove that she resided with the abuser at some point in time during the marriage. No specific length of residency with the abuser is required. Evidence may include:

- self-petitioner's affidavit describing residency with the abuser;
- joint auto, health or life insurance, tax returns or bank accounts, lease agreements, property deeds, or rent receipts with both names on them;
- employment or school records that list the names of both the applicant and the abuser at the same residence;
- letters or cards addressed to both the applicant and the abuser at the same residence;
- utility bills, medical records, credit card bills, magazine subscriptions in both names or to each spouse at the same address;
- an affidavit of the landlord, apartment manager or neighbors at the address where the couple lived attesting to their residence at that location.

e) Evidence demonstrating the abusive spouse or parent is a U.S. citizen or lawful permanent resident:

A self-petitioner must prove that her/his spouse or parent is a U.S. citizen or lawful permanent resident. The following is a list of documents that can be used to prove the abuser's U.S. citizenship or lawful permanent resident status:

- abuser's birth certificate indicating birth in the United States;
- abuser's naturalization certificate, green card, 'A' number, or any DHS document indicating immigration status;
- abuser's U.S. passport or passport number;

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- a copy of the I-551 stamp in the abuser's passport, indicating lawful permanent resident status; or
- upon request, DHS will attempt to electronically verify abusers' citizenship or immigration status from their computerized records.¹⁰²

f) Battery or extreme cruelty during the marriage

One of the most important elements of a VAWA self-petition is proof that battery or extreme cruelty took place. VAWA does not explicitly require any particular quantity of abuse. Proof of one incident of battery or extreme cruelty is legally sufficient.¹⁰³ Sexual Assault is battery and extreme cruelty under this definition.¹⁰⁴ It is strongly recommended, however, that advocates and attorneys work with immigrant victims to include as much of the history of battery and extreme cruelty in the victim's affidavit as possible. Advocates and attorneys should provide evidence for as many incidents as possible to establish a pattern of violence and extreme cruelty. Types of documentation to obtain are:

i) Affidavit of the battered woman telling her story: It is important to focus on the facts of the violence or cruelty, mentioning each incident separately, and in chronological order, listing when each incident occurred, and describing the applicant's fears and injuries (both physical and psychological), and the effect that each abusive incident had on any children.

The history of power, control, and extreme cruelty should also be described as part of the chronology. The effect that this pattern of power and control had on the self-petitioner and her children should be discussed. The affidavit should establish that the self-petitioner is credible, explain why she is entitled to relief, and elicit the reader's sympathy.

Types of evidence establishing abuse or extreme cruelty have occurred are:

- Restraining orders or civil protection orders that are obtained in any state, along with the pleadings (petition/affidavit) signed by the self-petitioner that were filed with the court in the civil protection order case.
- Police reports, records of phone calls to the police, or police visits to the couple's address. This may include phone calls to the police registering a complaint, a log of police runs made to the couple's address, and copies of all tapes of calls to the police for help.
- Photographs of the sustained injuries that have been taken by the police, family, advocate, victim's attorney, or the victim herself. If possible, for larger injuries, take a photo holding a ruler next to the injury so that the fact-finder can ascertain the size and scale of the injury. Include the woman's face within every photo, or take a full-body photo and then close ups. The local police station may also take photos. Include an affidavit of the person who took the photograph about their observations, including the time and date the photograph was taken, the fact that they took the photograph, and an attestation to the accuracy of the photograph compared to the photographer's in-person observations of the bruises. Take several extra photos to be sure you will end up with one of good quality that will be useful to the case.
- Photographs of damaged property If a batterer has damaged any property during a violent incident, such as ripping clothes, smashing sentimental objects, pulling phone cords out

¹⁰² 8 C.F.R. § 204.1(g)(3) (2007). This can be useful if the abuser is a naturalized citizen, a lawful permanent resident, or a U.S. born citizen who previously filed an immigration case for the self-petitioner or a child.

¹⁰³ VAWA self-petitioners and VAWA cancellation of removal applicants need not prove any specific amount of abuse. In contrast, battered immigrants who can only file for U visas (crime victim visas) must prove that they suffered substantial physical or mental harm as a result of criminal activity. This is a much higher standard. Refer to Chapter 3.6 of this manual, "Alternative Forms of Relief for Battered Immigrants and Immigrant Victims of Crime: U Visas and Gender-Based Asylum", for more information on U visas.

¹⁰⁴ 8 C.F.R. §204.2(c)(1)(vi) (2007).

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of the wall, etc., if possible. The damaged property should be photographed where it was damaged, and then the object should be collected and retained. The woman's affidavit should state that the applicant still has the object and that it can be inspected by the DHS.

- Corroborating witness affidavits for each incident of abuse where another person was present, or from witnesses who saw or heard an assault or threat, saw the victim with bruises or injuries, or was told by her about abusive incidents close to the time they occurred. Reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel are very helpful.
- Medical records If the account told by the victim to the health professional differs from her true story (e.g. the victim initially reported falling down the stairs rather than revealing the truth that she had been battered), the applicant's affidavit and the cover letter from the attorney or advocates to DHS must address and explain any inconsistencies between the two stories. Advocates and attorneys should develop a specific HIPPA compliant doctor/patient privilege-waiver form to obtain copies of her medical records and mental health treatment records. Such a waiver should limit the scope of release to obtaining medical documentation for use solely in a victim's VAWA self-petition. VAWA confidentiality provisions, in conjunction with a limited release waiver, protect against the records being used in any family or criminal court proceeding without the victim's consent.
- Criminal court records if a batterer was arrested or convicted for any act of violence or destruction of property relating to the applicant (certified copies if possible); a victim's own statements to police or prosecutors may be released to her by the prosecutor's office for this purpose.
- Domestic violence program or shelter records or affidavits attesting to the time the victim spent in the shelter, and the incidents of abuse disclosed to shelter workers. If the applicant attended counseling sessions, records indicating her attendance should also be added.

g) Good moral character

Convictions for certain crimes, as well as other actions, will bar a self-petitioner from establishing good moral character.¹⁰⁵ To demonstrate good moral character, the petitioner should present:

- information in her affidavit attesting to her own good moral character, lack of a criminal record, and involvement in her community, church, or her children's school;
- local police clearance or state-issued background checks from each locality or state in the United States in which the victim has resided for six months or more during the three years immediately preceding the petition date. A police clearance or "good conduct" letter can be obtained from the local or county police department in each locality where she lives or has lived. If the victim has moved, these letters can be requested in writing, normally with proof of identity and a small fee for the search. Further, it may be necessary to obtain similar clearance letters from foreign countries if the victim lived abroad during the requisite time period;
- an explanation of why police clearances or background checks cannot be safely obtained or are not available, submitted along with other evidence of good moral character with her

¹⁰⁵ INA § 101(f); 8 U.S.C. § 1101(f) (2000).

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affidavit;

- affidavits from responsible persons who can knowledgeably attest to her good moral character and lack of criminal record may also be submitted; and/or
- **if the battered immigrant was arrested, accused or has committed a crime, it is absolutely essential to consult with an immigration lawyer prior to filing the self-petition in order to assure that the victim's affidavit and/or documentary submissions adequately address and mitigate the consequences such past criminal activity may have on a finding of good moral character. Failure to do so could place the victim at strong risk of deportation.**

h) Petitioner's residence in the U.S. or abroad:

To file a self-petition, victims must either reside in the United States, have been abused in the United States, or be the abused spouse of a U.S. government employee, or member of the military working or stationed abroad. Self-petitioners residing in the United States may provide proof of current U.S. residence through the following documents:

- employment or school records;
- a property deed with her name on it, rent or mortgage receipts, utility bills, insurance policies, hospital or medical records;
- birth certificates of children born in the United States and children's school records;
- cards or letters addressed to her address, affidavits by her neighbors, landlords, and friends attesting to her residence in the United States; and/or
- the self-petitioner's affidavit stating her residence in the United States. No specific length of the residence in the United States is required as long as the victim resides in the United States at the time of filing.

Some self-petitioners may file from abroad if the abusive spouse or parent falls into one of three categories:

1) Where the abusive spouse or parent is an employee of the U.S. government:¹⁰⁶ Evidence should include:

- spouse's or parent's employment records, pay stubs, employment identification card, and/or
- other documentation of the spouse's or parent's employment with the U.S. government;

2) Where the abusive spouse or parent is a member of the uniformed services¹⁰⁷: Evidence should include:

- Spouse's or parent's military identification card,
- military orders, pay stubs,
- DD-214, or
- documentation that the self-petitioner is a dependent member of the U.S. military of uniformed services;

3) Victims subjected to battery or extreme cruelty in the United States who are currently residing abroad or filing from abroad should submit documentation showing the abuse occurred in the United States.

¹⁰⁶ The abuse can occur in the United States or abroad.

¹⁰⁷ The abuse can occur in the United States or abroad. Uniformed services include all branches of the United States military, the Coast Guard, and the Public Health Service.

i) Loss of citizenship or lawful permanent resident status:

In cases where the abuser lost or renounced his immigration or citizenship status within the past two years, the abuse victim can still file the self-petition if she demonstrates that the loss of status or renunciation of citizenship or lawful permanent resident status is related to the domestic violence.¹⁰⁸

j) When an abuser has renounced his citizenship or given up his lawful permanent resident status:

Self-petitioners should submit evidence proving that the domestic violence predated the renunciation. This is particularly important in cases where lawful permanent resident abusers flee the country after the issuance of a protection order or a warrant in a criminal case.

Obtaining Lawful Permanent Residence Under VAWA

Obtaining lawful permanent residence status through VAWA involves two steps. First, DHS must approve the VAWA self-petition. Once approved, the applicant must apply for lawful permanent residence. There are two ways in which an applicant can obtain her green card, which is proof of lawful permanent residence. These are: 1) adjustment of status and 2) consular processing.

“**Adjustment of status**” is the procedure for obtaining a green card for applicants presently in the United States. Applicants submit their application for lawful permanent residence to local DHS District Offices and await an interview with DHS examiners.

“**Consular processing**” is the procedure for obtaining legal permanent resident status for those who are not in the United States, and those who do not qualify to adjust status (obtain lawful permanent residency) within the United States. Applicants who fall into this category must apply for immigrant visas abroad at a U.S. consulate in their home country.

Battered immigrants with approved self-petitions can obtain their green cards through adjustment of status. They are not required to leave the U.S. and apply for immigrant visas at U.S. consulates abroad.¹⁰⁹ Recent legislation enabled a battered immigrant to adjust her status while in the United States, provided that she has an approved self-petition, that she is not inadmissible,¹¹⁰ and that she has a visa immediately available to her. This chapter provides basic information on adjustment of status as a means of obtaining lawful permanent residence for battered immigrants with approved VAWA self-petitions.

ELIGIBILITY FOR LAWFUL PERMANENT RESIDENCY

Being a permanent resident, also called having a ‘green card,’ means that a person has lawful permission to live and work in the United States. Permanent residents can petition for spouses and children to come to the United States. When someone has an approved VAWA Self-petition and they want to become a permanent resident they must apply to change their immigration status to that of a permanent resident, this is called “adjustment of status.” Not everyone who has an approved self-petition is eligible to obtain lawful permanent resident status immediately following the approval of the petition. However, **VAWA self-petitioners who are married to, or are the minor unmarried children (under age 21) of U.S. citizens, are considered “immediate relatives”** and can file for lawful permanent residency as soon as their VAWA self-petitions are approved.

¹⁰⁸ INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(bbb), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(bbb) (2000) (relating to loss of U.S. citizenship); INA § 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa), 8 U.S.C. § 1154§ 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa)(2000) (relating to loss of lawful permanent resident status).

¹⁰⁹ All VAWA self-petitioners may adjust their status in the United States under INA §§ 245(a) and (c) without paying the \$1000 fine. Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1506(a), 114 Stat. 1464, 1527 (2000).

¹¹⁰ To enter the United States or be granted lawful permanent residence, an applicant must not fall within any of the inadmissibility grounds listed in INA section 212(a). See INA § 212(a), 8 U.S.C. § 1182(a) (2000).

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VAWA self-petitioners who are married to (or the children of) **lawful permanent residents** are subject to a “visa quota” system. VAWA self-petitioners who are married to, or the children of **US citizens** do not fall into the visa quota system. The visa quota system is a limit on the number of people that can apply for and be granted permanent residency. The visa quota system limits the number of visas provided for relatives of lawful permanent residents and in some cases U.S. citizens. Since there are more people each year seeking to become lawful permanent residents than there are available visas, immigrants restricted by the visa quota system must wait for a visa to become available before they can adjust their status and become lawful permanent residents. This process can take up to seven years, and is dependent on the applicant’s country of origin, and when they filed their self-petition with the DHS.¹¹¹

HOW TO APPLY FOR LAWFUL PERMANENT RESIDENCY

Once a self-petitioner qualifies for to apply to become a lawful permanent resident she must submit the “application for adjustment of status”¹¹² and supporting documents, along with the filing fee (listed below) to the local DHS District Office with jurisdiction over the applicant’s residence. The documents can be downloaded on the United States Citizenship and Immigration Services (USCIS) website at <http://www.uscis.gov> (go to Immigration Forms), or can be ordered by calling 1(800) 870-3676. The self-petitioner and any dependents will each need:

- Form I-485, Application for Adjustment of Status
- the filing fee of \$315 (\$215 if under 14 years of age), or fee waiver request for form I-485 (a sample fee waiver request is included as a appendix to this chapter);
- copy of birth certificate, along with an English translation (**translations of foreign documents must be certified by a competent translator**);¹¹³
- Form G325A, biographic information;
- a copy of the Form I-797, Notice of Action (showing that the VAWA self-petition, Form I-360 was approved);
- Form I-693, Medical Examination of Aliens Seeking Adjustment of Status (plus supplemental vaccination form);
- 2 color photos taken within the last 30 days (see form I-485 instructions for more details);
- Form I-765 Application for Employment Authorization, if the self petitioner doesn’t already have a work permit, along with a filing fee of \$175 or fee waiver request;
- \$50 for fingerprints for applicants 14 to 79 years of age;
- proof of entry into the U.S., if applicable (i.e. I-94 card and copy of passport).

Supplementary forms to include (depending on the circumstances) are:

- Form G-28, Notice of Entry as Appearance as Attorney or Accredited Representative, if the victim is represented
- Form I-131, Application for Travel Document, along with the filing fee of \$165, if the petitioner needs to travel outside the United States while the application is processed, **but note that applicants who have been out of immigration status should generally not travel because they will be barred from returning to the United States and adjusting their status.**¹¹⁴
- Form I-601, Application for Waiver of Grounds of Excludability with filing fee of \$250, if the applicant is inadmissible for one of the reasons described below.

¹¹¹ If the abusive spouse previously filed a family-based I-130 petition for the immigrant victim, that petition date may be used to shorten the wait time.

¹¹² “Adjustment of Status” is the DHS legal phrase that means to apply for and attain legal permanent resident status.

¹¹³ 8 CFR 204.1(f)(3) (2007).

¹¹⁴ Before any applicant travels outside the United States, she must consult with an immigration attorney regarding the potential consequences. An applicant who has been out of status for more than six months can be barred from receiving any immigration benefits, including lawful permanent residence, for three years. If an applicant has been out of status for over one year, she will be barred from receiving any immigration benefits for ten years. INA § 212(a)(9)(B)(i), 8 U.S.C. 1182 (a)(9)(B)(i) (2000).

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Each form has its own filing fee. The applicant will need to add up the total cost of the fees for each form and submit that total cost with her application package. If the applicant is unable to pay the filing fees, she can submit a fee waiver request along with her residency application. All fees can be waived except for the fingerprinting fee. After the I-485 Application for Adjustment of Status and supporting documents are filed, DHS will alert the applicant of the date, time and location of a personal interview with a DHS examiner. Battered immigrants should be fully prepared for their adjustment of status interviews by having all of the necessary documents available in order to avoid further delaying the adjustment process.¹¹⁵ Items to bring to the interview:

- original birth certificate of each applicant;
- original marriage certificate;
- certified copy of Final Dissolution of Marriage (i.e. divorce decree) for all previous marriages, prior to marriage with the batterer, as well as the divorce decree if she is now divorced from the batterer within two years;
- original passport, if available;
- original I-94 card, if available;
- certified copies of arrest report and final court disposition (if applicable);
- copy of the approved self-petition – I-360;
- copy of DHS memorandum stating procedures that the local DHS office must follow if they have any questions about the self-petition;¹¹⁶
- evidence of the applicant’s income and financial resources – tax returns, pay stubs, letter from employer, proof of receipt of child or spousal support, court orders for child support, etc.

The objective of the adjustment interview is for the DHS examiner to decide if the applicant is admissible as a lawful permanent resident. Whenever possible, the immigrant victim should consult with an immigration attorney before the adjustment interview to identify potential problems or grounds for inadmissibility. To determine admissibility, the immigration official will assess the application and ask the applicant questions relating to the required medical exam, any criminal history, or any grounds of inadmissibility that may apply, such as fraud, “public charge”, or violations of the immigration laws. In addition, the interview serves as an opportunity for the applicant to update information on the application and correct any minor errors on the forms.

If the application for adjustment of status is approved, meaning the applicant is now a legal permanent resident, the Department of Homeland Security will mail a green card to the self-petitioner.

If the application to become a legal permanent resident is denied, the applicant may be placed in removal (deportation) proceedings before an Immigration Judge. The applicant may still be eligible to apply for adjustment of status again before an Immigration Judge.

GROUND OF INADMISSIBILITY

Grounds of inadmissibility are a list of reasons that render an applicant ineligible for permanent residence or admission to the United States (meaning the DHS or an Immigration Judge must generally deny the application for lawful permanent residence).¹¹⁷ Examples of the grounds are listed in Section 212(a) of the Immigration and Nationality Act and include the following:

- Health-related grounds (including HIV and tuberculosis);
- Criminal and related grounds;
- Security and related grounds;

¹¹⁵ The battered immigrant may be able to attend the interview without an attorney or other representative if there are no inadmissibility problems or other foreseeable complications. It is preferable, however, to have an attorney or accredited representative attend and help the battered immigrant prepare for the interview.

¹¹⁶ A copy of this memo is included in the Appendix to this manual.

¹¹⁷ Inadmissibility and excludability are synonymous. See INA § 212(a), 8 U.S.C. § 1182(a) (2000) (classes of aliens ineligible for visas or admission) for a complete listing of grounds for inadmissibility.

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- Public charge grounds;
- Fraud/misrepresentation;
- Aliens previously removed (deported) from the United States
- Other immigration law violations;
- Communist/ totalitarian party membership;
- Terrorist activity.

WHEN IS INADMISSIBILITY DETERMINED?

Identify and assess possible grounds for inadmissibility as early as possible in the VAWA case. Battered immigrants may have committed disqualifying criminal acts or have used unlawful means to obtain immigration benefits in the past, such as entering the country with fraudulent documents or misrepresenting facts in a benefit application. Immigration attorneys working with battered immigrants should determine any questions of inadmissibility prior to filing the self-petition or adjustment of status application.¹¹⁸ A trained immigration attorney or advocate should represent any self-petitioner in this situation. The attorney or advocate should also have experience assisting victims of domestic violence. With proper case development, battered immigrants may be able to obtain waivers for many inadmissibility grounds.

SPECIFIC GROUNDS OF INADMISSIBILITY

Immigrants may be inadmissible for a variety of reasons. This section will outline the more typical grounds identify the relevance to cases of battered immigrant women, and discuss in more detail the grounds most likely to affect battered immigrants when they apply for lawful permanent resident status: misrepresentation, health-related, and public charge. **Immigrants with criminal histories are also potentially subject to different criminal grounds of inadmissibility.** There are waivers available for many types of crimes, and VAWA self-petitioners can qualify for special waivers if there is a connection between the crime and the domestic violence. The criminal grounds of inadmissibility and available waivers are discussed separately in detail in Chapter 19 of this manual.

VIOLATIONS OF IMMIGRATION LAWS

Immigrants who have previously been removed or deported from the United States also face inadmissibility problems, and should be referred to an immigration attorney before applying for relief. An applicant who has been deported and then re-entered the United States illegally or who has been unlawfully present in the country for more than 180 days (and has left or now leaves the United States) will be inadmissible and ineligible for lawful permanent residence.¹¹⁹ There are waivers available and exceptions if there is a connection between the immigration violation and the abuse, but a battered immigrant in this situation **should not apply for adjustment of status without first consulting with an attorney.**¹²⁰ For example, waivers are available for victims of sexual assault, domestic abuse, and trafficking from sanctions for failing to voluntarily depart.¹²¹ Also, DHS can waive prior removal determinations for immigrant victims to help prevent the summary reinstatement of a prior removal order.¹²²

MISREPRESENTATION¹²³

¹¹⁸ If that is not possible, such as in instances where the self-petition must be filed before the abuser divorces the self-petitioner, or the abused immigrant fails to mention details that may make her inadmissible, the immigration attorney should use the time waiting for approval of the self-petition to assess admissibility issues.

¹¹⁹ An applicant who has been out of status for more than six months and subsequently left the United States can be barred from reentering the United States and receiving any immigration benefits (including lawful permanent resident status), for three years. If an applicant has been out of status for over one year and leaves, she will be barred from receiving any immigration benefits for ten years. INA § 212(a)(9)(B)(i), 8 U.S.C. 1182 (a)(9)(B)(i) (2008).

¹²⁰ See INA §§ 212(a)(9)(B)(iii)(IV) and (v), 8 U.S.C. § 1182(a)(9)(B)(iii)(IV) and (v) (2000); INA § 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii) (2000).

¹²¹ INA § 240A(b)(2), 8 U.S.C. 1229b

¹²² INA §§ 240A(b)(4) and (5), 8 U.S.C. 1229b

¹²³ Adapted from American Bar Ass'n Comm'n on Domestic Violence, CHAPTER SEVEN: OBTAINING LAWFUL PERMANENT RESIDENCY, *in* DOMESTIC VIOLENCE AND IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (2000).

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When an individual is seeking to obtain an immigration benefit such as permanent residence, any false statements made to an immigration official will have an impact on their immigration status.¹²⁴ Qualified battered immigrants can be barred from becoming lawful permanent residents due to misrepresentation and can even be removed (deported) from the United States.

Battered immigrants, who have, through fraud or willful misrepresentation made to an immigration official, sought to obtain admission into the United States, a visa, or any benefit under immigration laws, are inadmissible unless they acquire a waiver – referred to as a “212(i) waiver.”¹²⁵ Battered immigrants who falsely represent themselves as U.S. citizens **to any government official** are also inadmissible. There was no waiver for this form of misrepresentation and, in certain circumstances, may be subject to criminal prosecution.¹²⁶ There is a waiver to inadmissibility for misrepresentation by a VAWA self-petitioner based on hardship to US citizen children.¹²⁷

Adjustment and immigrant visa applications contain questions that the DHS examiner will ask and review at the interview. The questions asked can relate to how the petitioner entered the U.S. and where she lives and works. It is important for immigration attorneys and advocates to discuss any prior misrepresentation of facts with their battered immigrant clients to ensure that prior information has been consistently represented and does not lead to misrepresentations being made at the adjustment or visa interview.

The passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹²⁸ (IIRAIRA) created a new ground for inadmissibility, preventing battered immigrants from adjustment of their status if they misrepresented themselves as U.S. citizens. The most common form of misrepresentation is when an immigrant signs an I-9 form for employment and checks a box indicating that he/she is a U.S. citizen. Those immigrants that falsely signed the form before September 30, 1996, are not inadmissible; however, those that signed after September 30, 1996, may be found to be inadmissible.¹²⁹ Advocates and attorneys should warn their clients not sign any forms or make statements that falsely identify themselves as U.S. citizens.

WHAT QUALIFIES AS A MISREPRESENTATION?

Immigration attorneys can best advise battered immigrant clients on whether an action constitutes “misrepresentation” or “fraud” as it has been defined in immigration law. In the context of immigration law, three issues need to be analyzed to determine whether a battered immigrant has committed fraud:

1. Was there misrepresentation?
2. If so, was it “willful?”
3. Did the misrepresentation involve a fact or issue “material” to the application or benefit being sought?

It is important to understand the context of the statements made, including: at what time in the immigration proceeding was the statement made; to whom it was made; under what conditions was the statement

¹²⁴ INA § 212(a)(6)(C) covers two separate but related grounds of inadmissibility for immigrants who make or have made false claims in the past. These are separate from the criminal grounds for removal under INA § 237(a)(3) or the civil penalties for document fraud under INA § 274C. Carefully review all three sections.

¹²⁵ INA § 212(a)(6)(C)(i); 8 U.S.C. § 1182(a)(6)(C)(i) (2000).

¹²⁶ INA § 212(a)(6)(C)(ii); 8 U.S.C. § 1182(a)(6)(C)(ii) (2000).

¹²⁷ 212(a)(6)(C)(iii) authorizes a waiver to this under INA 212(i)(1), which says:

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States Citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the aliens' United States citizen, lawful permanent resident, or qualified alien parent or child.

¹²⁸ Pub. L. No. 104-208 Div. C, 110 Stat. 3009-546 (1996) [hereinafter IIRAIRA].

¹²⁹ This provision was added by IIRAIRA § 344(a) and only applies to misrepresentations made on or after September 20, 1996.

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made; and was the misrepresentation was made under oath. Advocates should work closely with battered immigrants to develop a trusting relationship so that advocates can learn whether battered immigrants have had any prior contact with DHS agents, and, if so, what information was provided at that time. If a battered immigrant has made prior false statements to DHS officials, her VAWA case could be complicated and may require an additional waiver application to be filed at the time of adjustment. Victims in this situation should be referred to an immigration attorney who can work with the advocate in preparing the victim's self-petition and subsequent adjustment application.

It is important to understand that battered immigrants may not remember making false claims, or may not consider their actions to be misrepresentation. It is, therefore, important for attorneys to ask comprehensive questions with regard to any interactions their client might have had with immigration authorities, and any forms they may have signed, or false documents they may have used. If the attorney has any doubts, the attorney should do a fingerprint check¹³⁰ or Freedom of Information Act (FOIA) Request.¹³¹

MISREPRESENTATION WAIVER

For battered immigrants, a 212(I) waiver of inadmissibility is available for some misrepresentations of material fact.¹³² In order to qualify for this waiver in non-VAWA cases, the applicant must be married to – or be the son or daughter of – a United States citizen or lawful permanent resident. The DHS or State Department official must determine that the decision to refuse admission to the immigrant would cause “extreme hardship” to the U.S. citizen or lawful permanent resident spouse or parent involved.¹³³

In a VAWA self-petitioning case, however, the petitioner must show that denying the waiver will cause extreme hardship to either the victim or U.S. citizen or lawful permanent resident parent or child. This standard, however, can be extremely difficult to meet.

HEALTH-RELATED GROUNDS

If an immigrant has a communicable disease that is significant to public health, including HIV and tuberculosis, they will not be eligible for admittance to the United States.¹³⁴ They will also be inadmissible if they do not prove that they received vaccinations for certain diseases.¹³⁵ Those immigrants with certain physical or mental disorders,¹³⁶ and substance abuse problems, can also be inadmissible.¹³⁷ Any immigrants in such a situation should be referred to an immigration attorney before they file any papers with immigration authorities. There is a waiver available for communicable diseases such as HIV and tuberculosis, and VAWA self-petitioners can apply for the waiver and do not need to have a U.S. citizen or permanent resident spouse, child, or parent “qualifying relative” (normally a requirement for waiver applicants).¹³⁸

¹³⁰ Fingerprints can be taken at police stations or other accredited locations and sent to FBI CJIS Division, Attn: Special Correspondence Unit, 1000 Custer Hollow Road, Clarksburg, WV 26306.

¹³¹ To file a FOIA request, the battered immigrant's attorney should send DHS form G-639 to the local Department of Homeland Security (DHS) office. There is no fee. Go to the DHS website at www.dhs.gov for more information.

¹³² See INA § 212(i), 8 U.S.C. § 1182(i) (2000). A false claim to United States citizenship makes an immigrant excludable. There is no waiver for this exclusion. See *id.*

¹³³ See INA § 212(i), 8 U.S.C. § 1182(i) (2000).

¹³⁴ These diseases include chancroid, granuloma inguinale, gonorrhea, syphilis, human immunodeficiency virus (HIV) infection, leprosy (infectious), lymphogranuloma venereum, and tuberculosis (active). 42 C.F.R. § 34.2-.3 (2007).

¹³⁵ These include mumps, measles, rubella, polio, tetanus, diphtheria toxoid, pertussis, influenza type B, and hepatitis B.

See INA § 212(a)(1)(ii), 8 U.S.C. § 1182(a)(1)(ii) (2000).

¹³⁶ See INA § 212(a)(1)(iii), 8 U.S.C. § 1182(a)(1)(iii) (2000).

¹³⁷ See INA § 212(a)(1)(iv), 8 U.S.C. § 1182(a)(1)(iv) (2000).

¹³⁸ See INA § 212(g)(1), 8 U.S.C. § 1182(g)(1) (2000).

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“PUBLIC CHARGE”¹³⁹

Immigrants, including battered immigrants, are ineligible to become lawful permanent residents of the United States if they are likely to become “public charges.”¹⁴⁰ Deciding whether an immigrant is likely to become a public charge relies, not on the prior receipt of public benefits, but rather the prospect of future reliance on public benefits if the victim were allowed to remain in the United States.¹⁴¹

An immigrant who is applying for lawful permanent residency under a family-based visa petition is required to file an affidavit of support from the immigrant’s sponsor.¹⁴² Sponsors must financially support the petitioner by maintaining him/her at an annual income of not less than 125 percent of the federal poverty guides. VAWA-approved self-petitioners, on the other hand, are not subject to the requirement of obtaining an affidavit of support. They must, however, demonstrate that they are not likely to become public charges. In order to prove this, **self-petitioners should demonstrate during the adjustment interview that they will be employed and are not receiving benefits and/or have other means to support themselves and their children.** While battered immigrants should be able to demonstrate employment, unlike other applicants for admission, they are not required to prove that their earnings plus any support place them at 125 percent of the poverty line.¹⁴³

IIRAIRA granted access to public benefits to VAWA approved self-petitioners (See Chapter 5 regarding benefits and services available to battered immigrants). Battered immigrants should take advantage of this emergency economic option if needed, but should only rely on benefits for as short a period of time as possible. Once a battered immigrant’s self-petition has been approved, her attorneys or advocate should assist her in obtaining employment authorization. Temporary receipt of public assistance should not result in an approved self-petitioner being denied lawful permanent residence as a public charge. This is particularly true when she has obtained work authorization and employment by the time of her scheduled adjustment interview. VAWA 2000 recognized the desperate need for battered immigrants to be able to earn a living and clarified that a VAWA self-petitioner’s use of public benefits specifically made available under IIRAIRA did not make the immigrant a public charge, or jeopardize her eligibility to receive lawful permanent residence.¹⁴⁴

After Becoming a Lawful Permanent Resident

Once the battered immigrant has obtained her green card, or lawful permanent residence card, she has the right to live and work in the United States. A lawful permanent resident is still subject to immigration laws. She should not, for example, stay out of the United States for more than six months, because she may be found to have “abandoned” her permanent resident status and be denied re-entry to the United States.¹⁴⁵ Certain criminal acts can also render a lawful permanent resident deportable. *See Chapter 19 of this manual for a discussion of these crimes.* It should be noted, however, that a lawful permanent resident has substantial due process rights associated with her ability to remain in the United States. For instance, the only person who can take away an individual’s lawful permanent resident status is an Immigration Judge after a full and fair hearing. Threats from abusers to have the battered immigrant deported may continue once she has obtained her green card, but the battered immigrant should be informed that the threats carry no weight so long as she does not violate criminal or immigration laws.

¹³⁹ INA §212(a) (4) (B); Inadmissibility and Deportability on Public Charge Grounds; Field Guidance on Deportability and Inadmissibility on Public Charge Grounds; Proposed Rules and Notice, 64 Fed. Reg. 28676 (May 26, 1999); USCIS materials linked through:

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=c215c9f3743ff010VgnVCM1000000ecd190aRCRD&vgnnextchannel=4f719c7755cb9010VgnVCM10000045f3d6a1RCRD>

¹⁴⁰ See INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A) (2000).

¹⁴¹ See INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A) (2000).

¹⁴² See INA §§ 212(a)(4) and 213A, 8 U.S.C. §§ 1182(a)(4) and 1183A (2000).

¹⁴³ INA § 212(a)(4)(C), 8 U.S.C. § 1182(a)(4)(C) (2000).

¹⁴⁴ Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1505(f), 114 Stat. 1464, 1526; INA

§ 212(p), 8 U.S.C. § 1182(p) (2000).

¹⁴⁵ See INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2000).

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Children in the United States who have been listed as dependents on the battered immigrant's I-360 can apply for adjustment to lawful permanent resident status along with their parent. A VAWA-approved lawful permanent resident's children living outside of the United States may file for an immigrant visa through a process referred to as "following to join." This will allow children (under the age of 21) to obtain an immigrant visa (lawful permanent residence) and join the VAWA self-petitioner in the United States.¹⁴⁶ The lawful permanent resident needs to file an I-824 petition with the DHS office that initially adjudicated her adjustment application. The immigration authorities will then contact the U.S. consulate where the children are living and provide the consulate with verification that the battered immigrant self-petitioner's status was adjusted. The lawful permanent resident should contact that consulate and inform them that they will be receiving verification of the adjustment from DHS and that the children will be applying for immigrant visas as "following to join" dependents. The consular officials will most likely grant "following to join" visas based upon proof of the parent-child relationship and should not question, questioner-open or otherwise disturb the underlying VAWA case in any way. The consulate will inform the lawful permanent resident as to what procedures must be followed in order for the children to receive their visas.

Conclusion

- Once DHS approves the VAWA self-petition, the self-petitioner can apply for lawful permanent resident status through adjustment of status and continue living in the United States.¹⁴⁷
- A self-petitioner abused by a U.S. citizen can file immediately for adjustment to lawful permanent resident status.
- Victims abused by lawful permanent resident spouses or parents will have to wait (often up to 5 to 7 years) to adjust their status.
- During their wait for adjustment, battered immigrants with approved self-petitions receive "deferred action status," meaning that ICE agrees not to deport them and DHS provides them with work authorization.
- Those waiting for a status adjustment cannot travel abroad.
- It is extremely important to advise immigrants to follow all U.S. laws, including immigration, tax, and criminal laws, while waiting for a status adjustment.
- It is important for battered immigrants to disclose to advocates and attorneys information about previous encounters with ICE/DHS, any arrests or criminal convictions, and any false representations or claims of U.S. citizenship. If any of these issues exist, refer the battered immigrant to an immigration lawyer trained in VAWA immigration cases.
- Advocates should collaborate with immigration lawyers, particularly in cases where inadmissibility waivers are needed, to ensure that immigrant victims successfully obtain permanent resident status.

¹⁴⁶ See 8 C.F.R. § 40.1(a)(1) (2007).

¹⁴⁷ See INA §§ 245(a) and (c), 8 U.S.C. §§ 1255(a) and (c) (2000). Unlike other out-of-status immigrants, battered immigrants should not have to rely on INA § 245(i) or pay a \$1000 penalty. See *id.*

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3.4

VAWA Cancellation of Removal¹²

By Rebecca Story, Cecilia Olavarria and Moira Fisher Preda

Introduction

Cancellation of removal³ (formerly suspension of deportation⁴) is a type of “waiver” that allows certain immigrants in deportation or removal proceedings to be granted permanent residence if they have established roots in the United States and meet other requirements.⁵ A special form of cancellation of removal for battered immigrants was created as part of the Violence Against Women Act (“VAWA”) and is called VAWA Cancellation of Removal.⁶

¹ “This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.”

² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ See INA § 240A(b)(2); 8 U.S.C. § 1229b(b)(2).

⁴ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), (hereinafter IIRIRA) replaced “suspension of deportation” relief with “cancellation of removal,” which is similar to suspension but has stricter eligibility requirements.

⁵ See A.B.A. COMMISSION ON DOMESTIC VIOLENCE AND AYUDA, INC., *Chapter Eight: Cancellation of Removal*, in DOMESTIC VIOLENCE AND IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (2000).

⁶ When an applicant is granted VAWA cancellation, her child may be granted parole until the family-based petition filed by the battered parent on the child’s behalf can be approved. INA § 240A(b)(4); 8 U.S.C. § 1229b(b)(4).

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Cancellation can only be granted by an immigration judge once a battered immigrant has been placed in removal proceedings.⁷ This means that cancellation is not relief for which every battered immigrant woman can apply. She first must be charged by immigration authorities with an immigration violation – usually being unlawfully present in the United States or overstaying a visa – and ordered to appear before an immigration judge.

If an immigration judge grants the battered immigrant's application for cancellation of removal, the immigrant is granted lawful permanent residence. If the judge denies the application, the battered immigrant will be ordered removed from the United States.

Given the potential for deportation associated with applying for cancellation of removal before an immigration judge, it is important that immigrant victims of abuse find legal representation so they may effectively present a claim under VAWA if eligible. Applying for cancellation of removal is a complex process. No one should attempt to file a cancellation application without the assistance of an immigration attorney. In this regard, all immigrant victims of domestic violence and sexual assault placed in removal proceedings after being turned in or discovered by the immigration authorities must secure the assistance of an immigration attorney knowledgeable about VAWA.

This chapter provides basic information on VAWA cancellation of removal, lists the eligibility requirements that must be met by an applicant, and provides some suggested examples of evidence that an attorney or advocate may offer to meet each requirement. This chapter is designed to help advocates and attorneys who are not immigration attorneys identify immigrant victims who may be eligible for cancellation of removal. The information provided will also be useful to immigration attorneys who may not have experience with domestic violence, sexual assault, or incest cases. This chapter will help them to work in collaboration with advocates and other attorneys assisting immigrant victims. The most successful cancellation of removal cases are those in which advocates and civil attorneys support the efforts of the immigration attorney.⁸

Who is eligible for VAWA cancellation of removal?

The following immigrants qualify for VAWA cancellation of removal:

- A person who is an abused spouse, former spouse, or intended spouse⁹ of a U.S. citizen or lawful permanent resident;
- A person who is or was an abused child¹⁰ of a U.S. citizen or lawful permanent resident; and
- A person who is the non-abusive parent of a child who is or was subjected to domestic violence or extreme cruelty by a U.S. citizen or lawful permanent resident parent. The parent herself need not be abused.¹¹

The following are examples of battered immigrants who do not qualify to file a VAWA self-petition but might qualify for VAWA cancellation of removal:

- The parent of an abused child, regardless of the child's U.S. citizenship, who was never married to the child's abusive U.S. citizen or permanent resident parent;
- The abused spouse of a U.S. citizen or permanent resident spouse who has died or any abused children of a U.S. Citizen or permanent resident parent who has died over 2 years ago;
- An abused spouse who was divorced for over 2 years from the U.S. citizen or permanent resident abuser spouse;

⁷ Removal proceedings were called "deportation" proceedings before April 1, 1997. Some individuals who were in deportation proceedings before that date and are still in the U.S. may apply for suspension of deportation under VAWA, which has essentially the same requirements as cancellation of removal.

⁸ For a discussion on the benefits of collaboration, see Chapter 1 of this manual.

⁹ See INA § 101(a)(50); 8 U.S.C. § 1101(a)(50), for definition of "intended spouse." An immigrant victim can qualify for relief under VAWA even if the marriage is invalid due to the bigamy of the abusive spouse, provided the immigrant victim was unaware that her intended spouse was still married.

¹⁰ See INA § 101(b)(1); 8 U.S.C. § 1101(b)(1), for definition of child. A person who is now over the age of 21 yet who was abused before age 21 can also file for cancellation of removal based on the abuse.

¹¹ The abusive parent need not be the natural parent of the abused child and may be a step-parent. Further, the parent of an abused child may file for VAWA cancellation whether or not she was ever married to the child's abusive parent.

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- An abused stepchild whose immigrant parent has been divorced from the abusive parent for over 2 years;
- An abused spouse or child whose citizen or legal permanent resident parent renounced citizenship or lost lawful permanent resident status over 2 years ago;
- Victims of child abuse or incest abused by a U.S. citizen or permanent resident parent while under 21 years of age but who did not file their VAWA self-petition while they were under 21 and who are now over 21 years of age; and
- Victims of child abuse who cannot establish that they have resided with the U.S. citizen or permanent resident abuser parent.

What is the procedure for applying for cancellation of removal?

In order to apply for cancellation of removal, the immigrant survivor must be in removal proceedings before an immigration judge. If she is not, it may be possible in some instances to be placed in removal proceedings in order to apply for VAWA cancellation. To do this, the immigrant must essentially “turn herself in” to the immigration authorities and inform them she is unlawfully present in the United States. This should only be considered when the survivor cannot qualify for a green card in any other way, because if the application for cancellation is ultimately denied, the immigrant will be ordered removed and deported from the United States.

The following is an overview of the different phases of applying for relief in removal proceedings.

REQUESTING ISSUANCE OF A CHARGING DOCUMENT (“NOTICE TO APPEAR”) IF NECESSARY

If an applicant is not already in removal proceedings, she must secure the assistance of an immigration attorney to help her turn herself into Immigration and Customs Enforcement (ICE) of the Department of Homeland Security, (“DHS”, formerly INS) and request that she be put in removal proceedings. Each local DHS office has its own procedures and has discretion to decide whether to initiate removal proceedings. In some jurisdictions, this process may occur rather quickly, while in others it may take several months. In some cases, the DHS office might decide not to place the immigrant in removal proceedings.

The immigrant must currently be **out of lawful immigration status** to be placed in proceedings. If, for example, the battered immigrant entered the U.S. without authorization, overstayed her visa, or worked without DHS authorization while on an otherwise valid non-work visa, she may be found to be in violation of the immigration laws and removable. If she is still in lawful status under a current non-immigrant visa such as a student, tourist, or work-related visa, such as an H-1B visa, she cannot be placed in removal proceedings.

DHS initiates removal proceedings by issuing a charging document called a “Notice to Appear” (“NTA”). This charging document formally alleges that the individual is not a citizen or national of the United States and charges the immigrant with specific violations of immigration law. Examples of the immigration violations with which a potential applicant may be charged are overstaying a tourist visa, unauthorized work while on a student visa, or entering the United States without authorization.¹²

APPEARING BEFORE THE IMMIGRATION COURT AFTER A NOTICE TO APPEAR IS ISSUED BY THE DEPARTMENT OF HOMELAND SECURITY AND FILED WITH THE COURT

Several different units of federal agencies are involved in immigration enforcement proceedings before immigration judges. Immigration enforcement officers working for the Department of Homeland Security (DHS) either for Immigration and Customs Enforcement or for Customs and Border Patrol may issue to an individual a Notice to Appear in immigration court. Immigration judges work for the Executive Office of Immigration Review (EOIR) that is part of the U.S. Department of Justice. The attorneys representing DHS in immigration proceedings seeking removal of an immigrant from the United States is a trial attorney who works for DHS. For removal proceedings to begin, DHS enforcement agents, file the Notice to Appear (NTA) with the immigration court. Upon receiving the NTA, the immigration court will mail a hearing notice to the immigrant informing her of the time, date, and location

¹¹ See e.g. INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i); INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C).

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of the next hearing. **It is very important to give DHS a safe current address where the battered immigrant can receive mail.** If she does not receive the hearing notice and/or fails to appear at the hearing, she will be ordered removed in her absence. If this occurs, she will be barred from applying for cancellation of removal, and may potentially be barred from other immigration relief in the future. Likewise, the immigrant may be subject to detention if found by DHS and, ultimately, deported from the United States.¹³

The first hearing will be a preliminary one, called a “master calendar” hearing, where the immigrant must appear and plead to the charges on the NTA. There are normally two or three brief master calendar hearings before the immigrant has a longer individual hearing in which testimony is taken regarding the cancellation application.

PLEADING TO THE CHARGES

As stated above, only immigrants who are currently inadmissible or deportable for violating the immigration laws may be placed in removal proceedings. For any charge of inadmissibility or deportability, DHS has the burden to establish this.¹⁴ In many cases, an immigrant, through her attorney, will concede to the charges in order to move the process more quickly to the point where a cancellation application may be considered.¹⁵ However, it is very important that the attorney not concede a charge such as fraud or one based on a criminal ground if it will render the victim ineligible for cancellation of removal. If the attorney is in doubt, he or she should speak to an expert with knowledge and experience with VAWA cases.

After pleading to the charges, the attorney will state what relief from removal the immigrant (called the “respondent” in removal proceedings) is seeking. At this time, the attorney must state that the respondent will apply for cancellation of removal. If the attorney fails to request cancellation of removal at this time, the immigrant victim will be precluded from applying for cancellation later in the proceedings. It is therefore very important that the attorney meet with the client and explore whether she qualifies for VAWA cancellation or any other type of relief before this master calendar hearing.

The applicant may request additional time to prepare and file the application or may file it at the master calendar hearing if it is ready. Form EOIR-42B (Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents), which can be downloaded from the Executive Office for Immigration Review website (<http://www.usdoj.gov/eoir/formslist.htm>), must be used. This form has instructions that *must be read in detail*. These instructions include all filing requirements concerning fees, fee waivers, photographs, fingerprinting, and accompanying documents. The types of supporting documents that should be submitted with the application are discussed in more detail later in this chapter. After the respondent files the application, she is eligible to apply for employment authorization.¹⁶

THE INDIVIDUAL HEARING ON THE MERITS OF THE APPLICATION

At the immigrant’s master calendar hearing, the judge will schedule a date for the immigrant to return for a longer individual hearing (called a “merits hearing”) where testimony will be taken concerning the cancellation application. The applicant must prove several things to receive cancellation of removal, and these requirements are discussed in detail later in this chapter. She will answer questions about the abuse, about her moral character (including the circumstances of any arrests if she has a criminal record), her work history in the United States, her ties to the community, how she and any of her children would be affected by being deported, and various other matters. She should also bring witnesses to testify about her moral character and ties to the community. She may also submit affidavits in support of the requirements. If the judge decides after hearing the testimony to grant cancellation of removal, the applicant receives lawful permanent resident status and will eventually receive an actual green card in the mail.

The following facts must be established to be granted VAWA cancellation of removal by the immigration judge.

¹³ INA § 240(b)(5)(A) and (7); 8 U.S.C. § 1229a(b)(5)(A) and (7).

¹⁴ See *Murphy v. INS*, 54 F.3d 605, 608-9 (9th Cir. 1995).

¹⁵ *Woodby v. INS*, 385 U.S. 276 (1966) (concerning deportability); *Molina v. Sewell*, 983 F.2d 676, 678 (5th Cir. 1993) (concerning admissibility). See also 8 C.F.R. 240.8(a).

¹⁶ See 8 C.F.R. 274a.12(c)(10).

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Relationship to the abuser: The applicant must submit evidence of her relationship to the batterer. If she is applying as an abused spouse, she should submit a copy of her marriage certificate. If she is an intended spouse, then she must demonstrate that she believed she was the spouse. A battered child applicant must submit his or her birth certificate and, in the case of a stepchild, the marriage certificate of the parent to the abusive stepparent.

Continuous physical presence: The applicant must have lived continuously in the United States for 3 years immediately preceding the filing of the application.¹⁷ A single absence from the United States of 90 days, or aggregate absences over 180 days, breaks continuity of physical presence. However, an applicant is not considered to have failed to maintain continuous physical presence if the absences from the United States were connected to the abuse.¹⁸

Battery or extreme cruelty:¹⁹ The applicant must prove that, while she was in the United States, she was battered or subject to extreme cruelty by the United States citizen or legal permanent resident spouse or parent.²⁰

Good Moral Character:²¹ The applicant must prove that she is of “good moral character,” which is a legal term used in immigration law. The immigration laws do not precisely define good moral character, but preclude a finding of good moral character if the immigrant has certain criminal convictions or for other reasons.²² The applicant must show good moral character during the 3-year period immediately preceding her application. The immigration judge may be permitted to find good moral character even if there is an act or conviction that would otherwise bar such a finding if the action or crime was connected to the abuse.²³

Extreme Hardship: An applicant must prove that she, her child, or the parent of the abused child would suffer “extreme hardship” if deported. The following circumstances on their own will **not** constitute extreme hardship: economic deprivation, loss of employment, or difficulty readjusting to life in the native country.²⁴ The best way for battered immigrants to prove extreme hardship is to show how experiencing the abuse has been harmful to the victims and how deportation would impede any progress that they have made to overcome the effects of the abuse. Battered immigrant applicants can rely on both domestic violence and non-domestic violence related extreme hardship factors to support their cancellation applications. The victim should emphasize how the hardship is related to or exacerbated by the domestic violence, and the steps she needs to take to overcome the effects of the violence.

Extreme hardship is determined based on the facts of each case.²⁵ Demonstrating the following factors will assist in proving the extreme hardship element of the cancellation of removal application:²⁶

- The nature and extent of the physical and psychological consequences of the battering or extreme cruelty;
- The impact of the loss of access to the U.S. courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, alimony, maintenance, child custody, and visitation);
- The applicant's or applicant's child's need for social, medical, mental health, or other supportive services, particularly those related to the abuse or surviving the abuse, which would not be available or reasonably accessible in the foreign country;
- The existence of laws, social practices, or customs in the foreign country that would penalize or ostracize the applicant or applicant's child for leaving an abusive situation, or for taking action to stop the abuse;

¹⁷ Unlike other types of cancellation of removal provided for under immigration law, the serving of a Notice to Appear on an immigrant applying for VAWA Cancellation does not stop continuous presence from accruing. INA § 240A(b)(2)(A)(ii); 8 U.S.C. § 1229b(b)(2)(A)(ii).

¹⁸ INA § 240A(b)(2)(B); 8 U.S.C. § 1229b(b)(2)(B).

¹⁹ For full discussion of battering or extreme cruelty, see the section on self-petitioning under VAWA in Chapter 3.3 of this manual.

²⁰ INA § 240A(b)(2)(A)(i); 8 U.S.C. § 1229b(b)(2)(A)(i).

²¹ For full discussion of good moral character, see the section on self-petitioning under VAWA in Chapter 3.3 of this manual.

²² See INA § 101(f); 8 U.S.C. § 1101(f).

²³ INA § 240A(b)(2)(C); 8 U.S.C. § 1229b(b)(2)(C). This exception applies to crimes and actions connected to the battering or extreme cruelty and for which a waiver of inadmissibility is also permitted under the immigration laws.

²⁴ Matter of Anderson, 16 I. & N. Dec. 596 (BIA 1978).

²⁵ Matter of Ige, 20 I. & N. Dec. 880, 882 (BIA 1994); Matter of Chumpitazi, 16 I. & N. Dec. 629 (BIA 1978); Matter of Kim, 15 I. & N. Dec. 88 (BIA 1974); Matter of Sangster, 11 I. & N. Dec. 309 (BIA 1965).

²⁶ 8 C.F.R. §§ 1240.20(c) and 1240.58(c). See also INS Memorandum from Paul Virtue, INS General Counsel, *Extreme Hardship and Documentary Requirements Involving Battered Spouses and Children* (October 16, 1998).

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- The abuser's ability or lack thereof to travel to the foreign country, and the ability, willingness, or lack thereof of foreign government authorities to protect the applicant and/or the applicant's child from future abuse;
- The likelihood that the abuser's family, friends, or others acting on the abuser's behalf in the foreign country would physically or psychologically harm the applicant or the applicant's children if they were deported.

Applicants may also seek to support the extreme hardship element of their cancellation of removal cases by providing evidence of the “traditional” types of extreme hardship typically used in non-VAWA cancellation claims. This type of evidence is most helpful when the applicant can make a strong connection between the particular hardship and the abuse and its consequences. Some “traditional” hardships present in regular cancellation cases, such as economic hardship caused by deportation, can be exacerbated by the abuse. This would be the case, for example, if, because she has left her husband and is believed to have brought shame to the family, an immigrant survivor will be ostracized by her family in her native country and have no economic support.

The following are established factors used to assess extreme hardship:

- Age (youth/old age) of the applicant;
- Ages and number of the applicant's children;
- The children's ability to speak the native language of the foreign country and the children's ability to adjust to life there;
- Serious illness of the person or her child that necessitates medical attention not adequately available in the foreign country;
- A person's inability to obtain adequate employment abroad;
- The person and her children's length of residence in the United States;
- Existence of other family members residing legally in the United States and lack of family in the home country;
- Irreparable harm arising from a disruption of educational opportunities;
- The adverse psychological impact of removal;
- The impact of separation on both mother and children if the mother is removed and the children do not accompany her;
- The extent to which deportation would interfere with court custody, visitation, and child support awards; and
- The extent to which the battered woman is an asset to her community in the United States (i.e., involvement in church/temple/mosque, children's school, community, other service programs).²⁷

The information below outlines how eligibility for VAWA Cancellation can be proven. The applicant has the burden to prove that she meets all requirements for cancellation of removal. Therefore, it is in the applicant's best interest to have as much supporting documentation as possible to help in proving her claim for relief. This documentation should be as complete and as detailed as possible. Advocates and attorneys should help the battered immigrant gather as much evidence as possible to document each aspect of her cancellation claim. The following is a checklist of suggested supporting documents.

STATUS OF THE ABUSER AND RELATIONSHIP TO THE ABUSER

- Evidence that the batterer is a U.S. citizen (such as a U.S. birth certificate or naturalization certificate) or permanent resident (such as a green card or other document with the batterer's alien number)
- If the applicant is applying as a battered spouse, a copy of her marriage certificate; if the applicant was previously married to someone other than the abuser, she must submit proof that her prior marriage was terminated

²⁷Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,067 (Mar. 29, 1996) (to be codified at 8 C.F.R. pts. 103, 204, 205, and 216).

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- If the applicant is the battered child of a citizen or resident, a birth certificate; in the case of a battered stepchild, the marriage certificate of the parent to the abusive stepparent must also be submitted
- Documents showing that the marriage was entered into in good faith and not to evade the immigration laws

CONTINUOUS PHYSICAL PRESENCE (Some of these documents, such as joint tax returns, lease agreements, or birth certificates of children born to the marriage, will also help prove good faith marriage.)

- Copy of all income tax returns filed by the applicant or the applicant jointly with the spouse; if the returns were not filed, she will have to file back tax returns
- Birth records of children born in the United States
- Driver's license (if obtained lawfully)
- Copy of lease agreements, rental receipts, or mortgage payments
- Employment records (paycheck stubs, tax forms, etc.)
- Bank statements
- Utility bills and copies of credit card statements
- Copy of insurance policies (automotive, health, life insurances)
- School records of the applicant or her children
- Medical records
- Court records, including protection orders and custody and support orders
- *If the applicant does not have other documentation to establish her continuous presence: affidavits from landlords or neighbors and other persons who can attest to her continuous presence in the United States*

BATTERY OR EXTREME CRUELTY

- Police reports
- Restraining/protective orders
- Photos of bruises, cuts, injuries, etc.
- Medical records
- Hospital records documenting the abuse (even if she did not tell anyone at the hospital that her partner caused the abuse and even if she denied that the cause was domestic violence or sexual assault, in which case the battered immigrant should be prepared to explain why)
- Intake forms from domestic violence or sexual assault organizations shelter or women's community center or both
- Letters from counselors, domestic violence case workers, shelter advocates
- Child Protective Services reports describing the abuser's behavior²⁸
- Torn clothing or destroyed property or photographs of these
- Transcript from "911" calls
- Psychological evaluations
- Affidavits from neighbors, friends, or family who witnessed the abuse, witnessed any incident of the abuse, saw the survivor's bruises, heard her scream, or witnessed her abuser's threats against her, her children or her family members

²⁸ Any negative information in these reports submitted with the application must be added in testimony. You should consult with a family law attorney with knowledge and experience with child abuse cases.

GOOD MORAL CHARACTER²⁹

- “Police clearance letter” from each jurisdiction in which the applicant has lived for the past 3 years³⁰
- If the applicant has ever been arrested, an arrest report and court disposition for the arrest and an explanation in her affidavit of the circumstances of the arrest
- Affidavits by friends, community members, children’s teachers, clergy, etc.
- Awards, certificates of appreciation, etc.

EXTREME HARDSHIP VIOLENCE AGAINST WOMEN RELATED FACTORS³¹

- Affidavit from the victim detailing the history of power and control; emotional, physical and sexual abuse; nature and extent of the battering or extreme cruelty; and consequences to her physical and psychological well-being if she’s removed from the United States
- Affidavits from experts, such as battered women’s advocates, social workers, shelter workers, counselors, or psychologists about the impact of the abuse on the victim and her children
- Affidavits from the victim’s family members, friends, and co-workers describing how the physical, sexual, and psychological abuse affects the victim or her children
- Affidavits from teachers, counselors, clergy, or day care providers about the impact of the violence on the victim’s children
- Documentation on the impact of the loss of access to the U.S. courts, both the civil and criminal systems (including, but not limited to, the ability to obtain and enforce protection orders, secure criminal investigations and prosecutions, and receive assistance offered by family law proceedings, including orders regarding child support, alimony, maintenance, child custody, visitation and property division)³²
- Court records (including civil protection orders, custody, child support, and safe visitation orders, as well as copies of the underlying pleadings when useful)³³
- Police records (including police reports and copies of all taped calls)
- “Victim impact statements” provided by the victim for sentencing in a criminal case³⁴
- Documentation demonstrating the victim’s efforts to seek help from the justice system
- For a victim who may not have sought help from the justice system, or a victim who unsuccessfully sought help from the justice system, affidavits from persons who can document the victim’s fears or the abuser’s actions that prevented her from seeking assistance from the courts (or the barriers that the victim faced or encountered when she tried to seek help from the justice system)
- Evidence of the VAWA cancellation applicant’s or her children’s needs for social, medical, mental health, victim, or other supportive services that would not be available or reasonably accessible in the foreign country (It is important to note that a VAWA cancellation applicant must prove that parallel services designed for domestic violence and/or sexual assault victims are lacking in the home country.), including the following:
 - Records of counseling programs in which the applicant or her children have participated and affidavits from the counselors describing the program and the benefit of the program to the applicant;
 - Copies of medical and mental health records that document the abuse;

²⁹ See INA § 101(f); 8 U.S.C. § 1101(f).

³⁰ The applicant should contact the local police for each county or locality where she has lived for six months or more during this period and request a police clearance or “good conduct” letter. For her current jurisdiction, she should make sure to submit a recent police clearance letter.

³¹ Adapted from A.B.A. COMMISSION ON DOMESTIC VIOLENCE INC., *Chapter Six: Proving A Case, in DOMESTIC VIOLENCE AND IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (2000)*.

³² The U.S. State Department issues human rights country reports each year that contain a section on the rights of women. These reports will sometimes provide brief information about lack of police and legal protection for victims of domestic violence and sexual assault. These Country Reports can be found at <http://www.state.gov/g/drl/hr/>.

³³ A protection order that awards custody, safe visitation, and child support can help the victim prove extreme hardship, because deportation will deprive the victim of the protection provided by the court order.

³⁴ Victim impact statements, which are used in criminal cases, provide the crime victim with an opportunity to address the sentencing judge about the effect the crime has had on the victim’s life and the victim’s opinion about the sentence.

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- Affidavits from battered women’s advocates and shelter workers who have worked with the applicant or her children;
- Affidavits from advocates, experts, university professors, or women’s groups and other documentation confirming that services parallel to those she is receiving in the United States are lacking in her home country.
- Documentation on the existence of laws, social practices, or customs in her home country that would penalize or ostracize the applicant or the her children for having been the victim of abuse, for leaving the abusive partner, for getting a divorce, for reporting the abuser’s violence to authorities, or for actions by the victim taken to stop the abuse and protect her children, including the following:
 - Documentation about any laws or the lack of laws in her home country that protect victims of domestic violence from continued abuse and that could hold the abuser accountable for his actions, with particular attention to whether the laws are effective in the particular region of the country to which the victim will return;
 - Documentation of customs and practices in the battered immigrant’s home country that would harm her or make recovery or healing difficult for the VAWA applicant or her children;
 - An affidavit by the victim stating her knowledge of laws, customs, and practices in her home country that harm victims of domestic violence, divorced women, and single mothers.
- Documentation of abuser’s ability to travel to the victim’s home country, and the ability and willingness of foreign authorities to protect the applicant or her children from future abuse, including the following:
 - Documentation of the abuser’s history of travel outside of the United States, his travel in her home country, contacts in her home country, and his access to funds needed for travel;
 - Documentation of the abuser’s history of stalking, escalation of violence, and his behavior following the separation;
 - An affidavit by the victim describing the abuser’s level of contact with friends and family in the country to which the victim would be deported.
- Documentation of the likelihood that the abuser’s family, friends, or others acting on his behalf in her home country would be likely to physically or psychologically harm the applicant or her children, including the following:
 - Affidavits from the victim’s family members and others who have been threatened by the abuser or the abuser’s agents in the home country;
 - Documentation of the abuser’s stalking behavior and his manipulation of third parties to track, harass, and monitor the victim or her children.
- If the abuser is the parent of the VAWA cancellation applicant’s U.S.-born children, evidence of this parent-child relationship should be included. An abuser with parental rights could obtain a court order prohibiting the removal of a citizen child from the United States, effectively cutting off a deported victim permanently from access to her children, causing extreme hardship to the victim and her children. Information should be gathered about parental rights and custody laws in the home country, as an abuser who is the father of the victim’s children could obtain control over the children in the home country and cut the victim and her family members off from all access to her children. This is particularly important to emphasize when the children are U.S. citizens and when U.S. courts have determined that it is in the children’s best interests to be in the applicant’s custody.

TRADITIONAL FACTORS OF EXTREME HARDSHIP³⁵

- Age of the applicant upon entry into the United States and at the time of application for cancellation of removal
 - For age to be a significant factor, the battered immigrant would have entered the United States at an early age or have an entire support system (socially and culturally) tied to the United States. Additionally, an immigrant who has lived in the United States for a long time and who may be older might argue that it will be difficult to re-assimilate to a new culture (that of the home country) or find employment.
- Age and number of the applicant’s children and their ability to speak applicant’s native language and to adjust to life in another country, demonstrated by evidence including but not limited to the following:

³⁵ 8 C.F.R §1240.58(a)

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- Affidavits from the children’s teachers, clergy, and child care providers on the following:
 - The children’s ability to speak, read, or write in English and or a native language
 - The children’s current adjustment to life in the United States;
 - The children’s likely response to moving to a country in which the language and customs are foreign;
 - The effect that the children’s moving to another country would have on their ability to overcome the harmful effects of hearing, witnessing or experiencing domestic violence.
- An affidavit from an expert on how the children’s exposure to the abuse has harmed the child. The expert should assess each child’s needs for counseling services to address harms suffered due to abuse and the additional harm that would arise from removing each child to a foreign country or separating each child from the battered immigrant parent.
- If children are born to an interracial couple or a couple from different ethnic or religious groups, provide information about how this factor might affect each child’s adjustment to the country to which the victim might be deported.
- Medical condition of the survivor or any of her children that requires medical attention not adequately available in the foreign country, demonstrated by evidence including but not limited to the following:
 - Documentation of any serious illness of the victim or her children and, if appropriate, description of how the illness was caused by or exacerbated by the abuse;
 - Description of whether similar medical treatment is available to the victim in the victim’s home country or why alternative healthcare services there are likely to be less effective, particularly if such services do not take into consideration treatment needed because of the abuse; emphasis should be placed on the need for coordinated services to address the illness, the abuse, and the effects of the abuse.
- The immigrant’s inability to obtain adequate employment in the foreign country
- The immigrant and her advocate should address this issue only if the victim’s inability to obtain any employment or to obtain adequate employment was a result of or connected to the abuse. Examples might include (1) the victim’s status as a divorcee precludes employment; (2) the abuser’s level of power and influence in the home country prevent employers from hiring the immigrant victim; or (3) adequate employment sufficient to support the victim is not open to women in her home country.
- The applicant’s and her children’s length of residence in the United States
 - The immigrant and her advocate should raise this issue when the immigrant victim is or was married to a United States citizen or lawful permanent resident spouse for a significant period, and the abuser refused to obtain legal residency for the victim or her children.
 - The immigrant and her advocate should raise this issue also when the battered immigrant applicant was brought to the United States illegally as a child and has lived in the United States for a long time, particularly if the applicant completed high school in the United States.
- Existence of the applicant’s other family members legally residing in the United States or/and lack of family (as support system, for employment contacts) in the home country, demonstrated by evidence including but not limited to the following:
 - A list of each member of the victim’s family who legally resides in the United States, including the family members’ immigration or U.S. citizenship status and length of time in the United States;
 - Affidavits from family members (each family member’s affidavit and the victim’s affidavit should articulate the role each relative has played providing the victim with emotional support, how they helped the victim escape, survive, or heal from the effects of having suffered abuse while living in the United States).

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- Irreparable harm that may arise as a result of disruption of educational opportunities, demonstrated by evidence including but not limited to the following:
 - Affidavits from teachers, special education counselors, and mental health treatment providers can be used to document potential harm from lost educational opportunities for children. When the children's special educational needs are related to having been victims of or having witnessed domestic violence, this should be emphasized;
 - Affidavits should highlight lost opportunities and special job training programs and educational opportunities in which the victim is participating or for which she qualifies through her local domestic violence and/or sexual assault organization.
- The adverse psychological impact of deportation, demonstrated by evidence including but not limited to the following:
 - An affidavit from an expert discussing the adverse psychological impact deportation would cause the abused woman.
 - An affidavit from an expert describing the nexus between the adverse impact of deportation and the specific abuse this victim has suffered.
- The impact of separation on both the victim and her children if the victim is removed, demonstrated by evidence including but not limited to the following:
 - Data on the danger to the child of living with an abuser if the victim is deported. Many abusers commit violence against their children, as well as their spouses. Even if the children are not physically abused, living with an abuser is likely to traumatize the children and affect their emotional development. Include the psychological impact on the children of being permanently separated from their non-abusive parent by deportation and being left in the care of the abusive parent;
 - Description of the extent to which deportation would interfere with court-ordered custody, visitation, and child support awards;
 - Discussion of the harm to the U.S. citizen and lawful permanent resident children of being forced by their mother's deportation to move to their mother's home country with her as the only option other than having to continue living with the abuser.
- The extent to which the battered immigrant woman is an asset to her community in the United States, demonstrated by evidence including but not limited to the following:
 - Information regarding the battered immigrant applicant's involvement in a local religious community, the children's schools, community service programs, or immigrant women's or domestic violence prevention programs;
 - Letters from friends, neighbors, employers, clergy, social workers, and fellow church members attesting to the applicant's strong qualities and contributions to her community;

Any acknowledgment of her children's personal involvement, achievements, contributions, awards, scholarships, etc. is important, as they confirm the unique ways each child has established his or her own bonds to their community.

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3.5

Additional Remedies Under VAWA: Battered Spouse Waiver¹²

By Cecilia Olavarria and Moira Fisher Preda

Introduction³

In 1986, Congress added the Immigration Marriage Fraud Amendments (IMFA)⁴ to the Immigration and Nationality Act (INA). The purpose of IMFA was to deter people from entering fraudulent marriages solely for the purpose of obtaining lawful permanent resident status.⁵ One of the main changes that resulted from IMFA was the creation of “conditional residence.”⁶ Immigrant women who are married to U.S citizens or

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² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/vawa-confidentiality>.

⁴ Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. § 1186a.)

⁵ *Id.*

⁶ INA § 216(a)(1), 8 U.S.C. § 1186a(a)(1) (1986); INA § 216(g)(1), 8 U.S.C. § 1186a(g)(1).

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lawful permanent residents for less than two years at the time of the permanent residence interview with U.S. Citizenship and Immigration Services (CIS, formerly INS) are not automatically granted permanent residence; rather, they receive “conditional” residence for two years. Within ninety days before the end of the two-year period, both husband and wife must file a joint petition to have the condition removed, and both may be required to appear before a CIS official for a personal interview.⁷

The joint petition requirement placed battered immigrant women in a vulnerable situation because of the power that it gave to their abusers. To control their victims, abusers could refuse to jointly file the petition or cooperate in the mandated CIS personal interview. Victims had no alternative but to remain in abusive relationships or try to meet the stringent requirements for waivers under the 1986 IMFA.⁸ Otherwise, their immigration status would be jeopardized. In certain situations, the 1986 IMFA allowed waivers of the joint petition requirement.⁹ These waivers, however, did not address the circumstances of battered immigrants.¹⁰

Congress responded to this dangerous situation by enacting the 1990 Amendments to the INA (Immigration Act of 1990).¹¹ In addition to amending the existing waivers, Congress created a new type of waiver addressing specifically the dangers experienced by battered immigrants.¹² If the battered immigrant can prove certain conditions, approval of a battered spouse waiver eliminates the joint petition requirement for removal of conditional resident status and prevents her from being locked for two years in an abusive marriage.¹³ The 1990 changes provided battered immigrant women with a powerful legal tool to escape abusive relationships.

This chapter provides an overview of conditional residence and explains the process involved in attaining and removal of that status. The chapter details the different waivers to the joint petition, specifically the Battered Spouse Waiver, that were created by the Immigration Act of 1990. The chapter also provides guidance on how to spot potential Battered Spouse Waiver applicants and how to effectively prepare a Battered Spouse Waiver.

Conditional Residence

Once an immigrant’s conditional residence status is approved, she will receive formal notice of her approval, as well as a conditional residence card, which is similar to a lawful permanent resident card. This conditional residence is granted for a two-year period. The applicant, along with his or her spouse, must file a joint petition to remove the condition on the applicant’s residence 90 days before the end of the conditional two-year period. Once the conditions are removed, the applicant becomes a lawful permanent resident. Advocates should know the following key aspects of conditional residence:

- These are cases in which the citizen or lawful permanent resident’s spouse filed the papers to help the immigrant spouse gain residency status based on the marriage;
- Conditional residence ONLY applies to spouses who are married to a U.S. citizen or lawful permanent resident, AND the marriage is less than two years old at the time the couple has their interview with CIS for the immigrant spouse to adjust status to permanent residence;
- Unless a waiver applies, both the U.S. citizen or lawful permanent resident spouse and the conditional resident spouse must file a joint petition within 90 days prior to the expiration of the two-year conditional residency;

⁷ INA § 216(c)(1), 8 U.S.C. 1186a(c)(1); INA § 216(d)(2), 8 U.S.C. 1186a(d)(2); INA § 216(d)(3), 8 U.S.C. 1186a(d)(3).

⁸ Maxine Yi Hwa Lee, *A Life Preserver for Battered Immigrant Women: The 1990 Amendments to the Immigration Marriage Fraud Amendments*, 41 BUFF. L. REV. 779, 788-790 (1993) [hereinafter Lee Article].

⁹ *Id.*

¹⁰ *Id.* at 790-91.

¹¹ Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

¹² *Id.* § 701(b) (codified as INA § 216(c)(4)(C)); see also Lee Article at 792.

¹³ INA § 216(c)(4)(C), 8 U.S.C. § 1186a(c)(4)(C).

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- The conditional residence status is only valid for two years. If the spouses do not file to lift the condition, the immigrant spouse's permanent resident status expires, and he or she falls out of status.

Waivers to the Joint Petition to Remove Conditions on Residence

In certain cases, conditional residents will not be able to file the joint petition to remove the conditions with their petitioning spouses. In these situations, the conditional resident will have to file the joint petition herself, requesting a waiver of the usual requirement to file jointly with the petitioning spouse. There are three types of waivers to the joint petitioning requirement, all of which require evidence of a good faith marriage.¹⁴ The applicant must prove that her marriage was entered into in good faith, and not for fraudulent immigration purposes. Additionally, an applicant must demonstrate that she fits within at least one of the following three categories:¹⁵

- The removal of the conditional resident from the United States would result in extreme hardship; OR
- The good faith marriage was legally terminated, other than by death, and the applicant was not at fault for failing to file a timely application to remove the condition; OR
- During the course of the good faith marriage, the conditional resident was *subjected to battering or extreme cruelty* by the U.S. citizen spouse and the conditional resident was not at fault for the failure to timely file to remove the condition¹⁶. In the case of a child applicant, the battering or extreme cruelty occurred at the hands of her U.S. citizen or lawful permanent resident parent.¹⁷

There are waivers in all of these cases that are separate and independent.¹⁸ A conditional resident may file for any or all three of the waivers for which she qualifies.

Confidentiality

In addition to the waivers, Congress included a confidentiality provision to ensure the safety of battered immigrants.¹⁹ Regulations require a court order or the applicant's permission before any information from the application or proceedings may be released to someone besides the applicant, the applicant's representative, a Department of Justice official, or any state or federal law enforcement agency.²⁰

Evidentiary Requirements For a Battered Spouse Waiver Application

While advocates for battered immigrants are encouraged to apply for all the waivers that may be applicable, the following section will outline the evidentiary requirements for a battered spouse waiver.²¹

Good Faith Marriage: In order to obtain a battered spouse waiver, the applicant must prove that the marriage between the survivor and the U.S. citizen or lawful permanent resident was entered into in good faith. The

¹⁴ INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The definition of battered or subjected to extreme cruelty "includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence." 8 C.F.R. § 216.5(e)(3)(i).

¹⁸ INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4); Matter of Balsillie, 20 I. & N. Dec. 486 (BIA 1992).

¹⁹ INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

²⁰ 8 C.F.R. § 216.5(e)(3)(viii).

²¹ Applicants are encouraged to apply for all waivers together, if they qualify, to avoid the risk of being barred from raising another waiver at a later proceeding or application.

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CIS has discretion in finding that a good faith marriage exists.²² The CIS will consider evidence relating to the couple's commitment to the marriage and assess whether it was a marriage made in good faith. An indication of a good faith marriage may be found by examining the intention of the parties at the time that they were married to see if they intended to establish a life together.²³ To show an applicant's good faith in entering into the marriage, the following are examples of documents that the applicant should submit:²⁴

- Birth certificate(s) of children born to the marriage;
- Lease or mortgage contracts, or affidavits of landlords and neighbors, showing joint occupancy and/or ownership of the couple's communal residence;
- Financial records showing joint ownership of assets and joint responsibility for liabilities, such as joint savings and checking accounts, joint federal and state tax returns, insurance policies that show the other spouse as the beneficiary, joint utility bills, joint installment or other loans;
- Affidavits by people who have known both spouses since the conditional residence was granted, attesting to their personal knowledge of the marital relationship, in addition to the personal knowledge of their courtship or dating;
- Photographs from the wedding, family vacations, special events, holiday celebrations.

Battery or Extreme Cruelty: An applicant must prove that she has been subjected to battery or extreme cruelty. An applicant for the waiver may be separated or divorced from her husband, or may still be living with her abuser.²⁵ Additionally, the battered spouse waiver, unlike the other two waivers, is available to women who have been ordered removed and deported from the United States, or who have failed to depart after their conditional resident status terminated.²⁶ If an applicant can prove that she has been subjected to battering or extreme cruelty, the evidence of abuse stands as a justifiable reason for the applicant's inability to join with the abuser to remove the conditions on her residence. To prove her case, the applicant should try to submit as many of the following documents as possible:²⁷

- Copy of reports or official records documenting the abuse or the effects of the abuse on the battered immigrant or her child issued by school officials and representatives of social service agencies;
- Medical records documenting the frequency and extent of any injuries;
- Police records of calls or complaints (e.g. police reports and 911 call tapes);
- Court records documenting arrests, convictions, or the issuance of protection orders;
- Affidavits from police, judges, medical personnel, school officials, battered women's advocates or shelter workers, mental health professionals treating the victim or her children, social services agency personnel, and witnesses to the domestic violence incidents documenting the emotional abuse or injuries that resulted from the abuse;
- Affidavit from the applicant;

²² INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

²³ See *Bark v. INS*, 511 F.2d 1200 (1975).

²⁴ See General Filing Instructions to INS Form I-751.

²⁵ 8 C.F.R. § 216.5(e)(3)(ii); Lee Article at 794.

²⁶ 8 C.F.R. § 216.5(e)(3)(ii).

²⁷ See General Filing Instructions for INS Form I-751.

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- An original evaluation by a professional such as a licensed social worker, psychologist, or psychiatrist to show extreme mental cruelty could be helpful but is not required;²⁸
- Copy of divorce decree if marriage was terminated by divorce on grounds of physical abuse or mental cruelty;
- Copy of the custody order if the decision to grant custody was based on a finding of domestic violence.

Affidavit from Applicant: The applicant's affidavit plays a very important role. Her affidavit should address specifically the waiver that she hopes to pursue. She should discuss her intention of marrying in good faith and not solely for immigration purposes. She should also include the following in her affidavit:

- How she and her batterer first met, the nature of their relationship and dating history, living arrangements and children (if applicable);
- When they began living together, or when they got married. A timeline of the relationship will make it easier for CIS officials to understand the entire picture and nature of the relationship;
- The first act of domestic violence and a history of the violence to date, including as many specific incidents as she can accurately recall and a summary of the frequency of incidents of abuse. She should also address what factors make or made it difficult for her to leave the abuser;
- A detailed description of each incident of violence or extreme cruelty, including her protests and attempts to seek help, her feelings of how the abuse affected her and any children; a description of physical injuries, verbal abuse, and threats, and the help she sought and problems she encountered in finding help;
- A list of all address where she and her batterer resided, including names and places of employment or both;
- The batterer's relationship with the survivor's children, parents and siblings;
- The survivor's relationship with her abuser's family members;
- The role of the batterer's parents, if they pressured her not to report the incident to the authorities, or any other person who pressured her not to report. Include her relationship to this person (e.g., neighbor, priest, other relatives, etc.);
- Her own feelings of fear for her safety and the safety of her children. These feelings may include the fear that her abuser will use her immigration status to exert power over her.²⁹ If an applicant is dependent upon her batterer to obtain immigration status, the batterer may use that control to make immigration-related threats to manipulate and abuse her. Some common manifestations of this abuse could be threatening deportation, threatening removal of her LPR status, not filing papers, or threatening not to sign the joint petition.³⁰ The impact of immigration threats in an abusive relationship is quite pervasive, because they can make it hard for an applicant to separate herself from an abusive relationship.

²⁸ CIS is prohibited from requiring the recommendation of a mental health professional or any other specific form of evidence to support a Form I-751 waiver based upon abuse or extreme mental cruelty. Aleinikoff, Executive Associate Commissioner, Office of Programs, INS Memorandum HQ 204-P, at ii (April 16, 1996).

²⁹ Leslye E. Orloff & Rachel Little, *Somewhere to Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women*, at 6 (AYUDA, Inc., May 1999).

³⁰ *Id.* at 6-7.

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The applicant's affidavit should detail as much as possible, but focus upon the specific hardships encountered as a result of the abuse. If a client is unable or not comfortable with writing, advocates and attorneys should gather stories and details for her affidavit. An advocate should know that an applicant may not feel comfortable discussing her abuse, or the discussion may be painful for her. Advocates should be sensitive to these feelings and help the survivor through the application process so that she can obtain the waiver and retain legal permanent residence.

In addition to the Battered Immigrant Waiver discussed above, there are two other waivers that an immigrant can apply for if she is unable to file the joint petition with her spouse: the extreme hardship waiver, and the good faith/good cause waiver. An applicant should be encouraged to apply for all three waivers at the same time if she qualifies for all three waivers.³¹ Below is a brief discussion of the two other waivers.

Extreme Hardship Waiver

In order to qualify for an extreme hardship waiver, an applicant must convince the CIS adjudicator that she would be subject to "extreme hardship" if she were forced to return to her home country.³² "Extreme hardship" does not have a fixed and inflexible meaning, but, rather, is dependent upon the facts and circumstances of each case. The traditional extreme hardship factors that have been used include: (1) age of the person; (2) age and number of the person's children, the children's ability to speak the native language of the foreign country, and the children's ability to adjust to life there; (3) serious illness of the person or her child that necessitates medical attention not adequately available in the foreign country; (4) a person's inability to obtain adequate employment abroad; (5) the person and her children's length of residence in the U.S.; (6) the existence of other family members residing legally in the U.S.; (7) irreparable harm arising from a disruption of educational opportunities; and (8) the adverse psychological impact of removal.³³ Applicants may provide evidence on the extreme hardship factors listed above in non-domestic violence cases, but wherever possible in domestic violence situations, the applicant should emphasize the nexus between the factor and the violence, the consequences of the violence, and the victim's inability to recover from the violence. If at all possible, the affidavit should emphasize hardship factors other than, or in addition to, economic factors.

Good Faith/Good Cause Waiver

The good faith/good cause Waiver is used for immigrants who are unable to file the joint petition because they are no longer married to their spouses, even though the marriage was entered into in good faith.³⁴ In order to qualify for a good faith/good cause waiver, an applicant needs to prove that she entered into the marriage in good faith, and that the marriage was legally terminated through divorce or annulment during the two-year conditional residence period. If domestic violence was a factor in an applicant's separation from her spouse, it will be helpful to include that in the petition. The applicant's affidavit should include as many of the domestic violence elements described above as are relevant to the applicant's case.

Procedure For Waiver Application

For a conditional resident to remove the conditions on her permanent residence, both the conditional resident and the U.S. citizen or lawful permanent resident spouse must file a joint petition during the 90 days immediately before the 2-year anniversary of the granting of conditional residency. The CIS form for this

³¹ Sarah B. Ignatius & Elizabeth S. Stickney, *Immigration Law and the Family* § 5.06[2], note 3, 1 (West Group, current through Release #6/June 2001).

³² INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

³³ See *Matter of Pilch*, 21 I. & N. Dec. 627 (BIA 1996), *Matter of Anderson*, 16 I. & N. Dec. 596 (BIA 1978), *Matter of Chumpitazi*, 16 I. & N. Dec. 629 (BIA 1978), *Matter of Kim*, 15 I. & N. Dec. 88 (BIA 1974), *Matter of Sangster*, 11 I. & N. Dec. 309 (BIA 1965).

³⁴ INA § 216(c)(4)(B), 8 U.S.C. § 1186a(c)(4)(B).

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joint petition is the I-751, Petition to Remove the Conditions on Residence.³⁵ If joint filing is not possible, the applicant must check off the box on the I-751 referring to the waivers of the joint filing requirement that we have discussed in this chapter. In addition to the I-751, the conditional resident must also submit the required fee and any supporting documentation. The required supporting documentation would include the applicant's affidavit, and other documentation to prove the good faith marriage, the battery or extreme cruelty, and extreme hardship (if the applicant is applying for this waiver).

For a conditional resident who hopes to obtain a waiver, the conditional resident must apply for the waiver while simultaneously applying for the condition to be removed. For those who apply after the 2-year period, the applicant must show good cause for the untimely application, and the CIS has discretion to accept or deny the application.³⁶ Those conditional residents applying for the battered spouse waiver, however, may file for this waiver even after their conditional residence has expired without a showing of good cause.³⁷

Conclusion

Any immigrant spouse who has been married less than two years when the CIS adjusts her status to permanent resident (or when she enters the United States on an immigrant visa) will be granted a conditional residence status for a two-year period. In order to remove the conditional status and retain lawful permanent residence, she and her U.S. citizen or lawful permanent resident spouse must file a joint petition within ninety days before the end of her two-year conditional residence period.

If an immigrant spouse encounters problems filing the joint petition, she may qualify for one of three waivers. If a waiver is granted, the approval allows the immigrant spouse to file on her own behalf and bypass the requirement of a joint petition. Two of the waivers do not require proof of domestic violence, while the third waiver, the battered spouse waiver, is designed specifically for domestic violence victims. By creating these waivers, Congress has taken a positive step forward in protecting immigrant spouses from abusive relationships. Advocates for survivors of domestic violence should become familiar with these waivers so they can be used to help survivors achieve stable status in the United States.

³⁵ The I-751 Form must be filed along with a filing fee with the DHS Service Center having jurisdiction over the applicant. Please check U.S. CIS's website prior to filing the waiver application for up to date information on filing locations and filing fees.

³⁶ INA § 216(d)(2)(B), 8 U.S.C. § 1186a(d)(2)(B).

³⁷ 8 C.F.R. § 216.5(e)(3)(ii).

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3.6

U-Visas: Victims of Criminal Activity¹²

By Leslye Orloff, Carole Angel and Sally Robinson

Introduction

The U-visa is a form of immigration relief designed to offer access to temporary legal immigration status for immigrant victims of domestic violence, sexual assault, human trafficking and a range of other criminal activities. Victims of domestic violence who qualify for VAWA self-petitioning³ may also qualify to file for a U-visa. U-visas are available for victims of domestic violence who may not qualify for VAWA self-petitioning. A VAWA self-petition is a form of immigration relief available only when the victim's abuser is a U.S. citizen or a lawful permanent resident spouse, former spouse, parent, step-parent or over 21 year old son or daughter. The U-visa was developed to provide the protection of immigration benefits to victims when the abuser is a family member who is not a spouse (e.g. a father-in-law, brother), is a boyfriend, is the father of the victim's child, or is a spouse who is not a citizen or lawful permanent resident. Some victims of sexual assault and other crimes may not qualify for VAWA self-petitioning relief because the sexual assault

¹ "This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women." We would like to acknowledge the contributions of Kavitha Sreeharsha, Caitlin Oyler and Ragini Tripathi.

² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (United States v. Windsor, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ For a full discussion of VAWA self-petitioning see Chapter 3.3 "Preparing the VAWA Self Petition and Preparing for Residence" in this manual. For more information on this topic visit <http://niwaplibrary.wcl.american.edu/vawa-confidentiality>.

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assailant is a stranger. Many sexual assault perpetrators are acquainted to the victim through family, school, university or the abusers attempt to have a dating relationship with the victim. The U- visa was created as part of the Violence Against Women Act of 2000 to offer the protection of legal immigration status to a broader range of immigrant domestic violence, sexual assault, and other crime victims.

It is important to note that the U-visa can help several groups of victims of violence against women, including victims of sexual assault and battered immigrants who were not covered by the original VAWA self-petition or cancellation of removal provisions. Immigrants who are abused by a boyfriend or another person who is not a spouse or parent or by a spouse or parent who is not a U.S. citizens or permanent resident can obtain U-visas. The U-visa will also help non-citizen victims of other crimes, including victims of rape or sexual assault who may not know or be related to the perpetrator and domestic workers who are abused or held hostage in the home by their employers.

Qualifying to be granted a U-visa is in some ways more difficult than for self-petitioning under VAWA in that the U-visa requires that a victim must report to law enforcement officials. To qualify, the battered immigrant must suffer substantial physical or emotional abuse and must cooperate with law enforcement. If an immigrant victim has never called the police, never reported the criminal activity or never filed a police report and is afraid or unwilling to do so, it will not be possible to apply for a U-visa. Victims who had not filed a police report prior to seeking help as a crime victim can be assisted by victim advocates in making a police report. This is possible even if the incident occurred in the past and if the local police decide not to pursue an investigation of the criminal activity reported.

The purpose of this chapter is to assist advocates and attorneys in identifying sexual assault, domestic violence, and other crime victims who may be eligible for U-visa immigration status and to provide resources to help advocates and attorneys work together to prepare U-visa applications for immigrant crime victims. If a potential U-visa applicant is identified, she should be referred promptly to an immigration attorney or advocate who has experience filing U-visa cases.⁴ This chapter discusses Department of Homeland Security (DHS) procedures and case processing priorities that are extremely important for advocates and attorneys doing safety planning with immigrant crime victims. The suggested evidentiary documents in this chapter are provided as guidelines and are not an exhaustive description of the types of evidence that may be offered to support an immigrant victim's U-visa application. This chapter concludes with guidance on how to assist immigrant U-visa holders in applying for lawful permanent residency.⁵

The Violence Against Women Act of 2000

The Violence Against Women Act of 2000 (“VAWA 2000”)⁶ created the U-visa for immigrant victims of criminal activity. This visa offers temporary lawful immigration status to victims of certain criminal activity if the victim has suffered substantial physical or mental abuse as a result of the criminal activity.⁷ The victim must have information about the criminal activity and a law enforcement official (*e.g.*, police, prosecutor) or a judge must certify that the victim has been helpful, is being helpful, or is likely to be helpful in detecting, investigating or prosecuting the criminal activity.⁸ Congress made legislative findings describing why U-visa immigration relief was being created. The purpose of this legislation was to:⁹

⁴ To find attorneys and advocates with expertise working with immigrant victims of violence against women advocates and attorneys should contact the technical assistance resources listed at the end of this chapter. To locate resources a state-by-state listing of programs with expertise offering advocacy, legal services and support for immigrant crime victims, see the National Immigrant Women's Advocacy Project's Directory, National Directory of Programs with Experience Serving Immigrant victims, available at: <http://niwaplibrary.wcl.american.edu/reference/service-providers-directory>.

⁵ The process of applying for lawful permanent residency in the United States is referred to under immigration law as “adjustment of status.”

⁶ Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

⁷ INA § 101(a)(15)(U)(i); 8 U.S.C. § 1101(a)(15)(U)(i).

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

⁹ Violence Against Women Act of 2000 Section 1513(a), Pub. L. No. 106-386, 114 Stat. 1464. H.R. REP. No. 106-939, at 73 (2000) (Conf. Rep.).

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“[C]reate a new nonimmigrant visa¹⁰ classification that will strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking and other crimes ... committed against aliens¹¹, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States... This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.... Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.”

This form of relief gives the applicant temporary legal immigration status and the possibility of lawful permanent residence. The maximum number of U-visas available in any one year is 10,000 for the crime victim applicants. Spouses and children of U-visa applicants, as well as parents of applicants who are under 16, may also qualify for a U-visa under certain circumstances. There is no limit on the number of visas available for these qualifying relatives.¹²

Adjudication of U- visa Applications

U-visa adjudications have been centralized at the Violence Against Women Act (VAWA) Unit of the DHS Vermont Service Center where all VAWA, T-visa and U-visa cases are adjudicated.¹³ The legislative history of the Violence Against Women Act of 2005 describes the Victims and Trafficking Unit as follows:

“In 1997, the Immigration and Naturalization Service consolidated adjudication of VAWA self-petitions and VAWA-related cases in one specially trained unit that adjudicates all VAWA immigration cases nationally. The unit was created ‘to ensure sensitive and expeditious processing of the petitions filed by this class of at-risk applicants . . .’, to ‘[engender] uniformity in the adjudication of all applications of this type’ and to ‘[enhance] the Service’s ability to be more responsive to inquiries from applicants, their representatives, and benefit granting agencies.’... T visa and U visa adjudications were also consolidated in the specially trained Victims and Trafficking Unit.”¹⁴

All U-visa applications should be filed with the Victims and Trafficking Unit at the DHS Vermont Service Center.¹⁵ Applications filed by victims outside of the United States must also be filed with the Victims and Trafficking Unit following the same process as all other U-visa applicants. Once an application is approved, the Victims and Trafficking Unit of the Vermont Service Center will notify the applicant and grant employment authorization.

It is important to note that there are no filing fees required by DHS in U-visa cases. Victims must be afforded access to fee waivers for all DHS imposed filing fees and costs from filing through receipt of lawful

¹⁰ “Non-immigrant” visas are issued to persons granted permission to remain temporarily (not permanently) in the United States. If an immigrant is granted permission to live permanently in the United States they will receive an “immigrant” visa.

¹¹ The Immigration and Nationality Act defines the term ‘alien’ as any person who is not a citizen or national of the United States. Practically speaking, this term covers a broad group of people including but not limited to permanent residents, refugees, asylees, people granted other forms of legal immigration visas, people who enter with visas and then overstay, and people who enter the U.S. without inspection.

¹² INA § 214(o)(3); 8 U.S.C. § 1184(o)(3).

¹³ Memorandum from William R. Yates, Assoc. Dir. Operations, Dep’t of Homeland Sec. to Dir. Vermont Serv. Ctr. re: Centralization of Interim Relief for U Nonimmigrant Status Applicants (October 8, 2003) at 2, available at <http://www.uscis.gov/files/pressrelease/UCntrl100803.pdf>. Forms of temporary status include deferred action, parole and stays of removal.

¹⁴ H.R. REP. NO. 109-233, 116 (2005).

¹⁵ 8 C.F.R. § 214.14(c)(1) (2008).

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permanent residency in U-visa cases.¹⁶ This includes fees associated with inadmissibility waivers (I-192) and waivers of passport or visa requirements (I-193) in U-visa cases.¹⁷ All fees associated with work authorization¹⁸ and filing for lawful permanent residency as a U-visa holder are also waivable (form I-485¹⁹, form I-765²⁰, biometrics²¹, I-601²²).

Although the U-visa was created in 2000, the DHS regulations implementing U-visa protections were not published until September 17, 2007. The regulations went into effect October 17, 2007. During the period between 2000 and 2007, Department of Homeland Security (“DHS”) created a temporary application process called interim relief that gave U-visa eligible immigrants access to legal work authorization and protection from deportation (*deferred action*)²³. On October 18, 2007 DHS stopped providing interim relief and began processing U-visas. However, the backlog of cases that had not been adjudicated led to significant delays in U-visa victims’ ability to obtain access to work authorization and protection from deportation.²⁴ As of December of 2010, the waiting time from filing to receipt of work authorization for U-visa victims can often be longer than 6 months.

DHS OFFERS PROTECTION FROM DEPORTATION FOR IMMIGRANTS WITH FILED IMMIGRATION APPLICATIONS: A SAFETY PLANNING OPPORTUNITY

Early screening of immigrant victims of domestic violence and sexual assault for U-visa or VAWA self-petitioning eligibility speeds an immigrant victims’ access to both legal work authorization and protection from deportation. The enhanced victim safety that can be achieved by early identification and filing of U-visa applications and VAWA self-petitions was clarified in August of 2010 when DHS issued a policy guidance.²⁵ The policy guidance instructed DHS trial attorneys and DHS enforcement officers to exercise prosecutorial discretion:

- Should not initiate immigration enforcement actions against immigrants with pending applications for legal immigration status that DHS deems valid;
- Should not detain immigrants with valid pending applications for immigration benefits; and
- To dismiss deportation and removal actions against immigrants with valid pending cases.

Immigration officials adjudicating applications for legal immigration status, under these policies, will decide pending cases:

- Within 30 days if the immigrant who has filed the application is detained; and
- Within 45 days in cases of non-detained immigrants.

All victims seeking immigration benefits designed to help immigrant victims of domestic violence, sexual assault, human trafficking, and other crimes covered by the U-visa will benefit from these protections.²⁶ However, these protections against deportation will not benefit immigrant victims unless they have a case that

¹⁶ William Wilberforce Trafficking Victims Protection Act, Section 201(d) Pub. L. 110-457 (2008); INA §245(l)(7).

¹⁷ 8 C.F.R. § 103.7(c) (2008).

¹⁸ INA §245(l)(7).

¹⁹ 8 C.F.R. § 103.7(c)(5)(ii) (2008) (Adjustment of Status).

²⁰ 8 C.F.R. § 103.7(c)(5)(i) (2008) (Application for Employment Authorization).

²¹ 8 C.F.R. § 103.7(c)(5)(i) (2008).

²² 8 C.F.R. § 103.7(c)(5)(ii) (2008) (Form I-601 Application for Waiver of Inadmissibility Grounds).

²³ See *generally* Memorandum from Michael D. Cronin, Acting Executive Assoc. Comm’r, Office of Programs, INS to Michael A. Pearson re: VTPVA Policy (Aug. 30, 2001) (on file with Legal Momentum and the National Immigration Project of the National Lawyer’s Guild) (hereinafter “Interim Guidance”).

²⁴ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53016 (Sept. 17, 2007).

²⁵ John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 1 (DHS, U.S. Immigration and Customs Enforcement, August 20, 2010).

²⁶ *Id.* at 1. These policies cover only the types of Immigration cases that DHS has the ability to adjudicate once deportation (removal) proceedings have been initiated. In addition to crime victim related immigration protections, these provisions extend to many family based visa petitions.

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have been filed and is pending with DHS. It is therefore extremely important from a victim safety planning perspective to identify immigrant victims who qualify for U-visa relief as early in the process of working with an immigrant victim as possible. Advocates and attorneys working with immigrant victims are strongly urged to help eligible victims file for U-visa or other VAWA related immigration relief²⁷ before pursuing other legal protections that could trigger an abuser or crime perpetrator reporting the victim to DHS enforcement officials. Once a case is pending with DHS, retaliatory steps the perpetrator may take to have the victim deported will be less effective.

This approach also informs DHS that an immigrant is a crime victim eligible for VAWA confidentiality protections. VAWA confidentiality was designed to stop DHS enforcement officials and DHS trial attorneys from relying on or seeking perpetrator provided information to harm an immigrant victim. By filing a VAWA confidentiality protected immigration case, DHS is provided information that the undocumented immigrant is a victim. DHS also receives information regarding the identity of the victim's perpetrator. This strengthens the probability VAWA confidentiality protections will be more effective in the victim's case. A final reason early filing of immigration cases for eligible victims is important has to do with how some DHS officials view U-visa and VAWA cases filed after a DHS enforcement action has been initiated. In some cases DHS enforcement officials have been suspicious about the validity of U-visa and VAWA cases filed after DHS has begun an enforcement action against an immigrant. Once the case is filed, not only are many DHS enforcement officials more willing to believe that the victim is credible, but DHS officers who attempt to take enforcement actions against victims can be held accountable for violation of VAWA confidentiality statutes.

I. Applying For A Nonimmigrant U-Visa

Benefits of the U-visa

The U-visa provides legal immigration status for qualifying immigrant crime victims. This status offers protection from deportation. The U-visa is of limited duration, 4 years, and is not intended to offer permanent legal immigration status.²⁸ Congress also created a separate provision through which some U-visa holders²⁹ may qualify for lawful permanent residency (a green card), allowing an immigrant victim to remain permanently in the United States.³⁰

U-visa holders are lawfully permitted to accept employment in the United States.³¹ Once the U-visa is granted victims are simultaneously provided employment authorization. Legal work authorization is crucial to helping immigrant victims provide for themselves and their children. It also enhances victim safety by severing economic dependence on an abusive family member or employer.

U-visa applicants may include their family members in their U-visa application. This provides U-visas for families members allowing them to remain together in the United States rather than being separated while the

²⁷ See the Introduction to Immigration Relief Chapter of this manual for an overview of the range of immigration relief available to help immigrant victims as well as the individual chapters of this manual devoted to specific forms of immigration benefits including the VAWA self-petition, the Battered Spouse Waiver, the T-Visa and VAWA Cancellation of Removal.

²⁸ TVPRA 2008, section 201(c) allows DHS to extend the U-visa and employment authorization for U victims beyond four years when either 1) there has been a delay in issuance of adjustment regulations or 2) an adjustment of status application is pending. As of January 16, 2009, there are no rules implemented or pending for these statutory provisions.

²⁹ In order to be eligible for lawful permanent residence, a U-visa holder must prove that she was lawfully admitted to the U.S. as a U nonimmigrant, continues to hold that status (and it has not been revoked), is not inadmissible under INA 212(a)(3)(E) (Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing), has been physically present for three years, has cooperated in an investigation of the criminal activity upon which the U-visa was granted, and that her presence is justified "on humanitarian grounds, to ensure family unity, or is in the public interest." INA § 245(m); 8 U.S.C. § 1255(m). 8 C.F.R. §§ 245.23, 245.24 (2008).

³⁰ Immigrant crime victim eligibility for lawful permanent residency will be discussed fully in a later section of this chapter.

³¹ 8 C.F.R. § 214.14(c)(7) (2008).

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crime victim participates in the criminal investigation process. U-visa applicants may also obtain U-visas for family members living abroad. Beyond family reunification, U-visas for family members can be extremely helpful in providing emotional and financial support for the U-visa victim. Family members can assist with the victim child care and other issues. U-visa protection for family members may also be an urgent safety precaution as it protects the victim's family members from threats and retaliation in their home country if the victim cooperates with law enforcement officials in the United States.

U-visa applicants can simultaneously file applications for other forms of immigration relief with DHS.³² However, DHS will grant the applicant only one form of immigration relief. The application that is first granted is the form of immigration relief that the immigrant victim applicant will receive and all other pending applications will be denied.³³

Who is Eligible to Apply for the Nonimmigrant U-Visa?

In order to be eligible for U-visa status, the immigrant victim must:

1. Have suffered substantial physical or mental abuse as a result of having been a victim of the one or more of the criminal activities listed under INA § 101(a)(15)(U)(iii);³⁴
2. Possess information concerning the criminal activity;³⁵
3. Obtain a certification from a law enforcement official, prosecutor, judge, immigration official, or other federal, state, or local authority that the victim is being, has been, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing of the perpetrator of one or more listed criminal activities;
4. The criminal activity violated the laws of or occurred in the United States.³⁶

What Constitutes Substantial Physical or Mental Abuse?

In order to be eligible for U-visa status, an applicant must have suffered substantial physical or mental abuse as a result of being a victim of the criminal activity.³⁷ Mental abuse is defined as an impairment of emotional or psychological soundness.³⁸ In determining whether the abuse is *substantial*, DHS will consider:

- The nature of the injury;
- The severity of the perpetrator's conduct;
- The severity of the harm suffered;
- The duration of the infliction of harm;
- Permanent or serious harm to the appearance, health, or physical or mental soundness of the victim.³⁹

DHS will take into account any or all of these factors. No single factor is required, nor does the existence of any single factor automatically establish that the abuse was substantial.⁴⁰ It is important to note that a series of actions taken together can cumulatively establish substantial abuse, even where no single act would alone rise to that level.⁴¹ Moreover, DHS has discretion to consider both the aggravation of pre-existing conditions, as well as the severity of the perpetrator's conduct -- even if the actual impact on the victim may have been

³² 214(p)(5), 8 U.S.C.1184(p)(5).

³³ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53023 (September 17, 2007).

³⁴ INA § 101(a)(15)(U)(i)(I); 8 U.S.C. § 1101(a)(15)(U)(i)(I).

³⁵ INA § 101(a)(15)(U)(i)(II); 8 U.S.C. § 1101(a)(15)(U)(i)(II).

³⁶ INA § 101(a)(15)(U)(i)(IV); 8 U.S.C. § 1101(a)(15)(U)(i)(IV).

³⁷ INA § 101(a)(15)(U)(i)(I); 8 U.S.C. § 1101(a)(15)(U)(i)(I).

³⁸ 8 C.F.R. 214.14(a)(8) (2008).

³⁹ 8 C.F.R. § 214.14(b)(1) (2008).

⁴⁰ *Id.*

⁴¹ *Id.*

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less than intended by the perpetrator.⁴² Under the Violence Against Women Act's any credible evidence rules victims are allowed to present any credible evidence to prove that they suffered substantial physical or mental abuse.⁴³ Advocates and caseworkers can play a critical role in assisting victims in collecting documentation and evidence that supports a DHS finding that the victim suffered substantial physical or mental abuse.

What are the Types of Criminal Activity That Lead to U-visa Eligibility?

Congress created an extensive list of criminal activities a U-visa eligible victim may have suffered.⁴⁴

Crimes Covered:

Rape	Kidnapping
Torture	Abduction
Trafficking	Unlawful criminal restraint
Incest	False imprisonment
Domestic violence	Blackmail
Sexual assault	Extortion
Abusive sexual contact	Manslaughter
Prostitution	Murder
Sexual exploitation	Felonious assault
Female genital mutilation	Witness tampering
Being held hostage	Obstruction of justice
Peonage	Perjury
Involuntary servitude	Slave trade

This enumerated list provides guidelines on the types of federal, state, or local crimes that make immigrant victims eligible for U-visa immigration relief. When federal, state or local officials believe that criminal activity occurred and that the victim is a potential U-visa applicant, officials should provide victims with certification and referrals to local advocates and attorneys who can assist the victim in filing for U-visa immigration protection.⁴⁵

The listed crimes are broadly described in the statute in order to capture the diversity of state and federal criminal activities that an immigrant victim may suffer that are similar to the listed crimes. The U-visa list is not an exclusive list and the statute and the DHS regulations provide access to U-visa protections for criminal activities that are substantially similar to the listed criminal activities.⁴⁶ DHS U-visa regulations explain that attempts, conspiracy and solicitation to commit a criminal activity covered by the U-visa is sufficient for the victim to U-visa eligible.⁴⁷ The rule provides that:⁴⁸

“[T]he criminal activity listed is stated in broad terms. The rule’s definition of ‘any similar activity’ takes into account the wide variety of state criminal statutes in which criminal activity may be named differently than criminal activity found on the statutory list, while the nature and elements of both criminal activities are comparable.”

On some occasions and for varying reasons a listed criminal activity has occurred but the case that law enforcement is pursuing for prosecution is for a crime that is not contained in the U-visa list. This can occur for example, when law enforcement officials are investigating narcotics offenses and they obtain a warrant to

⁴² New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53018 (September 17, 2007).

⁴³ 8 C.F.R. § 214.14(c)(4) (2008).

⁴⁴ INA § 101(a)(15)(U)(3).

⁴⁵ See, Legal Momentum, NIWAP and the Vera Institute, Toolkit for Law Enforcement Use of the U-Visa (August 2010) available at: <http://niwaplibrary.wcl.american.edu/immigration/u-visa/tools/law-enforcement>.

⁴⁶ 8 C.F.R. § 214.14(a)(9) (2008).

⁴⁷ *Id.*

⁴⁸ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53018 (September 17, 2007).

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search the home of an alleged drug dealer. When they enter the home on a warrant the drug dealer's girlfriend has a black eye. Upon interviewing her they learn that she has been battered by the drug dealer. Under this scenario, police can sign a U-visa certification for the domestic violence victim based on her report of domestic violence, although the drug offense, not the domestic violence, case, will be prosecuted.

The U-visa offers protection to victims of “criminal activity” as opposed to “crimes” because the U-visa was developed to help federal, state or local government officials in the *detection*, investigation or prosecution of criminal activity. Both Congress and DHS agree that U-visas are available to help victims who help with crime detection.⁴⁹ Assistance with detection of criminal activity may include: filing a police report, calling the police for help and talking to police at the crime scene, or seeking a protection order based on criminal activities.

Immigration relief offered through the U-visa was structured to ensure that immigrant victims who came forward to report their victimization by criminal activity would be able to obtain the protection of legal immigration status for 4 years. Victims are able to access this relief without regard to how the criminal justice system decides to proceed with the case.

Who is a “Victim” Eligible to Apply for a U-visa?

Direct Victims

The regulations incorporate a broad framework for how a victim can satisfy the requirement that she has been a victim of an enumerated criminal activity. In order to establish eligibility, the rule generally requires an applicant to show that she was *directly and proximately*⁵⁰ harmed by qualifying criminal activity. Petitioners who have another form of temporary legal immigration status may apply for and change their status to a U visa.⁵¹

Indirect Victims

DHS sets out several instances under which indirect victims may establish U-visa eligibility.⁵² Family members filing their own U-visa application must meet all of the same eligibility requirements as any other U-visa victim including substantial harm and helpfulness.⁵³ The categories of indirect victims authorized to apply for U-visas are:

- **Bystanders:** Under limited circumstances bystanders may qualify as U-visa victims. When a bystander has suffered an unusually direct injury as the result of a qualifying crime (i.e., suffering a miscarriage after witnessing a criminal activity), the bystander may be eligible for a U-visa. DHS will exercise its discretion to grant U-visas to bystanders on a case-by-case basis.⁵⁴

⁴⁹ Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 §1513(a)(2)(A) (U visa purpose is to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes...”); New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53020 (September 17, 2007) (DHS

“is defining the term to include the detection of qualifying criminal activity because the detection of criminal activity is within the scope of a law enforcement officer’s investigative duties.... such inclusion is necessary to give effect to section 214(p)(1) of the INA, 8 U.S.C.1184(p)(1), which permits judges to sign certifications on behalf of U nonimmigrant status applications....Judges neither investigate crimes nor prosecute perpetrators.”

Judges may certify U-visas because when they issue a ruling in a protection order case they detect the existence of criminal activity. They may also appropriately certify when they are involved in conviction or sentencing of a perpetrator. 72 Fed. Reg. 53020.

⁵⁰ A victim is proximately harmed by a criminal activity if the harm would not have occurred had the criminal activity been not been perpetrated.

⁵¹ INA Section 248(b).

⁵² 8 C.F.R. § 214.14(a)(14) (2008).

⁵³ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53017. (September 17, 2007).

⁵⁴ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53016. (September 17, 2007).

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- Victims of Perjury, Obstruction of Justice, Witness Tampering: A victim of witness tampering, perjury or obstruction of justice, or witness tampering is an immigrant who is directly or proximately harmed by the perpetrator of one of these three crimes, where there are reasonable grounds to conclude that the perpetrator committed the offense in an effort to frustrate, undermine or avoid a criminal investigation, arrest or prosecution and when the perpetrator uses the legal system to exploit, manipulate or control the victim.⁵⁵
- Victim is deceased: In a murder or manslaughter case the actual victim is deceased. In these cases DHS regulations allow the spouse and under 21 year old children of the deceased victim to file a U-visa petition on their own behalf as indirect victims. If the deceased victim was under 21 years of age their parents and under 18 year old siblings could be indirect victims.⁵⁶
- Victim is incompetent, incapacitated or under age 16: In a case in which the direct victim of criminal activity is incompetent or incapacitated DHS regulations allow the spouse and under 21 year old children of the direct victim to file a U-visa as an indirect victim. When the direct victim is under the age of 16, indirect victims may be their parent and/or their parents or their unmarried siblings under the age of 18.⁵⁷

With regard to the last two categories, DHS explains that:

“ Family members of murder, manslaughter, incompetent, or incapacitated victims frequently have valuable information regarding the criminal activity that would not otherwise be available to law enforcement officials because the direct victim is deceased, incapacitated, or incompetent. By extending the victim definition to include certain family members of deceased, incapacitated, or incompetent victims, the rule encourages these family members to fully participate in the investigation or prosecution.”⁵⁸

Finally, it is important to note that family members included in the list of indirect victims may apply for U-visa immigration relief in their own right. They are not however required to do so.⁵⁹ If a mother and her two teen age under 21 year old children all qualify to file for U-visas as indirect victims, but the mother wants to avoid the trauma of one or more of her children having to cooperate with law enforcement or prosecution officials to that same extent as would be required if the child filed their own U-visa application, the mother can file as an indirect victim and can include her children in her U-visa application. This way the mother’s children receive U-visas through the mother’s application and cooperation.

Victims May Not Be Culpable in the Qualifying Criminal Activity

Victims must also show that they are not culpable of the criminal activity upon which the U-visa is based.⁶⁰ Some U-visa applicants may have criminal convictions.⁶¹ In such cases, the applicant will not be prevented from qualifying as a victim if the convictions are unrelated to the qualifying criminal activity that caused the victimization.⁶² However, where the victim was a culpable participant in the underlying criminal activity upon which the U application is based, she is precluded from establishing U-visa victimization. Additionally, a U-visa applicant cannot seek U-visas for culpable family members.⁶³

⁵⁵ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53017. (September 17, 2007).

⁵⁶ *Id.*; 8 C.F.R. § 214.14(a)(14)(i) (2008).

⁵⁷ 8 C.F.R. § 214.14(a)(14)(i) (2008).

⁵⁸ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53017. (September 17, 2007).

⁵⁹ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53017. (September 17, 2007).

⁶⁰ 8 C.F.R. § 214.14(a)(14)(iii) (2008).

⁶¹ *Id.*

⁶² Although unrelated criminal activity on the part of the applicant will not prevent her from qualifying as a victim for U-visa purposes, that criminal activity may make her inadmissible to the United States. There are waivers available to U-visa applicants for some grounds of inadmissibility. Please see the section later in this chapter discussing inadmissibility and waivers.

⁶³ 8 C.F.R. § 214.14(a)(14)(iii) (2008).

What Is Required To Satisfy “Possession of Information”?

The U-visa was enacted to encourage victims of criminal activity to feel safe in reporting crimes against them without adverse immigration consequences. U-visa applicants must prove that they possess information about the criminal activity.⁶⁴ Their knowledge of the criminal activity against them is a critical component of the U-visa application. Applicants who were under 16 when the criminal activity occurred and victims who lack capacity or competence do not have to prove that they possess information if a parent, guardian, or next friend possesses that information.⁶⁵ The *next friend* is a person who acts in a legal proceeding on behalf of an individual who is under the age of 16 or incompetent or incapacitated.⁶⁶

What Is Required To Obtain A U-Visa Certification Of Helpfulness?

Ongoing Helpfulness or Willingness to be Helpful

The requirement that an applicant “has been helpful, is being helpful or is likely to be helpful”⁶⁷ includes past, present, and future helpfulness. Congress adopted this approach to ensure that certifications were not limited only to cases in which prosecutions were underway or completed. The choice of the term “criminal activity” reflects an understanding that victims do not control the process of criminal investigations or prosecutions. This choice was based on the history and development of the protection orders that were needed to provide domestic violence victims a form of civil legal relief that the victim could initiate and make decisions about how to proceed with an eye predominantly toward victim safety. Whereas criminal domestic violence prosecutions were brought by the state and the victim had little, if any, control over the process, the proceedings or the outcome.

Movement of a case through the criminal justice system is a complex matter. In some cases an investigation is initiated, but stalls when a perpetrator cannot be identified or located. In other cases a perpetrator is arrested, charged, and tried, but a conviction is not obtained. A key congressional goal of the U-visa legislation was to encourage victims to come forward and report crimes and to secure their assistance in criminal investigations, not just in successful prosecutions. For this reason, victims were granted the opportunity to access U-visa protection early in the criminal justice process, and eligibility is not contingent upon a case going to trial or upon obtaining a conviction. Rather, the U-visa is available to an individual crime victim who is “helpful, was helpful, or will be helpful” in the detection, in an investigation **or** in the prosecution of the criminal activity. The criminal justice process in each case will be different, and different levels of assistance may be required from each victim. For instance, in one case a victim’s testimony at trial might be needed, whereas in another case the prosecutor may have ten other witnesses who can testify and, therefore, the victim will not have to testify in order to establish eligibility as long as she was available to assist as necessary.

In assessing how helpful an applicant must be, advocates and attorneys note that the U-visa was designed to help immigrant crime victims willing to be helpful in detection, investigation or prosecution of criminal activity. Victims of qualifying criminal activities continue to qualify for a U-visa who have been helpful or are willing to be helpful without regard to whether or not:⁶⁸

- ▶ A criminal case is initiated against the perpetrator;
- ▶ The criminal activity results in a prosecution;
- ▶ A warrant is issued for the arrest of the perpetrator
- ▶ The warrant issued but cannot be served because the perpetrator absconded after a warrant was issued for the perpetrator’s arrest.

⁶⁴ INA § 101(a)(15)(U)(i)(II); 8 U.S.C. § 1101(a)(15)(U)(i)(II).

⁶⁵ 8 C.F.R. § 214.14(b)(2) (2008).

⁶⁶ 8 C.F.R. § 214.14(a)(7) (2008).

⁶⁷ INA § 101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III).

⁶⁸ The following examples are illustrative of the range of issues that can arise criminal investigations and prosecutions and do not reflect a complete or full list.

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- ▶ The perpetrator was detained and removed from the United States by DHS and cannot be served with the warrant in the criminal case.
- ▶ The perpetrator is charged and prosecuted for a crime that is not a U-visa qualifying crime (e.g. a drug offense so as long as a qualifying crime was at the least detected and reported.
- ▶ The case is dismissed because the police mishandled evidence; conducted an unlawful search or other similar issues.
- ▶ The perpetrator is ultimately convicted of any criminal activity.

Victim Does Not Unreasonably Refuse to Cooperate

It is critical for victims who are reporting criminal activity to understand that although they can obtain U-visa status based on reporting criminal activity, their helpfulness does not end with the initial report of the criminal activity. Though it is not required that the case be carried through and prosecuted, DHS requires the applicant to continue to cooperate as needed throughout the duration of the U-visa status.⁶⁹ This cooperation requirement is modified however, when the victim's refusal to cooperate is reasonable. For U-visa holders to obtain lawful permanent residency, victims must prove either cooperation or that their refusal to cooperate was not unreasonable.⁷⁰ When the victim's ongoing cooperation in the criminal investigation may jeopardize the victim's safety or the safety of her family members in the U.S. or abroad the victim's failure to cooperate is not unreasonable. In a domestic violence case in which the victim continues to live with the abuser, has children with the abuser or is economically dependent on the abuser, her refusal to cooperate would also not be unreasonable. If the victim has not continued to be helpful in the investigation or prosecution, the victim risks that the certifying official will deem her non-cooperation unreasonable and will contact DHS to provide information about the victim's non-cooperation, raising the potential that DHS may act on this information and initiate a process for revoking the U-visa.

It is therefore important for advocates and attorneys working with U-visa victims to ensure that law enforcement and prosecution officials are aware of the immigrant victim's safety concerns that led to her decision to not continue cooperation. Law enforcement and prosecution officials who understand the victim's difficulties and safety concerns and understand that immigrant victims, like many other victims of domestic violence or sexual assault may reasonably choose not to continue to be involved the criminal case against the perpetrator. It is also helpful to inform police and prosecutors non-cooperating victims will be unable to attain lawful permanent residency through the U-visa unless they prove to DHS that their failure to offer ongoing cooperation was not unreasonable.

Certification From a Federal, State or Local Official is Mandatory

DHS mandates that all U-visa applications include a certification from a state, local, or federal agency as part of the crime victim's application. A crime victim applicant must include a U-visa certification from a government official who completes a U-visa certification (Form I-918 Supplement B).⁷¹ The U-visa statute authorizes certifying agencies to sign certifications--⁷²

- for victims who cooperated in the past on a case that is now closed or completed (has been helpful)
- for victims currently or recently providing information for ongoing investigations or prosecutions (is being helpful); and
- for victims who are willing to cooperate should an investigation or prosecution take place in the future (likely to be helpful).

The statute and regulations are clear that there is no time limitation and certifications can be signed any time after the criminal activity occurred. Once a victim receives a certification, the victim must file her completed U-visa application within 6 months of the date the certification was signed. If the victim is unable to complete evidence collection and filing within 6 months, the victim will need to obtain a new certification.

⁶⁹ 8 C.F.R. § 214.14(b)(3) (2008).

⁷⁰ 8 C.F.R. § 245.24(b)(4) (2008).

⁷¹ 8 C.F.R. § 214.14(c)(2)(i) (2008).

⁷² INA § 214(o), 8 U.S.C. 1184(o).

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The form requires the law enforcement official, judge, prosecutor, or other authorized state, local, or federal employee to certify the following:

- What criminal activity occurred
- Identify the immigrant applicant as the victim of the qualifying criminal activity;
- That the applicant has been, is being, or is likely to be helpful in the investigation or prosecution;
- Note any injuries observed in the police report
- List any family members that may be implicated in commission of the crime.

Congress specified a range of federal, state and local governmental agencies that are authorized to sign U-visa certification. The goal was that certification could be completed by a number of government officials with the authority to detect, investigate or prosecute criminal activities.⁷³ Agencies authorized to certify include traditional criminal justice system law enforcement agencies (e.g. police, prosecutors, sheriffs). Other federal, state, and local governmental agencies also have investigative jurisdiction over matters that include criminal activities and have been included among authorized certifying agencies. Agencies and officials who can sign U-visa certifications include but are not limited to:⁷⁴:

- ▶ Federal, state, and local law enforcement agencies (e.g., police, sheriffs, assistant U.S. attorneys, federal marshals, FBI)
- ▶ Federal, state, and local prosecutors
- ▶ Federal, state, and local judges
- ▶ Child Protective Services
- ▶ Adult Protective Services
- ▶ Equal Employment Opportunity Commission
- ▶ Department of Labor
- ▶ Immigration officials
- ▶ Other federal, state, and local investigative agencies

The certification must be signed by the head of the certifying agency or designated supervisors.⁷⁵ The DHS regulations anticipate that many agencies will have multiple designated supervisors.⁷⁶ Judges are government officials statutorily authorized by statute to sign U-visa certifications.⁷⁷ DHS does not impose the head of agency or supervisor requirement on judges.⁷⁸

Although DHS encourages certifying agencies to develop certification policies and procedures,⁷⁹ as of 2010 certifying agencies in many jurisdictions have yet to do so. Advocates and attorneys working with immigrant crime victims in jurisdictions that do not have established U-visa certification policies and procedures should provide certifying agencies with the tools they need to begin doing U-visa certifications. It is important to note that certifying agencies are not required to have U-visa protocols in place to begin signing U-visa certifications. However, having a protocol in place promotes efficiency, consistency, and predictability in the U-visa certification process. This benefits both the U-visa victim and the certifying agency improving police-immigrant community relations, fostering better community policing and enhancing crime detection, investigation and prosecution needed to promote community safety.⁸⁰

⁷³ 8 C.F.R. § 214.14(a)(2) (2008).

⁷⁴ 8 C.F.R. § 214.14(a)(2) (2008).

⁷⁵ 8 C.F.R. § 214.14(a)(3) (2008).

⁷⁶ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53023. (September 17, 2007); 8 C.F.R. § 214.14(a)(3) (2008).

⁷⁷ 101(a)(15)(U)(i)(III).

⁷⁸ A U-visa certification toolkit for judges is available at: <http://iwp.legalmomentum.org/immigration/u-visa/tools/judges>.

⁷⁹ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53023. (September 17, 2007).

⁸⁰ Sample protocols and tool-kits on the U-visa that are being used in jurisdictions across the country are available at:

http://iwp.legalmomentum.org/immigration/u-visa/tools/police-prosecutors/IMM_UVISA_Sample_Cert_Protocol_OVW1.12.10.pdf/view?searchterm=protocol ;
http://iwp.legalmomentum.org/immigration/u-visa/tools/police-prosecutors/IMM_UVISA_Sample_Cert_Protocol_OVW1.12.10.pdf/view?searchterm=protocol.

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It is important for advocates and attorneys to work with law enforcement, prosecutors, judges and other government agencies (*e.g.*, EEOC, labor or child abuse investigators) to build a better understanding of the role of the certification, how it benefits the certifying agency (*e.g.* by improving community policing) and help certifying agencies establish procedures and protocols that encourage signing of certifications.

If A Crime That Violated U.S. Law Occurred Abroad, Will It Qualify For U-Visa Purposes?

The final U-visa requirement is that the criminal activity must either occur in the United States or violate U.S. laws.⁸¹ Crimes are considered by DHS to have occurred in the United States if the crime was committed in any of the following locations:

- ▶ Indian land including any Indian reservation within United States jurisdiction, dependent Indian communities, and Indian allotments⁸²
- ▶ Military installations including transportation (vessels, aircrafts) under Department of Defense jurisdiction or military control or lease⁸³
- ▶ United States territories including American Samoa, Swain Islands, Bajo Nuevo (the Petrel Islands), Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, Navassa Island, Northern Mariana Islands, Palmyra atoll, Seranilla Bank, and Wake Atoll⁸⁴
- ▶ Guam, Puerto Rico, and the U.S. Virgin Islands⁸⁵

For U-visa purposes, criminal activity occurring outside of the United States to be considered qualifying criminal activity there must be a U.S. federal statute that creates extraterritorial jurisdiction that allows for prosecution of that crime in a U.S. court. For example, violation of the federal statute that allows prosecution of U.S. citizens and nationals who engage in illicit sexual conduct outside the United States, such as sexual abuse of a minor, would be considered a violation of U.S. law for U-visa purposes.⁸⁶

While the criminal activity must have occurred in the U.S. or must have been in violation of a U.S. federal statute which extends extraterritorial jurisdiction, it is important to note that the victim need not be in the United States in order to apply for a U-visa.⁸⁷ Victims may file U-visa applications from abroad in the same manner as all U.S. based victims. Applications are filed directly with the Victims and Trafficking Unit of the DHS Vermont Service Center. Victims may file from abroad for a number of reasons. For some, the qualifying criminal activity may have occurred abroad. Other victims may be filing for U-visa protection from abroad because their abuser took her abroad and then stranded her there with no means to reenter the United States.

Which Family Members of U-Visa Holders Are Eligible To Receive A U-Visa?

Certain family members of U-visa applicants are also eligible to receive U-visas. A U-visa victim may include U-visa petitions for her family members along with the victim's own U-visa application. The victim may also submit U-visa applications for her family members at a later time. Victims may wait until after they are awarded a U-visa to file U-visa petitions for family members, particularly those family members residing abroad. While there is a numerical cap of 10,000 U-visas per year on the number of U-visas awarded immigrant crime victims, there is no numerical cap on the number of U-visas that can be issued to the spouses, children, parents, or siblings of U-visa recipients.⁸⁸

⁸¹ INA § 101(a)(15)(U)(i)(IV); 8 U.S.C. § 1101(a)(15)(U)(i)(IV).

⁸² 8 C.F.R. § 214.14(a)(4) (2008).

⁸³ 8 C.F.R. § 214.14(a)(6) (2008).

⁸⁴ 8 C.F.R. § 214.14(a)(11) (2008).

⁸⁵ INA § 101(a)(38); 8 U.S.C. § 1101(a)(38).

⁸⁶ 8 C.F.R. § 214.14(b)(4) (2008).

⁸⁷ 8 C.F.R. §§ 214.14(c)(5)(i)(A)-(B) (2008).

⁸⁸ INA § 214(o); 8 U.S.C. § 1184(o).

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Family members include the U-visa victim's spouse and children (under 21).⁸⁹ Victims under the age of 21, may also request U-visas for their parents and unmarried siblings (under age 18).⁹⁰ A sibling's age is determined as of the date when the sibling's U-visa application is filed.⁹¹ Children who are born after the application is approved are also considered qualifying family members as long as an additional application is filed on their behalf.⁹² Perpetrators of battery or extreme cruelty or human trafficking who are family members of the U-visa petitioners are not eligible to gain U-visa status as a dependent family member of the U-visa victim.⁹³

Removal Proceedings

Victims Currently in Removal Proceedings

Victims who are currently in removal proceedings may file U-visa applications with DHS. Immediately following the victim's filing of a U-visa case, counsel for the victim should notify the DHS, Immigration and Customs Enforcement Office of Chief Counsel (OCC) and the trial attorney and the immigration court of the fact that the U-visa case has been filed. Under policies issued by DHS on August 20, 2010⁹⁴ and on September 24, 2009⁹⁵ the upon receiving notification that a U-visa application has been filed with DHS the Office of Chief Counsel will be required to:

- notify the Victims and Trafficking Unit at the Vermont Service Center of the filing,
- request expedited adjudication of the U-visa case
- immediately transfer the immigrant victim's case file (A-file) to the Victims and Trafficking Unit at the Vermont Service Center,
- when the victim has been detained, make the victim available for any interview that the Vermont Service Center may require.⁹⁶
- upon receipt of a copy of the U-visa filing from the crime victim's attorney, review the filing to determine if as a matter of law the immigrant victim is eligible for relief from removal (e.g. it appears likely that the victim will be granted a U-visa), the Office of Chief Counsel should—⁹⁷
 - promptly move to dismiss the immigration court case without prejudice⁹⁸ and
 - if the victim is detained, secure the victim's release from detention . --

Upon receiving a U-visa filing and the transfer of the applicant's case file (A-file) from Office of Chief Counsel the **Victims and Trafficking Unit** will endeavor to adjudicate cases referred by DHS in this manner within 30 days when the immigrant victim is detained. If the victim is not detained, but is involved in removal proceedings the **Victims and Trafficking Unit** will endeavor to adjudicate the immigrant crime victim's case within 45 days of receiving the applicant's case file (A-file).

Although DHS policy places the responsibility for requesting that the **Victims and Trafficking Unit** expedite adjudication of the U-visa case on DHS trial attorneys and the Office of Chief Counsel and not on the victim's attorney or the immigration judge,⁹⁹ it is important that attorneys representing immigrant victims

⁸⁹ INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

⁹⁰ INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

⁹¹ 8 C.F.R. § 214.14(f)(4) (2008).

⁹² 8 C.F.R. § 214.14(f)(4)(i) (2008).

⁹³ 8 C.F.R. § 214.14(f)(1) (2008).

⁹⁴ John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 2 (DHS, U.S. Immigration and Customs Enforcement, August 20, 2010).

⁹⁵ Davie Venturella, Guidance Adjudicating Stay Requests Filed By U Nonimmigrant Status (U-Visa) Applicants (DHS, Immigration and Customs Enforcement, September 24, 2009).

⁹⁶ As of December 2010, the Vermont Service Center has not been requiring interviews with victims in connection with the adjudication of U-visa cases.

⁹⁷ John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 2-3 (DHS, U.S. Immigration and Customs Enforcement, August 20, 2010).

⁹⁸ This new process should significantly reduce the need for attorneys representing immigrant victims to seek agreement from the DHS trial attorney to file a joint motion to terminate removal proceedings under 8 C.F.R. §§ 214.14(c)(1)(i), 214.14(f)(2)(i) (2008).

⁹⁹ John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 3 (DHS, U.S. Immigration and Customs Enforcement, August 20, 2010). ("No obligation for such requests shall

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take all steps needed to assure that the request is both made and received by the **Victims and Trafficking Unit**. Attorneys representing U-visa victims should take all steps necessary to ensure that the U-visa case filed is complete and contains all available evidence. Attorneys must respond quickly to any requests for further evidence from the Victims and Trafficking Unit. It is recommended that attorneys for U-visa applicants with cases before the immigration court also communicate through the **Victims and Trafficking Unit** hotline¹⁰⁰ or e-mail¹⁰¹ with VAWA Supervisors to also request expedited review of the case and to learn about any additional evidentiary needs of adjudicators and provide requested information swiftly.¹⁰²

Family members who are eligible to apply for U-visas are also eligible to have their immigration case dismissed without prejudice or terminated.¹⁰³ If the proceedings are terminated and subsequently the U-visa is denied, the applicant may be reissued a *Notice to Appear* and once again placed in removal proceedings.¹⁰⁴ If the victim received a stay of removal from either the immigration court or DHS if the U-visa application is denied the order to stay the removal will be terminated effective the date of the denial.¹⁰⁵

Victims With Prior Orders of Removal

Victims who already have a final removal order remain eligible to file a U-visa application with DHS.¹⁰⁶ Filing the U-visa application will not in and of itself prevent the applicant's removal.¹⁰⁷ To protect victims who are in the United States against the victim's removal before being granted a U-visa, an application for a discretionary stay of removal must be filed on the victim's behalf with DHS.¹⁰⁸ A stay of deportation or removal is an administrative decision by DHS to stop temporarily the deportation or removal of an alien who has been ordered deported or removed from the United States.¹⁰⁹ This will stay their removal pending a decision on their U-visa application.¹¹⁰ If the U-visa is granted, any order of removal, exclusion, or deportation issued by DHS will be cancelled by operation of law effective on the date the U-visa is approved.¹¹¹

In cases where an order of exclusion, deportation, or removal against the victim was issued by an immigration judge or the Board of Immigration Appeals, the alien may seek cancellation of such order by filing, with the immigration judge or the Board, a motion to reopen and terminate removal proceedings.¹¹² For victims granted U-visas who have exceeded either or both time and numerical limitations for the filing motions to reopen, the victim's attorney will need to seek agreement from the DHS trial attorney to join in the U-visa holder victim's motion to reopen.¹¹³ The DHS policy directives issued in August of 2010 should

be placed on the alien's attorney, accredited representative, or the immigration judge.") This policy applies to pending applications for immigration relief including VAWA, T and U visa cases.

¹⁰⁰ The Vermont Service Center VAWA Hotline is 1-802-527-4888.

¹⁰¹ Attorneys representing immigrant victims should elect to communicate with Victims and Trafficking Unit supervisors by either telephone or e-mail – Not Both. The e-mail is: hotlinefollowup918914.vsc@dhs.gov

¹⁰² For technical assistance in cases of victims in proceedings before an immigration judge contact: Immigration Technical Assistance for Survivors (ASISTA) at (515) 244-2469, questions@asistahelp.org, www.asistahelp.org; or The National Immigrant Women's Advocacy Project (NIWAP), info@niwap.org, (202) 274-4457, <http://wcl.american.edu/niwap>

¹⁰³ 8 C.F.R. §§ 214.14(c)(1)(i), (f)(2)(i) (2008).

¹⁰⁴ 8 C.F.R. §§ 214.14(c)(5)(ii), (f)(6)(iii) (2008).

¹⁰⁵ The TVPRA 2008, Section 204, for which there is currently no rule, provides that DHS has the authority to grant stays of removal to persons with pending T- and U-visa applications that will last through granting of the T- or U-visa and if the case is denied will last through the exhaustion of administrative appeals. Applicants granted stays shall not be removed from the United States. A denial of a stay under this provision does not preclude an individual from applying for a stay, deferred action, or a continuance under other immigration provisions. This provision does not preclude DHS or DOJ from granting stays of removal or deportation under other immigration provisions.

¹⁰⁶ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53022, 53037 (September 17, 2007); 8 C.F.R. §§ 214.14(a)(3), (c)(1)(ii), (f)(2)(ii) (2008).

¹⁰⁷ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53022 (September 17, 2007).

¹⁰⁸ To receive a stay of removal immigrant victims must file Form I-246, "Application for Stay of Removal;" 8 C.F.R. §§ 241.6(a), 1241.6(a) (2008).

¹⁰⁹ See 8 C.F.R. §§ 241.6, 1241.6 (2008); New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53016 (September 17, 2007).

¹¹⁰ 8 C.F.R. §§ 214.14(c)(1)(ii), (f)(2)(ii) (2008).

¹¹¹ 8 C.F.R. §§ 214.14(c)(5)(i), (f)(6) (2008).

¹¹² New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53023 (September 17, 2007).

¹¹³ *Id.* 8 C.F.R. §§ 1003.2, 1003.23 (2008).

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potentially improve the ease with which DHS trial counsel should agree to join in these motions, as each of these cases will be cases in which the victim as a matter of law as a U-visa holder is entitled to relief from removal.¹¹⁴

Confidentiality and Credible Evidence Standard

Confidentiality: As with other types of cases under the Violence Against Women Act, DHS is required to keep all information about U-visa applications confidential.¹¹⁵ They cannot release information about the existence of a case to any person who is not authorized to access that information for a legitimate law enforcement purpose or other statutorily prescribed purpose.¹¹⁶ If the perpetrator of the crime or any of his or her family members provides information to DHS about the crime victim, DHS cannot rely solely upon that information to make an adverse decision on any other case the victim may be involved in (*e.g.* removal action). Further, DHS is precluded from relying on information provided solely by the abuser or his family members to initiate or take any part of an enforcement action against the victim.¹¹⁷ Additionally, DHS policies urge DHS enforcement officials to exercise prosecutorial discretion to avoid initiating enforcement actions against immigrant crime victims.¹¹⁸

Credible Evidence Standard:¹¹⁹ DHS is required to consider “any credible evidence” when deciding U-visa cases and U-visa holder’s applications for lawful permanent residency.¹²⁰ With regard to proof of eligibility for a U-visa and for any decision DHS makes regarding a U-visa victim’s case from initial filing to the filing for lawful permanent residency DHS is prohibited from requiring any specific type of evidence in support of the application and must accept “any credible evidence” submitted to support each requirement. The credible evidence standard was first created by the Violence Against Women Act in the context of VAWA self-petitions and other protections for women and children who are battered or subjected to extreme cruelty by a U.S. Citizen or Lawful Permanent Resident spouse or parent. It was developed with an understanding that victims of domestic violence and other violent crimes may have difficulty obtaining certain types of evidence.¹²¹ The U-visa certification (Form I-918, Supplement B) is the only exception to this rule. A victim must file a U-visa certification as part of her U-visa or the application will be rejected as incomplete.

Waiver of Inadmissibility¹²²

There are several issues that can make an applicant for lawful immigration status inadmissible into the United States. For instance, applicants for admission to the U.S. who are in the United States unlawfully, have certain criminal convictions, or suffer from certain health conditions are deemed inadmissible by statute. However, Congress recognized that many U-visa applicants will be inadmissible for one or more reasons and provided various waivers for these inadmissibility factors. For most grounds of inadmissibility, including for unlawful entry into the U.S., a waiver is available if DHS determines that granting the victim a waiver is in

¹¹⁴ John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 3-4 (DHS, U.S. Immigration and Customs Enforcement, August 20, 2010)

¹¹⁵ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”) § 384, Pub. L. No. 104-208, 110 Stat. 3009-652 (2001); 8 U.S.C. § 1367.

¹¹⁶ *Id.*

¹¹⁷ For further information about the confidentiality protections, see the chapter in this manual entitled “VAWA Confidentiality: History, Purpose and Violations.”

¹¹⁸ John P. Torres, Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 2-3 (January 22, 2007).

¹¹⁹ For a full discussion of VAWA’s any credible evidence rules, see Leslye E. Orloff, Kathryn C. Isom, And Edmundo Saballos, Mandatory U-Visa Certification Unnecessarily Undermines The Purpose Of The Violence Against Women Act’s Immigration Protections And Its “Any Credible Evidence” Rules— A Call For Consistency, Vol. XI Georgetown Journal of Gender and the Law 619-647 (2010).

¹²⁰ 8 C.F.R. §§ 214.14(c)(4), (f)(5) (2008).

¹²¹ As defined by INA 212(a)(3)(E). See INA § 204(a)(1)(J); 8 U.S.C. § 1154(a)(1)(J).

¹²² Grounds of Inadmissibility (INA section 212(a)) – An individual who seeks admission into the United States or to receive lawful permanent residency must meet certain eligibility requirements to receive a visa and eventually be legally *admitted* into the United States. Grounds for *inadmissibility* include health related grounds, criminal and related grounds, security and related grounds, likelihood of becoming a public charge, not meeting labor certification and qualifications, and illegally entering the country. An immigration officer deciding cases including T- and U-visa applications for the Department of Homeland Security will make inadmissibility determinations on cases they are adjudicating.

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the public or national interest. Waivers are not available for applicants who have committed Nazi persecution, genocide, or an act of torture or extra judicial killing.¹²³ U-visa victims who have committed violent or dangerous crimes and security-related crimes¹²⁴ will only be granted waivers upon a showing of extraordinary circumstances.¹²⁵

It is extremely important that all victims who may qualify for a U-visa or another form of immigration relief be screened as early as possible to identify difficult issues or “red flags”¹²⁶ that could complicate the victim’s immigration case. It is critical that advocates and attorneys working with immigrant victims fully review the list of potentially adverse factors in the victim’s case including inadmissibility factors. When a victim has adverse factors in her background it is essential that she have an immigration attorney with U-visa expertise representing her. The attorney will review adverse factors and develop the U-visa victim’s application so as to mitigate the effect any adverse factors may have on the victim’s case. The goal will be to convince DHS adjudicators that they must balance any adverse factors against the social and humane considerations presented in the victim’s case and decide to waive adverse factors by finding that granting the victim a waiver is in the public or national interest.¹²⁷

Approval and Duration

U-visas approved for an immigrant victim and the victim’s family members who applied together with the victim will have a 4-year duration. U-visa victim can apply for an extension of her U-visa status only if the immigrant’s presence in the United States is needed to assist in the investigation or prosecution of qualifying criminal activity.¹²⁸

When a U-visa victim applies for her family members at a later date than the victim filed his or her own application, the family members will receive U-visas that have the same termination date as the U-visa victim. Family members who file for U-visas from overseas could have their U-visas expire before they have been in the United States for the three years needed to qualify to apply for lawful permanent residence. When this occurs DHS regulations allow the U-visa family member to file for an U-visa extension.¹²⁹

The DHS **Victims and Trafficking Unit** adjudicates U-visa cases in the order that they are received. Only 10,000 U-visas may be awarded each fiscal year. Once the cap of 10,000 per year is reached DHS will continue to review cases but cannot issue U-visas. Victims will be placed on waitlist in the order the cases were received. Though there are no caps for family members, DHS will not approve a family member until the primary victim U visa petitioner’s petition is approved. Family members’ U-visa applications will be adjudicated based on the U-visa victim’s place in line. U-visa victims and their family members placed on the waiting list will be issued deferred action.

Documentary Evidence for U-visa Applications

- “A Cover Letter: *“The letter should explain how the applicant meets the requirements for the U-Visa. The letter should provide a roadmap to the exhibits filed in support of each U-visa requirement. The cover letter should also provide identification information, including applicant’s full name and date and place of birth. If the applicant’s spouse, child, or, parent, will also be*

¹²³ INA § 212(d)(14); 8 U.S.C. § 1182(d)(14).

¹²⁴ Described in INA §§ (212)(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii) or (3)(C).

¹²⁵ 8 C.F.R. § 212.17(b)(2) (2008).

¹²⁶ For a full list of inadmissibility grounds see INA § 212. See also VAWA Red Flags available at:

http://iwp.legalmomentum.org/immigration/vawa-self-petition-and-cancellation/tools/VAWA_Red%20Flags.pdf/view?searchterm=red+flag.

¹²⁷ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53021. (September 17, 2007)..

¹²⁸ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53028 (September 17, 2007). 8 C.F.R. § 214.14(g) (2008). The application for extension of status must be filed using DHS Form I-539.

¹²⁹ 8 C.F.R. § 214.14(g)(2)(i) (2008).

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seeking U-visas, the cover letter should state this and should list information such as the family members' names, dates of birth, and relationship to the U-visa victim applicant.

- Signed statement from the applicant: *A detailed declaration should describe the criminal activity and how the applicant meets each U-Visa requirement*
- The Applicant's Personal Identification Information
- Form I-918 *Application for U Nonimmigrant Status*
- Form I-918 Supplement B *U Nonimmigrant Status Certification*
- Additional evidence to support each U-visa requirement
- Form I-918 Supplement A *Petition for Qualifying Family Member of a U-1 Recipient* for each family member included with the victim's application. (The victim may add applications for family members at a later date)
- Form I-765 *Application for Work Authorization* is not required for the U-visa victim applicant but is required for all family members who want employment authorization with accompanying fee or a fee waiver request.
- Form I-192 *Application for Advance Permission to Enter as a Non-Immigrant* if the applicant is inadmissible with accompanying fee or fee waiver request.¹³⁰
- A copy of the applicant's passport or Form I-193 *Application for Waiver for Passport and/or Visa* with accompanying fee or fee waiver request
- Biometrics (fingerprinting) fee or fee waiver request
- Fees: There are no filing fees associated with filing a U-visa (Form I-918). All fees associated with a U-visa application from filing through receipt of lawful permanent residency are by statute required to be waivable for U-visa applicants.¹³¹

The following is a list of suggested documents that may be submitted to prove each element of a U-visa case. This list is meant to serve as a guide, and additional types of evidence may also be submitted in support of the application. Not all documents listed below will be available in every case.

In addition to a signed U-visa application, the victim's affidavit and the signed certification from a federal, state or local government official, an application for U non-immigrant status may include evidence of each of the following, if available:

Evidence of Substantial Physical and Mental Abuse as a Result of the Criminal Activity:

- Records from a health care provider documenting the diagnosis and treatment of physical injuries or a psychological condition resulting from the criminal activity
- Affidavits from victim advocates, shelter workers, counselors, or mental health professionals, detailing any physical and mental abuse or harm that the applicant has experienced and the effect that the abuse has had on the applicant, the applicant's children and the applicant's family
- Affidavit of the applicant detailing the substantial physical and mental abuse or harm suffered as a result of the criminal activity
- Copies of any police/ incident reports on domestic violence, sexual assault, trafficking or listed other criminal activity
- Copies of any protection orders/ restraining orders against the perpetrator
- Copies of any family, criminal or other court findings or rulings documenting the criminal activity
- Affidavits and certifications from neighbors, landlords, friends, or family who witnessed the criminal

¹³⁰ The TVPRA 2008, Section 201(d), for which there is currently no rule, assures permanent access to fee waivers of all costs and fees associate with filing an application through final adjudication of the adjustment of status in VAWA self-petition, T-visa, U-visa, VAWA cancellation of removal, and VAWA suspension of deportation cases and for the cases of nonimmigrant derivative victims of domestic violence.

¹³¹ 8 C.F.R. § 103.7(c)(5)(i) (2008).

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activity or the resulting harm or injuries

- Affidavits from police officers or prosecutors describing the violence or abuse that the applicant has experienced
- Photographs showing injuries and any other damage from the criminal activity (e.g. torn clothing, broken door, etc.)
- Records of any 911 calls

Evidence that the Victim Possesses Information Concerning the Criminal Activity:

- Affidavits and certifications from police officers, prosecutors, EEOC investigators, judges, child abuse investigators, adult protective services investigators, Department of Labor investigators detailing the applicant's knowledge of the criminal activity
- Copies of any police reports or statements that the applicant has made to a law enforcement agency
- Copies of claims for Victims of Crime Act ("VOCA") assistance filed as a result of the criminal activity
- Copies of reports filed with state child abuse investigators
- Copies of reports filed by state adult protective services investigators
- Transcripts of testimony that the applicant has given to a state, local, or federal law enforcement agency or court
- Affidavits from witnesses that may place the applicant at the scene of the criminal activity or attest to the applicant's knowledge of the criminal activity
- Copies of medical records documenting physical injuries occurring as the result of the criminal activity
- Copies of reports made to sexual assault health professionals and law enforcement with regard to evidence collection in rape cases.

Evidence That the Crime Victim Has Been Helpful, Is Helpful, or Is Likely to Be Helpful to a Federal, State, or Local Investigation or Prosecution:

- Copies of any police reports, statements or complaints that the applicant made to law enforcement officials (these be at the time of the incident or statements taken by police at a later date.
- Certifications and affidavits from police officers and prosecutors detailing the applicant's helpfulness
- Copies of reports filed with state child abuse investigators
- Transcripts of testimony that the applicant has given to a state, local, or federal law enforcement agency or court
- Copies of reports made to law enforcement with regard to evidence collection in rape cases.

Evidence That Criminal Activity Violated the Laws of the United States or Occurred in the United States or its Territories:

- Copies of any police reports or statements that the applicant has made to a law enforcement agency, particularly those citing criminal code sections violated
- Copies of claims for Victims of Crime Act (“VOCA”) assistance filed as a result of the criminal activity
- Copies of reports filed with state child abuse investigators
- Copies of reports filed by adult protective services investigators
- Transcripts of testimony that the applicant has given to a law enforcement agency
- Copies of any arrest warrants, police reports, or domestic violence incident report
- Copies of records from a hospital or health care professional in the United States close in time to the occurrence of the criminal activity

II. U-Visa Holder’s Applications for Lawful Permanent Residency¹³²

To be eligible to attain lawful permanent residency, a U-visa holder and any family member granted a U-visa applicant must:

- Have been lawfully admitted to the United States as a U-visa holder;¹³³
- Have current U-visa status;¹³⁴
- Have had 3 years continuous physical presence in the U.S. since the date of admission as a U-visa holder (exempting any individual absence of 90 days or less or an aggregate of 180 days or less)¹³⁵;
- Not be inadmissible as a perpetrator of Nazi persecution, genocide, or an act of torture or extra-judicial killing (INA 212(a)(3)(E))
- Since being granted a U-visa has not unreasonably refused to provide assistance to an official investigating the qualifying criminal activity; and
- Establish that his or her presence in the United States is justified:¹³⁶
 - on humanitarian grounds;
 - to ensure family unity; or
 - is in the public interest.
- Offer evidence to support a favorable factors demonstrating why DHS should exercise its discretion to grant the applicant lawful permanent residency¹³⁷

U-visa holder victims and their U-visa holder family members who have been physically present in the United States for three years are eligible to apply for lawful permanent residency.¹³⁸ U-visa lawful

¹³² This section on lawful permanent residency for U-visa holders was derived from the National Network to End Violence Against Immigrant Women, “Summary of U Adjustment Regulations,” (2009), available at www.immigrantwomensnetwork.org.

¹³³ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75540, 75546 (December 1, 2008).

¹³⁴ *Id.*

¹³⁵ 8 C.F.R. § 245.24(a)(1) (2008); see INA § 245(m)(2); 8 U.S.C. 1255(m)(2); Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75546 (December 1, 2008).

¹³⁶ INA § 254(m); 8 C.F.R. § 245.24(d) (2008).

¹³⁷ 8 C.F.R. § 245.24(d)(11) (2008); Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

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permanent residency applications are adjudicated the DHS **Victims and Trafficking Unit** in the order that the applications are received.¹³⁹ There is no cap on the total number lawful permanency applications that can be granted to U-visa victims and eligible family members in any year.¹⁴⁰ DHS is the sole agency authorized to grant lawful permanent residency to U-visa victims.¹⁴¹

Once the U-visa applicant's case has been adjudicated, DHS will issue a written notice of approval and the notice will instruct the applicant on how to obtain temporary lawful permanent residency documentation.¹⁴² The U-visa victim's date of admission to the United States will be the date the victim's application for lawful permanent residency was approved by DHS.¹⁴³ Applicants must complete a form from which DHS will produce a green card (Form I-89).¹⁴⁴

If the U-visa victim's application for lawful permanent residency is denied, the victim may file an appeal with the DHS Administrative Appeals Office.¹⁴⁵ The denial by a U-visa holder's application for lawful permanent residency cannot be renewed or filed before the immigration judge in removal proceedings since immigration judges cannot grant lawful permanent residency for U-visa victims.¹⁴⁶ Should a victim's appeal be denied by the Administrative Appeals Office, the victim is not precluded from filing a new U-visa application that is well documented and more fully addresses any issues raised in the victim's previous U-visa case.

Admission and Current Status as a U-Visa Holder

Immigration and Nationality Act Section 245(m) provides that crime victims lawfully admitted to the United States as U-visa holders must apply for lawful permanent residency while they are still in U-visa status.¹⁴⁷ U-visas are granted for up to four years. After three years, U-visa holders are eligible to apply for lawful permanent residency.¹⁴⁸ Victims with U-interim relief approved for U-visas will be granted U-visa status retroactive to the date on which the U-visa holder was originally granted U-interim relief.¹⁴⁹ Those who timely apply for lawful permanent residency retain U-visa status until DHS adjudicates their application for lawful permanent residence.¹⁵⁰ Applicants whose U-visas have been revoked are not eligible to apply for lawful permanent residence as U-visa holders.¹⁵¹

Continuous Physical Presence for 3 Years

Applicants for lawful permanent residence must have maintained and must establish continuous physical presence in the United States for at least three-years. To show this, the U-visa holder should demonstrate:

¹³⁸ 8 C.F.R. § 245.24(b)(3) (2008); see INA § 245(m)(1)(A); 8 U.S.C. 1255(m)(1)(A) (2008). Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75546 (December 1, 2008).

¹³⁹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75555 (December 1, 2008).

¹⁴⁰ *Id.*

¹⁴¹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008). Immigration judges do not have legal authority rule on lawful permanent residency for U-visa victims.

¹⁴² *Id.*; 8 C.F.R. § 245.24(f) (2008).

¹⁴³ 8 C.F.R. § 245.24(f)(1) (2008); see INA § 245(m)(4); 8 U.S.C. 1255(m)(4).

¹⁴⁴ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

¹⁴⁵ 8 C.F.R. § 245.24(f)(2) (2008).

¹⁴⁶ 8 C.F.R. § 245.24(k) (2008).

¹⁴⁷ 8 C.F.R. § 245.24(b)(2) (2008); Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75546 (December 1, 2008).

¹⁴⁸ 8 C.F.R. § 245.24(b)(3) (2008); see INA § 245(m)(1)(A); 8 U.S.C. 1255(m)(1)(A).

¹⁴⁹ 8 C.F.R. § 245.24(b)(2)(ii) (2008) creates a transition rule for U-visa victims who had received U-interim relief for more than three years prior to January 12, 2009 may combine their physically presence in the United States during both U-interim relief with U-visa status and immediately apply for lawful permanent residency. INA § 214(p)(6). However, victims who initially had U-interim relief are required to first file for a U-visa and then once approved file for lawful permanent residency. The deadline set in the regulations for victims with U-interim relief to file for U-visas has passed.

¹⁵⁰ INA § 245(l)(1)(A); 8 U.S.C. § 1255(l)(1)(A).

¹⁵¹ 8 C.F.R. § 245.24(c) (2008).

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- That they have remained in the United States from the time they received U-interim relief and their U-visa through the time of application for lawful permanent residency;¹⁵² or
- That they did not travel outside of the United States for a single period of 90 days or more than for an aggregate period of 180 days or more;¹⁵³ or
- That any absence in excess of the 90/180 day maximums was necessary for the purposes of assisting in an investigation or prosecution of the qualifying criminal activity or if an official involved with investigation or prosecution certifies that the absence was otherwise justified.¹⁵⁴

The applicant must submit an affidavit attesting to her continuous physical presence along with any other evidence which shows the requisite continuous time period has been met. Documents submitted to prove continuous presence should be sufficiently detailed to establish continuity of presence for three years. Proof of presence on every single day is not required.¹⁵⁵ However, there should be no significant chronological gaps in documentation.¹⁵⁶ All government-issued documents submitted should include a seal or other authenticating instrument if such a seal or indicia would normally be on the agency's documents.¹⁵⁷ In addition to documents from official government agencies, the petitioner may also submit non-governmental documents including college transcripts, employment records, state or federal tax returns showing school attendance or employment, or installment period documents like rent receipts, bank statements, or utility bills covering the full 3 year period.¹⁵⁸ If these types of documents are not available, the applicant should submit any credible evidence proving continuous presence including supporting affidavits from others who can attest to the applicant's continuous physical presence.¹⁵⁹

Documents that are already in the applicant's DHS file do not need to be resubmitted. However, the lawful permanent residency application should describe each document in the DHS file upon which the victim is relying as evidence supporting their application. A list describing each document by type and date of the document should be included.¹⁶⁰ These documents could include the written copy of a sworn statement to a DHS officer, law enforcement agency documents, hearing transcripts, or other evidence originally submitted as part of the U-visa application.¹⁶¹ Evidence of continuous presence must also include a copy of the victim's passport and/or alternative travel documents showing entries into and departures from the United States.¹⁶² When the victim has left and reentered the United States, a signed statement by the applicant as the only evidence submitted will not be sufficient proof.¹⁶³

Convincing DHS to Exercise Discretion in Favor of Granting U-Visa Holder Lawful Permanent Residence

U-visa holders applying for lawful permanent residency must prove that they are not inadmissible under 212(a)(3)(E) as Nazis, or perpetrators of genocide, torture or extrajudicial killing.¹⁶⁴ Although U-visa holders seeking lawful permanent residency are not required to establish admissibility,¹⁶⁵ in deciding whether to exercise discretion to grant lawful permanent residency to an immigrant crime victim, DHS will weigh both

¹⁵² 8 C.F.R. § 245.24(b)(3) (2008); see INA § 245(m)(1)(A); 8 U.S.C. 1255(m)(1)(A).

¹⁵³ 8 C.F.R. § 245.24(a)(1) (2008); see INA § 245(m)(2); 8 U.S.C. 1255(m)(2). Absences of less than 90 or 180 days will not be deducted when counting 3 years continuous presence.

¹⁵⁴ 8 C.F.R. § 245.24(a)(1) (2008); see INA § 245(m)(2); 8 U.S.C. 1255(m)(2).

¹⁵⁵ 73 Fed. Reg. 75,548 (2008-12-12).

¹⁵⁶ *Id.*

¹⁵⁷ See generally 8 C.F.R. § 245.22 (2008).

¹⁵⁸ 8 C.F.R. § 245.22 (2008).

¹⁵⁹ 8 C.F.R. §§ 245(d)(5), (6) (2008).

¹⁶⁰ 73 Fed. Reg. 75,548 (2008-12-12).

¹⁶¹ 73 Fed. Reg. 75,548 (2008-12-12).

¹⁶² 8 C.F.R. §§ 245.24(d)(5), (6) (2008).

¹⁶³ 8 C.F.R. §§ 245.24(d)(5), (6) (2008). Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

¹⁶⁴ INA § 212(a)(3)(E), 8 U.S.C. 1182(a)(3)(E); INA § 245(m)(1), 8 U.S.C. 1255(m)(1).

¹⁶⁵ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

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favorable and adverse factors in the victim's case.¹⁶⁶ The victim has the burden of showing that discretion should be exercised in their favor.¹⁶⁷ Any inadmissibility factors present in the victims case that arose after the victim received U-interim relief and a U-visa are likely to be considered by DHS in adjudicating the victims application for lawful permanent residency.¹⁶⁸ However, inadmissibility factors that DHS waived in awarding the victim a U-visa cannot be re-adjudicated in the victim's application for lawful permanent residency and should also not be considered by DHS in their exercise of discretion.¹⁶⁹

To prove that DSH should exercise its discretion to grant lawful permanent residency to a U-visa holder the applicant may provide any credible evidence. There is no set number or type of documents that can be presented. Evidence of family ties, hardship, and length of residence in the United States are factors which could weigh decisively in favor of DHS making a discretionary grant of lawful permanent residency.¹⁷⁰ Adverse factors, such as those that would otherwise render the applicant inadmissible, may be considered in DHS's discretion. For a U-visa holder to overcome the prejudicial weight of these adverse factors, he or she must offset adverse factors with mitigating factors. The victim may be required to show clearly that denial of the adjustment would result in exceptional and extremely unusual hardship.¹⁷¹ These mitigating factors may not be sufficient, absent the "most compelling positive factors,"¹⁷² to offset adverse factors if the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse of a child, multiple drug-related crimes or where there are security- or terrorism-related concerns.¹⁷³

Proving Applicant Has Not Unreasonably Refused to Assist in Investigation Or Prosecution

Victims granted U-visas have an ongoing obligation not to unreasonably refuse to provide assistance in the investigation or prosecution of qualifying criminal activity.¹⁷⁴ Both the victim and any family members¹⁷⁵ who receive U-visas why apply for lawful permanent residency should¹⁷⁶ provide proof including:

- Whether they were asked to offer assistance, by whom; and how they responded¹⁷⁷ and
- That they offered assistance; or
- Evidence explaining that their refusal to offer assistance was not unreasonable.
- Evidence on their efforts to offer assistance may also be submitted.

DHS regulations define "refusal to provide assistance" as refusal to provide assistance *after* the victim was

¹⁶⁶ *Id.*

¹⁶⁷ 8 C.F.R. § 245.24(d)(11) (2008).

¹⁶⁸ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008). For more on inadmissibility grounds see the chapter "Human Trafficking and the T Visa" at 21-22 in this manual.

¹⁶⁹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

¹⁷⁰ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

¹⁷¹ 8 C.F.R. § 245.24(d)(11) (2008). (The application for lawful permanent residency is called "adjustment of status" under immigration law)

¹⁷² Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

¹⁷³ 8 C.F.R. § 245.24(d)(11) (2008).

¹⁷⁴ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008).

¹⁷⁵ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008). (If a family member with a U-visa possesses information about at the underlying criminal activity AND was asked to assist in the investigation or prosecution the family member with the U-visa has a responsibility to not unreasonably refuse to provide assistance).

¹⁷⁶ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008). ("The applicant is not required to establish the reasonableness of any refusals to comply with such requests for assistance, as it is a matter for the [DHS] Attorney General to determine whether any refusal was unreasonable.") See INA § 245(m)(5) (Establishing that DHS makes the determination of reasonableness and may do so in cases involving federal prosecutors in consultation with the U.S. Department of Justice).

¹⁷⁷ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008). 8 C.F.R. §§ 245.24(d)(8), 245.24(e) (2008).

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granted U-visa status.¹⁷⁸ The determination of whether a victim's refusal to provide was unreasonable is a DHS decision.¹⁷⁹ The DHS regulations provide U-visa holders with an option of submitting a document signed by a government official that had responsibility for the investigation or prosecution of criminal activity. The document should affirm that the victim complied with requests for assistance or did not unreasonably refuse to comply with reasonable requests for assistance.¹⁸⁰ This need not be the same official who signed the U-visa certification. Alternately, applicants for lawful permanent residency may prove assistance by submitting a newly executed U-visa certification containing additional information about the assistance offered by the victim.¹⁸¹

DHS will take into account the totality of the circumstances.¹⁸² Factors¹⁸³ that may be considered in this determination are:¹⁸⁴

- General law enforcement, prosecutorial and judicial practices;
- The kinds of assistance asked of victims of other crimes involving force, coercion, or fraud;
- The type of request for assistance and how the request for the assistance may have been made;
- The nature of the applicant's victimization;
- Preexisting guidelines for victim and witness assistance;
- Circumstances specific to the applicant such as:
 - Fear
 - Safety of the victim and the victim's family members
 - Severe physical and/or mental trauma
 - The applicant's age
 - The applicant's maturity.

A determination that an applicant unreasonably refused to provide assistance may only be made by DHS based on affirmative evidence in the record suggesting that a U-visa recipient "*may have* unreasonably refused to provide assistance to the investigation or prosecution of persons in connection with the qualifying criminal activity."¹⁸⁵ Evidence of that a victim's refusal to assist with an investigation or prosecution was unreasonable may be provided by the U-visa certifying official to DHS and DHS is authorized under the regulations to seek such information from federal or state law enforcement or prosecutorial entities.¹⁸⁶

Documentary Evidence for U-Visa Holders Applying for Lawful Permanent Residency

Applications for lawful permanent residency filed by U-visa holders and their U-visa holder or U-visa eligible family members are to be submitted to the **Victims and Trafficking Unit** of the DHS Vermont Service Center. The **Victims and Trafficking Unit** will adjudicate lawful permanent residency applications for U-visa holders.¹⁸⁷

¹⁷⁸ 8 C.F.R. § 245.24(a)(5).

¹⁷⁹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008).

¹⁸⁰ 8 C.F.R. § 245.24(e)(1) (2008).

¹⁸¹ 8 C.F.R. § 245.24(e)(3) (2008).

¹⁸² 8 C.F.R. § 245.24(a)(5) (2008).

¹⁸³ A list of evidence that could be submitted to prove that the U-visa victim did not unreasonably refuse to comply with requests for assistance is included later in this chapter.

¹⁸⁴ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008).

¹⁸⁵ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75548 (December 1, 2008). (Such evidence may have been submitted to DHS by the federal or state government official.)

¹⁸⁶ 8 C.F.R. § 245.24(e)(3) (2008); Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008). The U visa certification form provides information to U-visa certifiers regarding how to communicate with and provide information to DHS the official determines that a U-visa recipient's refusal to assist with a request from the official was unreasonable.

¹⁸⁷ The Victims and Trafficking Unit has the authority to request that the U-visa victim applying for lawful permanent residency be interviewed at a local DHS District Office, however, as of December 2010 this has not been a frequent or regular procedure.

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Documents required for U-Visa Lawful Permanent Residency Applications¹⁸⁸ include:

- Form I-485, Application to Register Permanent Residence or Adjust Status;
- Form I-485 Supplement E which is essentially additional instructions for U visa holders;
- Form I-485 filing fee or a fee waiver request;¹⁸⁹
- Biometric services fee or a fee waiver request;
- Photocopy of the applicant's U-visa approval notice;
- Photocopy of all pages of all the applicant's passports valid from the time the U-visa holder received U-interim relief and/or a U-visa for the required three year period¹⁹⁰ and documentation showing the following:
 - The date of any departure from the United States during the period that the applicant was in U-visa status;
 - The date, manner, and place of each return to the United States during the period that the applicant was in U-visa status; and
 - If the applicant has been absent from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days or more, a certification from the investigating or prosecuting agency that the absences were necessary to assist in the investigation or prosecution of the criminal activity or were otherwise justified.
 - Applicants who do not have passports are required to provide a valid explanation of why the applicant does not have a passport.¹⁹¹
- Copy of the applicant's Form I-94, Arrival-Departure Record;
- Evidence that the applicant was lawfully admitted in U-visa status and continues to hold such status at the time of the application;
- Evidence pertaining to any request made to the applicant by an official or law enforcement agency for assistance in the criminal investigation or prosecution, and the applicant's response to such request;¹⁹²
- Evidence, including an affidavit from the applicant that he or she has continuous physical presence the full period of at least three years .
 - This should include a signed statement from the applicant attesting to continuous physical presence—although that alone generally may not be sufficient to meet this eligibility requirement;
 - Documentation of continuous presence including:
 - college transcripts,
 - employment records,
 - state or federal tax returns,
 - documents showing school attendance,
 - documents showing employment,
 - installment period documents like rent receipts, bank statements, or utility bills. covering the full three year period,
 - Affidavits of persons with first-hand knowledge who can attest to the applicant's continuous physical presence supported in the affidavit by specific facts
- Evidence establishing that approval of lawful permanent residency by DHS is warranted as a matter of

¹⁸⁸ 8 C.F.R. § 245.24(d) (2008).

¹⁸⁹ 8 C.F.R. § 103.7(c)(5)(ii) (2008).

¹⁹⁰ The applicant may alternately provide an equivalent travel document or a valid explanation of why the applicant does not have a passport.

¹⁹¹ 8 C.F.R. § 245.24(d)(5)(2008).

¹⁹² See more details about documentation of this below.

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discretion:

- Evidence of favorable factors
- Evidence of mitigation of adverse
- Evidence that the U-visa holder qualifies for lawful permanent residency on one or more of the following grounds:
 - Humanitarian need;
 - Family unity;
 - Public interest

- NOTE: Form I-601 “Application for Waiver of Inadmissibility Grounds” will *not* be submitted. This is because the only applicable inadmissibility ground, the INA 212(a)(3)(E), cannot be waived.

Documentation That the Victim Did Not Unreasonably Refuse to Provide Assistance in the Investigation or Prosecution¹⁹³

U-visa holders may submit evidence of cooperation or that the victim did not unreasonably refuse to provide assistance in the investigation or prosecution the qualifying criminal activity in one of the following two ways:

- *Option One:* Submit a document signed by an official or law enforcement agency that had responsibility in connection with the investigation or prosecution of the qualifying criminal activity.¹⁹⁴ The document should affirm that the applicant complied with and did not unreasonably refuse to comply with reasonable requests for assistance in the investigation or prosecution during the requisite period.¹⁹⁵ This may be done by:
 - Submitting a statement from a government official involved in the investigation or prosecution of qualifying criminal activity or;
 - Submitting a newly executed U-visa certification Form I-918, Supplement B, “U Nonimmigrant Status Certification.”¹⁹⁶

- *Option Two:* Since in some cases it may be difficult for an applicant to obtain the newly executed U-visa certification on Form I-918, the regulations allow the applicant to instead submit an affidavit describing:
 - the applicant’s efforts to obtain a newly executed U-visa certification Form I-918 Supp B;
 - Evidence about requests for assistance that the victim received may include:¹⁹⁷
 - What assistance was requested
 - Who requested the assistance (e.g. name, agency, title)
 - When the request was made (before or after the victim had a U-visa)
 - Details of how and when the request was made
 - The victim’s response to the request(s)
 - Applicants should also include, when possible:
 - Identifying information about the law enforcement personnel involved in the case
 - Any information of which the applicant is aware about the status of the criminal investigation or prosecution
 - Information about the outcome of any criminal proceedings, or
 - Whether the investigation or prosecution was dropped and the reasons¹⁹⁸
 - Depending on the circumstances, evidence might include:

¹⁹³ The TVPRA 2008, Section 201(e), shifted adjudicatory authority from the Department of Justice (DOJ) to the Department of Homeland Security (DHS) for all U-visa related adjudications including applications for lawful permanent residency. DHS shall consult with DOJ as appropriate regarding affirmative evidence demonstrating that a victim unreasonably refused to cooperate in a Federal investigation or prosecution.

¹⁹⁴ 8 C.F.R. § 245.24(e)(1) (2008).

¹⁹⁵ *Id.*

¹⁹⁶ 8 C.F.R. § 245.24(e)(2) (2008).

¹⁹⁷ 8 C.F.R. §§ 245.24(d)(8), 245.24(e) (2008). See *generally* Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008).

¹⁹⁸ *Id.*

- Court documents
- Police reports
- News articles
- Copies of reimbursement forms for travel to and from court, or
- Affidavits of other witnesses or officials¹⁹⁹

Petitioning For Family Members to Attain Lawful Permanent Residency Who Did Not Have U-visas²⁰⁰

A U-visa holder may file an application for lawful permanent residency on behalf of the U-visa victim's family member who did not previously apply for or receive a U-visa. Qualifying family members' applications for lawful permanent residency may be submitted along with the victim's application for lawful permanent residency.²⁰¹

To qualify for lawful permanent residency the family member must meet the following criteria:

- The family member was never awarded U-visa status and never held a U-visa;
- A qualifying family relationship exists at the time that the U-visa victim was granted lawful permanent residency and that family relationship continues to exist through the adjudication of the qualifying family members application for and the issuance of lawful permanent residency to the family member. Relationships include:
 - The adult U-visa victim's spouse and children (under 21).²⁰²
 - Victims under the age of 21 their spouse, children, parents and unmarried siblings (under age 18).²⁰³
 - A U-visa victim's children who are born after the application is approved.²⁰⁴
 - Perpetrators of battery or extreme cruelty or human trafficking who are family members of the U-visa victims are not qualifying family members.
- Extreme hardship would result for either the U-visa holder or the qualifying family member if the family member is not allowed to remain in or join their family member in the United States; and
- The U-visa victim has:²⁰⁵
 - Been granted lawful permanent residency;
 - Has a pending application for lawful permanent residency; or
 - Is concurrently filing an application for lawful permanent residency.

Qualifying family members of U-visa victims must file an application for an immigrant visa on DHS Form I-929 Petition for Qualifying Family Member of a U-1 Nonimmigrant. If the family members are, at the time of filing, outside the United States, they will be eligible to obtain an immigrant visa from a U.S. Consulate abroad.²⁰⁶ The family member must include the filing fee²⁰⁷ or request a fee waiver²⁰⁸ for the visa and for all costs or fees associated with the family member's application for lawful permanent residency. Filing for

¹⁹⁹ Preamble at 27.

²⁰⁰ INA § 245(m); 8 U.S.C. 1255(m).

²⁰¹ 8 C.F.R. § 245.23(b)(1) (2008). Family members' applications for lawful permanent residency may not be filed before the T-visa victim's application has been filed.

²⁰² INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

²⁰³ INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

²⁰⁴ 8 C.F.R. § 214.14(f)(4)(i) (2008).

²⁰⁵ 8 C.F.R. § 245.24(g) (2008).

²⁰⁶ INA § 245(m)(3); 8 U.S.C. § 1255(m)(3).

²⁰⁷ 8 C.F.R. § 103.7(b)(1) (2008).

²⁰⁸ 8 C.F.R. § 103.7(c)(5)(i) (2008).

lawful permanent residency for qualifying family members who did not receive U-visas is a two-step process:

Step One:

The victim who is a U-visa holder files an immigration petition on behalf of the qualifying family member.²⁰⁹ The victim files Form I-929, with a fee, or a fee waiver request²¹⁰ at the **Victims and Trafficking Unit** of the DHS Vermont Service Center. The application should include evidence establishing the U-visa holder's relationship to the family member.²¹¹

- Preferred evidence of the family relationship includes:
 - Birth certificates; or
 - Marriage certificates
- Secondary evidence may be submitted where primary evidence is not available.²¹² The applicant may prove the relationship by providing any other credible evidence.

The Form I-929 for a family member may be filed concurrently with the U-visa holder's application for lawful permanent residency or may be filed later after the U-visa holder has been granted lawful permanent residency. The family members' application will not be approved until the U-visa holder's application for lawful permanent residency is adjudicated.

In determining whether the extreme hardship requirement has been satisfied, the burden is on the applicant to provide sufficient supporting evidence that the qualifying family member or the U-visa holder would suffer extreme hardship should the family member not be allowed to remain in the U.S.²¹³ Applications will be reviewed on a case-by-case basis, and the USCIS will consider all credible evidence and adjudicate as a matter of discretion. If the immigrant visa petition (I-929) for any family member is denied, DHS will notify the applicant in writing. The denial can be appealed to the Administrative Appeals Office.²¹⁴

Step Two:

Once the family member's visa petition (I-929) is approved, the family member who is in the United States will file their application for lawful permanent residency at the **Victims and Trafficking Unit** of the Vermont Service Center where their application for lawful permanent residency will be adjudicated. Once a family member in the United States has filed their application for lawful permanent residency (Form I-485) the applicant will be eligible to be granted work authorization.²¹⁵

Family members residing abroad whose I-929 visa petitions are approved will need to go to the U.S. consulate or embassy to receive their immigrant visa.²¹⁶ DHS will forward the approval notice to the National Visa Center for consular processing or to a Port Of Entry.²¹⁷ Family members who are outside of the United States will be required to show admissibility to be granted entry into the United States.²¹⁸

Documentation for Family Member's Immigrant Visa Applications²¹⁹

- Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant;
- I-929 filing fee or fee waiver request;

²⁰⁹ 8 C.F.R. § 245.24(h) (2008).

²¹⁰ 8 C.F.R. §§ 245.24(h)(1)(ii), (i)(l)(iii), (iv) (2008).

²¹¹ 8 C.F.R. § 245.24(h)(1)(iii) (2008).

²¹² 8 C.F.R. § 103.3(b)(2) (2008).

²¹³ 8 C.F.R. § 245.24(h)(1)(iv) (2008). For examples of the types of evidence that can be used to prove extreme hardship in cases involving immigrant crime victims see Chapter 11 Human Trafficking and the T-Visa and Chapter 9 VAWA Cancellation of Removal in this manual.

²¹⁴ 8 C.F.R. § 245.24(h) (2)(ii) (2008).

²¹⁵ 8 C.F.R. § 274a.12(c)(9) (2008).

²¹⁶ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549-50 (December 1, 2008).

²¹⁷ 8 C.F.R. § 245.24(h)(2)(i)(A) (2008).

²¹⁸ INA § 212(a); For further information about admissibility see the discussion of admissibility earlier in this chapter.

²¹⁹ 8 C.F.R. § 245.24(g) (2008).

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- Evidence of the relationship, such as birth or marriage certificate. If primary evidence is unavailable, secondary evidence or affidavits may be submitted;
- Evidence establishing that either the qualifying family member or the U-visa holder would suffer extreme hardship if the qualifying family member is not allowed to remain in or join the U-visa holder in United States.

Documentation for Family Member's Application for Lawful Permanent Residency

- Form I-485, Application to Register Permanent Residence or Adjust Status;
- Form I-485 filing fee or a fee waiver request;²²⁰
- Biometric services fee or a fee waiver request;
- Evidence of admissibility for family members living abroad.

Limitations on Travelling Outside of the United States On A U-Visa

A U-visa holder may travel outside of the United States once the victim has been awarded a U-visa. This ability to travel is limited in two ways if the victim wishes to apply for lawful permanent residency. First, should the victim travel abroad, the victim must be able to demonstrate that no trip abroad lasted for 90 days or longer and that the number of days of travel abroad did not amount to 180 days or longer.²²¹ If a crime victim travels out of the United States for durations in excess of these limits, the victim loses their ability to file for lawful permanent residency unless the victim shows that the excess absence was necessary to assist in the investigation or prosecution criminal activity or unless the prosecutor certifies that the absence was otherwise justified.²²²

The second limitation on a U-visa victim's ability to travel occurs on the date that the U-visa victim applies for lawful permanent residency. Generally, U-visa victims who have filed applications for lawful permanent residency cannot travel abroad unless they obtain from DHS legal permission to travel.²²³ The permission granted is called "advance parole." Advance parole must be received before a U-visa victim with a pending application for lawful permanent residency can travel abroad. If a victim with a pending lawful permanent residency application travels abroad without receiving advance parole, DHS deems the victim to have abandoned his or her application for lawful permanent residency as of the date the victim departed the United States²²⁴ and their lawful permanent residency application will be denied.²²⁵

Anyone who travels, including a U-visa with advance parole,²²⁶ will have to show admissibility every time they re-enter the United States.²²⁷ Even U-visa holders whose prior acts were waived when their U-visa was granted may be challenged at a port of entry. A crime victim who travels abroad can be barred from reentry into the United States by any inadmissibility factors resulting from past circumstances. Remaining in the United States and not traveling abroad until after the U-visa holder victim obtains lawful permanent residency may be the safest option for many crime victims. DHS officials at U.S. borders or ports of entry have no authority to grant waivers of admissibility. Such waivers may only be granted by DHS officials during the

²²⁰ 8 C.F.R. § 103.7(c)(5)(ii) (2008).

²²¹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75546 (December 12, 2008); 8 C.F.R. § 245.24(a)(1) (2008); see INA § 245(m)(2), 8 U.S.C. 1255(m)(2).

²²² *Id.*

²²³ 8 C.F.R. § 245.2(a)(4)(ii)(B) (2008); Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75551 (December 12, 2008).

²²⁴ 8 C.F.R. §§ 245.24(j), 245.2(a)(4)(ii)(A) (2008). These requirements also apply to U-visa holders applying for lawful permanent residency in removal, deportation or exclusion proceedings before an immigration judge. If the victim has an open case in immigration court leaving the United States will result in a DHS determination that the victim's lawful permanent residency application has been abandoned, unless the victim obtains advance parole.

²²⁵ 8 C.F.R. §§ 245.24(j), 245.2(a)(4)(ii)(A) (2008). Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75551 (December 12, 2008); 8 C.F.R. §§ 245.23(j), 245.2(a)(4)(ii)(B) (2008).

²²⁶ 8 C.F.R. § 245.23(j) (2008).

²²⁷ 8 C.F.R. § 245.23(j) (2008).

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adjudication of a U-visa application filed by a U-visa holder. U-visa victims whose travel strands them abroad without the ability to reenter the United States, jeopardize both their U-visa status and the U-visa status of their family members.²²⁸ Applicants should consult with an immigration attorney with U-visa experience before traveling outside of the United States. If after consultation the victim determines they can safely travel without triggering bars to reentry into the United States who seek advance parole should file an Application for Travel Document (Form I-131) and obtain advance parole before departing the U.S.²²⁹

Resources for Crime Victims on U-Visa Cases

Technical Assistance for Advocates and Attorneys Working With Immigrant Victims of Domestic Violence, Sexual Assault, Human Trafficking and other U-Visa Crimes

Immigrant Women Program, Legal Momentum –
Telephone: (202) 326-0040, fax: (202) 589-0511,
E mail: iwp@legalmomentum.org;
Address: 1101 14th Street, N.W., Suite 300, Washington, D.C. 20005.
www.iwp.legalmomentum.org

ASISTA
Telephone: (515) 244-2469
E mail; questions@asistahelp.org
Address: 3101 Ingersoll Ave. • Ste 210 • Des Moines, IA 50312
www.asistahelp.org

²²⁸ 8 C.F.R. §§ 245.24(j), 245.2(a)(4)(ii)(A) (2008).

²²⁹ 8 C.F.R. § 245.23(j) (2008). The filing fee for the advance parole petition may be waived for victims of U-visa holders. INA § 245(l)(1)(A)(7) (overruling form instructions and DHS practice prior to December 23, 2008).

National Immigrant Women’s Advocacy Project (NIWAP, pronounced *new-app*)
American University, Washington College of Law
4910 Massachusetts Avenue NW · Suite 16, Lower Level · Washington, DC 20016
(o) 202.274.4457 · (f) 202.274.4226 · niwap@wcl.american.edu · wcl.american.edu/niwap

3.7

Domestic Violence and Sexual Assault Survivors and Gender-Based Asylum¹²

By Alicia (Lacy) Carra, Hema Sarangapani and Leslye Orloff

Survivors of domestic violence and sexual assault who fear returning to their home country may be able to obtain lawful status in the United States by applying for gender-based asylum. If an applicant is successful in her application for asylum³, she will be authorized to live and work in this country; subsequently apply to become a lawful permanent resident; and eventually become a U.S. citizen. This chapter is designed to help advocates and attorneys not trained in immigration law identify when a survivor might be eligible for gender-based asylum and explain how to help a survivor develop the evidentiary record necessary to succeed in bringing a gender-based asylum claim.

¹ “This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.”

² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/immigration/asylum>

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To qualify for asylum in the U.S., an applicant must establish that she is a refugee.⁴ To be classified as a refugee, an applicant must demonstrate that she has a well founded fear of suffering harm in the future in her home country that rises to the level of persecution. In addition, an applicant must establish that the persecution was or will be on account of **Race, Religion, Nationality, Membership in a Particular Social Group, or Political Opinion**. Additionally, an applicant must establish that the persecution she suffered was committed by a foreign government, or, in the alternative, that the government of her home country is or was unwilling or unable to protect her from the harm of a non-governmental actor. As a general rule, an individual must apply for asylum within one year of her entry into the United States.

It is important to note that asylum is a legally complex process with highly specific criteria for eligibility. Denial of an asylum application can ultimately lead to deportation. U.S. law imposes many bars to asylum. For example, filing for asylum after one year of entry into the U.S. or an applicant's firm resettlement in another country may bar an applicant from receiving asylum. Likewise, certain criminal convictions, i.e. those constituting "particularly serious crime" may bar an individual from receiving asylum.⁵ Because an asylum applicant must navigate a minefield of statutory bars to relief, it is recommended that she proceed with her application only after consulting with an immigration attorney who has expertise both in immigration options for immigrant victims of violence and the intersection of immigration and crimes.

Additionally, gender-based asylum may not be the only option for relief for survivors of domestic violence or sexual assault. Under the Violence Against Women Act (VAWA), survivors of domestic violence, sexual assault or other violent crimes may benefit from relief under the U-visa, for victims of crimes, or the T-visa, for victims of trafficking.⁶ Gender-based asylum claims often arise in connection with sexual assault and domestic violence that occurs in a survivor's home country. However, some of the violence may also occur within the United States, and some of the future threat of violence may also exist within the United States. This may happen when those committing the crimes against a survivor follow them to the United States, or are connected to others who live in the United States, and are able to continue to harm the survivor because of family or community connections. In these situations, where violence also occurs within the United States, a U-visa can also be a viable option for a survivor.

U-visas are for victims of crime who have participated in the investigation or prosecution of said crime by local, state, or federal authorities. A U-visa will allow an individual to remain in the US lawfully for four years,⁷ and then U-visa recipients who can show humanitarian need, public interest or family unity may apply for lawful permanent residency and then later U.S. citizenship. Similarly, victims of human trafficking may benefit from either the U or T-visa, a visa specifically designed for victims of severe human trafficking. Again, such a visa is contingent on the victim's assistance in the investigation or prosecution of the crime that is the basis for the visa. Like with asylum, both the U and T-visas will provide the recipient with authorization to work, permanent residence, and an eventual path to citizenship. Based on these additional forms of relief, and dependent upon the facts underlying a particular case, a trained legal advocate may want to explore the availability of U and T-visa relief in addition to pursuing an application for gender based asylum.

When is a survivor of domestic violence or sexual assault eligible for asylum?

Survivors of gang rape, stranger rape, acquaintance rape, attempted rape, domestic violence⁸, or spousal rape may be eligible to file for asylum when their experiences cause them to fear returning to their home country.

⁴ See INA § 101(a)(42); 8 U.S.C. § 1101(a)(42)(defining the term "refugee"); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at various sections of 8, 22 U.S.C.); United Nations Protocol Relating to the Status of Refugees, art. I § 2, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

⁵ INA § 208(b)(2)(A); 8 U.S.C. § 1158(b)(2)(A).

⁶ See INA § 101(a)(15)(T)-(U); 8 U.S.C. § 1101(a)(15)(T)-(U). A "U" visa is a visa for a victim of a crime who is or has cooperated with police to address the crime. A "T" visa is a visa for victims of trafficking. For more information on applicants who may be eligible for the U-visa see the U-visa chapter of this manual, for the T-visa see the T-visa chapter in this manual.

⁷ See the U-visa chapter 3.6 A in this manual for more information.

⁸ .

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AN APPLICANT FOR ASYLUM MUST SHOW:⁹

1. Persecution

- a. Has either already occurred¹⁰ -or-
- b. Applicant has a well-founded future fear of persecution
 - i. Rape or well-founded fear of rape may rise to the level of persecution¹¹
 - ii. It is helpful to explain to a judge how rape is often a part of a larger picture of domestic violence.

2. Motive/ “On Account of”/Nexus

- a. An applicant must show that the persecution (in this case, domestic violence, rape, threat of rape, or sexual assault) was motivated, at least in part, by the applicants actual or perceived:
 - i. Race
 - ii. Religion
 - iii. Nationality
 - iv. Membership in a Particular Social Group¹²
 - v. Political Opinion

3. State Action/Inaction

- a. The country in which the survivor fled either perpetrated or supported the sexual assault.¹³
or
- b. The country was willfully blind, refused to act, or was unable to act to prevent or address the sexual assault/persecution.¹⁴

4. No safe option within home country

- a. The immigration officer or judge may raise the issue of whether the victim had a safe option to relocate within the victim’s home country in a victim’s asylum case. Under federal asylum law the immigration officer or judge raising the issue of safe relocation bears the burden for showing that the survivor could safely relocate within her country of origin.¹⁵
- b. To counter this issue, look for country condition documentation that establishes the nature of domestic violence and sexual assault in the applicant’s original country, as well as evidence of that government’s unwillingness or inability to protect victims of sexual assault/domestic violence. This can be from the victim’s own community as well as other communities in her home country where she has family members or some other support network.

5. Credibility

- a. The success of an asylum application often turns on the adjudicator’s determination of the credibility of the applicant. While corroborating evidence in support of an applicant’s claim is generally required, an applicant is not always required to corroborate her testimony to win her claim.¹⁶ There is guidance that suggests that an adjudicator should not make a negative credibility finding based on an applicant’s reticence or failure to immediately disclose incidents of rape or sexual assault. Just as in the criminal context, however, the credibility of a survivor of sexual assault may be called into question by an adjudicator’s

⁹ INA §101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

¹⁰ Past persecution generally only creates a presumption of a well-founded fear of persecution that may be rebutted by the government. Past persecution only qualifies an applicant for relief when there is extraordinary persecution such that the victim should not be required to return to the country for humanitarian reasons regardless of whether or not there is a fear of future persecution. See *Matter of Chen*, 20 I. & N. Dec. 16 (B.I.A. 1989). Rape has met this standard. *Ali v. Ashcroft*, 394 F.3d 780, 787 (9th Cir. 2005).

¹¹ *Ali*, 394 F.3d at 787 (gang rape based on family identity past persecution rising to the level that well founding fear of future persecution presumed by the court).

¹² See section below regarding domestic violence victims as a social group: “Asylum Based on Membership in a Particular Social Group for Victims of Domestic Violence.”

¹³ *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998); *Surita v. INS*, 95 F.3d 814, 819-820 (9th Cir. 1996), as cited in the DHS Brief *In Re R-A-*.

¹⁴ *Mgoian v. INS*, 184 F.3d 1029, 1036-37 (9th Cir. 1999), as cited in the DHS Brief *In Re R-A-*.

¹⁵ 8 C.F.R. § 208.13(b)(3)(i); *INS v. Ventura*, 537 U.S. 12, 123 S.Ct. 353 (2002).

¹⁶ Testimonial evidence is sufficient regarding sexual assault and asylum claims. *Shoafera v. INS*, 228 F.3d 1070, 1075-76 (9th Cir. 2000).

personal bias.¹⁷ It should be noted, however, that recent legislation has imposed more stringent requirements by imposing an obligation on the applicant to provide corroborating evidence where it is reasonably available.¹⁸

ASYLUM BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP FOR VICTIMS OF DOMESTIC VIOLENCE

On August 19, 2009 the Department of Homeland Security filed a Supplemental Brief in the asylum case of a Mexican domestic violence victim referred to as L.R. stating the conditions under which a domestic violence victim could qualify for asylum based upon membership in a particular social group. The DHS position taken in this brief ended over a decade of uncertainty in the law as to whether and under what circumstances a woman who fled domestic violence could be granted asylum under U.S. law.¹⁹ This DHS brief illustrates and provides guidance on how and under what circumstances a victim who suffered domestic violence in her home country may qualify for asylum in the United States. The DHS Supplemental Brief in the *Matter of L-R* provides a detailed illustration of how a domestic violence victim could meet each of the evidentiary requirements for asylum. The following quotes from this DHS brief grouped by asylum proof requirement:

“[I]n order to contribute to a process leading to the creation of better guidance to both adjudicators and litigants, the Department will offer here alternative formulations of “particular social group” that could, in appropriate cases, qualify aliens for asylum or withholding of removal²⁰ ... [I]t is possible that ... applicants who have experienced domestic violence could qualify for asylum or withholding of removal based on alternative social group formulations...”²¹

Domestic Violence Victims Must Meet All Asylum Requirements

“DHS accepts that in some cases, a victim of domestic violence may be a member of a cognizable particular social group and may be able to show that her abuse was or would be persecution on account of such membership. This does not mean, however, that every victim of domestic violence would be eligible for asylum. As with any asylum claim, the full range of generally applicable requirements must be satisfied...”²²

Harm Feared Must Constitute Persecution

“For example, the harm feared must be serious enough to constitute persecution, and the fear of future harm must be well founded...”²³

State Action or Inaction and No Safe Option in Home Country

“Asylum may be denied where the applicant has the reasonable option of avoiding abuse by relocating in the home country...”²⁴ Further, as in any asylum case where the persecutor is not the

¹⁷ *Id.*; see also, *Hassan v. Ashcroft*, 94 Fed.Appx. 461, 463 (9th Cir. 2004) (noting that judges should not speculate as to untrustworthiness and must have substantiated reason to disbelieve testimony, and that immediate disclosure of a sexual assault is not required for trustworthiness); see Lawyers Committee for Human Rights, *Refugee Woman at Risk; Unfair U.S. Laws Hurt Asylum Seekers* (2002)(finding INS officials often fail to recognize cross-cultural differences in evaluating asylum seekers credibility), available at http://www.humanrightsfirst.org/refugees/reports/refugee_women.pdf.

¹⁸ INA § 208(b)(1)(B)(ii)-(iii); 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii).

¹⁹ See *Matter of L-R*- Redacted Brief Filed By the Department of Homeland Security in a case before the Board of Immigration Appeals (April 13, 2009) (Hereinafter DHS Brief, *Matter of L-R*). See also, *Matter of R-A*-, 22 I&N Dec. 906 (AG 2001), remanded by AG, 23 I. & N. Dec 694 (A.G. 2005) (remanding earlier decisions to the Board of Immigration Appeals for reconsideration once the DHS proposed gender based asylum rule was finalized). As October of 2009 when DHS took a position in the *Matter of R-A*- and as of the date this chapter was completed (November 24, 2010) the rule had not been finalized. In October of 2009 the Department of Homeland Security took the position that R.A. had established that her membership in a social group defined as “married women in Guatemala who were unable to leave the relationship” met DHS’ new social visibility and particularity requirements and therefore qualified to be granted asylum in the United States. R.A was granted asylum by and immigration judge on December 10, 2009. See, Center for Gender and Refugee Studies, Documents and Information on Rody Alvarado’s Claim for Asylum in the United States. Available at: <http://cgrs.uchastings.edu/campaigns/alvarado.php#legal>

²⁰ DHS Brief, *Matter of L-R*- at 5.

²¹ DHS Brief, *Matter of L-R*- at 11.

²² DHS Brief, *Matter of L-R*- at 12

²³ *Id.*,

state itself, the applicant would have to show that the state is either unwilling or unable to protect her...The latter two considerations are likely to be of particular significance in domestic violence asylum cases. To the extent that combined private and public efforts provide reasonable possibilities for protection within the territory of the asylum applicant's home state, even if not in the immediate town or region where the respondent had been living, applicants may appropriately be expected to avail themselves of such options rather than claiming asylum in a foreign country..."²⁵

On Account of a Domestic Violence Victim's Membership in a Particular Social Group

"DHS believes...that it is important to articulate how a social group in such cases might be defined. DHS suggests that the particular social group in asylum and withholding or removal claims based on domestic violence is best defined in light of the evidence about how the respondent's abuser and her society perceive her role within the domestic relationship. The evidence ... raises the possibility that [respondent] believes that women should occupy a subordinate position in the relationship even though she has physically separated from [the abuser]. The evidence further suggests that [respondent] believes that abuse of women within such a relationship can therefore be tolerated, and that social expectations in Mexico reinforce this view. A group defined in light of this evidence might be articulated as 'Mexican women in domestic relationships who are unable to leave' or as 'Mexican women who are viewed as property by virtue of their positions within the domestic relationship.' DHS believes that groups understood in these ways, if adequately established in the record in any given case, would meet the requirements for a particular social group and that they may both accurately identify why [abuser] chose the female respondent as his victim and continued to mistreat her."²⁶

DHS states that for asylum based on membership in a particular social group "members of a particular social group must share a *common immutable or fundamental trait*, must be *socially distinct or 'visible,'* and must be *defined with sufficient particularity* to allow reliable determinations about who comes within the group definition."²⁷ (Emphasis added)

Immutable Trait

In the domestic violence context, "DHS believes that there are circumstances in which an applicant's status within a domestic relationship is immutable...for purposes of particular social group analysis. In a claim dealing with past persecution...[the victim's status] might be immutable where economic, social, physical or other constraints made it impossible for [her] to leave the relationship...All asylum claims will be considered within the context of the social, political, and historical conditions of the country...and all relevant evidence should be considered in determining whether a [victim] cannot change, or should be expected to change, the shared characteristic, all relevant evidence should be considered including the applicant's individual circumstances and country conditions information about the applicant's society."²⁸

Socially Visible

"A cognizable particular social group must reflect social perceptions and distinctions....The ... respondent testified about seeking help from the police multiple times...the police told her that her problems were private and that her life was not in danger...There is also country conditions evidence ... relating to the social perception of domestic violence within Mexico...police and prosecutors are reluctant to take action when they receive a domestic violence complaint..."²⁹ "This evidence may reflect a societal view... that the status of a woman in a domestic relationship places the woman into a segment of society that will not be accorded protection from harm inflicted by a domestic partner. In this light the female respondent' status by virtue of her relationship to [her husband] could indeed

²⁴ Id.

²⁵ DHS Brief, *Matter of L-R-* at 12-13.

²⁶ DHS Brief, *Matter of L-R-* at 14-15.

²⁷ DHS Brief, *Matter of L-R-* at 6

²⁸ DHS Brief, *Matter of L-R-* at 16.

²⁹ DHS Brief, *Matter of L-R-* at 17.

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be the kind of important characteristic that results in a significant social distinction being drawn in terms of who will receive protection from serious harm”³⁰

Sufficient Particularity

“[A] particular social group must be defined with sufficient particularity that it clearly delineates who is in the group and accurately identifies the shared trait on account of which the applicant is targeted by the persecutor for harm. DHS believes that, subject to proof, the ...particular social group formulations posited above satisfy ‘particularity.’...[T]he definitions are capable of application in a manner that allows the fact finder to determine with clarity whether an applicant is or is not a member of the group. ...[T]he term ‘domestic relationship’ ...is possible to interpret in a manner that entails considerable particularity.” For instance, under immigration law³¹ a detailed framework exists for conceptualizing domestic relationships ...albeit tailored to a unique situation of an asylum applicant’s own society in order to satisfy the particularity requirement.³² ... DHS suggests that assessments of a victim’s ability to leave a domestic relationship would involve case-by-case, fact-specific examinations of whether it would be reasonable to expect the victim to do so under all circumstances, thus sufficiently satisfying the particularity requirement.³³

The Effect of Domestic Violence on Motive and Other Asylum Proof Requirements

Finally, “DHS believes that such a [social] group definition may well most accurately identify the reason for which a domestic violence victim was chosen by the abuser as the target for harm. DHS recognizes that there can be serious debate about which aspects of the factual setting that create a victim’s vulnerability to domestic violence should be included in the particular social group definition as opposed to being assessed in the context of other elements of the refugee definition. For example, a victim’s inability to leave the domestic relationship could be analyzed in determining whether a fear of future abuse is well founded. Inability to leave the relationship could also be relevant to the determination that harm amounts to persecution. Certainly, if a victim is seriously harmed when she tries to leave a relationship, those facts would relate both to the persecution analysis and to the assessment of her ability to leave. Nevertheless, DHS posits that “in some cases, the persecutor’s perception that his victim cannot leave the relationship can play a central role in [the abuser’s] choice of the domestic partner as his victim. In such cases, DHS believes that it may be appropriate to include this factor in the social group analysis.”³⁴

APPLYING FOR GENDER BASED ASYLUM

TIMING OF APPLICATION

As a general rule, an applicant for asylum has one year from her entry into the United States to file for asylum³⁵. If an applicant has missed this deadline, she must either establish that her application was delayed due to circumstances beyond her control, or that circumstances have recently changed in her home country such that she now needs asylum.³⁶ Since there is such a short timeframe in which to apply for asylum, it is important that advocates or attorneys know how to identify potential gender based asylum cases and make referrals to immigration attorneys with experience in gender based asylum as quickly as possible.

³⁰ DHS Brief, *Matter of L-R-* at 18

³¹ Section 237(a)(2)(E)(I) of the Act defines “crime of domestic violence” to include offenses “Against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs.”

³² DHS Brief, *Matter of L-R-* at 20

³³ DHS Brief, *Matter of L-R-* at 19.

³⁴ DHS Brief, *Matter of L-R-* at 20-21

³⁵ INA § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B).

³⁶ INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D).

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The first exception to the one-year filing deadline requires a showing of “extraordinary circumstances related to the delay in filing” the application. These extraordinary circumstances must be factors beyond the applicant’s control.³⁷ In addition, the application must have been filed within a reasonable time period given the nature of the circumstances. Examples of extraordinary circumstances include:³⁸

- Serious illness or disabling medical condition. Such conditions may include the effects of past persecution or abuse;
- Legal disability, for example if the applicant was an unaccompanied minor or suffered from a mental impairment;
- The applicant maintained Temporary Protected Status or some other status until a reasonable period before the filing of the asylum application;
- The applicant submitted an asylum application prior to the expiration of the one-year deadline, but that application was rejected by the Department of Homeland Security (DHS) as not properly filed, was returned to the applicant for corrections, and was re-filed within a reasonable period; or
- Ineffective assistance of counsel.

The second exception to the deadline requires a showing of “changed circumstances” that materially affect the applicant’s eligibility for asylum.³⁹ For example, after an applicant has entered the U.S. and resided for a period of time, her home country’s political, religious, or social structure may significantly change so as to expose her to a well founded fear of persecution if she were to return. Additionally, the applicant may have become a member of a group subject to persecution after entering the U.S. In these instances, the applicant is required to file for asylum within a reasonable time period following the change in circumstances.⁴⁰

Options after the deadline has passed

If the applicant is not deemed to have met an exception to the one-year filing deadline, an applicant may still be eligible for the related forms of relief of

- Withholding of Removal or
- Relief under the Convention Against Torture Claim (CAT) for “non-refoulement.”
“Non-refoulement” is an international technical term of law referring to a principle that says you cannot send someone back into a situation where they will be tortured.

Both forms of relief require a higher standard of proof than asylum and, as a result, can be difficult to establish. Evaluating the risks and benefits of each path must be done with the assistance of an immigration attorney to best serve the survivor’s interests. These options are explained further at the end of this chapter.

PROCESSING OF THE APPLICATION

Applications for asylum are filed either affirmatively, when the applicant has not already been placed in removal proceedings, or defensively, as a request⁴¹ for relief once removal proceedings have commenced.

It is highly recommended that asylum applications include:

- a form I-589 application for asylum, withholding, and/or relief under the Convention Against Torture;
- the applicant’s detailed affidavit documenting her eligibility for asylum;
- extensive country condition documentation supporting the applicant’s claims of harm and fear,

³⁷ *Id.*

³⁸ See 8 C.F.R. § 208.4(a)(5).

³⁹ INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D).

⁴⁰ *Id.*

⁴¹ Sometimes this request is also called a “prayer for relief”

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- psychological evaluation of the applicant to support credibility and corroborate applicant's claim of harm, and
- expert affidavits.

Applications for asylum are submitted to the asylum office, if filed affirmatively, or with the immigration court, if filed defensively. Advocates can help gather supporting evidence throughout their interactions with their client.

After an application for asylum is filed, an applicant may be able to obtain work authorization if the asylum application has not been adjudicated within 150 days of filing.⁴² An applicant for asylum must appear for a detailed interview before a government asylum officer and must bring her own interpreter.⁴³ Family members who are in the United States, including a spouse and unmarried children under 21, may be included in the application and must also attend the interview.

At the interview, the asylum officer will review the application and evidence and ask the asylum applicant questions about the claim. It is important that the facts stated in the written application be correct and consistent with the applicant's oral testimony at the asylum interview. If there are inconsistencies, the applicant may be found not to be credible.⁴⁴ If the asylum office feels that it cannot approve the application based on the evidence presented and the interview, the case will be "referred" to the immigration court for a hearing, and will become a defensive application for asylum in immigration court. In immigration court the applicant will have a second chance to present testimony, this time before an immigration judge, regarding the substance of her asylum claim.⁴⁵

If the judge denies the gender based asylum claim, the applicant will be ordered removed (deported) to her home country. An applicant should reserve her right to appeal the decision of the immigration judge and immediately seek legal representation if she does not already have counsel. The victim may appeal to the Board of Immigration Appeals (BIA) within thirty days of the final order of the Immigration Judge. If an applicant encounters new evidence that supports her claim that was unavailable at the time of her initial hearing, she should consult with an immigration attorney as to whether her application for asylum may be reopened in light of the new evidence.

If a victim's application is granted, the individual and dependent family members are conferred the status of "asylee." Asylees are authorized to live and work in the United States. They also qualify for certain public benefits. If the asylee has a spouse or children outside the United States, she may file a petition to classify them as asylees and allow them to enter the U.S. After one year, an asylee is eligible to apply for lawful permanent resident status (a green card).⁴⁶

Due to the high risk of immediate removal if an asylum case is denied by the immigration judge, it is strongly recommended that no immigrant victim attempt to make a gender-based asylum claim with out representation of an immigration lawyer with expertise on gender-based asylum and/or violence against women cases. If a victim is represented by an immigration attorney without this experience, those attorneys are strongly encouraged to consult with experts listed at the end of this chapter. If you are an advocate or non immigration attorney trying to help with a gender-based asylum claim you can call these resources as well in order to find help.

⁴² 8 C.F.R. § 208.7(a).

⁴³ 8 C.F.R. § 208.9(g); see U.S. Citizenship and Immigration Services Frequently Asked Questions About Asylum, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=da55809c4410f010VgnVCM1000000ecd190aRCRD&vgnnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD>

⁴⁴ See *INS Supplemental Refugee/Asylum Adjudication Guidelines*, reprinted in 67 Interpreter Releases 101-03 (Jan. 22, 1990); *In re A-S-*, 21 I. & N. Dec. 1106 (B.I.A. 1998); INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D).

⁴⁵ If the applicant is already in removal proceedings before the immigration court prior to filing an asylum application, she can file her application directly with the immigration judge without first filing the application with the asylum office. The applicant, however, is still subject to the one year filing deadlines described above.

⁴⁶ INA § 209(b); 8 U.S.C. § 1159(b).

Confidentiality For Asylum Seekers

It is important to note that federal regulations⁴⁷ **prohibit**⁴⁸ the disclosure of information contained in or pertaining to asylum applications, credible fear determinations, and reasonable fear determinations to third parties.⁴⁹ These regulations exist to protect the asylum-seeker from retaliatory measures by government authorities or non-state actors if the immigrant victim is returned to her country of origin.⁵⁰ Confidentiality is considered to be breached when information in or pertaining to an asylum application is *disclosed to a third party* and the unauthorized disclosure is of a nature that would *allow the third party to identify the immigrant victim*.⁵¹

FACTORS TO CONSIDER IN PREPARING AN ASYLUM APPLICATION

As discussed above, the official parameters of gender-based asylum have been recently clarified.. After over a decade of litigation, a Guatemalan survivor of domestic violence was granted asylum by an immigration judge. Her release came after the Department of Homeland Security filed a Brief⁵² in an analogous case, which supported the proposition that domestic violence victims may, under certain circumstances, be eligible for asylum in the United States. The DHS explains that victims of domestic violence may be able to prove the requisite criteria of belonging to a “particular social group.”⁵³ The DHS brief provides general guidance to applicants, asylum officers and immigration judges regarding when a domestic violence victim may be granted asylum. Attorneys representing gender based asylum applicants should also consult with local asylum experts to gauge how best to construct a gender-based asylum application before the local asylum office or immigration court. The following framework provides some guidance as to what an immigration lawyer will consider when preparing an application for gender-based asylum for a survivor of domestic violence or sexual assault..

Persecution

Asylum case law supports a finding of persecution for asylum applicants who have been the victims of stranger/gang rape⁵⁴ or sexual assault by a government official.⁵⁵ Applicants who have been the victims of spousal rape⁵⁶ or domestic violence must largely rely on the discussion related to *In re R-A-* for guidance in preparing their application.⁵⁷ *In re R-A-* focused on domestic violence, the severity of torture, and the various forms of domestic violence, including rape, which the victim experienced. As of the date of this publication⁵⁸ there were no cases regarding spousal rape outside of the context of a long pattern of domestic violence/torture. However, amicus briefs and commentary have focused on the broad spectrum of persecution R-A- faced, including rape.

⁴⁷ 8 CFR 208.6

⁴⁸ Except under certain limited circumstances

⁴⁹ See USCIS “*Fact Sheet: Federal Regulations Protecting the Confidentiality of Asylum Applicants*,” Asylum Division, June 3, 2005.

⁵⁰ *Id.*

⁵¹ The asylum-seeker may provide written consent allowing disclosure of protected information. Otherwise, disclosure may be made only to United States government officials and United States federal or state courts on a *need to know basis*. Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) personnel are **not** considered third parties for purposes of the confidentiality requirements.

⁵² See DHS Supplemental Brief In the Matter of L-R-

⁵³ “Members of a particular social group must share a common immutable or fundamental trait, must be socially distinct or “visible,” and must be defined with sufficient particularity to allow reliable determinations about who comes within the group definition.”

⁵⁴ *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005); *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996); *Aguirre-Cervantes v. INS*, 242 F.3d 1169, *vacated in* 273 F.3d 1220 (9th Cir. 2001); *Hassan v. Ashcroft*, 94 Fed. Appx. 461 (9th Cir. 2004); *Paramasamy v. Ashcroft*, 295 F. 3d 1047 (9th Cir. 2002)

⁵⁵ *Shoafra v. INS*, 228 F.3d 1070, 1075-76 (9th Cir. 2000); *Lazo-Majano*, 813 F.2d 1432 (9th Cir. 1987).

⁵⁶ Also commonly referred to as ‘marital rape’.

⁵⁷ *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A.1999) (remanded by Ashcroft in 2005 to be reconsidered by BIA in light of new regulations, still not issued as of December 2007).

⁵⁸ December 2007.

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In every state within the United States spousal rape is defined as rape.⁵⁹ Explaining the context of domestic violence, power and control, and societal factors trapping a woman in a situation where sexual assault occurs will help asylum officers and immigration judges understand that spousal/family/partner rape is also persecution, which explains how the applicant may qualify for gender-based asylum because of spousal rape.⁶⁰

Female Genital Mutilation as Sexual Assault

Female Genital Mutilation (FGM) is a form of sexual assault against women and girls, and is a form of persecution that may qualify an applicant for asylum. FGM is a crime in the United States⁶¹. Both the Ninth and Seventh circuits have written that FGM is unequivocally persecution qualifying for asylum.⁶² However, as of publication there is some confusion over this determination because of a few new cases.⁶³ This type of confusion is why contacting an immigration expert on gender based asylum is crucial in preparing an asylum application. FGM is also a violation of human rights and should qualify for Convention Against Torture (CAT) relief. Fear of FGM can constitute a well-founded fear of persecution.⁶⁴

Motive, also called the “On Account of” or “Nexus” requirement

Asylum law requires proof that the assailant was motivated because of the survivor’s race, religion, nationality, membership in a particular social group, or political opinion. These categories **do not** have to be the only motive for the assault, but merely need to be part of the assailant’s motivation in persecuting the survivor.⁶⁵ Difficulties arise for gender based asylum applicants in meeting this requirement because there is not yet authority that suggests that gender, in and of itself, constitutes a particular social group. The Department of Homeland Security (DHS) issued a brief in support of a grant of asylum in *In re R-A-*. In its brief, it suggested that “Gender Plus(+)” may be a way to meet the nexus requirements of an asylum claim.⁶⁶ Under this framework, an applicant who believes she was persecuted on account of her gender could meet the nexus requirement by tying gender to another recognized social group such as family, nationality, religion, or political opinion.⁶⁷ Under such a framework, a survivor of gender based violence may have more likelihood of success if she was persecuted not solely on account of her gender, but on account of her gender within the context of her religion, nationality, or even political opinion. Thus, defining a particular social group more

⁵⁹ National Center for Victims of Crime, “Spousal Rape Laws: 20 years later”

<http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32701>

⁶⁰ *Morrison v. INS*, 166 Fed. Appx. 583 (2d Cir. 2006).

⁶¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-209, §645 (1996):

SEC. 645. CRIMINALIZATION OF FEMALE GENITAL MUTILATION.

(a) Findings.--The Congress finds that-- (1) the practice of female genital mutilation is carried out by members of certain cultural and religious groups within the United States; (2) the practice of female genital mutilation often results in the occurrence of physical and psychological health effects that harm the women involved; (3) such mutilation infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional; (4) the unique circumstances surrounding the practice of female genital mutilation place it beyond the ability of any single State or local jurisdiction to control; (5) the practice of female genital mutilation can be prohibited without abridging the exercise of any rights guaranteed under the first amendment to the Constitution or under any other law; and (6) Congress has the affirmative power under section 8 of article I, the necessary and proper clause, section 5 of the fourteenth amendment, as well as under the treaty clause, to the Constitution to enact such legislation.

(b) Crime.-- (1) In general.--Chapter 7 of title 18, United States Code, is amended by adding at the end the following: "**Sec. 116. Female genital mutilation** "(a) **Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.**" (b) A surgical operation is not a violation of this section if the operation is-- "(1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner; or "(2) performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife. "(c) In applying subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual." (2) Conforming amendment.--The table of sections at the beginning of chapter 7 of title 18, United States Code, is amended by adding at the end the following new item: "116. Female genital mutilation."

⁶² See *Mohammed v. Gonzalez*, 400 F.3d 785, 795 (9th Cir. 2005); *Agbor v. Gonzales*, 487 F.3d 499, 502 (7th Cir. 2007).

⁶³ See *In re A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007), but also see the 2nd Circuit: *Bah v. Mukasey*, *Diallo v. DHS*, *Diallo V. DHS* (June 11, 2008).

⁶⁴ See *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996)(involving a Togolese woman who fled female genital mutilation)

⁶⁵ *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000).

⁶⁶ DHS Brief *In re R-A-* at 20-21; *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207 (1987); *INS v. Sanchez-Trujillo*, 801 F.2d 1571 (9th Cir. 1986).

⁶⁷ DHS Brief *In re R-A-* at 20-22.

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narrowly, such as “married women in X country who cannot leave their husbands or families,” “women in a particular country who refuse to conform to the gender-specific norms of their country,” or “women in a particular country who are viewed as property by virtue of their positions within a domestic relationship,” may be successful theories for a gender-based asylum claim.⁶⁸ To prevail in an asylum claim, a survivor must demonstrate that their persecution was on account of one of the protected grounds.

Examples of demonstrating this nexus include:

- Assailant(s) used derogatory slurs before, during, or after the assault.⁶⁹
- Assailant(s) targeted the victim because of her membership in a racial, religious, nationality, social group, or her political beliefs.⁷⁰
 - This could mean that her family, village, neighborhood, religious group, etc. was targeted in any way by the assailant(s).⁷¹
- Military/guerilla groups assaulted her during civil war/rebellion/military action.⁷²
- An official used her, or her family’s, race, religion, nationality, social group, or political beliefs to force her to interact with that official and that official assaulted her, for example
 - during an official interrogation⁷³ or while blackmailing her to force her into domestic labor⁷⁴
- Her assailant(s) knew she would not be able to get any protection or help from the government because of her race, religion, nationality, social group, or political beliefs.⁷⁵
- She was targeted because of her family membership or to punish, hurt, or demean one of her family members.⁷⁶
- Her sexual identity is at odds with socially accepted sexual identities, and she has been persecuted or fears persecution on account of her sexual identity.⁷⁷

When the assailant was a spouse, a family member, or a partner

The nexus requirement is sometimes harder to demonstrate where the persecution occurred within a family, marriage, or intimate context. While the law is unsettled here, a DHS 2004 brief provides guidance on

⁶⁸ See *Fatin v. INS*, 12 F.3d 1233 (3d Cir.1993) (recognizing feminism as a political opinion); *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996)(involving a Togolese woman who fled female genital mutilation), and *In re S-A-*, 22 I. & N. Dec. 1328 (B.I.A. 2000)(involving a Moroccan woman whose father abused her for violating strict Islamic rules governing women’s behavior and dress). ADD DHS Brief Citation

⁶⁹ *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996); *Nedkova v. Ashcroft*, 83 Fed. Appx. 909 (9th Cir. 2003); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004); *Hassan v. Ashcroft*, 94 Fed. Appx. 461 (9th Cir. 2004).

⁷⁰ *Shoafera v. INS*, 228 F.3d 1070, 1075-76 (9th Cir. 2000); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004).

⁷¹ *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004).

⁷² *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004). However, the Ninth Circuit has determined that politically motivated rape by a guerilla group was not persecution because many other women in same village were also targeted. *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001). Further, the Eighth Circuit held that guerilla gang rape was expected crime in area and no fear of future persecution by guerilla group meant denial of asylum status. *Menendez-Donis v. Ashcroft*, 360 F.3d 915 (8th Cir. 2004).

⁷³ *Angoucheva v. INS*, 106 F.3d 781 (7th Cir. 1997); *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996).

⁷⁴ *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

⁷⁵ *Angoucheva v. INS*, 106 F.3d 781 (7th Cir. 1997); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987); *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000).

⁷⁶ *Gonzales v. Thomas*, 547 U.S. 183, 126 S.Ct. 1613 (2006).

⁷⁷ See *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005)(granting asylum based only on a finding of a well-founded fear of future persecution for a gay man with AIDS from Lebanon); *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003)(finding imputed membership in the particular social group of homosexuals to constitute a particular social group); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000)(gay men with a female sexual identity in Mexico constitute a protected social group for asylum law, sexual identity is here immutable); *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005).

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evidence that could be useful in meeting the nexus requirement in gender-based asylum cases.⁷⁸ The DHS brief guides applicants toward the following factors as supporting the nexus requirement:

- Direct evidence about the abuser's motives supporting the determination he believes he has the authority to abuse on account of victim's status in the relationship, such as:
 - Slurs or commentary by assailant about the survivor's race, nationality, religion, social group or political opinion
 - A long pattern of sexual assault and/or domestic violence
- Circumstantial evidence that patterns of violence are supported by the legal system/social norms of the country and reflect a prevalent belief within the country, such as:
 - Pattern of lack of response from public safety or government officials
 - Condoning of abuse or assault by community leaders
 - An inability to leave the relationship or living situation given current social or cultural conditions

State Action

In determining whether there was state action for the purposes of an asylum claim, the immigration judge or asylum officer will examine whether the applicant's government, including its agents and officials⁷⁹, was the persecutor or, alternatively, whether the government was unwilling or unable to control non-state persecutors.⁸⁰

Ways to Find State Action:

- Was the assault committed by a public/government official acting in an official capacity?
- Did military or rebel/guerilla forces commit the abuse/assault?
- Was there a lack of response from public safety or community officials?
- Was the survivor denied or unable to ask for government/public official aid regarding the abuse/assault?
- Because of the assailant's official capacity was the survivor unable to get redress?
- Did a public official condone the sexual assault?⁸¹
- Is there a cultural understanding that sexual assaults similar to the survivor's are commonplace or culturally accepted?
- Are there any laws or a lack of laws protecting people similar to the survivor from sexual assaults?
- Does divorcing or separating lead to further abuse, violence, or discrimination?

⁷⁸ See Brief for Respondent, *In Re: R-A-* (2004) (No. A-73-753-922). See also Memorandum from Phyllis Coven, Immigration and Naturalization Services, Department of Justice (May 26, 1995) (detailing former proposed regulations from 1995, copy attached in Appendix); Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (current proposed regulation, which should only be used as guidance since it is not yet promulgated, copy attached in Appendix).

⁷⁹ For example: police officers, bureaucrats, attorneys, investigators, civil servants, etc.

⁸⁰ DHS Brief *In re R-A-* at 38.

⁸¹ See *Morrison v. INS*, 166 Fed. Appx. 583 (2d Cir. 2006).

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- Is there is a social stigma attached to a woman taking action or speaking about her husband, partner, family member assailant by seeking outside help?
- Are there laws that punish a woman for seeking outside help in a family, spousal, or domestic violence matter?
- Will the violence continue if she is returned to her home country?⁸²

Trustworthiness/Credibility

Guidance on adjudicating gender-based asylum claims stresses the importance of understanding the impact of gender-specific trauma, cultural, and language differences on the survivor. Many survivors find the first their first asylum interview or hearing particularly difficult.⁸³ Some immigration officers or judges may equate hesitance on the part of survivor to share her story with a lack of credibility. In cases of spousal, family, and partner sexual assault putting the assault in context of other abuse and power dynamics can help officials understand the reactions of a survivor and a community. Courts have acknowledged that a survivor's inability or failure to initially relate details of a sexual assault should not automatically result in a negative credibility finding.⁸⁴ In *In re RA*, the court explained that there was not a question of veracity because the abuse and its after effects were so severe and prolonged.⁸⁵

Advocates and attorneys working with immigrant victims of domestic violence and sexual assault should be aware that some potential gender-based asylum applicants will have been abused, assaulted, raped, or otherwise persecuted in the United States by someone who comes from their home country.⁸⁶ In such cases, the abuser or perpetrator could be deported back to the home country as a result of a criminal prosecution for crimes he committed against the applicant. If the victim is removed from the United States and returned to her home country, she may be in danger of persecution there, either by her abuser or by family members residing in that country. A survivor who has experienced domestic violence/sexual assault in the U.S. faces returning to her home country where her abuser now lives, and fears he may violently retaliate against her may have a basis for gender-based violence.

The lack of consistent interpretation from the courts on gender-related asylum claims, the complexity of this area of the law, and the grave risk associated with denial of an asylum claim makes it critical that advocates promptly refer clients with potential gender-based asylum claims to an experienced immigration attorney. Immigration attorneys who do not have experience working with battered immigrants or with gender-based asylum claims are encouraged to contact the asylum experts listed at the end of this chapter for advice and assistance in formulating case strategies in gender-based asylum cases.

OTHER FORMS OF IMMIGRATION RELIEF RELATED TO ASYLUM

What is Withholding of Removal?

⁸² See Leslye E. Orloff & Nancy Kelly, *A Look at the Violence Against Women Act and Gender-Related Political Asylum*, 1 Violence Against Women 380, 393, 398 (1995).

⁸³ Memorandum from Phyllis Coven, Office of Int'l Affairs, INS to All INS Asylum Officers re: Guidelines, Office of International Affairs, Immigration and Naturalization Service, Regarding Adjudicating Asylum Cases on the Basis of Gender (May 26, 1996), available at <http://www.state.gov/s//65633.htm>. For children in general see Memorandum from Jeff Weiss, U.S. Dep't of Justice re: Guidelines for Children's Asylum Claims (Dec. 10, 1998).

⁸⁴ *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002); *Kaur v. Ashcroft*, 112 Fed. Appx. 652 (9th Cir. 2004); *Fiadjoe v. Att'y Gen. of the United States*, 411 F.3d 135 (3d Cir. 2005).

⁸⁵ DHS Brief *In re R-A*- at 12.

⁸⁶ Victims of domestic violence, sexual assault and/or other specified mostly violent crimes committed against them in the United States may also qualify for a crime victim visa. See the U visa chapter of this manual for a full discussion of this option.

⁸⁶ DHS Brief *In re R-A*- at 12.

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A survivor who applies for withholding of removal⁸⁷ must prove that it is more likely than not that they will face persecution on account of an enumerated ground if forced to return to their country of origin. Applicants for asylum typically file for asylum and withholding of removal concurrently. However, in cases where an applicant is barred from applying for asylum (such as missing the one-year filing deadline), an applicant will typically rely on a withholding of removal claim once they have applied for and been denied asylum. Applying for withholding of removal is the next step after asylum has been applied for and denied, or if an applicant has missed the filing deadline for asylum and cannot get a waiver, or asylum was denied on discretionary grounds.

When Does the Convention Against Torture (CAT)⁸⁸ Apply?

Applications for relief under Article III of the Convention Against Torture (CAT) are a last resort, and should only be attempted by an attorney after asylum and withholding claims have failed. A CAT claim arises from the international law principle of “non-refoulement,⁸⁹” and only applies where the survivor could show that being sent back to their home country would result in continuing of the torture and/or other cruel, inhuman, or degrading treatment or punishment, and that the government supports and/or refuses to act to prevent or correct the persecution.⁹⁰ Under the International Convention Against Torture, rape could be considered torture.⁹¹

Revictimization and Evolving Immigration Official Awareness

Survivors interacting with immigration officials can expect a range of understanding of and/or sensitivity to issues concerning gender-related violence, such as sexual assault or domestic violence. The Department of Homeland Security has issued guidance to all field officers on evaluating asylum claims that includes gender-specific persecution.⁹² However, even with these recommendations, including cultural sensitivity to differences in eye contact, comfort with interviewers of a different gender, or manner of describing sexual assaults,⁹³ in 2002, the Lawyers Committee for Human Rights found that there was still a great need for increasing sensitivity of government officers handling asylum claims. The report found that many women felt re-victimized, or were victimized, by the interview process.⁹⁴ Appeals courts have highlighted such failures on the part of asylum adjudicators as well.⁹⁵ Advocates and attorneys should work with survivors to prepare them for the retraumatization that may occur during the asylum interview process and work towards increasing immigration officials’ understanding of the dynamics of sexual assault and domestic violence.

Conclusion

Gender based asylum for survivors of domestic violence and sexual assault is an evolving field. With the aid of an immigration attorney who has experience in gender-based asylum claims or who works closely in developing the case with technical assistance experts (listed at the end of this chapter) a survivor can appropriately map out her asylum, withholding of removal, or CAT claims. No one should apply for asylum without the assistance of an immigration advocate or attorney who has experience with this type of case.⁹⁶

⁸⁷ INA § 241(b)(3); 8 U.S.C. § 1231(b)(3).

⁸⁸ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, adopted Dec. 10, 1984, 108 Stat. 382, 85 U.N.T.S. 1465 (hereinafter “CAT”).

⁸⁹ This legal term of art means that someone should not be sent back into a situation where they will be tortured again.

⁹⁰ Patricia J. Freshwater, *The Obligation of Non-Refoulement Under the Convention Against Torture: When Has A Foreign Government Acquiesced in the Torture of Its Citizens*, 19 Geo. Immigr. L.J. 585, 590-591 (Summer 2005).

⁹¹ CAT

⁹² Memorandum from Phyllis Coven, International and Naturalization Service (INS) Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995), available at http://cgirs.uchastings.edu/documents/legal/guidelines_us.pdf.

⁹³ *Id.* at 4-7.

⁹⁴ Lawyers Committee for Human Rights, *Refugee Woman at Risk; Unfair U.S. Laws Hurt Asylum Seekers* (2002).

⁹⁵ See *Angoucheva v. INS*, 106 F.3d 781, 793 (7th Cir. 1997).

⁹⁶ The following organizations can provide information and technical assistance:

National Immigrant Women’s Advocacy Project (NIWAP) – Phone: 202-274-4457, Fax: 202-274-4226, E-mail:

info@niwap.org; Address: 4910 Massachusetts Ave NW, Suite 16 lower level, Washington, DC 20016.

Advances Special Immigrant Survivors Technical Assistance (ASISTA) – Phone: (515) 244-2469, Email:

Battered Immigrants and Immigration Relief

This chapter serves only as a basic introduction and should not be relied upon to apply for asylum without first consulting an attorney. Because asylum law is constantly evolving, these standards may have changed after publication of this manual.

Resources Available to Advocates and Attorneys

- NIWAP's Technical Assistance Hotline 202-274-4457 for referrals and technical assistance to attorneys and advocates; <http://wcl.american.edu/niwap>.
- ASISTA's Technical Assistance Hotline 515-244-2469
- Mentoring and materials on domestic violence claims are available from ASISTA, <http://www.asistaonline.org/>.
- AILA, the American Immigration Lawyers Association, <http://www.aila.org/>
- **The Refugee Case Law Site** at the University of Michigan, providing cases, summaries, links, and information on refugee law around the world <http://www.refugeecaselaw.org/>
- **The Center for Gender and Refugee Studies** at the University of California, Hastings College of Law, monitors domestic violence asylum cases; summarizes current domestic and international case law, regulations, and standards particular to gender asylum; lists contact information for gender asylum experts; and provides individual case support. Phone 415-656-4791 <http://www.uchastings.edu/cgrs>
- **The Refugee Law Center**, in conjunction with the Harvard Immigration and Refugee Clinic Program, provides document support, attorney referrals and general advice on gender-based asylum claims. Phone 617-524-8400 <http://www.refugeelawcenter.org/>
- <http://www.asylumlaw.org/> - provides contact information for pro bono and low fee attorneys
- Request a free **UNHCR Handbook on Procedures and Criteria for Determining Refugee Status** from UNHCR, 1775 K Street, N.W. Suite 300, Washington, DC 20006, email usawa@unhcr.ch or access the *Handbook* on the Internet at <http://www.unhcr.ch>
- Contact a **university law clinic** where law students supervised by licensed attorneys represent asylum clients pro bono. Typically students have more time to prepare for cases and take on cutting-edge issues. Following is contact information for some law school clinics around the country:
 - American University International Human Rights Law Clinic
Washington College of Law
Washington, DC
Phone: 202-274-4147
 - Harvard Immigration and Refugee Law Clinic at
Greater Boston Legal Services
Boston, MA
Phone: 800-323-3205, 617-603-1808
 - Immigration Clinic
St. Thomas University School of Law

questions@asistahelp.org, website: <http://www.asistahelp.org/>

Battered Immigrants and Immigration Relief

Miami, FL
Phone: 305-623-2309

- Immigration Law Clinic
University of California Davis School of Law
Davis, CA
Phone: 530-752-6942
- Immigration Law Clinic
University of Southern California Law School
Los Angeles, CA
Phone: 213-821-5987
- International Human Rights Law Clinic
University of California Berkeley Boalt Hall School of Law
Berkeley, CA
Phone: 510-643-4800

National Immigrant Women's Advocacy Project (NIWAP, pronounced *new-app*)
American University, Washington College of Law
4910 Massachusetts Avenue NW · Suite 16, Lower Level · Washington, DC 20016
(o) 202.274.4457 · (f) 202.274.4226 · niwap@wcl.american.edu · wcl.american.edu/niwap

4.1

Access to Programs and Services that Can Help Battered Immigrants¹²

By Cecilia Olavarria, Amanda Baran, Leslye Orloff, and Grace Huang

Chapter Overview

Despite recent legal changes that restrict immigrant access to many forms of public assistance, battered immigrants continue to remain eligible for a wide array of programs and services.³ In recognition of the special needs of victims of domestic violence, the federal government has lifted many of the restrictions it otherwise imposes on immigrant access to legal and social services, allowing nonprofit organizations to provide a variety of services to battered immigrants regardless of their immigration status.⁴

1 "This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women." We wish to gratefully acknowledge Jody Feder of Yale Law School, Maunica Sthanki of Louisiana State University, Anne Cortina of Yale Law School, and Autumn Brietstein of the University of Michigan School of Law for their contributions in the preparation of this chapter.

2 In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/public-benefits>.

⁴ It is important to note that despite immigrant restrictions on government services, nonprofit charitable organizations have no legal obligation to inquire about the immigration status of persons who seek their services, nor do they have a legal

Battered Immigrants' Access to Services

This chapter highlights several important types of assistance that nonprofit organizations serving immigrant victims of domestic violence may provide and discusses the requirements that service providers must meet when working with battered immigrant populations. Specifically, the chapter describes shelter services, victim compensation, legal assistance, and other types of federal benefits that organizations may provide to battered immigrants. Next, it discusses federal laws prohibiting service providers from discriminating on the basis of national origin and requiring them to provide services without regard to immigration status when necessary to protect the life and safety of a victim.

Access to Shelter

INTRODUCTION

According to federal law and orders issued by the U.S. Attorney General, undocumented shelter residents qualify for federally funded emergency and short-term shelter and housing programs, as well as other forms of state and federally funded assistance necessary to “protect life and safety.” In addition, service providers who receive funds under other federal programs may help undocumented immigrants if they provide assistance regardless of income eligibility criteria. As a result, shelters can use certain types of federal funding to house undocumented women and to provide other social services to battered immigrants without penalty. This section discusses the legal and funding guidelines that permit and require domestic violence shelters to provide assistance to all battered immigrant women regardless of immigration status by treating them as they would any other battered woman or shelter resident.

With recent changes in federal immigration and welfare laws, there has been much concern in the domestic violence advocacy community about providing shelter and transitional housing services to battered immigrant women. Two major fears were whether shelter advocates could house undocumented residents without risk of losing federal funds and whether battered immigrants could qualify for shelter services or certain other types of public assistance in the first place. As a matter of law, battered immigrant women have full access to government funded domestic violence shelters and services *even if* they are undocumented. Furthermore, federal laws and decisions confirm that domestic violence service providers should provide shelter services, emergency services, short-term housing, domestic violence services, counseling, and most other services to undocumented battered women in the same manner that these services are available to all other battered women. Programs that turn away undocumented battered immigrants risk being charged with discrimination in violation of Federal law and loss of federal funding.

While the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (commonly referred to as PRWORA or the Welfare Reform Act) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) cut certain benefits for certain immigrants. Congress and the U.S. Attorney General have affirmed that public benefits should be available to help battered immigrants rebuild their lives after leaving their abusers. Thus, many battered immigrant women remained eligible for and were granted increased access to public benefits. These amendments underscore Congress' commitment to ensuring that battered immigrant women have full access to services and protection from ongoing abuse.

Moreover, all battered immigrants qualify for federal, state, and locally supported emergency and short-term shelter programs, regardless of immigration status. This understanding is derived from the Welfare Reform Act, IIRAIRA, orders of the U.S. Attorney General, the Fair Housing Act, the McKinney Homeless Act, the Violence Against Women Act (VAWA), and guidance issued by federal agencies that serve domestic violence victims. This section will explain how each of these legislative acts and executive decisions protect a battered immigrant's right to shelter services and other types of public assistance, exempt shelters and other domestic violence service providers from the U.S. Citizenship and Immigration Services (CIS) verification and reporting guidelines, prevent discrimination against immigrants, and allow federal funds to be allocated to shelters and other organizations serving battered immigrants.

obligation to report this information to the Immigration and Naturalization Services (now CIS, the United States Bureau of Immigration and Customs Enforcement). 8 U.S.C.S. § 1642(d).

PROVISION OF SHELTER SERVICES UNDER WELFARE REFORM AND THE U.S. ATTORNEY GENERAL'S LIST OF SERVICES NECESSARY TO PROTECT LIFE AND SAFETY

The Welfare Reform Act put in place major changes to the welfare system in an effort to “promote[s] work over welfare and self-reliance over dependency.”⁵ However, while Congress wanted to shrink the rolls of the welfare system, it acknowledged that some people still needed assistance and could not be abandoned. To assist these needy persons, the bill “retains protections for those who experience genuine and intractable hardship.”⁶ Congress recognized that “qualified aliens” are exempt from certain federal benefits cutoffs.⁷ Battered immigrant women and children abused by U.S. citizen or lawful permanent resident spouses, former spouses, or parents are included in this qualified alien exemption category.⁸

Moreover, while state and local government officials are allowed to contact the BCIS for information on a person’s immigration status, the Welfare Reform Act does not explicitly require them to do so.⁹ The Act is written in this way as a compromise to offer officials the flexibility not to report when doing so would be contrary to other state interests (i.e., prosecuting crimes or protecting victims of domestic violence).

The Welfare Reform Act also gives the U.S. Attorney General the authority to exempt certain programs from any restrictions on immigrant access to services and benefits, even if they are state or federally funded. Programs that meet the following criteria are required to provide services to all persons without regard to immigration status. These programs are also completely exempt from any requirements that they verify or report the immigration status of persons seeking or receiving their services. To be exempt, programs must:

- offer in-kind services¹⁰
- provide services at the community level
- provide services regardless of the individual’s income or resources and
- be necessary to protect life or safety¹¹

The following public assistance programs provided by community-based agencies have been designated by the U.S. Attorney General to be open to all persons, even undocumented immigrants, without regard to immigration status:¹²

- Crisis counseling and intervention programs;
- Services and assistance relating to child protection;
- Adult protective services;
- Violence and abuse prevention;
- Services to victims of domestic violence or other criminal activity;
- Treatment of mental illness or substance abuse;
- Short-term shelter or housing assistance for the homeless, victims of domestic violence, and runaway, abused, or abandoned children;
- Programs to help individuals during periods of adverse weather conditions;
- Soup kitchens;
- Community food banks;
- Senior nutrition programs and other nutritional programs for persons requiring special assistance;

⁵H.R. REP. NO. 104-725, at 261 (1996).

⁶*Id.*

⁷The term “qualified alien” refers to non-citizens who are nonetheless eligible for public benefits.

⁸Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 501(c), 110 Stat. 3009-625 (1996).

⁹H.R. REP. NO. 104-725, at 383 (1996).

¹⁰“In-kind” services are those that involve the provision of goods or services, not cash payments, to persons. These services could include food, clothing, shelter, legal assistance, counseling, etc.

¹¹AG Order No. 2049-96, 61 Fed. Reg. 45,985 (Aug. 30, 1996); AG Order No. 2170-98, 63 Fed. Reg. 41,662, 4166 (Aug. 4, 1998) (to be codified at 8 C.F.R. pt. 104).

¹²AG Order No. 2049-96, 61 Fed. Reg. 45,985 (1Aug. 30,1996); see also Attorney General's list included in the Appendix to this Manual.

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- Medical and public health services and mental health disability or substance abuse assistance necessary to protect life and safety; and¹³
- Activities designed to protect the life and safety of workers, children, and youths or community residents.

When the U.S. Attorney General specified what programs were to be open to all persons, domestic violence shelters and service providers were specifically included.¹⁴

By being included in the above list, shelters are legally permitted and required to offer their services equally to battered immigrant women as to all other battered women without regard to immigration status. Furthermore, as nonprofit, charitable organizations, shelters can legally provide services and are explicitly allowed to do so without asking any questions about immigration status and without any immigration status verification of those being served. Additionally, nonprofit, charitable organizations, including shelters, cannot be penalized for failing to verify immigration status.

IIRAIRA AND REPORTING REQUIREMENTS

In November of 1997, the U.S. Attorney General issued guidelines that specifically state “nonprofit charitable organizations” are not required to inquire into immigration status or ensure that applicants are “qualified aliens” before providing them services or benefits.¹⁵ This is true even when the nonprofit organization is using funds deemed federal public benefits (e.g., TANF funds) to provide services to an immigrant who may be undocumented.¹⁶ If a shelter administers TANF funds for its residents, the shelter may provide those funds to all residents who otherwise qualify, without regard to immigration status. In so stating, the Department of Justice indicated that its commitment to helping battered immigrants and others who truly need assistance from these programs is more important than identifying the immigration status of applicants. Thus, as a matter of federal law, shelters and other domestic violence service providers can be assured that they can and are required under the U.S. Attorney General’s and the Department of Health and Human Service’s directives to provide shelter and other services to protect the lives and safety of all battered women, even those who are in the country without legal papers.

The U.S. Attorney General’s guidance states, “A nonprofit charitable organization that chooses not to verify cannot be penalized . . . for providing federal public benefits to an individual who is not a U.S. citizen, U.S. non-citizen national, or qualified alien.”¹⁷

The only exception to this is if the state TANF agency or other nonexempt entity has verified the immigration status of the immigrant domestic violence victim following verification procedures set forth by the U.S. Attorney General. If a government entity notifies a shelter that a particular immigrant does not meet verification requirements, TANF funds could not be used to house that immigrant.¹⁸ Even in those

¹³This definition includes: immunizations for children and adolescents, AIDS and HIV services and treatment, tuberculosis services, and treatment for sexually transmitted diseases. See Claudia Schlosberg, *Not qualified Immigrants' Access to Public Health and Emergency Services After the Welfare Law*, available at www.healthlaw.org/pubs/19980112immigrant.html (1998).

¹⁴Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation. AG Order No. 2049-96, 61 Fed. Reg. 45,985 (Aug. 30, 1996).

¹⁵Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, AG Order No. 2129-97, 62 Fed. Reg. 61,344, 61,345 (Nov. 17, 1997).

¹⁶U.S. Department of Health and Human Services, *Policy Q's & A's – Immigrants*, available at <http://www.acf.dhhs.gov/programs/ofa/polquest/immigran.htm> (date revised Jan. 30, 2001).

¹⁷AG Order No. 2129-97, 62 Fed. Reg. 61,344, 61,346 (Nov. 17, 1997).

¹⁸This problem would only arise if a battered immigrant sought benefits from a public benefits agency for which she did not qualify. It could also arise if she applied for benefits for her children and the benefits-granting agency verified her immigration status despite the fact that she was not applying for benefits for herself. Verifying the immigration status of a non-applicant is a violation of federal law. For this reason, we highly recommend that battered immigrants not apply for benefits unless they are accompanied by an advocate who is familiar with the U.S. Attorney General’s Guidance and HHS policy directives regarding procedures requiring that agencies only ask about immigration status and social security number information for the persons on whose behalf the benefits are being sought. See AG Order No. 2129-97, 62 Fed. Reg. 61,344 (Nov. 17, 1997). See also Verification of Eligibility for Public Benefits, AG Order No. 2170-98, 63 Fed. Reg. 41,662, 41,662-65 (Aug. 4, 1998); DEP’T OF HEALTH AND HUMAN SERV. AND DEP’T OF AGRICULTURE, POLICY GUIDANCE REGARDING

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circumstances, the undocumented battered immigrant would continue to be fully eligible for all other shelter services except TANF, Medicaid, or other programs which are federal means-tested public benefits. The shelter simply would not apply for TANF funds for that resident but would be able to use funds it receives from other sources. These sources could include other state, local or federal government funds, foundation grants, grants from ecumenical programs, and funds from other sources raised by domestic violence programs. (See the discussion of unrestricted federal funding programs later in this section and the chapter on benefits elsewhere in this manual.)

DISCRIMINATION

THE U.S. ATTORNEY GENERAL'S GUIDANCE

Service providers who help women escape abusive relationships must be aware that programs receiving federal funds are required to provide services in a nondiscriminatory manner. Congress has consistently upheld the right of immigrants to be free from discrimination based upon their immigration status. The U.S. Attorney General's guidelines for implementing the Welfare Reform Act acknowledge that Title VI "prohibits discrimination on the basis of race, color, or national origin in any program or activity . . . that receives federal funds or other federal financial assistance."¹⁹ The guidelines further state:

This prohibition applies to disparate treatment, as well as to the utilization of facially neutral procedures . . . that have the effect of discriminating against individuals because of their race, color, or national origin . . . A benefit provider that denies benefits or delays determinations of eligibility on the basis of an individual's race, color or national origin may violate Title VI. A benefit provider may violate Title VI if it concludes that applicants are ineligible for benefits because they have ethnic surnames or origins outside the United States, or because they look or sound foreign. It also may violate Title VI if it acts upon the assumption that applicants with these characteristics are illegal aliens, or if it imposes additional eligibility requirements on ethnic or racial minorities because of their ethnicity or race.²⁰

When nonprofit organizations exempt from CIS verification and reporting requirements ask about or attempt to verify status before providing services or assistance, they risk violating the prohibitions of Title VI.²¹

Furthermore, protection against national origin discrimination under Title VI encompasses individuals with limited English proficiency (LEP). Under Executive Order 13166, federal agencies are required to ensure that programs who are recipients of federal financial assistance provide meaningful access to their programs and activities for LEP individuals.²² Thus, if federally funded organizations that serve immigrants refuse to assist individuals who speak another language, they violate the prohibition against LEP discrimination. Because Executive Order 13166 requires each federal agency to issue specific guidance regarding compliance with the LEP nondiscrimination policy, organizations that receive federal funding should consult the relevant agency for additional guidance. In conjunction with Executive Order 13166, the Department of Justice provides a list of agency guidance on their website.²³

THE FEDERAL FAIR HOUSING ACT

Domestic violence shelters should further be aware that their services are subject to the Fair Housing Act, which prohibits discrimination on the basis of race, national origin, color, religion, sex, familial status, or

INQUIRIES INTO CITIZENSHIP, IMMIGRATION STATUS AND SOCIAL SECURITY NUMBERS IN STATE APPLICATIONS FOR MEDICAID, STATE CHILDREN'S HEALTH INSURANCE PROGRAM (SCHIP), TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF), AND FOOD STAMP BENEFITS, available at www.hhs.gov/ocr/immigration/triagency.html (last modified Sept. 21, 2000).

¹⁹ AG Order No. 2129-97, 62 Fed. Reg. 61,344, 61,360 (Nov. 17, 1997).

²⁰ *Id.*

²¹ Verification, Reporting and Confidentiality, 6 *in* National Immigration Law Center in IMMIGRATION AND WELFARE RESOURCE MANUAL: 1998 EDITION (National Immigration Law Center ed., 1998).

²² Improving Access to Services for Persons With Limited English Proficiency, Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000).

²³ Available at www.usdoj.gov/crt/cor/13166.htm.

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disability.²⁴ Shelters fall under the rubric of fair housing because they are considered "dwellings" under the law. A dwelling is defined as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families."²⁵ The term residence is not defined by the statute, but courts have developed interpretations through case law. The courts have set forth various tests to determine whether a building is a "dwelling" and thereby bound to operate in compliance with the provisions of the Fair Housing Act.

For example, in the case of *Baxter v. City of Belleville*, the court looked to the objective intent of the director of the facility.²⁶ In that case, the facility was an AIDS hospice and the director installed a kitchen unit in the building. The court determined that the objective intent of the director was to use the building as a residence because he installed a kitchen where there previously had been none.²⁷ The court further determined that persons living at the hospice were not "mere transients", but rather were residents with the intent to return to that dwelling.²⁸ Preliminarily, the court found that adding kitchen units for individuals who would remain there temporarily or permanently made the building a residence. In turn, the AIDS hospice was bound by the provisions in the Fair Housing Act and could not discriminate against any individual on the basis of race, sex, national origin, color, religion, race, familial status, or disability. Similarly, domestic violence shelters are equipped with kitchens and their residents live there for an unspecified period of time while seeking other more permanent housing arrangements.

A later case also determined that a shelter for the homeless was a "dwelling" under the Fair Housing Act. *Woods v. Foster*, decided in 1995, further defined the term "dwelling" and what buildings fit into that definition.²⁹ In this case, the court deemed a homeless shelter to be a "dwelling" based on the intent of the visitor rather than the visitor's length of the stay at the shelter. The court stated, "Although the shelter is not designed to be a place of permanent residence, it cannot be said that the people who live there do not intend to return – they have nowhere else to go."³⁰

Women staying in domestic violence shelters have the intent to return there while they are shelter residents, however short their stay may be. Most shelters even have requirements that residents return to the shelter by a specified time each night. Furthermore, domestic violence shelter residents have no other safe place to reside because the violence in their homes has forced them to flee and seek shelter. The intent of the women is to return to the shelter because she has no other place where she may safely return. For some period of time, each woman who stays at a shelter *intends* to return there the next night.

These cases clarify that domestic violence shelters are bound by the Fair Housing Act. Failure to comply with this Act could put a shelter at risk of lawsuits or government enforcement actions. In order to protect themselves, it is advisable that shelters develop protocols for screening potential residents that are not based on any of the discriminatory factors prohibited under the Act such as race, national origin, language capabilities, or immigration status.

IMMIGRANT ACCESS TO FEDERALLY FUNDED PROGRAMS

The only federal programs from which immigrant access is restricted by the Welfare Reform Act or IIRAIRA are federal means-tested public benefits and federal public benefits.³¹ The only federal funds that fall into these categories are federal funds paid directly to an individual, a family unit, or a household. (For more detailed rules regarding these categories of federal programs, see the Benefits Chapter.) Thus, all state or federal funds provided to a shelter or other service provider to assist the organization in its work with battered women fall within the definition of "federal public benefits." Federal and state funding of domestic violence

²⁴Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 *et seq.*

²⁵42 U.S.C. § 3602(b).

²⁶720 F. Supp. 720, 731 (S.D. Ill. 1989).

²⁷*Id.*

²⁸*Id.*

²⁹884 F. Supp. 1169 (N.D. Ill. 1995).

³⁰*Id.* at 1173.

³¹8 U.S.C.S § 1611-1613.

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shelters or service programs are not “federal public benefits” and are not subject to any immigrant access restrictions.

“Federal public benefits” often include direct monetary assistance (e.g., TANF, Food Stamps, Medicaid, and SSDI). Nevertheless, not all of the benefits or services paid by federal public benefit programs count as “federal public benefits” under the law. Some benefits or services under such programs “may not be provided to an ‘individual, household, or family eligibility unit’ and, therefore, do not constitute ‘Federal public benefits’ as defined by PRWORA.”³² For example, Food Stamps are federal public benefits. However, food provided by a shelter or food bank is not a federal public benefit even if some or all of the food is purchased with federal dollars. Similarly, TANF funds that are paid to support the work of a shelter are not federal public benefits.³³

Immigration and welfare reform legislation place no new restrictions on immigrant access to other federally funded services. Since each of the programs listed below are grants awarded to nonprofit organizations and other programs that provide services to domestic violence victims, crime victims, and the homeless, federal dollars awarded by these programs are not “federal public benefits” and do not impose any restrictions on immigrant access. Programs that receive funds from any of the sources listed below must make their services available to all to avoid being in violation of federal discrimination and fair housing laws.

In addition to the specific programs listed below, funds that benefit battered immigrants are also available under the Victims of Crime Act (VOCA) programs, which are discussed separately later in this chapter. The appendix of this manual provides a list of some of the major federally funded programs that fall both within and outside the category of “federal public benefit” programs. Some federal agencies have also published guidances that list which of their programs are considered federal public benefits, which service providers may wish to consult. Programs deemed “federal public benefits” may only be accessed by battered immigrants who are qualified aliens, but programs not deemed federal public benefits are open to all immigrants without regard to immigration status.

DEPARTMENT OF JUSTICE FUNDING

The Violence Against Women Act (VAWA)

Passed in 1994 and amended in 2000, The Violence Against Women Act has designated more than \$1 billion in state grants to fund expanded shelter and related social services for battered women, a national domestic violence hotline, domestic violence research efforts, and educational programs for judges, police, prosecutors, and other court personnel.³⁴ The Victims of Trafficking and Violence Protection Act of 2000 describes underserved populations as:

“populations underserved because of geographic location (such as rural isolation), underserved racial and ethnic populations, populations underserved because of special needs (such as language barriers, disabilities, alienage status, or age), and any other population determined to be underserved by the State planning process in consultation with the Attorney General.”³⁵

The definition of “underserved populations” includes immigrant communities by specifically incorporating alienage status as well as cultural, ethnic, and language minority populations. Additionally, under VAWA, procedures set forth in the plan to ensure equal distribution of grant funds require states to consider the needs

³² Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of “Federal Public Benefit,” 63 Fed. Reg. 41,658 (Aug. 4, 1998).

³³ U.S. Department of Health and Human Services, *Policy Q's & A's – Immigrants*, available at www.acf.dhhs.gov/programs/ofa/polquest/immigran.htm (last modified Jan. 2001).

³⁴ Julie Goldscheid & Susan J. Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29 CLEARINGHOUSE REV. 505, 506 (1995).

³⁵ Pub. L. No. 106-386, § 1103, 114 Stat. 1464, 1496, codified at 42 U.S.C. § 3796gg-2.

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of underserved populations. These include those immigrant populations underserved because of ethnic, racial, cultural, or geographic isolation.³⁶

Under VAWA, alienage status is included in the list of underserved populations making assistance to immigrant victims of violence eligible for VAWA funding. Programs that receive grant funding from the Department of Justice's Office on Violence Against Women (OVW) can use those funds to help clients who are immigrant victims of domestic violence, sexual assault, and trafficking. Programs are encouraged to seek funding to provide assistance to underserved populations, including immigrant victims. It is also important to note that programs receiving OVW funding can use that funding to serve immigrant victims even if such services were not highlighted in the grant application.

VAWA aims to ensure that all battered women, regardless of nationality, language ability, or immigration status, receive equal access to domestic violence services that will free them from further abuse. VAWA grants are therefore not restricted based on alienage or national origin.

The OVW administers several grant programs, including: STOP grants (Services, Training, Officers, and Prosecutors; described below), Grants to Encourage Arrest Policies and Enforcement of Protection Orders, Rural Domestic Violence and Child Victimization Enforcement Grants, Legal Assistance for Victims Grants, and Grants to Reduce Violent Crimes Against Women on Campus. Programs that receive OVW grants must provide services without immigration restrictions and can use OVW grant funds to provide assistance to battered immigrants in immigration matters.³⁷

STOP Grants

STOP grants (Services, Training, Officers, and Prosecutors) are given to states to develop and strengthen the criminal justice response to violence against women.³⁸ State grants are allocated by formula to various activities, with 30 percent of the funds dedicated to victim services, 25 percent allocated to police, 25 percent earmarked for prosecutors, 5 percent set aside for state courts, and 15 percent dedicated to a discretionary category.³⁹ The program is intended to train law enforcement officers, court personnel, and prosecutors to respond more effectively to violent crimes against women. Funds may be used for training, expanding domestic violence units, strengthening victim services, and providing assistance to victims of domestic violence and sexual assault in immigration matters.

The U.S. Attorney General has issued guidelines relating to the use of federal monies and the manner in which states disburse their allotted share. The most critical guideline for this discussion requires that states, "...recognize and address the needs of underserved populations." STOP funding is fully available to programs working to help all domestic violence victims including battered immigrants. Specifically identifying the alienage status and language barriers to many domestic violence programs, the program helps battered immigrants by improving the language accessibility of the justice system, increasing services in other languages, and developing outreach programs to be conducted in previously underserved immigrant communities.

Grants to Encourage Arrest Policies and Enforcement of Protection Orders

Grants to Encourage Arrest Policies and Enforcement of Protection Orders (Arrest Program grants) are designed to encourage state and local governments to treat domestic violence as a serious problem by requiring the coordinated involvement of the entire criminal justice system. Funds may be used for executing mandatory and pro-arrest programs, developing policies and training in criminal justice agencies for domestic violence case tracking, and educating judges about domestic violence. Special consideration is given to programs that develop innovative approaches to responding to domestic violence in categories such as outreach to traditionally underserved populations, coalitions between businesses and the criminal justice

³⁶S. REP. NO. 103-138, (1993).

³⁷Pub. L. No.106-386, § 1201, 114 Stat. 1464, 1504, codified at 42 U.S.C. § 3796gg-6.

³⁸Violence Against Women Act of 2000,. Pub. L. No. 103-322, § 40121. 108 Stat. 1796, 1911, codified at 42 U.S.C. § 3796gg-1.

³⁹Violence Against Women Act of 2000, Pub. L. No. 106-386, § 1103, 114 Stat. 1497.

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system to ensure the safety of women in the community, and stopping domestic violence by police officers within the community. Applicants are required to enter into formal collaborations with nonprofit organizations serving victims of domestic violence.

Grants to Reduce Violent Crimes Against Women on Campus

The Campus Program is intended to strengthen the higher education community's response to sexual assault, stalking, domestic violence, and dating violence crimes on campuses and to encourage alliances between campuses and local criminal justice and victim advocacy organizations. The goals of the program are to assist institutions of higher learning to create a coordinated community response to end violence against women on campuses and ally themselves with local non-profit victim advocacy and civil justice organizations. Grant funds may be used for training, creation and development of victim services programs, installing data collection and communication systems, and other programs of the like. Priority consideration will be given to programs that address enumerated "special interests".

The amount of funding disbursed hinges on a variety of factors including the scope of activities proposed and the number of students served. Applicants are required to submit a copy of their application to the agency that administers STOP grants. To enhance victim safety and hold perpetrators accountable, applicants are discouraged from proposing any activities that may compromise victim safety.

Rural Domestic Violence and Child Victimization Enforcement Grants

The Rural Domestic Violence and Child Victimization Enforcement Grants are designed to enhance services available to victims and children by encouraging community involvement in developing a coordinated response to domestic violence, dating violence, and child abuse. A state is considered rural if it has a population of 52 or fewer persons per square mile or the largest county has less than 150,000 people. In rural states, eligible applicants are state and local governments and public and private entities. Non-rural states may apply on behalf of rural jurisdictions in their states. Eligible applicants also include tribal governments in rural and non-rural states. At least five percent of the funding for this program must be available for grants to Indian tribal governments.

States are encouraged to administer this program through the same agency that administers the STOP grants, unless there is a compelling reason to place responsibility for rural programs with a different agency. Again, to enhance victim safety and hold perpetrators accountable, applicants are discouraged from proposing any activities that may compromise victim safety.

HUD AND HHS GUIDANCE ON PROGRAMS FOR BATTERED IMMIGRANTS

Federal agencies that administer grant programs serving domestic violence victims- HUD and HHS- have issued guidance with respect to shelter services for battered immigrants. Since many of the federal agency grant programs are bound by the same rules discussed above, including the Title VI prohibition against discrimination on the basis of national origin, the Attorney General's list of services necessary to protect life and safety, and the definition of federal public benefit, the agency guidance generally tends to reiterate these rules and delineate how they apply to the agency's programs specifically. Thus, the HUD and HHS guidance on provision of services to immigrants are addressed only briefly here.

HUD guidance on services to battered immigrants clarifies that both emergency and short-term shelter for victims of domestic violence have been deemed by the Attorney General to be services necessary to protect life and safety. HUD emphasizes that HUD-funded programs that provide emergency shelter and transitional housing for up to two years, but that do not consider the recipient's income or resources when providing assistance, must make their services available to all needy individuals, including battered immigrants who may be undocumented and/or not qualify for other types of federal means-tested benefits.⁴⁰ HUD emphasizes that organizations that disregard the laws and guidance with respect to services for battered immigrants are

⁴⁰Letter from the Secretary of the U.S. Department of Housing and Urban Development to HUD Funds Recipient (Jan. 19 2001) (on file with author).

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subject to sanctions. Organizations receiving HUD funding who turn undocumented immigrants who are victims of domestic violence away from shelter or transitional housing risk losing federal funding.

Likewise, HHS guidance clarifies that battered immigrants are eligible for services provided by domestic violence shelters and other domestic violence programs, that receive HHS funding under the Family Violence Prevention and Services Act, community and migrant health centers, Community Services Block Grant, substance abuse, mental health, and maternal and child health programs.⁴¹ Many of these programs provide services that are considered necessary for the protection of life and safety, while others are open to all persons without regard to immigration status because they do not meet HHS's definition of federal public benefit programs.⁴²

HUD – McKinney Homeless Act Funding

In the eyes of the law, domestic violence shelters are considered homeless shelters because they help battered women who would otherwise be homeless. Some domestic violence programs receive McKinney Homeless Act funds as programs which allow homeless individuals and families to move to more permanent housing within twenty-four months...⁴³ This Act places no alienage restrictions on those persons who can access emergency shelter and short-term or transitional housing facilities, nor does it require operators of McKinney Act-funded programs to inquire into the immigration status of their residents.⁴⁴ Under the McKinney Act, shelter services must be available to all needy individuals, and shelters receiving McKinney Act funds may use those funds to serve all battered immigrants, including undocumented battered immigrants.

HHS – Family Violence Prevention and Services Act Funding

FVPSA (Family Violence and Prevention Services Act) grants are awarded to states for distribution to support programs that provide services to battered women. This funding provides services to domestic violence victims and their dependents. Funded services include shelter, counseling, preventive activities, and outreach. The Family Violence Prevention and Services Act funds the national domestic violence hotline and has at times specifically provided discretionary grants directed toward improving domestic violence services to immigrant and migrant communities. Further, FVPSA funds can be used to serve battered victims without regard to their immigration status.⁴⁵

FVPSA also urges states to devote a portion of their FVPSA funding to improve their services to underserved populations. FVPSA further allows the individual states to determine the underserved population within their borders and create better programs for that population. Consistent with the intention of Congress in passing the Violence Against Women Act, which contained amendments of FVPSA, funds may be used to serve underserved immigrant battered women. Programs serving battered women with FVPSA funds must serve any victim of domestic violence without regard to immigration status.⁴⁶ Programs that receive FVPSA funding who turn undocumented or non-citizen battered women away from receiving services risk HHS sanctions.

CONCLUSION

⁴¹ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH AND HUMAN SERV., ACCESS TO HHS-FUNDED SERVICES FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, available at <http://www.hhs.gov/ocr/immigration/bifsltr.html> (date revised Jan. 30, 2001).

⁴² Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Public Benefit," 63 Fed. Reg. 41,658 (Aug. 4, 1998).

⁴³ See Stewart B. McKinney Homeless Act of 1987, 42 U.S.C. § 11301.

⁴⁴ 42 U.S.C. §§ 11301-11302.

⁴⁵ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH AND HUMAN SERV., ACCESS TO HHS-FUNDED SERVICES FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, available at <http://www.hhs.gov/ocr/immigration/bifsltr.html> (date revised Jan. 30, 2001).

⁴⁶ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH AND HUMAN SERV., ACCESS TO HHS-FUNDED SERVICES FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, available at <http://www.hhs.gov/ocr/immigration/bifsltr.html> (date revised Jan. 30, 2001). ("In most cases, HHS-funded programs serving domestic violence victims are available to all immigrants who have been abused when those programs do not impose eligibility criteria, such as income. These programs include, but are not limited to, FVPSA-funded programs, community and migrant health centers, Community Services Block Grant (CSBG), substance abuse, mental health and maternal and child health programs.")

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Despite recent legislation that generally treats immigrants more harshly, battered immigrant women and children have been consistently singled out for additional protection by that very same legislation. An examination of current statutes and grant programs reveals that the federal government remains committed to protecting battered immigrants without regard to their immigration status.

Therefore, shelters and other domestic violence programs need not fear opening their doors to any immigrant who needs their services. In fact, shelters that do turn immigrant women away may actually open themselves up to federal enforcement actions for discrimination. Shelters and transitional housing programs that receive some form of federal funding must provide emergency shelter, transitional housing for up to two years, and other domestic violence services to all battered women, including those who are undocumented. Battered immigrant women, like battered women from other underserved populations, desperately need access to the protection provided by battered women's shelters and other social services programs. In many communities, cutting off battered immigrants from shelter programs isolates them from the only service providers in their community who are domestic violence experts. The information in this section can be used to educate other advocates, state officials, and local grant programs about keeping shelters and other social services programs open and accessible to everyone who needs them.

Access to Victims of Crime Act (VOCA) Funds

INTRODUCTION

Although all battered immigrants can legally access shelter, transitional housing, and domestic violence services, many will not qualify to access the full range of public benefits that they may need for economic survival apart from their abusers. Despite their need for economic resources, battered immigrants may be restricted in their ability to access many of the financial safety nets available to non-immigrant victims of domestic violence. These restrictions prevent many battered immigrants from being economically self-sufficient, and force them to remain in abusive relationships to survive or care for their children's needs. Crime victim compensation and assistance programs may provide one source of relief and services for battered immigrants to help them cover expenses related to their victimization by their abuser.

The Victims of Crime Act (VOCA) established two major formula grant programs for the states – one for victim compensation and the other for victim assistance. The Crime Victims Fund, derived from fines, penalty assessments, and bond forfeitures from convicted federal offenders, is the source of the federal funds provided to the states. State programs serve victims of domestic violence, sexual assault, and child abuse. Thus, battered immigrants may be eligible for VOCA services and compensation to help end the violence in their lives.

VOCA grants were created to 1) provide direct victim services including safety services (e.g., repairing broken locks), information about how they can participate and understand the criminal justice system, and funds to stabilize life circumstances, and 2) provide victim assistance funds for agencies that respond to the physical and emotional needs of crime victims.⁴⁷ VOCA provides funding that states can use to support programs, including domestic violence shelters and services that assist battered women who are crime victims.

States receiving VOCA funds are required to "identify gaps in available services [to] ... 'underserved' victims, [which include] ... non-English speaking residents ... [and] members of racial or ethnic minorities ..."⁴⁸ The requirement further notes that each state has the discretion to determine who the underserved population is within their borders. The formal grant requirements do not exclude any group of persons. In fact, this requirement allows states to incorporate undocumented immigrants into the group of persons entitled to better services due to inadequate services in the past.

⁴⁷DEPARTMENT OF JUSTICE, FINAL PROGRAM GUIDELINES, <http://www.ojp.usdoj.gov/ovc/welcovc/scad/guides/vaguide.htm> (last updated June 23, 2004).

⁴⁸*Id.*

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In addition to these state formula grant programs, VOCA funds are also available for victims of federal crimes under the Federal Crime Victim Assistance Fund, which supports activities similar to those conducted under the state programs described below.

VICTIM COMPENSATION

Victim compensation programs vary by state, but all programs reimburse victims for crime-related expenses, including: medical costs; mental health counseling; funeral and burial costs; and lost wages. Federal funds provide a portion of the state compensation program budgets. State funds provide the remainder of the budget, and state laws govern the precise types of compensation available.

In some states, compensation is available for other domestic violence related needs, such as counseling for children who witness domestic violence or lost support (paid to a victim if reporting the crime leaves the victim without financial support from the offender). Domestic violence victims can also benefit from state compensation statutes that cover the following expenses:

- Moving expenses for victims
- Legal expenses
- Wages lost while attending legal proceedings related to the case
- Hotel rooms
- Housing and utility deposits
- Emergency expenses.

These types of financial compensation may provide victims with the temporary assistance they need to leave their abusers. Emergency financial aid payments may be particularly useful for immigrant victims of domestic violence whose economic resources are limited.

In some states, domestic violence victims may have difficulty complying with the state's conditions for receiving victim compensation. VOCA requires victim compensation programs to "promote victim cooperation with the reasonable requests of law enforcement authorities."⁴⁹ Individual states, however, have victim compensation requirements at odds with the circumstances of many victims of domestic violence. For instance, some states require victims to report the crime to law enforcement within seventy-two hours, cooperate with the police and prosecution, and submit a timely application, in order to receive victim compensation benefits.

Battered immigrants may be particularly unable to comply with strict victim compensation rules. For instance, a battered immigrant may be unaware of a seventy-two-hour reporting requirement or unable to communicate effectively in English. They are unlikely to know that they are eligible for victim compensation benefits until an informed victim advocate or immigrant rights advocate who speaks their language informs them of these laws. Alternatively, the victim may be reluctant to call the police because her abuser has said the police will deport her or because of prior experiences with repressive police forces in her home country. Similarly, battered immigrants may be afraid to work with the police or prosecutors because of misperceptions of the United States legal system, or because of language and cultural barriers. Advocates working with battered immigrants should inform them about VOCA eligibility and assist them in filing timely applications.

Battered immigrant victims of sexual assault who qualify for U-visas because they are crime victims must be willing to report the crime to law enforcement or other government officials (e.g., prosecutors and the EEOC). To qualify they must obtain a certificate from a government official stating that they have been, are being, or will be helpful in an investigation or prosecution of criminal activity. Further, U-visa crime victims will not qualify for public benefits, so victim assistance funds can provide critical financial support to help them bridge the gap between leaving abuser, and attaining work authorization, based on their U-visa, and securing employment. Advocates should conduct careful safety planning with immigrant victims whose only

⁴⁹42 U.S.C. § 10602(d)(2).

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option for attaining legal immigration status is thru the U-visa to help them determine whether they can safely report the crime to officials and cooperate in any resulting investigation or prosecution. If so, advocates should encourage reporting in a timely manner consistent with state VOCA eligibility rules so that the immigrant victim can also receive VOCA support based on her report of the crime to law enforcement.

Many states are revising their victim compensation policies to be more responsive to the dynamics of domestic violence. These changes are likely to benefit battered immigrants as well. Several states have changed their seventy-two-hour reporting requirements, instead requiring a report to be made within a reasonable period of time. This should enable victims of domestic violence to get to a safe place and protect themselves prior to pursuing criminal charges. In New York, victims of domestic violence may be compensated even if they do not initiate criminal cases against their abusers, but rather seek orders of protection in Family Court.⁵⁰ This policy recognizes that victims of domestic violence may have justifiable reasons for failing to prosecute. These reasons may include fear for their safety based on their abusers' threats or prior violence.

California's guidelines permit a report to be made by a battered women's shelter employee, friend, relative, neighbor, or clergy person, in addition to the victim. This provision can help battered immigrants who do not speak English, or who are unaware of victim compensation benefits, receive assistance from others in filing claims. The state also interprets "lack of cooperation" narrowly, recommending that victims receive benefits unless they actively interfere with police or prosecution efforts to hold perpetrators accountable. This standard gives greater protection to victims of domestic violence whose fears of retaliation may prevent them from testifying against their abusers in criminal cases.

Finally, in states that retain the seventy-two-hour reporting requirement, many battered immigrants may only find their way to an advocacy program after the seventy-two-hour time limit has expired. In these cases advocates should advise battered immigrants about the types of assistance available to them under VOCA, explain the seventy-two-hour reporting rules, and offer to help her file the required police report should she experience any future incident of domestic violence. In light of the on-going nature of domestic abuse, victims who may be cut off from VOCA relief for a prior domestic violence incident may apply should they be victimized in the future.

VICTIM ASSISTANCE

VOCA funds awarded to states support more than 5,000 community-based organizations serving several million crime victims each year.⁵¹ Battered immigrants may require services provided by these domestic violence shelters, rape crisis centers, and victim services programs in police departments, prosecutors' offices, hospitals, and social services agencies. Victim assistance programs provide desperately needed relief, such as crisis intervention, counseling, emergency shelter, criminal justice advocacy, and emergency transportation.

Crime victim assistance programs must certify that they provide assistance to victims of sexual assault, spousal abuse, or child abuse. Additionally, they must certify that they fund programs that serve historically underserved populations of victims of violent crime.⁵² Since battered immigrants are often underserved in their communities due to cultural or language barriers, this VOCA provision should foster the development by providers of improved programs for battered immigrants with the use of VOCA funds.

IMMIGRANT ELIGIBILITY FOR VICTIM COMPENSATION AND VICTIM ASSISTANCE

⁵⁰NY FAM. CT. ACT § 446(g) .

⁵¹Office for Victims of Crime, U.S. Department of Justice, *OVC Fact Sheet: State Crime Victim Compensation and Assistance Grant Programs* (last modified April 19, 2001);

<http://www.ojp.usdoj.gov/ovc/publications/factsheets/companassist/welcome.html>

⁵²42 U.S.C. § 10603(a)(2)(B).

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In most states, immigration status is not a bar to receiving victim compensation benefits or victim assistance benefits.⁵³ Victim compensation administrators do not require applicants to identify their immigration status,⁵⁴ and have no duty to inquire about immigration status under either federal or state law. Rather, victims are eligible for benefits when they have been injured in the state and meet the conditions set forth in the state's guidelines.

Specifically, VOCA funds are only available to states whose victim compensation programs "make[s] compensation awards to victims who are nonresidents of the State on the basis of the same criteria used to make awards to victims who are residents of such State."⁵⁵ State victim compensation statutes cover victims injured in the particular state regardless of their residency in the state.⁵⁶ Thus, immigration status should also be irrelevant to receipt of victim compensation benefits. The VOCA guidelines confirm that:

the term 'nonresident' must, at a minimum, include anyone who is a resident in one state but victimized in another. A state may, at its discretion, broaden its definition of nonresident to include anyone victimized in the state regardless of whether the victim is a United States resident.⁵⁷

Further underscoring the legislative intent of VOCA to provide compensation and services to all victims, regardless of their national origin, the VOCA nondiscrimination provision states:

No person shall on the ground of race, color, religion, *national origin*, handicap, or sex be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in connection with, any undertaking funded in whole or in part with sums made available under this chapter.⁵⁸ (Emphasis added)

Thus, services to battered women and crime victims funded by VOCA must offer their services equally to all persons without regard to immigration status. As with VAWA- and HUD- and HHS-funded services for domestic violence victims, programs offering victims' services funded under VOCA that discriminate risk violating VOCA and other federal antidiscrimination laws. Battered immigrants and other immigrant crime victims have the same access to VOCA-funded services as all other crime victims.

Further, VOCA-funded services are among the services necessary to protect life and safety that are open to all individuals without regard to immigration status.⁵⁹ With regard to victims' compensation payments that can be made directly to crime victims, VOCA and most state victim compensation statutes do not discriminate against battered immigrants based on immigration status. Further, VOCA benefits have not been identified by either the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) or the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) as one of the "federal public benefits" programs, a designation which would restrict immigrant access. Thus, victim compensation benefits should be accessible for both battered immigrants and other immigrant crime victims without regard to immigration status.

CONCLUSION

VOCA grants are an important yet often overlooked source of funds for battered immigrants. Because many immigrants are ineligible for assistance under the primary federal public benefit programs such as TANF, Food Stamps, and Medicaid, VOCA grants can fill an important gap in the social safety net for battered

⁵³Telephone Interview with Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards (Nov. 20, 1997).

⁵⁴Telephone Interview with Laurie Schipper, Iowa Coalition Against Domestic Violence (Dec. 8, 1997).

⁵⁵42 U.S.C. § 10602(b)(4).

⁵⁶ Even if residency were an issue, state residency laws focus on where a person intends to reside permanently. These laws do not consider immigration status. See Family Law Chapter of this manual for full discussion on residency laws.

⁵⁷42 U.S.C. § 10601, *et seq.*

⁵⁸ *Id.*; See <http://www.ojp.usdoj.gov/ovc/welcovc/scad/guides/voca.pdf>

⁵⁹AG Order No. 2129-97, 62 F.R. 61344 (Nov. 17, 1997); AG Order No. 2170-98, 63 F.R. 41664 (Aug. 4, 1998).

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immigrants who leave their abusers, allowing them to access cash assistance, medical care, and shelter during their time of need. Since VOCA program requirements vary from state to state, advocates and attorneys representing battered immigrants should become familiar with the program rules in their states. Consult the web site for the Department of Justice's Office for Victims of Crime at <http://www.ojp.usdoj.gov/ovc/> to find a listing of state contacts for victim compensation and assistance programs.

Access to Legal Services

INTRODUCTION

Currently, the availability of free or low-cost legal services for battered immigrants is somewhat limited. Nevertheless, battered immigrants seeking legal assistance do have several options. One such option is found among the loose network of stand-alone nonprofit legal services providers that assist low-income clients in cities and towns across the country. Many of these nonprofit legal assistance organizations, however, receive funding from the federal government, most notably under the auspices of the federally funded Legal Services Corporation (LSC). Although organizations that receive LSC funds are barred from using their federal dollars to assist most immigrants who are non-citizens, they may use non-LSC money to provide free legal services to certain groups of battered immigrants regardless of their immigration status. Thus, LSC-funded organizations are an important potential source of free legal assistance for immigrants who are victims of domestic violence.

A second major source of legal services for battered immigrants stems from programs that receive grants from the Department of Justice's Office on Violence Against Women (OVW). Several OVW grant programs can be used to provide legal assistance to battered immigrants. Funds from OVW's STOP, Rural, Legal Assistance for Victims, Arrest, and Campus grant programs may be used to provide immigration assistance to battered women.⁶⁰

Legal Assistance for Victims (LAV)⁶¹ grants are the most significant source of OVW funding for legal services for domestic violence victims. The Violence Against Women Act of 2000 created a LAV grant program designed to improve the legal aid available to domestic violence victims. These grants allow organizations to assist all victims of domestic violence, stalking, or sexual assault with a wide range of legal matters that arise as a result of the abuse or violence. LAV grantees are explicitly authorized to provide a broad range of legal services to battered immigrants, including representation in immigration cases to certain groups of battered immigrants. Programs that receive both LAV and LSC funding were, however, subject to LSC grant program restrictions regarding the groups of undocumented battered immigrants they can serve. Programs that receive no LSC funding or receive LAV but not LSC funding have no restrictions on providing services to undocumented battered immigrants. Both LSC- and VAWA-funded legal services for battered immigrants are discussed in greater detail below.

LEGAL SERVICES CORPORATION SERVICES FOR BATTERED IMMIGRANTS

In 1996, Congress passed a law prohibiting any organization that receives Legal Services Corporation (LSC) funding from providing legal assistance to undocumented immigrants and many lawfully present non-citizens.⁶² This law originally even prohibited a LSC-funded organization from using non-LSC funds to provide legal assistance to ineligible non-citizens. Since most legal services offices at the time relied solely or primarily on funding from the LSC, this meant that most legal services offices could no longer represent many non-citizens. LSC-funded organizations could, however, provide brief service and consultation by telephone, and normal intake and referral services to anyone, regardless of their citizenship or immigration status.⁶³

⁶⁰ For a list of OVW-funded grant programs, please visit the OVW website at <http://www.ojp.usdoj.gov/vawo/applicationkits.htm>.

⁶¹ Formerly called Civil Legal Assistance Grants.

⁶² Legal Services Corporation Appropriations Act of 1996, Pub. L.No. 104-134, § 504 (a) (11), 110 Stat. 1321 (1996).

⁶³ 45 C.F.R. § 1626.3, 1626.6(a).

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The following year, Congress amended this law to ameliorate some of its harsh effect on battered women and abused children.⁶⁴ The amendment permits LSC-funded organizations to use non-LSC funds to represent certain victims of domestic abuse on matters directly related to the abuse, even if these abuse victims would otherwise be ineligible for legal representation from the LSC funded organization because of their immigration status.⁶⁵ LSC-funded legal services offices can now represent non-LSC eligible battered immigrant women, regardless of their immigration status, on matters directly related to domestic abuse, if they raise non-LSC funds to do so.⁶⁶

LSC-funded organizations may only, however, represent non-LSC eligible battered immigrant women who have been battered by either a spouse, a parent, or a member of the spouse's or parent's family residing in the same household as the immigrant when the spouse or parent consented to the battery. The law allows representation only on issues directly related to the abuse. Therefore, non-LSC eligible immigrant women who are not married but who are battered by their boyfriends or the fathers of their children may not be served by a LSC-funded organization.

REPRESENTATION OF NON-CITIZENS

Battered women need to have access to the assistance of legal services program lawyers for help in obtaining protection orders, child and spousal support, child custody, divorce, and immigration benefits. In many communities, legal services lawyers are the only lawyers in the community with significant expertise and experience assisting battered women and children. Confusion about which non-citizens may receive legal assistance from LSC-funded programs and which funds governmental and non-governmental programs may use for this representation has reduced battered immigrant's access to legal services below that which is legally required. For this reason it is important for battered women advocates and immigrant rights advocates to know which non-citizens legal services programs are authorized. In order to assist clients in obtaining much needed services, advocates also need to be familiar with the broad range of services that have been deemed directly related to the abuse. Advocates should work with their local LSC-funded programs to encourage them to represent battered immigrants by using non-LSC funding. Also, advocates should consider working with legal services programs with experience representing battered women to jointly raise non-LSC funds that can be used to provide legal services to battered women and children who are non-citizens.

Many non-citizen battered immigrant women and abused immigrant children are eligible to receive legal services because they qualify for assistance under federal law. LSC-funded organizations may represent U.S. citizens and the following non-citizens using federal LSC dollars:

- Lawful permanent residents;
- Lawful conditional residents;
- Immigrants who are married to U.S. citizens and who have filed an application for adjustment of status to lawful permanent resident status where such application has not been rejected;
- Immigrants who are parents or unmarried children under the age of 21 of U.S. citizens who have filed an application for adjustment of status to lawful permanent resident status and such application has not been rejected;
- Immigrants who have been admitted as refugees or granted asylum;
- Immigrants who have been granted conditional entry pursuant to INA § 203(a)(7) as in effect on March 31, 1980 because of persecution or fear of persecution on account of race, religion, or

⁶⁴45 C.F.R. § 1626.2(g).

⁶⁵Legal Services Corporation Appropriations Act of 1997, Pub. L. No. 104-208, § 504(a)(11), 110 Stat. 3009 (1996).

⁶⁶*Id.*

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political opinion or because of catastrophic natural calamity; and

- Immigrants who are lawfully present in the U.S. as a result of withholding of deportation.

The following groups of domestic violence victims are the only other non-citizens who may receive legal representation from an LSC-funded organization regardless of their citizenship or immigration status. A victim of domestic violence may receive services if the legal assistance is directly related to the preventing or obtaining relief from the battery or cruelty and she meets the following criteria:

- The applicant has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse's or parent's family residing in the same household as the immigrant, when the spouse or parent consented or acquiesced to such battery or cruelty.
- The applicant's child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the immigrant or by a member of the spouse's or parent's family residing in the same household as the immigrant, when the spouse or parent consented or acquiesced to such battery and the immigrant did not actively participate in such battery.⁶⁷

The first prong of eligibility for battered immigrant women and abused immigrant children to receive services from an LSC-funded organization requires that the client have been battered or subjected to extreme cruelty.

"Battered or subjected to extreme cruelty" is defined as including, but not limited to:

Being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that in and of themselves may not initially appear violent but that are a part of the overall pattern of violence.⁶⁸

This definition is fairly expansive. It parallels the definitions contained in immigration law and is broader than most protection order statutes because it includes some forms of emotional abuse. The definition of battering or extreme cruelty is limited however to battering or extreme cruelty that occurs within the United States.⁶⁹

To be eligible for representation by an LSC-funded organization, the battered immigrant woman or child must have suffered abuse at the hands of:

- a spouse
- a parent
- a member of the spouse's or parent's family residing in the same household as the battered immigrant⁷⁰

Note that the relationship with the abuser is the chief relationship. If the abuser is a spouse, former spouse, or parent, the battered immigrant may receive a variety of legal services on issues directly related to the abuse, regardless of whether the abuser has or does not have any form of legal immigration status.

The preamble to the LSC regulations states that the terms "spouse" and "parent" are terms of relationships that are generally regulated by state law. The LSC regulations do not expand the generally recognized legal meanings of these terms under state law, nor do they define them. The preamble directs that LSC-funded organizations should defer to the local law defining spouse and parent or the federal law that would apply in a

⁶⁷ Legal Services Corporation Appropriations Act, 104 P.L. 134, § 504(a)(11).

⁶⁸ 45 C.F.R. § 1626.2(f).

⁶⁹ 45 C.F.R. § 1626.4.

⁷⁰ Legal Services Corporation Act, § 504(a)(11).

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particular case.⁷¹ It is important to note that the immigration law definition of parent includes step-parents and could include children up to the age of twenty-one.⁷² This federal law definition of the parent/child relationship should be used by LSC-funded programs where it may be broader than local or state laws. Advocates should look to state definitions of spouse and parent, particularly those included in state domestic violence laws and family laws regarding common law marriages, as well as the immigration law definition, and work with their local LSC-funded legal services program to convince them to interpret these terms broadly.

The statute and the regulations offer legal services access to an immigrant who "has been" battered or subjected to extreme cruelty by a spouse or parent. The statute contains no requirement that the spousal or parent/child relationship continue to exist when the battered immigrant seeks legal assistance from a LSC-funded agency. Similarly, all state domestic violence statutes refuse to make distinctions between current and former spousal or parental relationships for the purpose of offering access to legal protection. Thus, abused immigrant spouses and children should be able to obtain legal assistance from LSC-funded programs even if the abuser's parental rights have been terminated and even if the abuser has divorced his immigrant wife.⁷³

The LSC regulations lack a definition for the meaning of a "member of the spouse's or parent's family" and instead direct LSC-funded organizations to refer to state protection order statutes where available or to other applicable local law in defining these terms.⁷⁴ This approach parallels the approach taken by the Attorney General of the United States in defining this same terminology in the welfare context. In November 1997, the Attorney General⁷⁵ provided guidance to the states for use in the welfare context on how the phrase "member of the spouse or parent's family" is to be defined. The guidance provides a definition that should also be followed by LSC funded programs. A "member of the spouse or parent's family," means:

“...any person having a relationship to the spouse or parent that is covered by the civil or criminal domestic violence statutes of the state or Indian country in which the alien, the alien’s child, or the alien’s parent received a protection order.”

This definition also sheds useful light on how this language should be interpreted in the context of access to legal services.

State protection order statutes often broadly define family to protect individuals from ongoing abuse. Under many state protection order statutes, that definition would usually include persons who are in the following relationship with the spouse or parent of the battered immigrant:

- Blood relatives
- Current and former relatives by marriage
- Current and former cohabitants
- Persons who share a common child with the victim’s spouse or parent
- People who have dated the victim’s spouse or parent
- Any other people in relationships with the immigrant victim’s spouse or parent covered in the state’s protection order statute.

Immigrant women who have been battered by individuals that have any of the above relationships with the immigrant victim’s spouse or parent should be eligible for representation by an LSC-funded organization, in accord with the definition provided by the state's protection order statute.

In order for battered immigrants who do not otherwise qualify for LSC funded services to be eligible to receive services from an LSC funded organization, they must show that the legal assistance provided is

⁷¹Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 45,755, 45,756 (Aug. 29, 1997).

⁷²Immigration and Nationality Act, § 101(b)(1), 8U.S.C.A. § 1101.

⁷³Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (1996).

⁷⁴*Id.*

⁷⁵AG Order No. 2129-97, 62 Fed.Reg. 61344 (Nov. 17, 1997).

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directly related to their abuse. Legal assistance directly relating to the prevention of, or obtaining relief from, the battery or cruelty is defined as any legal assistance that will:

- Assist victims of abuse in escaping from the abusive situation
- Ameliorate the effects of abuse
- Protect against future abuse.⁷⁶

A wide array of legal assistance for which battered immigrants are eligible may be deemed related to the abuse. For example, an LSC-funded organization may use non-LSC funds to represent battered immigrant women, helping them secure housing, medical, or income assistance so that they and their children are no longer forced to depend on their abuser. Similarly, an LSC-funded organization may provide legal assistance to seek a civil protection order against the abuser or to terminate the marriage and parental rights of the abuser. The LSC program may not, however, provide adoption assistance if the victim remarries and the new spouse, who is an ineligible alien, wishes to adopt the children.⁷⁷

The preamble to the LSC regulations provides a non-exclusive list of examples of permissible legal representation and makes it clear that a broad variety of legal services are needed to assist abuse victims. According to the preamble, permissible representation includes, but is not limited to:

- Representation of a domestic violence victim in a VAWA immigration case; or
- Representation of a domestic violence victim in other immigration cases that would allow an abuse victim to stabilize immigration status, facilitate naturalization, or acquire work authorization so long as the victim can show the necessary connection to abuse.

In addition to providing assistance in immigration matters, LSC programs may provide any of the following forms of legal assistance when they are necessary to assist victims' escape from an abusive situation or ameliorate the current effects of the abuse or protect against future abuse. This legal assistance includes, but is not limited to:

- Obtaining civil protection orders
- Divorce
- Child custody
- Child and spousal support
- Housing
- Public benefits
- Employment
- Abuse and neglect
- Juvenile proceedings
- Small claims cases
- Contempt actions⁷⁸

Additionally, there are many poverty law issues a battered immigrant woman faces that affect her ability to maintain self-sufficiency and independence from her abuser. Such legal assistance is permissible as it is related to the abuse, and it includes assistance in:

- Obtaining public benefits
- Retaining the family home for the battered immigrant and her children
- Evicting the abuser from the residence

⁷⁶45 C.F.R. § 1626.2(g).

⁷⁷Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 45,755, 45,757 (1997). This restriction parallels restrictions in immigration law which previously cut off access to VAWA relief if the abuse victim remarries. The Violence Against Women Act of 2000 deleted this restriction from immigration law.

⁷⁸Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 19409, 19410-11 (Apr. 21, 1997) (codified at 8 C.F.R. pt. 204).

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- Obtaining child and spousal support
- Maintaining health insurance from the abuser
- Staving off eviction.

REQUIREMENTS TO VERIFY IMMIGRATION STATUS

The Legal Services regulations implementing battered immigrant access to legal services provide important confidentiality protections so that immigrants who receive legal representation by LSC-funded organizations can be assured that the information about the immigration status contained in the LSC organization's records will not be provided to BCIS/BICE or used against them by immigration officials. These confidentiality provisions are extremely important in light of the onerous immigration status eligibility requirements that LSC-funded programs normally are required to undertake. Confidentiality protections were included in the regulations to allay the fears of battered immigrant women who would otherwise be deterred from seeking the legal representation they need to help them escape from their abuser.⁷⁹ The regulations recognize the need to protect from disclosure information provided to an organization by battered immigrants who may be undocumented immigrants, and by potential clients who are rejected or referred to another legal services provider because they do not qualify as eligible non-citizens.

Consequently, the regulations provide that LSC-funded organizations are not required to inquire about a domestic violence client's immigration status or to maintain records regarding her status.⁸⁰ Further, since legal assistance as defined under these regulations does not include normal intake and referral services, an organization is not required to verify citizenship or eligibility during intake and referral or when providing brief advice or consultation by telephone. LSC-funded programs do not need to document the immigration status of potential clients to whom they offer only intake and referral services or to whom they provide quick advice.⁸¹

For all other clients, except battered immigrants and clients provided only referrals or quick advice, an LSC-funded organization is required to have clients attest to their citizenship (or prove it, if there is reason to doubt it), or verify their non-citizen eligibility under LSC regulations. The organization must also maintain records sufficient to document its compliance with LSC regulations.⁸² For this reason, even battered immigrant women who fall within the group of non-citizens whom LSC is authorized to assist may prefer to apply for legal services under the special provisions for battered immigrants. Those services are available without any requirements for verification of immigration status and without producing specific immigration documents.⁸³

Practically, this means that interviewers should determine whether applicants are victims of battery or extreme cruelty by a spouse or parent, thus establishing Kennedy Amendment eligibility. Once this eligibility is established, interviewers should qualify questions related to immigration status by assuring the applicant that the questions about to be asked are asked of everyone and that all responses will be kept confidential. This is done so that the applicant is not deterred from applying for legal aid. Hence, potential clients will not be afraid to access much needed legal services provided by LSC-funded organizations.

Battered immigrants who qualify for LSC-funded legal representation using federal LSC funds may prove their eligibility by providing:

- United States passport
- Birth certificate
- Naturalization certificate
- United States Citizenship Identification Card

⁷⁹Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 45,755, 45,757 (1997).

⁸⁰45 C.F.R. § 1626.4(b).

⁸¹45 C.F.R. §§ 1626.3, 1626.6(a), 1626.7(a).

⁸²45 C.F.R. §§ 1626.12, 1626.6, 1626.7.

⁸³This approach is not an option when the LSC-funded program has raised no non-LSC funds that can be used to represent battered immigrants who do not otherwise qualify for federally funded LSC services. Domestic violence programs should encourage local LSC-funded programs to raise and allocate non-LSC dollars for representation of battered immigrants.

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- Baptismal certificate showing place of birth within the United States and date of baptism within two months after birth
- Green card
- Evidence of lawful permanent residency or conditional residency
- Application for adjustment of status
- Evidence of admission as a refugee, asylee, conditional resident, or of withholding of deportation.

An LSC-funded organization may also accept any other authoritative document, such as a document issued by BCIS, a court, or another governmental agency, that provides evidence of citizenship or qualifying immigration status. Examples include documents confirming refugee or asylee status, conditional entry, or withholding of deportation. If a person is unable to provide any of the above documents, she may submit a notarized statement signed by a third party. LSC programs may accept certified copies or photocopies of any of the documents in cases where documentation of immigration status is required.

It is also important to take note that LSC-funded programs may provide emergency legal assistance without written verification of immigration status. The LSC regulations do not define "emergency." The preamble to the LSC regulations state, however, that emergency in the legal services context would include cases in which immediate action is necessary to preserve significant legal rights or prevent significant harm to a person's family, property, or other legal interests.⁸⁴ Under these emergency provisions, LSC-funded programs should be able to assist battered immigrants in filing for and obtaining temporary protection orders and civil protection orders which remove the abuser from the family home, grant custody, and provide immediate protection. They should be able to provide this assistance without regard to immigration status to those battered immigrants who qualify under state protection order laws, but who are abused by persons who are not their spouse or parent.⁸⁵ Further representation of battered immigrants, however, is not permitted unless they are abused by a spouse or parent or can provide documentation of immigration status that qualifies them for representation.

VAWA LEGAL ASSISTANCE FOR VICTIMS

Under the Violence Against Women Act amendments passed in 2000, a new program offering legal assistance for domestic violence victims was created.⁸⁶ The Legal Assistance for Victims (LAV) grants are designed to establish projects or expand existing programs that provide legal services to victims of domestic violence, stalking, and sexual assault. Organizations that receive grants under this new program may assist victims in a range of legal services that arise as a consequence of abuse or violence, including protection orders, family law, public benefits, immigration, employment, and housing matters.⁸⁷

Under this program, domestic violence is defined broadly to include abuse by a current or former spouse, a person with whom the victim shares a child, a person with whom the victim has cohabitated as a spouse, or other people who could be covered by a protection order under the domestic violence laws of the jurisdiction in question.⁸⁸ Because the federal funding under this program is provided to nonprofit organizations, not to individuals directly, this program is not a federal public benefit program and therefore is not subject to immigrant access restrictions. Thus, organizations receiving grants under this program may provide free or low-cost legal services to battered immigrants regardless of their immigration status. Advocates working with battered immigrants in local communities should collaborate with legal services providers to encourage them to apply for LAV funding to support legal representation of battered immigrants.

ADVOCACY STRATEGIES

⁸⁴ 45 C.F.R. § 1626.8.

⁸⁵ Advocates should urge LSC funded programs in their states to represent any battered woman in a protection order case without regard to her immigration status.

⁸⁶ 42 U.S.C.S. § 3796gg-6. This law codified and made permanent the civil legal assistance grant program that had been inoperative for a few years prior to VAWA 2000.

⁸⁷ Pub. L. No.106-386, § 1103, 114 Stat. 1464, 1503-1505, codified at 42 U.S.C. § 3796gg-6.

⁸⁸ 42 U.S.C.S. § 3796gg-2.

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LSC management and senior attorneys should educate advocates in the domestic violence community about the Kennedy Amendment because direct service providers may assume that the law prohibits immigrants from receiving legal services. Additionally, LSC program staff should educate their own staff by including the language of the Kennedy Amendment and articles such as this one in their training manuals for new attorneys and paralegals.

Because LSC-funded programs may represent otherwise ineligible battered immigrants under the Kennedy Amendment, programs should locate community resources to which they can refer immigrant victims whose abusers fall under other categories. LSC-funded programs should, in turn, accept referrals of clients who qualify for representation. Without careful coordination, legal aid programs not receiving LSC-funding may fill their caseload with clients who also qualify for LSC-funded representation. In this event, a battered immigrant whose abuser is not her spouse, but the father of her child, will have nowhere to turn for representation in a custody case, for example.

Coordination can also fill a critical need to develop additional resources. In many communities, LSC-funded organizations are beleaguered by the demand for their services. Local advocates and LSC-funded programs should work together to compile referral lists of private attorneys and other legal agencies whose staff understand domestic violence and immigration issues. Additionally, domestic violence advocates, along with legal services programs, should consider joint efforts to raise non-LSC funds they can use to provide services to battered immigrant women and children. This joint funding can be used to support advocate/legal services attorney collaborations in which one attorney working with advocates can provide legal representation to many more battered immigrant victims than if he or she were doing all of the client interviewing and evidence collection alone. This approach works particularly well in VAWA self-petitioning cases.

A model approach to such collaboration has been developed in Albuquerque, New Mexico. In New Mexico, one attorney trained battered women's advocates across the state on VAWA's self-petitioning provisions. Working with advocates who conduct client interviews and collect evidence for VAWA immigration cases based on checklists provided by the attorney, one attorney has been able to represent large numbers of battered immigrants in VAWA self-petitioning cases with a very high success rate in securing swift approvals from CIS.⁸⁹ This approach is particularly useful for ensuring that battered immigrant victims living in rural communities gain access to immigration relief offered by VAWA.

CONCLUSION

While the law precludes LSC-funded organizations from representing many non-citizens, the law does allow LSC-funded organizations to represent many domestic violence victims, regardless of their citizenship or immigration status. Battered immigrant women who have been abused by a spouse, parent, or member of their spouse's or parent's family can receive legal assistance from an LSC-funded organization for any matter that is directly related to their abuse, so long as the organization uses non-LSC funds for the representation. Other battered immigrants may be able to obtain emergency legal assistance to obtain temporary protection orders and civil protection orders.

While the language of the regulations and the statute does limit who is eligible for representation as a victim of domestic violence, many of the restrictions are subject to flexible interpretations, which LSC-funded organizations must be encouraged to interpret broadly.⁹⁰ Battered women's advocates must encourage LSC-funded organizations not to turn away any battered immigrant women because of the restrictions on representing non-citizens until they have carefully evaluated a woman's case. Ultimately, many battered immigrant women will be eligible for representation by the LSC-funded organization. Some will be eligible for services because they fit within the categories of non-citizens whom LSC programs may represent using federal funds. Others will qualify for legal services because they have been victims of domestic violence. Programs must be encouraged to represent everyone in protection order cases and to interpret the range of services they can offer immigrants abused by a spouse, parent, or specified family member broadly.

⁸⁹ For more information on this approach developed by Mirna Torres of Catholic Charities in Albuquerque, as well as sample materials, contact the National Immigrant Women's Advocacy Project (NIWAP). (202) 274-4457, info@niwap.org.

⁹⁰The LSC regulations implementing the 1997 statute encourage a broad and flexible interpretation. 62 Fed. Reg. 19,410, 19,411.

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Likewise, advocates should work with all local legal services programs, both those that are funded by LSC and those that are not, to encourage them to apply for LAV funding and to inform them that both LAV funding and other sources of OVW funds (STOP, Rural, Arrest, and Campus grants) can be used to provide assistance to battered immigrants in a broad array of matters, including assistance in immigration matters. Battered immigrants are eligible for legal assistance services authorized under VAWA through OVW-funded grants regardless of their immigration status. To assure that programs funded by OVW or state STOP grant funds will actually provide the full range of services battered immigrants need, it is important that legal services and all other programs apply for OVW or STOP grant funds to provide services to immigrant victims by specifically including in their grant applications a provision stating that they intend to provide legal assistance to battered immigrants. Provisions of immigration assistance need not be the primary purpose of the grant, but to ensure that immigration assistance can be provided when needed, this form of legal assistance should be listed in the grant.

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4.2

Public Benefits Access for Battered Immigrant Women and Children¹²

By Cecilia Olavarria, Amanda Baran, Leslye Orloff, and Grace Huang

Introduction

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA or Welfare Reform Act)³ and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA)⁴ substantially altered most immigrants' eligibility to receive many public benefits. These laws eliminate eligibility for most

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² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter PRWORA].

⁴ Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-547 (codified as amended at 8 U.S.C. § 1101 et seq.) [hereinafter IIRAIRA].

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immigrants for Supplemental Security Income (SSI)⁵ and Federal Food Stamps, limit access to certain other federal programs, and give states the discretion to determine whether immigrants can qualify for state and local public benefits programs. Furthermore, the new laws strengthen the connection between public benefits eligibility and the immigration status of an applicant. In response to the drastic changes in the Welfare Reform Act and IIRAIRA, subsequent laws have restored access to SSI and Food Stamps for very limited numbers of immigrants.⁶

Although the revised welfare laws contain provisions that deny public benefits to many immigrants, some immigrants, including some battered immigrants, either remain or have become eligible for certain critical public benefits. PRWORA grants access to some federal benefits to “qualified aliens” (hereafter referred to as “qualified immigrants”), depending on their date of entry to the United States.⁷ Additionally, guidance to the states issued by the U.S. Attorney General, and the definition of “federal means-tested public benefits” established by a number of federal agencies discussed in this chapter narrowly construe PRWORA to ensure that some public benefits remain available to some immigrants, including battered immigrants.⁸

It is important for advocates and attorneys working with battered immigrants to understand that, while PRWORA and IIRAIRA significantly reduce access to federal benefits for most immigrants, these laws also expand access to public benefits for some battered immigrants who had been previously ineligible for assistance. Two important examples are outlined below:

- Undocumented and documented immigrants who are battered by their U.S. citizen or lawful permanent resident spouses or parents can apply for some public benefits if they have filed a Violence Against Women Act (VAWA) immigration case, or certain family-based visa petitions (I-130) with CIS.
- IIRAIRA exempts many battered immigrants from “sponsor deeming” rules. These rules had previously made many battered immigrants, particularly those who had received lawful permanent resident status through a spouse or parent, economically ineligible for benefits because they were falsely presumed to have full access to the income and assets of their abusive spouse or parent. Many battered immigrants were ineligible for public benefits because their income, added to their abuser’s income, totaled an amount that exceeded the income guidelines of state and federal welfare programs. (See full discussion on “sponsor deeming” below.)

Furthermore, although PRWORA and IIRAIRA reduce access to certain federal public benefits, a wide range of other federally funded social services remain open to many immigrants, including battered immigrants, without regard to their status.

This chapter begins with a discussion of the types of immigration status relevant to a public benefits determination, including the legal requirements for qualifying as a battered “qualified” immigrant. Next follows a discussion of the other considerations relevant to public benefits eligibility, such as date of entry into the United States, eligibility bars, sponsor deeming, and the “40 qualifying quarters” exemption. The chapter continues with a description of the different categories of benefits for which battered immigrants may qualify, and a discussion of the specific eligibility rules for some important federal programs. Finally, the chapter concludes by providing guidance on several overarching issues of which attorneys and advocates for domestic violence victims should be aware when assisting battered immigrant women in applying for benefits. These issues include the need to accompany battered immigrants applying for benefits; “public charge” concerns; rules regarding inquiries into citizenship, immigration status, and Social Security numbers; and availability of non-work Social Security numbers.

⁵ SSI is a cash benefit program for low-income disabled and elderly individuals.

⁶ Agricultural Research, Extension, and Education Reform Act of 1998, Title V, Pub. L. No. 105-185, 112 Stat. 852.

⁷ While the term used in the law is “qualified aliens,” we will use the term “qualified immigrants.” Throughout this manual, except when quoting language contained in statutes, we use the term immigrants rather than aliens and “undocumented immigrants” rather than “illegal aliens.” We strongly encourage advocates and attorneys working with battered immigrants to use this same terminology.

⁸ Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Att’y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344 (Nov. 17, 1997).

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Readers should be aware that many immigrant eligibility provisions and public benefit requirements discussed in this chapter are both complex and deeply intertwined. Because of this overlapping complexity, some of the information in this chapter is duplicated in more than one section when required for clarity. Our goal is to assure that advocates and attorneys using this manual can easily access the most complete information they will need to assist clients.

Immigration Status and the Eligibility of Battered Immigrants for Public Benefits

When working with battered immigrants who need to obtain public benefits, service providers need to consider four different issues:

- 1) What is the woman's immigration status?
- 2) Is she herself eligible for benefits?
- 3) Can she apply for benefits that her children qualify for although she does not?
- 4) Can the battered immigrant apply for benefits for herself and for her children in a manner that will not risk her being reported to ICE?

The law distinguishes between three kinds of immigrants:

- “qualified immigrants” who entered the United States before August 22, 1996;
- “qualified immigrants” who entered the United States on or after August 22, 1996; and
- immigrants who are not “qualified immigrants”.

It is important to distinguish between “qualified immigrants” who entered the United States before August 22, 1996 and those who entered after because those who entered on or after August 22, 1996 are subject to a five-year bar from receiving federal public benefits after their date of entry (unless they fall into an “exempt” category). This will be discussed in further detail.

WHO ARE “QUALIFIED IMMIGRANTS”?

“Qualified immigrants” are:⁹

- Lawful permanent residents (including conditional permanent residents);¹⁰
- Refugees;
- Asylees;
- Persons granted withholding of deportation or cancellation of removal;
- Cuban/Haitian entrants;
- Victims of Trafficking;
- Veterans of certain United States military actions;
- Person granted conditional entry;
- Amerasians;
- Persons paroled into the United States for a year or more;
- Persons who have been battered or subject to extreme cruelty by a U.S. citizen or lawful permanent resident spouse or parent, with pending or approved VAWA cases or certain family-based immigrant petitions before BCIS; and
- Persons whose children have been battered or subject to extreme cruelty by the U.S. citizen or lawful

⁹PRWORA § 431(b), 8 U.S.C. § 1641(b).

¹⁰Conditional permanent residents are spouses of U.S. citizens who at the time of obtaining resident status were married less than two years. Therefore, CIS issues a “green card” which expires two years after their residency interview and the immigrant spouse must submit a second application to remove the conditions on her residence status 90 days before her card expires. For a full discussion of immigration options for battered immigrants with conditional residence status see Chapter 3 of this manual.

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permanent resident other parent, who have pending or approved VAWA cases or certain family-based petitions before CIS.

PRWORA provides that “qualified immigrants” are eligible for some, but not all, public benefits. Originally, many undocumented battered immigrants were not included in this definition. However, Congress subsequently recognized that certain immigrant women and children who were battered or subject to extreme cruelty needed access to public benefits if they were to escape abuse. Therefore, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)¹¹ expanded the definition of “qualified immigrants” to include immigrant women and children who were battered or subjected to extreme cruelty by their U.S. citizen or lawful permanent resident spouse or parent, and who were beneficiaries of an application for relief under VAWA or a family-based immigrant visa petition filed by an abusive spouse or parent with CIS.¹²

BATTERED IMMIGRANT CATEGORY

Under IIRAIRA, immigrant spouses or children who have been battered or subjected to extreme cruelty can be considered “qualified immigrants” under certain defined circumstances.¹³ An interim guidance issued by the U.S. Attorney General¹⁴ explains eligibility and verification of “qualified immigrant” status under PRWORA. The circumstances under which battered immigrant spouses or children of U.S. citizens or lawful permanent residents can be granted “qualified immigrant” status are the following:

- 1) The U.S. Citizenship and Immigration Services (CIS) or the Executive Office for Immigration Review (EOIR) (in this situation, this means an immigration judge):
 - has approved a self-petition¹⁵ or family-based visa (filed by the spouse or parent) for the applicant; OR
 - has granted cancellation of removal; OR
 - has granted suspension of deportation; OR
 - has found that the applicant's pending petition or application sets forth a *prima facie* case for such benefit or relief;¹⁶ AND
- 2) The immigrant or the immigrant’s child has been battered or subject to extreme cruelty in the United States by a U.S. citizen or lawful permanent resident spouse or parent, or by a member of the spouse’s or parent’s family residing in the same household (if the permanent resident or citizen spouse or parent consents to or acquiesces in such battery or cruelty and, in case of a battered child, the immigrant did not actively participate in the battery or cruelty); AND
- 3) There is a substantial connection between the battery or extreme cruelty and the need for public benefit sought; AND
- 4) The battered immigrant or child no longer resides in the same household as the abuser.

Requirements for Benefits Applications Based Upon Pending or Approved Applications:

- A VAWA case or qualifying family-based visa petition¹⁷ must be filed with CIS or EOIR before

¹¹IIRAIRA § 501, *amending* PRWORA by adding § 431(c).

¹²The VAWA case may be a self-petition, a cancellation of removal application or a suspension of deportation application.

¹³IIRAIRA § 501.

¹⁴Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Att’y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344 (Nov. 17, 1997).

¹⁵Note that spouses can file a self-petition up to two years after divorce.

¹⁶A *prima facie* case is one in which CIS or an immigration judge has made initial determination that a VAWA case contains all of the necessary elements of proof.

¹⁷Which a spouse or parent must have previously filed.

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the immigrant can qualify for benefits.

- If the case has been filed but is not yet approved, CIS or the immigration judge must have ruled that the pending petition or application filed sets forth a *prima facie* case.¹⁸
- To prove a *prima facie* case, the applicant must have presented in her petition at least some credible evidence that provides proof of each required element of her VAWA or family-based visa petition case.
- These approved petitions or applications qualify the applicant for benefits. When applying for benefits, the battered immigrant must give the public benefits agency a copy of her approval notice from CIS or EOIR, or her notice of *prima facie* case determination.

Requirements for Benefits Applications Based Upon Being Battered or Subjected to Extreme Cruelty:

- A battered immigrant with an approved VAWA case or *prima facie* determination is not required to provide the benefits-granting agency with evidence of abuse beyond her approved petition or *prima facie* determination letter. This is because, in order to have CIS or EOIR approve her VAWA petition or enter a *prima facie* determination, an applicant under VAWA must have shown that she experienced such battery or extreme cruelty.
- A battered immigrant with a family-based petition filed by her spouse or parent must submit proof of the battery or extreme cruelty (such as a protection order, police report, photographs, a report from a counselor at a battered women's program, or medical records) along with her approval notice or *prima facie* determination to the benefits agency.

“Battery or extreme cruelty” is defined as, but not limited to:

¹⁸Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Att'y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344, at 61,366 (Nov. 17, 1997)(providing guidance for establishing a *prima facie* case).

... being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under this rule. Acts or threatened acts that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence.¹⁹

To be a “member of the spouse or parent’s family” is defined as:

... any person related by blood, marriage, or adoption to the spouse or parent of the immigrant, or any person having a relationship to the spouse or parent that is covered by the civil or criminal domestic violence statutes of the state or Indian country where the immigrant resides, or the state or Indian country in which the alien, the immigrant’s child, or the immigrant child’s parent received a protection order.²⁰

The “Substantial Connection” Element of Proof

To obtain benefits a battered immigrant must demonstrate that there is a “substantial” connection between the battery or extreme cruelty and the need for the public benefit. As defined by the U.S. Attorney General’s Order, which sets forth a non-exclusive list, the following are examples of the types of circumstances in which there would be a “substantial connection” between abuse and the need for benefits:²¹

- To become self-sufficient following separation from the abuser;
- To escape the abuser or the abuser’s community;
- To ensure the safety of the victim, the victim’s child, or the victim’s parent;
- To compensate for the loss of financial support resulting from the separation;
- Because the victim lost her job or earns less because of the battery or cruelty or because of the involvement in legal proceedings relating them (child custody, divorce actions, etc.);
- Because the victim had to leave her job for safety reasons;
- Because the victim needs medical attention or mental health counseling or has become disabled;
- Because the victim loses a dwelling or a source of income following separation;
- Because the victim’s fear of the abuser jeopardizes the victim’s ability to take care of her children;
- To alleviate nutritional risk or need resulting from the abuse or following separation;
- To provide medical care during a pregnancy resulting from the relationship with the abuser, the abuse, or abuser’s sexual assault; or
- To replace medical coverage or health care services lost following the separation with the abuser.²²

Considerations when the battered immigrant or child no longer resides in the same household as the abuser:

The U.S. Attorney General’s Order notes that:

¹⁹*Id.* at 61,369. This definition is parallel to the definition of “battering and extreme cruelty” contained in the immigration regulations governing VAWA self-petitions and battered spouse waivers. Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061, at 13,074 (Mar. 26, 1996) (codified at 8 C.F.R. pt. 204). It is important for advocates to understand that this definition is broader than the definition of domestic or family violence contained in many state domestic violence statutes in that it includes emotional abuse, which, in many states, would not lead to the issuance of a protection order. It therefore may be necessary for advocates and attorneys assisting battered immigrants to educate state benefits-providing agency staff about this more inclusive definition.

²⁰Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Att’y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344, at 61,369. (Nov. 17, 1997)

²¹*Id.* at 61,370. This is not an all-inclusive list.

²²The U.S. Attorney General’s Interim Guidance on “Substantial Connection” provides a detailed, broad description of the types of circumstances under which battered immigrants may access benefits. *Id.*

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Although a qualified applicant is not a “qualified alien” eligible for benefits until the battered applicant or child, or parent ceases residing with the batterer, applicants will generally need the assurance of the availability of benefits in order to be able to leave their batterer and survive independently.²³

The Order therefore suggests that, wherever possible, the state benefits provider complete the eligibility determination process and approve the applicant for receipt of benefits prior to the time that the applicant has separated from the batterer. This ensures that the applicant will be able to receive benefits as soon as she leaves her abuser.

States have addressed this issue in two ways. Some states, like Illinois, for example, take the battered immigrant's application and complete the process of determining that she will be eligible to receive public benefits as a qualified alien. They then award her benefits immediately and give her one month to come back to the benefits-granting agency to provide them evidence that she no longer resides with the abuser. We advocate that states use this approach. Other states complete the benefits determination process, and inform the battered immigrant that she will receive the benefits as soon as she provides the benefits-granting agency with evidence that she is no longer residing with the abuser.

Evidence of separation from the abuser could include:

- “Civil Protection Order” (CPO) removing the abuser from her home;
- CPO ordering the abuser to stay away from her home;
- Letter from the landlord stating that the abuser no longer resides there;
- Letters from family members, friends, neighbors, or victim advocates stating that the abuser no longer resides in her household;
- Affidavit from victim asserting that abuser no longer resides with her;
- New lease agreement evidencing that she is not residing with abuser;
- Utility bills evidencing that she is no longer living in abuser's home.

Other Considerations Relevant to Public Benefits Eligibility

Once a battered immigrant qualifies for benefits under VAWA, she is legally entitled to access a much wider array of services and benefits than she would be able to receive if she was not a qualified immigrant. Nevertheless, several other factors are still relevant to determining which benefits programs she can access. These considerations, which also affect the eligibility of other immigrants and are described in detail below, include date of entry into the United States, eligibility bars to access, sponsor deeming, and the 40 qualifying quarters exemption.

WHEN THE IMMIGRANT ENTERED THE UNITED STATES: PRE- VS. POST-AUGUST 22, 1996 ENTRANTS

Advocates should be aware that immigrant eligibility for certain benefits depends in part upon the immigrant's date of entry into the United States. Immigrants who are or become “qualified immigrants,” and who entered the United States before August 22, 1996, are generally eligible for the same federal means-tested public benefits, federal public benefits, and federally funded social services available to U.S. citizens, except for SSI.²⁴ Further, states may choose to restrict some of the public benefits available to “qualified immigrants.”

Immigrants who become “qualified immigrants” and who entered the United States *on or after* August 22, 1996, however, are barred from receiving federal means-tested benefits during the first five years after obtaining

²³*Id.* at 61,370.

²⁴Immigrants who entered before August 22, 1996, are eligible for Supplemental Security Income (SSI) only if they were qualified immigrants, were lawfully residing in the United States, and were receiving SSI on August 22, 1996.

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qualified immigrant status. They may, however, receive, during this five-year period, federal public benefits that are not deemed to be "federal means-tested public benefits." With respect to both federal public benefits and federal means-tested public benefits, most immigrants are subject to income deeming rules that may continue to make them ineligible for such benefits (see discussion on sponsor deeming and the battered women's exception below).²⁵

A few groups of post-August 22, 1996, entrants are exempt from this five-year bar. These immigrants include:

- Refugees;
- Asylees;
- Victims of Trafficking;
- Amerasians;
- Cuban/Haitian entrants;
- Veterans and aliens on active military duty, their spouses (and unremarried surviving spouses), and their unmarried children under the age of 21 (includes Filipino, Hmong, and Highland Lao);
- Immigrants granted withholding of deportation;
- Certain immigrants without sponsors.

INDEFINITE, TEMPORARY, AND OPTIONAL BAR ON BENEFITS ELIGIBILITY

Under PRWORA, there are several different types of bars that prevent certain immigrants from accessing benefits. The three main bars are of varying durations and fall into the following categories: (1) indefinite bar, (2) temporary bar, and (3) optional state bar.

THE INDEFINITE BAR TO SSI

The indefinite bar applies to non-qualified immigrants, as well as to qualified immigrants who entered the United States after August 22, 1996. These immigrants, unless they later fall into a different category, are indefinitely barred from receiving SSI. However, certain exceptions to the indefinite bar on SSI apply to qualified immigrants under the following circumstances: (1) refugees, asylees and other "exempt" categories of qualified immigrants are exempt from the bar for the first seven years after gaining their status as refugees or asylees; (2) immigrants who meet the 40 qualifying quarter requirement are exempt; and (3) veterans or active duty military members and their spouses and unmarried dependent children are also exempt.²⁶

THE TEMPORARY FIVE-YEAR BAR TO "MEANS-TESTED PUBLIC BENEFITS"

The temporary bar prevents qualified immigrants who are post-August 22, 1996, entrants from accessing federal means-tested public benefits for a period of five years. (The term "federal means-tested public benefits" has a technical meaning and is described in a separate section below.) Similar to the indefinite bar, qualified immigrants who are "exempt," including refugees, asylees, or who are veterans or active duty military members and their spouses and unmarried dependent children, are exempt from the five-year bar on accessing federal means-tested public benefits.²⁷ Nonqualified immigrants are also barred from accessing federal means-tested public benefits.

OPTIONAL STATE BAR

The optional state bar exists in two forms. First, PRWORA gave states the option to deny TANF, Medicaid, and the Title XX Social Services Block Grant to qualified immigrants. The exceptions to this optional state bar are identical to the exceptions to the permanent bar on SSI and Food Stamps.²⁸ As a result of this bar, states may deny

²⁵In all other respects, the rights and limitations on post-August 1996 immigrants to receive public benefits do not differ from the rights and limitations of "qualified immigrants" who entered the U.S. before August 22, 1996.

²⁶8 U.S.C. § 1612(a)(2).

²⁷*Id.* § 1613.

²⁸*Id.* § 1612(b)(2).

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benefits under TANF, Medicaid, and the Social Services Block Grant to qualified immigrants even when those immigrants have surpassed the five-year bar on accessing federal means-tested public benefits.

Second, PRWORA gave the states the option to override the bar that prevents non-qualified aliens, including undocumented immigrants, from receiving state or local public benefits. To do so, a state must enact, after August 22, 1996, a new law that provides for such eligibility.²⁹

“SPONSOR DEEMING”

For any person to qualify to receive public benefits, the benefits granting agency must determine whether the applicant is "income eligible" to receive the benefit. “Sponsor deeming” rules control how the income eligibility determination is made for many non-citizens who apply for public benefits. Under immigration law, when an immigrant’s family member sponsors him or her to receive lawful permanent residency in the United States, the sponsoring family member must sign and file an affidavit of support with CIS. This affidavit states that the sponsor is willing to be financially responsible for that immigrant as the immigrant’s sponsor.³⁰ When an immigrant with an affidavit of support filed on her behalf applies for public benefits, sponsor deeming rules require that the benefits-granting agency assume, for the purposes of determining income eligibility for benefits, that the immigrant has full access to the income and assets of her sponsor. It is often the case that these rules render the vast majority of immigrants with sponsors ineligible to receive public benefits.

Sponsor deeming poses grave problems for battered immigrants who received their lawful permanent residency through U.S. citizen or lawful permanent resident spouses. In the past, deeming rules cut off many battered immigrant lawful permanent residents from public benefits when they fled their abusive sponsoring spouses. IIRAIRA created an exemption to sponsor deeming rules for the following immigrants:

- Qualified battered immigrant spouses and children (with certain limitations discussed below);
- Refugees;
- Asylees;
- Those granted withholding of deportation under Section 243 of the Immigration and Nationality Act (INA);³¹
- Lawful permanent residents who have earned or can be credited with 40 quarters of employment;³² and
- Lawful permanent residents at risk of hunger or homelessness.

THE BATTERED IMMIGRANT DEEMING EXEMPTION

Battered qualified immigrants who first entered the United States prior to August 22, 1996, may receive public benefits without being subject to the five-year bar and are exempt for one year from deeming requirements. Battered immigrants who need benefits beyond one year will either need a judicial or CIS determination of abuse, or they will be subject to deeming requirements. If they are required to satisfy deeming requirements after the expiration of the one-year period, they, like other lawful permanent residents, may count the qualifying quarters earned by their spouse or parent in order to qualify despite deeming.

Immigration law now specifically exempts most qualified battered immigrants from satisfying deeming requirements for 12 months³³ if the battery or extreme cruelty took place in United States; if the abuser was the spouse, parent, or member of spouse’s or parent’s family; if there is a "substantial connection" between the battery or extreme cruelty and the need for the public benefit; and if the victim no longer resides with the abuser.

²⁶ *Id.* § 1621(d).

³⁰ Immigration and Nationalization Act (INA) § 212(a)(4)(C)&(D), 8 U.S.C. § 1182(a)(4)(C)&(D); INA § 213A(a)(1), 8 U.S.C. § 1183a(a)(1).

³¹ 8 U.S.C. § 1253.

³² In certain circumstances, quarters of employment earned by a spouse or parent may be credited to the immigrant.

³³ Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Att’y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344, at 61,371 (Nov. 17, 1997).

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The following groups of battered immigrants are exempt for 12 months from meeting the deeming requirements:

- VAWA self-petitioners (adults and children with *prima facie* determinations, approved self-petitions, or those who have received lawful permanent residency under VAWA);
- VAWA cancellation of removal or VAWA suspension of deportation applicants (adults and children with *prima facie* determinations, approved self-petitions, or those who have received lawful permanent residency under VAWA);
- Battered immigrants with approved I-130 petitions filed for them by their spouses or parents;
- Children whose battered immigrant parent qualifies for benefits due to VAWA or an approved family-based visa petition (whether or not the child has been abused);
- Lawful permanent residents and any dependent children who obtained their status through a family-based visa petition and were battered before and/or after obtaining lawful permanent residency; and
- Certain indigent immigrants whom the benefits provider determines to be unable to obtain food and shelter in the absence of assistance.

Notably, IIRAIRA recently created a new type of affidavit of support (the I-864) with much more stringent income-deeming rules than previous affidavits. Battered immigrants with I-864 affidavits of support submitted after December 5, 1997, are explicitly exempted from the I-864 deeming rules for 12 months.³⁴ After the one-year exemption expires, a battered immigrant applicant may continue to be exempted from the deeming requirements if she can demonstrate:

- that an order of a judge or a prior CIS determination has recognized the battery or cruelty; AND
- that there continues to be a substantial connection between the abuse and battery suffered and the need for the benefits sought.³⁵

Judicial determinations of abuse that would be sufficient to meet this requirement might be made in a protection order case, a criminal case, a custody case, a divorce and property division case, a self-petitioning or battered spouse waiver immigration case, a suspension of deportation case, or a cancellation of removal case.³⁶

However, subsequent immigration legislation, aimed at preserving access to greater benefits for persons who received lawful permanent residency before IIRAIRA, may have undermined the deeming exemption for battered immigrant women.³⁷ Whether battered lawful permanent residents with old I-134 affidavits of support are exempt from deeming is now unclear. Generally, the battered immigrant exemption to deeming requirements applies to all battered immigrants who qualify for benefits. However, this issue is not fully settled. In the meantime, attorneys and service providers working with battered immigrants should determine whether an I-134 or I-864 was filed for a battered immigrant. In states that have adopted the Family Violence Option (FVO) battered immigrants with old affidavits of support, I-134, may succeed in getting the state welfare agency to use the FVO to waive deeming.

In addition to some battered immigrants, certain categories of “other qualified immigrants” are exempt from sponsor deeming in all federal means-tested programs:

Post August 22, 1996, Entrants Exempt From Sponsor Deeming
Those who have become U.S. citizens; Persons with 40 quarters of work history in the United States Persons married to U.S. citizen or lawful permanent residents with 40 quarters of work history; Certain battered immigrants (for up to 12 months or longer if there has been a judicial finding regarding domestic violence);

³⁴ *Id.*

³⁵ *Id.*; IIRAIRA § 552, amending PRWORA § 421(f)(1)(B).

³⁶ 8 U.S.C. § 1631(f); see also NATIONAL IMMIGRATION LAW CENTER, *Alien Eligibility of Federal Benefits*, in IMMIGRANTS AND WELFARE RESOURCE MANUAL: 1998 EDITION, Tab 1-9 (1998).

³⁷ Balanced Budget Act of 1997 § 5505(e), Pub. L. No. 105-33, codified at 42 U.S.C. § 608(f).

Immigrants facing hunger or homelessness (for up to 12 months) Immigrants whose sponsor is deceased.

COUNTING OF 40 QUARTERS OF EMPLOYMENT IN THE UNITED STATES

In general, qualified immigrants who entered the country after August 22, 1996, are indefinitely ineligible for Food Stamps and SSI, and are ineligible for federal means-tested public benefits for five years after attaining their qualified immigrant status. However, there are several exceptions to this rule, one of which applies to qualified immigrants who meet a forty work-quarter (10 year) requirement.³⁸ In order to satisfy the work requirement, the qualified immigrant must pass a test by achieving 40 quarters of qualifying work. A “qualifying quarter” is a three-month work period with enough income to qualify as a Social Security quarter and, with respect to periods beginning after 1996, during which the worker did not receive Federal means-tested assistance.³⁹

The 40-quarter test works in the following way: a “qualifying quarter” is calculated upon the basis of how much a person earns in a calendar year. Each year, the required amount is determined by the Social Security Administration (SSA). Up to four quarters of credit may be earned yearly. All work done in the United States will be counted toward qualifying quarter credits. One does not necessarily have to work during all four calendar quarters. Instead, the SSA counts qualifying quarters solely based upon the total amount earned. For example, in 2001, a qualifying quarter was credited for every \$830 earned. This amount changes yearly based upon inflation. Because the maximum number of qualifying quarters that may be achieved each year is four, qualified immigrants must have worked for all or part of each year for at least ten years in order to attain their 40 qualifying quarters of work and to overcome the five-year bar on benefits eligibility. If an immigrant receives federal means-tested public benefits at any time during a quarter, the individual will not receive credit for that quarter of work.

Any work done by a parent prior to the applicant’s eighteenth birthday may be counted. Similarly, if the immigrant is married or widowed, any work done by the spouse during the marriage may be counted toward establishing a qualifying quarter. However, after divorce, immigrant spouses lose the ability to count quarters earned by their spouses during the marriage.

As noted above, immigrants who can prove 40 quarters of work credit may be eligible to receive public benefits for which they otherwise would be ineligible due to the permanent or five-year bar on certain types of assistance. For example, persons with 40 quarters of work credit can receive SSI, the primary program that is otherwise indefinitely unavailable to qualified immigrants. Similarly, persons with 40 quarters can avoid the five-year bar on receiving federal public benefits, and can escape other state restrictions on benefits to immigrants. Even if qualified immigrants are subject to the five-year bar, but have not accumulated enough qualifying work quarters to overcome that restriction, qualified immigrants may count work during those five years to establish qualifying quarters. Thus, if a person with only seven years of work credit becomes a qualified immigrant and if they work for three more years after attaining qualified immigrant status, they will only be barred from access to benefits for three rather than five years.

An immigrant may also count work done in the United States without authorization toward his or her 40 quarters. However, when an immigrant wishes to count quarters in which he or she worked illegally, he or she may have to share information with the Social Security Administration and possibly to CIS and the Internal Revenue Service, which could result in tax and immigration consequences. Immigrants considering using work credit should pay back taxes for those years worked illegally (if taxes on those wages have not been paid) and should consult an immigration lawyer before reporting work without legal authorization to ensure that using such quarters to qualify for benefits will not undermine access to legal immigration status in the long run.

QUICK TIPS

- Meeting the 40-quarter requirement depends upon the number of years worked. Determine how

³⁸ The other exceptions to both the permanent and five-year bars on receiving certain benefits apply to refugees, asylees, and veterans or active duty military members and their spouses and unmarried dependent children.

³⁹ Social Security Act, title II, 42 U.S.C. §§ 401, *et seq.*

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many years the battered immigrant, the battered immigrant's spouse (during their marriage if still married, or if spouse is deceased, but not if the spouses are divorced), or the battered immigrant's parents (while the alien was under 18 years of age) lived or worked in this country. If the answer is a total of less than five to ten years, the alien cannot meet the 40-quarter requirement.⁴⁰

- A battered immigrant who has resided in the United States for over five years may be able to meet the 40 quarter requirement if she was married during the entire five-year period and both she and her spouse worked and earned sufficient money each of those five years to count towards 40 quarters. The five years of work credit of the spouse and the five years of work credit of the immigrant may be added together to equal ten years of work credit as long as the battered immigrant and her spouse remained married. Similarly, if the marriage was for seven years and the spouse had four quarters of work credit for each of the seven years and the immigrant spouse had an additional 12 quarters (three years) of work credit during those seven years, she could also claim a total of 40 quarters. The immigrant, however, loses the ability to count the spouse's quarters once she and the spouse are divorced
- The term "quarter" means the three-calendar-month period ending on March 31, June 30, September 30, or December 31 of any year.⁴¹
- Social Security credits called "quarters of coverage" are earned by working at a job or as a self-employed individual as long as Social Security taxes are paid to SSA (either through employer withholding or direct payment by the immigrant). Each earner can be credited with a maximum of four quarters each year.⁴²
- Credits are based solely upon the total yearly amount of earnings. (For example, in 2001 a qualifying quarter totaled \$830).⁴³ Thus, an immigrant would qualify for four quarters in 2001 if at any time during 2001 the immigrant earned a total of \$3320.00.
- The current quarter may be included in the 40-quarter computation.⁴⁴
- Qualifying quarters must be verified by the benefits-granting agency through the Social Security Administration.
- The law provides that the worker's own quarters and quarters worked by a parent while the immigrant was under age 18, by a spouse during the marriage if the immigrant remains married to the spouse or the marriage ended by the death of the spouse, may also be credited to the individual in determining the number of qualifying quarters.
- A battered immigrant who relies on her husband's forty quarters of work credit may only use these quarters if they are still married when she applies for benefits.
- If they divorce after qualifying for benefits, a battered immigrant will be able to continue receiving benefits only until she is required to recertify her ongoing qualification for benefits. At recertification, she can no longer count her husband's quarters.

What Benefits May Battered Immigrants Receive?

The types of *federal* benefits available to battered immigrants can be divided into three categories: (1) "federal

⁴⁰Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Att'y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344, at 61,412 (Nov. 17,1997).

⁴¹*Id.* at 61,413.

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

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means-tested public benefits,” (2) “federal public benefits,” and (3) other federally funded social service programs that do not fall within the definition of “federal public benefit” or “federal means-tested public benefits”. These categories are listed according to the severity of their immigrant eligibility rules (from most to least restrictive):

- Federal means-tested public benefits are generally open to many qualified immigrants, although immigrants who entered the country after August 22, 1996, are subject to certain restrictions;
- Federal public benefits, on the other hand, are open to all qualified aliens without limitation;
- Unlike federal means-tested public benefits and federal public benefits, which are closed to non-qualified immigrants, federally funded social services are open to all immigrants, including battered immigrants, regardless of their immigration status.

Each of these categories of federal benefits is described in detail below. Attorneys and advocates should also be aware that battered immigrants may be eligible for other nonfederal public benefits that are provided by state or local governments. (See the “State and Local Public Benefits” section later in this chapter for details on state benefit program restrictions.)

FEDERAL MEANS-TESTED PUBLIC BENEFITS

Federal means-tested public benefits consist mostly of cash, cash-equivalent or medical services provided directly to individuals and are generally the most difficult benefits to access. Under PRWORA, qualified immigrants who entered the country on or after August 22, 1996, are ineligible for this category of benefits for a period of five years,⁴⁵ unless they meet certain specified exceptions.⁴⁶ Immigrants entering the United States before August 22, 1996, who are or later become qualified immigrants, are eligible for federal means-tested public benefits to the same extent as U.S. citizens (except for SSI), subject to deeming rules and state restrictions.⁴⁷

Although there is no single federal definition, the term “federal means-tested public benefit” has thus far been interpreted by the Department of Health and Human Services (HHS),⁴⁸ the Department of Agriculture (USDA),⁴⁹ the Department of Housing and Urban Development (HUD),⁵⁰ and the Social Security Administration.⁵¹ These agencies consistently have defined the term “federal means-tested public benefit” to *apply only to mandatory spending programs in which eligibility for the program’s benefits, or the amount of such benefits, or both, are determined on the basis of the income, resources, or financial need of the individual, household, or family unit seeking the benefit.*

The HHS programs that constitute federal means-tested public benefits under PRWORA are Medicaid and TANF,⁵² while the Food Stamp program and the food assistance block grant program in the U.S. territories are the only programs that USDA has determined to be federal means-tested public benefits.⁵³ HUD has concluded that none of its programs falls within the definition of federal means-tested public benefit,⁵⁴ while SSA has identified

⁴⁵PRWORA § 403, 8 U.S.C. § 1613.

⁴⁶The exceptions to the five-year bar on federal means-tested public benefits apply to: refugees and asylees; veterans, active duty military personnel, or their spouses or unmarried dependant children; and qualified immigrants who meet the 40-quarter work requirement.

⁴⁷Immigrants entering the United States before August 22, 1996, are subject to pre-August 22, 1996 deeming rules. Deeming rules do not apply to VAWA eligible battered immigrants and battered immigrants with pending spouse-based petitions or battered immigrants who obtained lawful permanent residency status through a VAWA self-petition or spouse-based petition.

⁴⁸Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of “Federal Means-Tested Public Benefit,” 62 Fed. Reg. 45,256, at 45,257 (Aug. 26, 1997).

⁴⁹Federal Means-Tested Public Benefits, 63 Fed. Reg. 36,653, at 36,654 (Jul. 7, 1998).

⁵⁰Eligibility Restrictions on Noncitizens: Inapplicability of Welfare Reform Act Restrictions to Federal Means-Tested Public Benefits, 65 Fed. Reg. 49,994 (Aug. 16, 2000).

⁵¹Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA): Federal Means-Tested Public Benefits Paid by the Social Security Administration, 62 Fed. Reg. 45,284 (Aug. 26, 1997).

⁵²Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA): Interpretation of “Federal Means-Tested Public Benefit,” 62 Fed. Reg. 45,256, at 45,257 (Aug. 26, 1997).

⁵³Federal Means-Tested Public Benefits, 63 Fed. Reg. 36,653 (Jul. 7, 1998).

⁵⁴Eligibility Restrictions on Noncitizens: Inapplicability of Welfare Reform Act Restrictions no Federal Means-Tested Public Benefits, 65 Fed. Reg. 49,994, at 49,994 (Aug. 16, 2000).

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only one program, SSI, that constitutes a federal means-tested public benefit.⁵⁵ Advocates should be aware that, although SSI is, as a federal means-tested public benefits, theoretically available to qualified immigrants who are new entrants after the five-year bar has elapsed, in fact, a separate bar on SSI permanently prohibits non-exempt qualified immigrants from receiving assistance under these programs. (See chart on federal means-tested public benefits below.)

PRWORA explicitly exempted the following programs from the definition of “federal means-tested public benefit:”

- Emergency Medicaid,
- Short-term in-kind emergency disaster relief,
- Assistance under the National School Lunch Act or the Child Nutrition Act of 1966,
- Public health assistance for immunizations and for testing and treatment of communicable diseases,

Federal Means-Tested Public Benefits Available to Qualified Alien Battered Immigrants

Temporary Assistance to Needy Families (TANF)⁵⁶

- Persons who first entered the United States on or after August 22, 1996, are barred for the first five years after they become “qualified immigrants,” unless “exempt.”⁵⁷

Medicaid⁵⁸

- Persons who first entered the United States on or after August 22, 1996, are barred for the first five years after they become “qualified immigrants,” from all non-emergency Medicaid including parental care, and children’s health, unless “exempt.”

SSI

- Benefits are open only to those qualified immigrants who entered the United States before August 22, 1996 and who are “exempt.” However, qualified immigrants who entered before August 22, 1996 and who were reviving SSI on August 22, 1996 or who are or subsequently become disabled are also eligible.⁵⁹
- Theoretically, individuals who entered the UNITED STATES on or after August 22, 1996 are barred for the first five years after they become “qualified immigrants,” unless “exempt.” However, a separate, permanent bar on SSI also applies to non-“exempt” qualified immigrants who are post-August 22, 1996, entrants, making them ineligible.

- Foster Care and Adoption Assistance (if the parent is a qualified alien),
- Programs and services at the community level necessary for the protection of life and safety designated by the U.S. Attorney General (see below),
- Student assistance under Title IV, V, IX, and X of the Higher Education Act and Title III, VII, and VIII of the Public Health Service Act,
- Means-tested programs under the Elementary and Secondary Education Act,
- Head Start, and

⁵⁵Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA): Federal Means-Tested Public Benefits Paid by the Social Security Administration, 62 Fed. Reg. 45,284 (Aug. 26, 1997).

⁵⁶Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA): Interpretation of “Federal Means-Tested Public Benefits,” 62 Fed. Reg. 45,256 (Aug. 26, 1997).

⁵⁷Exempt groups include: veterans and active duty military personnel and their spouses, unremarried surviving spouses or children; refugee categories: persons who have one of the following immigration statuses refugee, asylee, withholding or removal/deportation, Amerasian immigrants, and Cuban or Haitian Entrants; individuals who meet the 40 quarters exemption; and Native Americans born outside of the United States.” NATIONAL IMMIGRATION LAW CENTER, IMMIGRANT ELIGIBILITY FOR PUBLIC BENEFITS, Chart (Dec. 1998). See www.nilc.org for more information.

⁵⁸*Id.*

⁵⁹Balanced Budget Act of 1997 § 5301, Pub. L. No. 105-33, 11 Stat. 251. See also, Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Pub. L. No. 105-306, 32, 112 Stat. 2926.

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- Benefits under Title I of the Workforce Investment Act of 1998.⁶⁰

Some, but not all, of these programs are also exempted from the definition of “federal public benefit.” See the “Federal Public Benefits” section for a list of programs that are exempted from that definition.

Detailed descriptions of each of these federal means-tested public benefits programs and the degree of their accessibility for battered immigrants are discussed separately later in this chapter. Advocates should note that despite the similarity in terminology, there is a legal distinction between “federal means-tested public benefits” and “federal public benefits,” which are described in the next section. Indeed, battered immigrants can receive federal public benefits even if they do not qualify for federal means-tested public benefits because qualified immigrants are eligible for federal public benefits without regard to their date of entry into the United States. See the separate section on date of entry requirements for a more detailed discussion of this issue.

FEDERAL PUBLIC BENEFITS

As distinguished from “federal means-tested public benefits,” “federal public benefits” have less strict immigrant eligibility rules than the programs described in the previous section of this chapter and are open to all qualified immigrants without restriction, regardless of their date of entry. In general, the only individuals who are not eligible for any of the benefits in this category are non-qualified immigrants (including undocumented immigrants) with certain exceptions described below.

Only certain benefits are defined as “federal public benefits” under the Welfare Act.⁶¹ The statutory definition includes:

- Grants, contracts, loans, and professional or commercial licenses provided by, or funded by, a U.S. agency;
- Benefits for retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, and unemployment, provided by or funded by a U.S. agency.

Programs are only considered federal public benefits when payments are made or assistance is provided *directly* to:

- an individual
- a household or
- a family eligibility unit.

If payments of federal funds are being made to a state in the form of block grant money, to a shelter, to a hospital or to other entities, these are not considered “federal public benefits” and are not subject to restrictions on immigrant access.⁶² The U.S. Attorney General’s Guidance clarifies this by stating:

⁶⁰8 U.S.C.S. § 1613(c).

⁶¹NATIONAL IMMIGRATION LAW CENTER, *Alien Eligibility of Federal Benefits*, in IMMIGRANTS AND WELFARE RESOURCE MANUAL: 1998 EDITION, Tab 1-9, 17-18 (1998).

⁶²*Id.* at 18.

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Although the Act prohibits certain aliens from receiving non-exempted "federal public benefits," it does not prohibit governmental or private entities from receiving federal public benefits that they might then use to provide assistance to aliens, so long as the benefit ultimately provided to the non-qualified alien does not itself constitute a "federal public benefit."⁶³

Federal Means-Tested Public Benefits Available to Qualified Alien Battered Immigrants		
• Food Stamps		
Current Law	Food Stamp Reauthorization Act (Pub. L. 107-171, Section 4401)	Effective Date
<p>Qualified Immigrants who entered after August 22, 1996 are not eligible to receive Food Stamps for five years unless they are otherwise exempt.*</p> <p>Immigrants have an additional requirement of demonstrating 40 qualifying quarters of employment.</p>	<p>Restores food stamp benefits for qualified immigrants who have lived in the UNITED STATES under qualified immigrant status for at least five years. Qualified immigrants are: lawful permanent residents, refugees, asylees, trafficking victims (T visa holders), veterans, Amerasians, individuals granted withholding of deportation or removal, Cuban/Haitian entrants, individuals paroled in the US for at least one year, conditional entrants, and VAWA applicants who have received a <i>prima facie</i> determination or whose case has been approved. This provision took effect April 1, 2003.</p>	<p>April 1, 2003</p>
<p>Qualified immigrant children are eligible for food stamps only if they were lawfully residing in the UNITED STATES on or before August 22, 1996 or they are otherwise exempt.*</p>	<p>Qualified immigrant children under 18 years of age are eligible to receive food stamps regardless of their date of entry (i.e.- eliminates five year bar). Qualified immigrant children are also not subject to deeming requirements. This provision took effect October 1, 2003.</p>	<p>October 1, 2003</p>
<p>Qualified disabled immigrants are eligible to receive food stamps only if they were lawfully residing in the UNITED STATES on or before August 22, 1996 and if they are currently receiving benefits for their condition or they are otherwise exempt.*</p>	<p>Qualified disabled immigrants are eligible to receive Food Stamps, regardless of date of entry, if they are receiving benefits for their condition. Sponsor deeming does apply to qualified disabled immigrants. This provision took effect October 1, 2002.</p>	<p>October 1, 2002</p>
<p>* Refugees, Asylees, Trafficking victims with T visas, Amerasians, Cuban/Haitian Entrants, and immigrants granted withholding of deportation are exempt from the five-year bar.</p>		

⁶³Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Att'y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344, at 61,361(Nov. 17, 1997).

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Thus, if a local agency receives a "grant" to provide shelter to domestic violence victims, fire protection, or crime victim counseling, or services that do not meet the strict statutory definition of "federal public benefits," these services may be provided to any person regardless of immigration status, because immigrant restrictions do not apply.⁶⁴ This remains true even when the federal program funds would be deemed a "federal public benefit" if the grant was made to an individual, household, or family unit.

The federal government as a whole has not issued regulations defining "federal public benefits." Five years after enactment of PRWORA, only one federal agency, the Department of Health and Human Services (HHS), has issued a notice interpreting the term "federal public benefit" and identifying which of its programs provide such benefits.⁶⁵ In order to reach its conclusion, HHS issued a detailed analysis of the phrase "individual, household, or family eligibility unit." According to HHS, the phrase "individual, household, or family eligibility unit" refers to:

benefits that are (1) provided to an individual, household, or family, and (2) the individual, household, or family must, as a condition of receipt, meet specified criteria (e.g., a specified income level or residency) in order to be conferred the benefit, that is, they must be an "eligibility unit." Such benefits do not include benefits that are generally targeted to communities or specified sectors of the population (e.g., people with particular physical conditions, such as a disability or disease; gender; general age groups, such as youth or elderly).⁶⁶

No federal agency other than HHS has issued a notice defining "federal public benefit." Although the HHS interpretation should give some guidance as to whether certain programs in other federal agencies are considered federal public benefits, advocates who have battered immigrant clients who are not yet qualified immigrants should consult with experts on battered immigrants and welfare to determine whether or not a given program is a federal public benefit off-limits to non-qualified aliens before recommending that non-qualified battered immigrants apply for such benefits.⁶⁷

Finally, some programs that may otherwise appear to meet the definition of a federal public benefit were explicitly exempted by PRWORA from immigrant restrictions.⁶⁸ Because these programs are exceptions that remain open to qualified and non-qualified immigrants alike, they are discussed in the following section of this chapter.

FEDERALLY FUNDED SOCIAL SERVICES AVAILABLE TO NON-QUALIFIED IMMIGRANTS

Generally "not-qualified immigrants" are ineligible for federal, state, and local public benefits.⁶⁹ Such benefits, however, tend to have a narrow, technical definition, and non-qualified immigrants remain eligible to receive a wide array of public benefits, even those that are funded with federal dollars. (State and local benefits are discussed in a separate section below.)

This category of benefits is particularly critical for battered immigrants who have not yet attained, or who cannot attain, qualified immigrant status. Unfortunately, some battered immigrants who are legally entitled under VAWA to access public benefits face procedural barriers that make attaining qualified immigrant status more difficult. Groups of battered immigrants who may not be able to access federal public benefits include:

⁶⁴*Id.*

⁶⁵Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Public Benefit," 63 Fed. Reg. 41,658, at 41,660 (Aug. 4, 1998). The chart at the end of this section provides a partial list of some of the programs that HHS and other federal agencies consider to be federal public benefits. In addition, readers seeking a more detailed list of federal public benefit programs should consult the appendix.

⁶⁶*Id.* at 41,659. Battered immigrants who are qualified immigrants under VAWA, battered immigrants with approved family-based visa petitions (I-130), and battered lawful permanent residents abused by a spouse, parent or member of the spouse or parent's family however, are always eligible for all benefits in this category.

⁶⁷Contact the National Immigrant Women's Advocacy Project (NIWAP) at (202) 274-4456 or info@niwap.org with questions concerning battered immigrant access to benefits.

⁶⁸PRWORA § 401(b), 8 U.S.C. § 1611(b).

⁶⁹The definition of which programs are considered "federal, state or local public benefits" has not been settled. Advocates and attorneys are encouraged, until a definition is issued, to urge benefits providers to narrowly define those benefits that are off limits to non-qualified immigrants.

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- Battered immigrant self-petitioners who filed self-petitions with the Vermont Service Center without the assistance of an attorney or trained advocate, and failed to include sufficient evidence in their self-petition to be awarded a *prima facie* determination⁷⁰;
- Battered immigrants who only qualify for VAWA cancellation of removal, and who have been unable to file for this relief because the ICE has not placed them in removal (also known as deportation) proceedings; and
- Battered immigrants whose spouses filed an I-130 family-based visa petition for them that has not been approved, and who need a *prima facie* determination in that case.⁷¹

Undocumented battered immigrants who do not qualify to file a self-petition to attain lawful permanent residency, those who do not qualify to file for cancellation of removal through VAWA, U (crime victim) visa applicants, and battered immigrants who qualify for VAWA protection but who face procedural barriers to access to public benefits, are all still eligible to receive a limited set of services and benefits funded by federal and state governments.

Some Significant Federal Public Benefit Programs Available to All Qualified Immigrants⁷²

Administration on Developmental Disabilities (ADD) (direct services only)⁷³
Child Care and Development Fund
Independent Living Program
Job Opportunities for Low Income Individuals (JOLI)
Low-Income Home Energy Assistance Program (LIHEAP)
Medicare
Postsecondary Education Loans and Grants
Public and Assisted Housing
Refugee Assistance Programs
Section 8 Subsidized Housing
State Children's Health Insurance Program (CHIP)
Title IV Foster Care and Adoption Assistance Payments (if parents are "qualified immigrants")
Title XX Social Services Block Grant Funds

Federally Funded Programs

There are several federally funded social service programs that are not subject to restrictions on the basis of immigration status, and are therefore available to all immigrants – both documented and undocumented immigrants as well as qualified immigrants. One group of programs that fall into this category are programs that otherwise might meet the definition of "federal public benefit" but that were exempted by PRWORA:⁷⁴

- Emergency Medicaid;⁷⁵

⁷⁰In such cases, it is recommended that the advocate or attorney assisting the battered immigrant who originally filed a *pro se* case explain the urgent need for benefits, and inquire about what additional evidence would need to be submitted to get a *prima facie* determination.

⁷¹There is currently no mechanism to obtain a *prima facie* determination in a family-based visa case. Applicants must wait until the family-based visa petition is finally adjudicated. One option in such cases is for the abused spouse to file a self-petition under VAWA through which she can obtain a *prima facie* determination, which requires an additional filing fee.

⁷²For a more detailed list of federal public benefits, please refer to the appendix.

⁷³The Administration on Developmental Disabilities operates four programs that provide services to individuals with developmental disabilities. They are: State Councils on Developmental Disabilities; State Protection and Advocacy Agencies; National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Services; and Projects of National Significance. Although any portion of these programs that provides direct services to individuals is considered to be a "federal public benefit" off-limits to non-qualified immigrants, any benefits or services that flow to individuals through states, schools or universities, or other nonprofit organizations, are not federal public benefits and are therefore open to all immigrants regardless of immigration status.

⁷⁴PRWORA § 401(b), 8 U.S.C. § 1611(b).

⁷⁵Emergency medical assistance must be provided to all immigrants regardless of their status. Emergency Medicaid is

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- Short term, in-kind emergency disaster relief programs;
- Public health assistance for immunizations and for testing and treatment of communicable diseases;
- Programs and services at the community level necessary for the protection of life and safety designated by the U.S. Attorney General;⁷⁶
- Programs for housing or community development assistance to the extent that the immigrant is receiving such assistance on August 22, 1996;
- School lunch and breakfast programs.

Nonprofit and Charitable Organizations Providing Services.

In addition, not all of the benefits or services provided by federal means-tested public benefits programs or federal public benefits programs count as federal means-tested public benefits or federal public benefits. Some benefits or services under such programs may not be provided to an “individual, household, or family unit” and therefore do not constitute federal means-tested public benefits or federal public benefits.⁷⁷ For example, Food Stamps are federal means-tested public benefits. However, food provided by a shelter or food bank is not a federal means-tested public benefit, even if some or all of the food is provided with federal dollars. Similarly, TANF funds that are paid to support the work of a shelter are not federal means-tested public benefits.⁷⁸

Furthermore, all immigrants have access to benefits provided by organizations that are both nonprofit and charitable. These organizations are exempt from immigration status verification and reporting, even if they receive federal, state, or local funding.⁷⁹ IIRAIRA eliminated the requirement that nonprofit charitable organizations either seek an applicant’s confirmation that she is a qualified immigrant, or have a separate entity verify the applicant’s status before providing federal, state, or local benefits.⁸⁰ Thus, nonprofit charitable organizations providing federal, state, or local public benefits are not required to determine, verify, or otherwise require proof of an applicant’s eligibility for such benefits on the basis of the applicant’s citizenship or immigration status. Nonprofit entities may not be penalized for failing to verify citizenship or immigration status, or for providing federal public benefits to an individual who is not a U.S. citizen, U.S. non-citizen national, or qualified immigrant.⁸¹ Nonprofit service agencies are barred from providing services that are defined as “federal public benefits” directly to particular individuals in their program only when an agency that is not exempt from verification requirements (such as a state government agency) has performed verification of the individual’s qualification to receive federal public benefits and found that the individual is not a “qualified alien”.⁸² This is true even if the nonprofit entity is providing federal public benefits like TANF to individuals. However, if an organization required to verify eligibility presents verification to the nonprofit charitable organization about the not-qualified immigration status of an undocumented person, the nonprofit charitable organization may not continue providing services that would be deemed “federal public benefits” to that undocumented individual. This does not mean that the individual would be removed from the shelter or other program; rather, it means that services to that immigrant would have to be provided with other funds. Thus, it is critical that advocates and attorneys carefully interview immigrant clients to determine eligibility before sending them to apply for any public

available in all cases where the patient needs treatment for medical conditions with acute symptoms that could jeopardize the patient’s health, impair body functions, or cause dysfunction of any bodily organ or part. 42 U.S.C. § 1396(b)(v)(3). This definition includes all labor and delivery.

⁷⁶Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 Fed. Reg. 3,613 (Jan. 16, 2001).

⁷⁷Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of “Federal Public Benefit,” 63 Fed. Reg. 41,658 (Aug. 4, 1998). See full discussion of such programs in Chapter Four of this manual and discussion below.

⁷⁸Department of Health and Human Services, *Policy Q’s & A’s - Immigrants*, at <http://www.acf.dhhs.gov/programs/ofa/polquest/immigran.htm> (last updated Jan. 2001).

⁷⁹Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Att’y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344, at 61,345-46 (Nov. 17, 1997).

⁸⁰IIRAIRA § 508, Pub. L. No. 104-208, 110 Stat. 3009, 3673 (codified at 8 U.S.C. § 1642(d)).

⁸¹Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Att’y Gen. Order No. 2129-97, 62 Fed. Reg. 61,344, at 61,346 (Nov. 17, 1997).

⁸²*Id.* at 61345-46; Immigration and Naturalization Service, Verification of Eligibility for Public Benefits, 63 Fed. Reg. 41,662, at 41,664 (Aug. 4, 1998) (to be codified at 8 C.F.R. pt. 104).

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benefits. This is very important because benefits-granting agencies must verify the applicant's status. If an immigrant is applying for benefits for her child, only the immigration status of the child is to be verified. Since benefits granting agencies are required to verify immigration status of applicants applying for TANF and certain other benefits like Food Stamps, it is important that advocates and attorneys accompany battered immigrants who will be filing for benefits for themselves or their children or both to ensure that the benefits workers only ask immigration status questions of the person on whose behalf benefits will be provided. Accompanying battered immigrants also allows the advocate or attorney to document how the battered immigrant applicant is treated if benefits are wrongly denied.

Attorney General's List

As noted above, PRWORA authorized the U.S. Attorney General to designate particular programs that are open to all persons without regard to immigration status.⁸³ To be exempt from immigration restrictions, the programs designated by the U.S. Attorney General must be in-kind services, provided at the community level, not based on the individual's income or resources, and necessary to protect life or safety.⁸⁴

The following programs have been designated as available to all without regard to immigration status by the U.S. Attorney General:

- Crisis counseling and intervention programs;
- Services and assistance relating to child protection;
- Adult protective services;
- Violence and abuse prevention;
- Victims of domestic violence or other criminal activity;
- Treatment of mental illness or substance abuse;
- Short-term shelter or housing assistance for the homeless, for victims of domestic violence, or for runaway, abused, or abandoned children⁸⁵;
- Programs to help individuals during periods of adverse weather conditions;
- Soup kitchens;
- Community food banks;
- Senior nutrition programs and other nutritional programs for persons requiring special assistance;
- Medical and public health services and mental health, disability, or substance abuse assistance necessary to protect life and safety;⁸⁶
- Activities designed to protect the life and safety of workers, children and youths or community residents; and
- Any other programs, services, or assistance necessary for the protection of life or safety.⁸⁷

According to the Attorney General,

⁸³Immigration and Naturalization Service, Verification of Eligibility for Public Benefits, 63 Fed. Reg. 41,662 (Aug. 4, 1998); Interim Guidance, 62 Fed. Reg. 61,346, *et seq.* See also, Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 Fed. Reg. 3613 (Jan. 16, 2001).

⁸⁴Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 62 Fed. Reg. 61, Att'y Gen. Order No. 2129-97, (Nov. 17, 1997).

⁸⁵HUD and HHS have defined "short-term housing assistance" as emergency shelter, short-term shelter and transitional housing for up to two years. See Letter from the Secretary of the U.S. Department of Housing and Urban Development to HUD Funds Recipient (Jan. 19, 2001). See also, Office for Civil Rights, U.S. Department of Health and Human Services, *Access to HHS-Funded Services for Immigrant Survivors of Domestic Violence*, available at <http://www.hhs.gov/ocr/immigration/bifsltr.html> (last modified Jan. 30, 2001). Readers should also refer to the chapter on access to programs and services that can help battered immigrants, elsewhere in this manual, for more details on the HUD and HHS memos.

⁸⁶This definition includes: Immunizations for children and adolescents; AIDS and HIV services and treatment; tuberculosis services; and treatment for sexually transmitted diseases. (See Claudia Schlosberg, *Not Qualified Immigrants' Access to Health Services After the Welfare Law*, in IMMIGRANTS AND WELFARE RESOURCE MANUAL: 1998 EDITION, Tab 3B-13 (National Immigration Law Center ed., 1998).

⁸⁷See Attorney General's list included in the Appendix to this Manual.

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a service provider should not assume that it must verify citizenship or immigration status simply because its program or service is not exempted by [the Attorney General's] Order. Service providers and other interested parties should refer to benefit-granting agencies' interpretations of the term "federal public benefit" ... in order to determine whether their program is a federal public benefit and therefore subject to the alienage restrictions.⁸⁸

Thus, a broad range of programs that benefit battered immigrants and their children are to be fully available to all domestic violence victims without regard to their immigration status. Providers of services included in the Attorney General's list may not ask questions about immigration status of recipients or applicants for services. The Attorney General's order further clarifies that the services included on this list are not the only programs that can be provided without immigration restrictions. Only programs that fit the legal definition of "federal public benefits" and "federal means-tested public benefits" require verification.

Through the mechanisms discussed above, battered immigrants who are not qualified aliens remain eligible to receive a wide array of assistance. A subsequent section of this chapter provides more specific information on immigrant eligibility rules for some important federal programs.

STATE AND LOCAL PUBLIC BENEFITS

PRWORA significantly restricted the ability of states and local governments to provide benefits to immigrants who *do not* fall within one of the following groups:

- "Qualified immigrants";
- "Non-immigrants" as defined by the Immigration and Nationality Act; and
- Parolees for less than one year under section 212(d)(5) of the Immigration and Nationality Act.⁸⁹

Prior to the passage of PRWORA, local governments could grant access to general assistance and state-funded benefits programs to battered undocumented immigrants who were not qualified to receive federal benefits. As a result of PRWORA, states can only provide benefits to undocumented or other non-qualified immigrants if the state legislature passes a law specifically authorizing qualified immigrant access. States that had such laws in place prior to August 22, 1996, cannot rely on pre-existing laws to provide state benefits to immigrants. These states must pass a post-August 22, 1996, new law authorizing immigrant access to these benefits.⁹⁰

Several states have passed laws after August 22, 1996, authorizing state-funded benefits programs for certain categories of immigrants. These state benefits can provide important access to public benefits for battered immigrants who are subject to the five-year bar on federal benefits, or may not qualify for immigration relief under VAWA. Many states that do offer access to these benefits do so with restrictions. (For a list of the state-funded benefits available to immigrants in your state, see the National Immigration Law Center's charts on states providing benefits to immigrants on their website: http://nilc.org/immspbs/sf_benefits/index.htm).

The PRWORA definition of "state public benefits" is similar to that of "federal public benefits." However, the terms "federal public benefits" and "state public benefits" are mutually exclusive. A program can be either a state public benefit or a federal public benefit, but it cannot be both. State public benefits are defined as benefits provided by an agency of a state or local government (or by appropriated funds of a State or local government) to an individual, household or family eligibility unit.⁹¹ They may constitute a grant or loan, a contract, professional or commercial license, retirement benefits, welfare benefits, health benefits, disability benefits, public or assisted housing, postsecondary education, food assistance, unemployment benefits, or any other similar benefits.

The following qualified immigrants are eligible without any immigration restriction for any state public benefits:⁹²

⁸⁸Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 Fed. Reg. 3613, at 3614 (Jan. 16, 2001).

⁸⁹PRWORA § 411(a), 8 U.S.C. § 1621(C).

⁹⁰*Id.* § 411(d), 8 U.S.C. § 1621(d).

⁹¹*Id.* § 411(c)(1), 8 U.S.C. § 1621(c)(1).

⁹²*Id.* § 412(b), 8 U.S.C. § 1622(b).

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- Refugees, asylees, trafficking victims and those granted withholding of deportation under INA section 243, for the first five years after their date of admission (Medicaid is provided for the first seven years);
- Permanent resident immigrants who have worked for 40 quarters as defined by the Social Security Act, and their spouses or children (who can use some or all of the lawful permanent resident's 40 quarters to qualify);
- Immigrants who are veterans on active duty, or the spouses or dependent children of such persons;
- Spouses and children of U.S. citizens (who can use some or all of their U.S. citizen spouse's or parents' 40 quarters to qualify).

Certain state and local public benefit programs were specifically exempted by PRWORA and are therefore open to all persons without immigration restrictions. These include:

- Emergency medical care;
- Short term, in-kind emergency disaster relief programs;
- Public health assistance for immunizations and for testing and treatment of communicable diseases;
- Programs and services at the community level necessary for the protection of life and safety designated by the U.S. Attorney General.⁹³

Specific Rules For Some Important Federal Benefit Programs

This section describes the specific eligibility rules for some of the federal programs that are most likely to benefit battered immigrant women. In general, programs are listed from most restrictive to least restrictive number. Readers should note that some public benefits have their own program-specific immigrant eligibility restrictions and therefore may not be accessible to some immigrants, regardless of the program's PRWORA classification as a certain type of benefit (e.g., federal means-tested public benefit, federal public benefit, or other federally funded social services program).

SUPPLEMENTAL SECURITY INCOME (SSI)

Supplemental Security Income (SSI) is a program that provides cash assistance to low-income individuals who are aged, blind, or disabled. After the enactment of PRWORA, an otherwise eligible person could be denied SSI cash assistance solely on the basis of his/her immigration status. The Balanced Budget Act of 1997 restored eligibility to receive SSI for most of the categories of immigrants who had been eligible before August 22, 1996.⁹⁴ The only battered immigrants who are currently eligible to receive SSI are those who were lawful permanent residents and were receiving SSI on August 22, 1996, or those who fit into one of the other categories of eligible immigrants.

The best chance most battered immigrants might have to obtain SSI is if they can qualify for the 40 quarters work credit exception category. A battered immigrant would qualify only if she, her spouse, or a parent had, individually or collectively, worked for 40 quarters. If SSI eligibility is based upon qualifying quarters earned by a spouse, the battered immigrant must be married to her abusive spouse at the time of the eligibility determination to have her husband's quarters credited to her. If she is divorced from her abusive spouse after she has been deemed eligible and has begun receiving SSI benefits, she may continue to qualify for the benefits already awarded.⁹⁵ If, however, she is divorced when she must be recertified to continue to receive benefits, she will no longer qualify, as she cannot continue to use any of her husband's quarters to meet the 40 quarters exception after divorce. Five states have created programs to provide state benefits to immigrants who are no longer eligible to

⁹³Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 Fed. Reg. 3613 (Jan. 16, 2001).

⁹⁴NATIONAL IMMIGRATION LAW CENTER, *Summary of the Immigrant Provisions of the Balanced Budget Act*, in IMMIGRANTS AND WELFARE RESOURCE MANUAL, Tab 1-1 (1998)

⁹⁵NATIONAL IMMIGRATION LAW CENTER, *Program Operations Manual System*, in IMMIGRANTS & WELFARE, STATUTES, REGULATIONS & ADMINISTRATIVE SOURCE MATERIALS § SI 00502.100 (1998).

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receive SSI: California, Illinois, Maine, New Hampshire, and Oregon; other states have pre-existing disability programs for those ineligible for SSI. (See National Immigration Law Center state by state chart included in the Appendix to this manual).

FOOD STAMPS

The Food Stamps program provides vouchers to low-income individuals so that they can use the benefits to buy food. Food Stamps eligibility for most non-citizens was eliminated by PRWORA as of August 22, 1996. The Balanced Budget Act of 1997 restored Food Stamps access for a small number of qualified immigrants. (See chart in federal means-tested public benefits section for details.) Under current law, very few battered immigrant women will qualify for Food Stamps. Qualified immigrants who entered the United States after August 22, 1996 are barred for five years unless they are otherwise exempt. In addition, qualified immigrants must demonstrate that they have 40 qualifying quarters of employment. Battered immigrants will usually need to count both their own work quarters and those of their abusive husbands. As with SSI, battered immigrants can be credited with all of the qualifying quarters worked by a spouse during the marriage, as long as they remain married. If, after qualification, they are divorced, the battered immigrant woman will be able to continue receiving benefits only until recertification. Battered immigrants who are divorced from their abusers and who lack sufficient qualifying quarters will lose Food Stamps upon recertification when they must reapply for Food Stamps.⁹⁶

On May 13, 2002 President Bush signed into law the Food Stamp Reauthorization Act.⁹⁷ This law restores Food Stamp benefits to approximately 400,000 qualified immigrants. The Food Stamp Reauthorization Act restores eligibility to three groups of immigrants:

- Qualified immigrant children under 18, regardless of date of entry. The provision takes effect October 1, 2003.
- Qualified immigrants who receive a disability benefit, regardless of the date of entry. This provision takes effect October 1, 2002. Qualified immigrants who entered the United States after August 22, 1996, are not eligible to receive SSI, however qualified immigrants who receive disability-related Medicaid or other disability benefits for their condition would be able to receive food stamps.
- Qualified Immigrants living in the United States for five years under qualified immigrant status. This provision takes effect April 1, 2003.

Despite restrictions on Food Stamps eligibility, both qualified and non-qualified immigrants retain eligibility for emergency food assistance. Moreover, states can choose to provide state-funded food stamps to immigrants who were made otherwise ineligible by the federal welfare reform law. Sixteen states have chosen to provide food assistance to immigrants with state funds: California, Connecticut, Illinois, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Rhode Island, Texas, Washington, and Wisconsin. Some states have restored the benefits for all immigrants who meet all the requirements for eligibility for Food Stamps except for their immigration status. Others have chosen to provide food assistance for specified categories of immigrants (children, elderly, or disabled) or provide benefits to immigrants who otherwise would not qualify under federal law at a lower benefit level. Some States have purchased federal food stamp coupons for legal immigrants: California, Florida, Maryland, Nebraska, New Jersey, New York, Rhode Island, and Washington. Other states run their own Food Stamps programs.⁹⁸ (See National Immigration Law Center state by state chart included in the Appendix to this manual.)

TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF)

TANF provides cash payments, vouchers, social services, and other types of assistance to families in need.

⁹⁶ *Food and Nutrition Service National office, Cumulative Questions and Answers on Certification and Work Issues in PRWORA*, at <http://www.usda.gov/fcs/stamps/cumula3.htm> (visited Jan. 23, 1998).

⁹⁷ Pub. L. 107-171, § 4401, 116 Stat. 134 (2002).

⁹⁸ See NATIONAL CENTER OF IMMIGRATION LAW, *State Strategies to Assist Legal Immigrants Losing Federal Food Stamp Benefits*, in IMMIGRANTS & WELFARE RESOURCE MANUAL: 1998 EDITION, Tab 3A-19, 19-22 (1998).

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PRWORA gives states the option to grant TANF to immigrant families. Most states have decided to provide assistance to qualified immigrants who were in the United States before August 22, 1996, and many are also providing access to TANF for those who entered after August 22, 1996, following the expiration of the five-year bar.⁹⁹ Other states have decided to offer state-funded TANF to certain categories of immigrants or battered immigrants who would otherwise have no access to benefits regardless of immigration status.¹⁰⁰ Nineteen states have created substitute TANF programs that provide benefits during the five-year bar: California, Connecticut, Georgia, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.¹⁰¹ (See National Immigration Law Center state by state chart included in the Appendix to this manual).

Battered immigrants who were not required to file affidavits of support because they are self-petitioners, and certain other battered immigrants with affidavits of support, are exempt from sponsor deeming in the TANF program. (See deeming discussion above.) Other immigrants who apply for TANF and other public benefits are subjected to "deeming restrictions" which may make them ineligible for benefits until they become U.S. citizens or have worked for 40 quarters.

In addition, the Family Violence Option (FVO) included in the Welfare Act of 1996 permits states to grant "good cause waivers" of certain TANF program requirements.¹⁰² Under the FVO, states are required to identify victims of violence, conduct individual assessments, and develop temporary safety and service plans in order to protect battered immigrants from: "...immediate dangers, [to] stabilize their living situations and explore avenues for overcoming dependency."¹⁰³ These family violence option waivers are temporary in nature, but the actual length is defined broadly as "so long as necessary."¹⁰⁴ This definition gives welfare administrators the discretion to determine the period during which the waiver will apply, and renew the waiver on a case-by-case basis.¹⁰⁵

Advocates should work to ensure that their states formally adopt the Family Violence Option. Under HHS regulations, states that formally adopt the Family Violence Option do not have to pay penalties if they do not meet work targets or exceed time limitations because of waivers granted to battered women. Only states that formally choose the Family Violence Option will be allowed to eliminate cases of battered women from the calculations that states must submit to the federal government on work requirements and time limitations. The state must include the family violence option in its state TANF plan to avoid penalties. To date, 30 states, including the District of Columbia and Puerto Rico have adopted the Family Violence Option.

Advocates should also work to ensure that the Family Violence Option protections are implemented to take into account the needs of battered immigrants. This may include screening in the appropriate language and referrals to appropriate services, as well as waivers of sponsor deeming requirements. In states that have adopted the FVO, battered immigrants with old affidavits of support (I-134) may be able to successfully ask the state welfare agency use the FVO to waive deeming so that they have the same access to benefits as battered immigrants with new I-864 affidavits of support.

MEDICAID

⁹⁹ NATIONAL IMMIGRATION LAW CENTER, *Temporary Assistance for Needy Families: Welfare Reform and Immigrants*, in IMMIGRATION & WELFARE RESOURCE MANUAL: 1998 EDITION, Tab 3E-1 (1998).

¹⁰⁰ "Permanently Residing Under Color Of Law"-Prior to the passage of PRWORA, those who were permanently residing in the United States under color of law (PRUCOL's) were eligible to receive federal public benefits. This group consisted of immigrants whom BCIS was aware of their presence in the United States. The PRWORA cut off access to federal public benefits for this group of immigrants, but several states have passed laws providing access to state-funded TANF for PRUCOL's. See NATIONAL IMMIGRATION LAW CENTER, *States Providing Benefits to Immigrants Under 1996 Welfare & Immigration Laws -- State Responses*, in IMMIGRATION & WELFARE RESOURCE MANUAL: 1998 EDITION, Tab 2-1, 14 (1998).

¹⁰¹ Wendy Zimmerman & Karen C. Temlin, *Key Substitute Programs by State*, in PATCHWORK POLICIES: STATE ASSISTANCE FOR IMMIGRANTS UNDER WELFARE REFORM 66 (Urban Institute, May 1999).

¹⁰² PRWORA § 402(a)(7), 8 U.S.C. § 1612(a)(7).

¹⁰³ Temporary Assistance for Needy Families Program (TANF), 62 Fed. Reg. 62,124, at 62,128 (Nov. 20, 1997) (to be codified at 40 C.F.R. pts. 270-5). State authorities are required to maintain the confidentiality of the victims.

¹⁰⁴ 42 U.S.C. § 607(a)(7).

¹⁰⁵ Temporary Assistance for Needy Families Program (TANF), 62 Fed. Reg. 62,124, at 62,131 (Nov. 20, 1997) (to be codified at 45 C.F.R. § 270.30).

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The Medicaid program provides health insurance to low-income individuals. Under PRWORA, most individuals who entered the United States after August 22, 1996, are barred from receiving all non-emergency Medicaid for the first five years after they become qualified immigrants. According to the Health Care Financing Administration (HCFA), an "...immigrant who loses SSI cash benefits would continue to be eligible for Medicaid until the State conducts a Medicaid eligibility redetermination ... and has found that the individual does not qualify for Medicaid by any other means."¹⁰⁶ Thus, immigrants who lose SSI benefits due to restrictions based upon their immigration status may also ultimately be denied Medicaid.

PRWORA allows states to choose to deny Medicaid to qualified immigrants who were in the United States before August 22, 1996.¹⁰⁷ To do so, the state must file a state plan amendment with HCFA. However, most states have continued offering Medicaid benefits to qualified immigrants who entered the United States before August 22, 1996. A few states provide full medical services to immigrants. Other states have funded medical assistance for some specific purposes, including prenatal care, nursing home resident care, child care, and for persons residing in long-term care or residential facilities. The fourteen states that provide some form of Medicaid assistance to immigrants cut off by PRWORA are: California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Pennsylvania, Rhode Island, Virginia, and Washington.¹⁰⁸ States cannot use Medicaid funds to pay for immunizations, or for testing and treatment of communicable diseases for non-qualified immigrants. In order to determine whether an immigrant is eligible for TANF or Medicaid, advocates and service providers should learn what laws their particular state has decided to enact concerning these benefits.

Emergency Medicaid

Emergency Medicaid is available in all cases where a person needs treatment for medical conditions with acute symptoms that could place a patient's health in serious jeopardy, result in serious impairment of bodily functions, or cause dysfunction of any bodily organ or part.¹⁰⁹ This definition includes all labor and delivery. Emergency medical assistance must be provided to all immigrants regardless of their immigrant status.

PUBLIC HOUSING FOR QUALIFIED BATTERED IMMIGRANT WOMEN¹¹⁰

Battered immigrant women who are or who become "qualified immigrants" are eligible to receive public or assisted housing.¹¹¹ PRWORA and IIRAIRA clearly by law grant access to publicly assisted housing for "qualified immigrants," including battered immigrants. Although statutory eligibility for public and assisted housing for qualified immigrants is clear, the U.S. Department of Housing and Urban Development (HUD) has not yet amended its regulations to reflect these statutes. Additionally, since HUD does not directly administer its programs at a state or local level, local housing administrators may be unaware that certain battered immigrants are eligible for housing benefits. Therefore, we strongly recommend that advocates and attorneys accompany battered "qualified immigrant" applicants to housing interviews to ensure that they are granted access to public and assisted housing. Advocates and attorneys should take with them a copy of 8 U.S.C. § 1641, which is included in the appendix to this manual, to demonstrate to housing program administrators that battered immigrants qualify under the statute.

An immigrant with a pending VAWA application may have problems reserving a place in line on the public housing waiting list if she does not have a Social Security Number (SSN). However, SSNs are *not* required to access public housing, so public housing authorities should not require them of applicants. Additionally, some battered immigrants who are qualified, have difficulty accessing public and assisted housing because local public

¹⁰⁶Letter from Dept. of Health and Human Services, Health Care Financing Administration, to State Medicaid Directors (Oct. 4, 1996).

¹⁰⁷PRWORA § 402(b)(1), (3), 8 U.S.C. § 1612(b)(1), (3).

¹⁰⁸Washington State has recently replaced its state-funded medical assistance program with a sliding scale health insurance plan. Wendy Zimmerman & Karen C. Temlin, *Key Substitute Programs by State*, in PATCHWORK POLICIES: STATE ASSISTANCE FOR IMMIGRANTS UNDER WELFARE REFORM 66 (Urban Institute, May 1999).

¹⁰⁹42 U.S.C. § 1396b(v)(3).

¹¹⁰Prepared with the help of Tara Pappas, a policy intern with Ayuda.

¹¹¹8 U.S.C. § 1641(c)(2)(A).

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housing agencies (PHAs) use the SAVE system¹¹² to verify immigration status eligibility. Battered immigrant women who are qualified immigrants are not entered into the SAVE system by immigration authorities for confidentiality reasons. Hence, an alternate verification system is being developed. This fax-back system will allow PHAs and other public benefits granting agencies to contact the VAWA unit of the Vermont Service Center to verify eligibility of battered immigrants for benefits including public and assisted housing.¹¹³

Battered Immigrant Women Receiving Public or Assisted Housing on August 22, 1996

Some battered immigrants who were already receiving public or assisted housing benefits on August 22, 1996, may be able to continue receiving this benefit. The PRWORA only affects new applicants requesting benefits after August 22, 1996. Since some battered immigrants may be living in public or assisted housing with their abusers, advocates should be aware of how actions in a domestic violence case of a battered immigrant woman may affect her continued access to public or assisted housing.

A battered immigrant woman who is qualified, apart from her abuser, for public or assisted housing, can continue to receive public or assisted housing because she is a qualified immigrant under the PRWORA and she already lives in the unit. If she is residing in that unit with her abuser, she should be able to obtain a protection order removing her abuser from the public or assisted housing unit and continue to reside in that unit. After the abuser is vacated, advocates can work with local housing authorities to transfer the unit to the battered immigrant's name if she is a "qualified immigrant." This avoids her having to reapply for public housing, and being put back on the public housing waiting list.

If a battered immigrant woman who is not a qualified immigrant is living with her abuser and another qualified family member who is a member of her family, the battered immigrant woman should be able to remain in the housing unit. She should also be able to obtain a protection order removing her abuser from the family home, provided that the other qualified immigrant will allow her to continue living there. If the other qualified immigrant is her family member, this should not be a problem. If that family member is a relative of the abuser, this may be more problematic. A battered immigrant who is dependent upon her abuser or her abuser's family to remain in public or assisted housing might consider obtaining a protection order allowing them to continue to reside together, but prohibiting him from physically abusing her.

An undocumented battered immigrant woman living with and married to a U.S. citizen or a lawful permanent resident abuser may wish to consider preparing and submitting a VAWA application and obtaining a *prima facie* determination in her VAWA case before having the abuser removed from the public or assisted housing unit. Once she has received a *prima facie* determination making her a "qualified immigrant," she could obtain a protection order removing her abuser from the public or assisted housing unit that she shares with him while obtaining her eligibility to reside in that unit.

Housing Options Open to "Not-Qualified" Battered Immigrants

If the parties are not married and are cohabiting, the undocumented battered immigrant would have no access to "qualified immigrant" status, and would not be able to remain in the public housing unit if her abuser were ordered to vacate. A "not-qualified" battered immigrant (such as an undocumented battered immigrant who is married to an undocumented abuser, or an undocumented battered immigrant abused by her cohabitating U.S. citizen boyfriends) may qualify for housing under "opt-out" provisions established by IIRAIRA for public housing agencies (PHAs).¹¹⁴ PHAs are responsible for the approval of applications for public or assisted housing.¹¹⁵ Under "opt-out" provisions, PHAs can grant public housing to individuals without verifying immigration status. These provisions also permit PHAs to allow a "not-qualified immigrant" to reside with a family headed by a

¹¹² The Systematic Alien Verification for Entitlements (SAVE) Program is an information-sharing initiative designed to allow Federal, state, and local benefit providers to verify an applicant's/recipient's immigration status. For more information, please see <http://uscis.gov/graphics/services/SAVE.htm>.

¹¹³ For more information, please contact NIWAP.

¹¹⁴ Pub. L. No. 104-208, §§ 571-577, 110 Stat 3009 (1996); IIRAIRA § 575 created a new PRWORA § 214(h)(2), which is the opt-out provision for PHAs.

¹¹⁵ See generally HOUSING L. BULL., vol. 26 (1996).

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citizen or "qualified immigrant" while allowing the rent to remain fully subsidized.¹¹⁶ These provisions include language that HUD will not override the PHA's decision to "opt out."¹¹⁷ PHAs may be hesitant to opt out because HUD bears no financial burden if the applicant is found to be ineligible. However, advocates working with particularly compelling cases of domestic violence may be able to obtain public housing for battered immigrant women by urging state housing officials to opt out of verifying immigration status.¹¹⁸

Nutrition Programs

Under PRWORA, any immigrant who is eligible to receive free public education benefits (see "Education" section below) is also eligible to receive benefits under both the School Lunch program and the School Breakfast program, regardless of immigration status.¹¹⁹ Thus, states may not deny these benefits to any immigrant children, whether documented or undocumented, on the basis of their citizenship or immigration status.

PRWORA also gave states the option to provide assistance under certain federally funded nutrition programs to any immigrant in the state without regard to immigration status.¹²⁰ These programs include:

- Summer Food program;
- Child and Adult Care Food program;
- Special Supplemental Nutrition Program for Women, Infants, and Children (WIC);
- Special Milk program;
- The Emergency Food Assistance Program (TEFAP);
- Commodity Supplemental Food Program;
- Food Distribution Program on Indian Reservations.

Although many of these nutrition programs could potentially be considered federal public benefit programs that are subject to limitations on immigrant eligibility, PRWORA does not specify whether the programs fall within or outside of this category. Instead, PRWORA exempts the School Lunch and School Breakfast programs entirely from restrictions on immigrant eligibility for federal public benefits, and allows states to determine immigrant eligibility for the remaining nutrition programs as they see fit.

EDUCATION

Battered immigrant women who seek education for themselves or their children should be aware that immigrant eligibility for federal education benefits varies greatly depending upon the program in question. Public elementary and secondary education programs, for example, are open to all immigrant children, whether documented or undocumented. On the other hand, higher education programs, especially student financial aid programs, are much more restrictive.

Battered immigrant women who are not yet "qualified immigrants" may enroll their children in elementary or secondary school without fear of the school reporting to the U.S. Immigration and Customs Enforcement (ICE). Since the Supreme Court decision in *Plyler v. Doe* in 1982, undocumented immigrant children have been guaranteed the right to a free public education.¹²¹ In *Plyler*, the Court struck down a Texas state law that barred the use of state funds for the education of undocumented immigrant children, holding that such laws violated the Equal Protection Clause of the Fourteenth Amendment.¹²² Meanwhile, when Congress enacted PRWORA, they directed that nothing in the Act "may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler v. Doe*."¹²³

¹¹⁶*Id.*

¹¹⁷HUD Reg. § 5.501(c).

¹¹⁸In addition, the legislative history suggests that Congress intended to grant this opt out provision because it was added to many drafts and Congress had ample time to remove this provision had it been incorrect.

¹¹⁹PRWORA § 742(a), 8 U.S.C. § 1615(a)

¹²⁰*Id.* § 742(b), 8 U.S.C. § 1615(b).

¹²¹*Plyler v. Doe*, 457 U.S. 202 (1982).

¹²²*Id.*

¹²³8 U.S.C. § 1643(a)(2).

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As a consequence of the directives in *Plyler* and PRWORA, public elementary and secondary schools are prohibited from doing the following:

- Denying admission to a student due to undocumented status;
- Engaging in disparate treatment in order to determine residency;
- Engaging in “chilling” actions that deter immigrants from accessing schools due to fear that their status will be discovered;
- Requiring parents or students to reveal or document their immigration status;
- Exposing the immigration status of students or parents;
- Requiring Social Security numbers.¹²⁴

In addition, the Family Educational Rights and Privacy Act prohibits schools from providing information about immigration status to any organization, including ICE.¹²⁵

Public Charge Concerns

Any immigrant who is likely at any time to become a “public charge” is ineligible to be granted lawful permanent residency in the United States.¹²⁶ Before an alien can be denied admission to the United States or denied adjustment of status to legal permanent resident based on public charge grounds, CIS or immigration judge must determine that the person is likely to become a public charge *in the future*. A number of factors must be considered including age, health, family status, assets, resources and financial status, education, skills, and the totality of the applicant’s circumstances.¹²⁷ Note that, although public charge is a “future-looking” determination, the regulations permit consideration of a number of present and past factors in making the public charge determination. Recent immigration and welfare reform laws have generated considerable confusion and concern about whether a non-citizen who is eligible to receive certain federal, state, or local public benefits may face adverse immigration consequences of being considered a public charge for having received public benefits.

On May 26, 1999, the Immigration and Naturalization Service issued proposed regulations and field guidance on the issue of public charge.¹²⁸ The field guidance was to go into effect immediately. While overall these regulations are helpful (i.e., not relevant to battered immigrants specially) to a certain extent for some battered immigrants, CIS has not issued final regulations and is still considering whether or not battered immigrants who apply for relief under VAWA will be exempt from or subject to the overall public charge ground of inadmissibility.¹²⁹ Until this issue is resolved attorneys representing battered immigrants should become familiar with the public charge proposed regulations and field guidance that apply to all immigrants.

Subsequent to publication of the proposed regulations, which are discussed in greater detail below, Congress amended the Violence Against Women Act to clarify the effect of the public charge provisions on battered immigrant women.¹³⁰ The statutory language guarantees that if an applicant for lawful permanent residence through adjustment of status or an immigrant visa has an approved VAWA self-petition, and that applicant has received or is receiving post-August 22, 1996, benefits, then CIS and consular officials are barred from considering the receipt of those benefits for public charge purposes. Evidence of use of IIRAIRA-authorized benefits must not be solicited, accepted, or considered by CIS officers or consular officials adjudicating adjustment of status or visa applications from self-petitioners or abused widows with approved self-petitions (I-

¹²⁴Susan C. Morse, and Frank S. Ludovina, *Responding to Undocumented Children in the Schools*, EDUCATIONAL RESOURCES INFORMATION CENTER (Sept. 1999), available at http://www.ed.gov/databases/ERIC_Digests/ed433172.html.

¹²⁵20 U.S.C. § 1232(g).

¹²⁶INA § 212(a)(4)(A)

¹²⁷INA § 212(a)(4)(B); Inadmissibility and Deportability on Public Charge Grounds; Field Guidance on Deportability and Inadmissibility on Public Charge Grounds; Proposed Rules and Notice, 64 Fed. Reg. 28,676, at 28,682, § 212.104 (May 26, 1999).

¹²⁸*Id.* at 28676 *et. seq.*

¹²⁹Immigration and Naturalization Service, *Questions and Answers -- Public Charge, Question 32*, at http://www.ins.usdoj.gov/public_affairs/news_releases/public_cqa.htm.

¹³⁰Pub. L. No. 106-386, § 1505(f), 114 Stat. 1464 (2000).

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360s). IIRAIRA-authorized benefits require that the applicant prove that she is a domestic violence victim, and that the need for benefits is substantially connected to the abuse (see above).

Because the VAWA amendments were enacted after the CIS issued the proposed public charge regulations, the proposed rule does not reflect these changes. The proposed regulation, however, does clarify the circumstances under which any non-citizen can receive public benefits without becoming a public charge. The only benefits that are to be relevant to the public charge determination are public cash assistance for income maintenance, and institutionalization for long-term (but not short-term) care at government expense.¹³¹ Benefits that fit under this definition for public charge purposes are SSI, TANF, state and local cash assistance for income maintenance and government-paid costs for institutionalization for long-term care.¹³²

Non-cash benefits and special-purpose cash benefits that are not intended for income maintenance are not to be considered in making a public charge determination.¹³³ Although some of these programs may provide cash benefits, they are not relevant to the public charge determination if the purpose of such benefits is not for income maintenance but to avoid the need for on-going cash assistance for income maintenance. Examples of public benefits that cannot be considered for public charge purposes include, but are not limited to: Food Stamps, Medicaid, State Children's Health Insurance Program, nutrition programs, housing benefits, child care services, energy assistance transportation vouchers, educational assistance, and job training programs.¹³⁴

The rule and the guidance also state that an alien's receipt of cash assistance for income maintenance, or being institutionalized for long-term care, which are among the criteria for being deemed public charge, does not *automatically* make her or him inadmissible, ineligible to adjust status to legal permanent residence, or deportable on public charge grounds. The law requires that CIS and Department of State (DOS) officials consider several additional issues as well,¹³⁵ including the totality of the applicant's circumstances,¹³⁶ the duration and, on a case-by-case basis, circumstances under which benefits were received,¹³⁷ and whether the immigrants spouse, parent or child received public benefits.¹³⁸ Therefore, temporary reliance on public benefits does not necessarily result in a determination that the battered immigrant is a public charge, even if the assistance received was provided based on eligibility that was not related to the domestic violence.¹³⁹ Cash benefits received by a child or other relative will not be attributed to a battered immigrant or other immigrant unless the benefits represent the sole support for the family.¹⁴⁰

Though self-petitioning, battered immigrant women are exempt from the requirement of providing an affidavit of support, and CIS is not allowed to consider post-August 22, 1996, benefits use, until further regulations are issued by CIS that specifically address public charge in the cases of battered immigrant women, such individuals may be required to show that they are not likely to become a public charge in the future. Under the proposed CIS rule, they will need to show that they have not become or are not likely to become "primarily dependent on the government for subsistence as demonstrated by receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense."¹⁴¹

Until the Justice Department issues further regulations that incorporate the new statutory changes regarding public charge and battered immigrants, when battered immigrants cannot clearly meet the exceptions to the public charge definition set out in the proposed public charge rule and the VAWA 2000 amendments, attorneys working with

¹³¹ Inadmissibility and Deportability on Public Charge Grounds; Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,676, at 28,685 (May 26, 1999).

¹³² Immigration and Naturalization Service, *Questions and Answers—Public Charge, Question 6*, at http://www.ins.gov/graphics/publicaffairs/factsheets/public_cfs.htm.

¹³³ Inadmissibility and Deportability on Public Charge Grounds; Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,676, at 28,681-82, §§ 212.102, 212.103(c), 212.105 (May 26, 1999).

¹³⁴ *Id.* at 28,682, § 212.105.

¹³⁵ *Id.* at 28,678.

¹³⁶ *Id.* at 28,682, § 212.104.

¹³⁷ *Id.* at 28,683, § 212.106(b).

¹³⁸ *Id.* § 212.109(a). Benefits provided to a family member will not make an alien inadmissible unless the evidence shows that the alien individually is likely to become a public charge.

¹³⁹ *Id.* § 212.106(b).

¹⁴⁰ *Id.* at 28,683 & 28,686, §§ 212.109(b) & 237.18(b).

¹⁴¹ *Id.* at 28,677.

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battered immigrants should assist them to use benefits and move off welfare as quickly as possible. It is best if battered immigrants can show some work history and some ability to sustain themselves and their children. Once the client's self-petition has been approved by the CIS, the battered immigrant should move quickly to obtain work authorization and employment by the date of her adjustment interview.

Battered immigrants who have received cash benefits for themselves in order to flee their abuser, or who received public benefits for their children that were the sole source of support for the household, should, if possible, delay filing for adjustment of status to lawful permanent residence until they have secured employment. If this is not possible, battered immigrants on public benefits should be prepared to demonstrate that the benefits they are using are IIRAIRA-related and cannot be considered under VAWA in the 2000 public charge determination, or that their use of benefits is temporary, and has been necessary to help the battered immigrant become self-reliant apart from her abuser. Attorneys should present evidence that the battered immigrant is a domestic violence victim, that her benefits use was authorized under IIRAIRA, that she can sustain herself in the future, and that the totality of the circumstances favor awarding her lawful permanent residence status. Battered immigrants considering seeking lawful permanent residence while receiving IIRAIRA-authorized benefits related to the abuse should seek child support awards from their abusers before applying for lawful permanent residence.

Applications on Behalf of Children Who Qualify for Benefits

Just as misunderstandings about public charge requirements may deter some battered immigrants from applying for benefits to which they are entitled, many immigrants are also reluctant to apply for public benefits because they fear that authorities will inquire about citizenship, immigration status, and social security numbers (SSNs) of family members who are not seeking assistance. Frequently, such fears center on whether such information will be reported to the ICE or used to deport undocumented family members. In fact, there are a number of federal laws and policies that are designed to ensure that all eligible individuals have access to federal benefit programs, and that limit inquiries into citizenship, immigration status, and SSNs to accomplish this goal.

Concerned that eligible members of immigrant families are not receiving all the benefits for which they are eligible, the Department of Health and Human Services and the Department of Agriculture issued joint guidance regarding inquiries into citizenship, immigration status, and SSNs, in state applications for Medicaid, State Children's Health Insurance Program (SCHIP), TANF, and Food Stamps. According to the guidance:

Under federal law, states are required to establish the citizenship and immigration status of applicants for Medicaid (except emergency Medicaid), SCHIP, TANF and Food Stamps. However, states may not require applicants to provide information about the citizenship or immigration status of any non-applicant family or household member or deny benefits to an applicant because a non-applicant family or household member has not disclosed his or her citizenship or immigration status.¹⁴²

This policy permits all eligible members of an immigrant family to apply for and receive benefits without fearing that their actions will jeopardize the immigration status or lead to the deportation of immigrant family members. It also specifically allows immigrant parents who are ineligible for public benefits to apply for benefits that their U.S. citizen children are eligible to receive. Therefore, for example, a battered immigrant woman who has not yet attained qualified immigrant status or who will not qualify for such status because her abuser is not her husband may seek Medicaid on behalf her U.S.-born children without revealing her own immigration status and without providing her own SSN. In this type of case (i.e., where benefits are sought only for the child), the child is considered the applicant, and the state is required to establish the citizenship and immigration status only of the child, not the child's parents. If the child is otherwise eligible, the state may not deny benefits simply because the child's parents have failed to provide information regarding their citizenship, immigration status, or their SSN.

¹⁴²Department of Health and Human Services and Department of Agriculture, *Policy Guidance Regarding Inquiries Into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*, at <http://www.hhs.gov/ocr/immigration/triagency.html> (last modified Sept. 21, 2000).

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Although each federal benefit program has its own rules regarding eligibility determinations, there are two major federal laws that limit the states' ability to make certain eligibility inquiries: Title VI of the Civil Rights Act limits inquiries into the citizenship and immigration status of non-applicants, and the Privacy Act of 1974 restricts the state's ability to require SSNs from non-applicants.

States that require non-applicants to reveal their citizenship or immigration status when such information is not legally required risk violating Title VI of the Civil Rights Act, which prohibits discrimination based upon race, color, or national origin by recipients of federal funds.¹⁴³ According to the HHS-USDA guidance,

to the extent that states' application and requirements and processes have the effect of deterring eligible applicants and recipients who live in immigrant families from enjoying equal participation in and access to these benefit programs based on their national origin, states inadvertently may be violating Title VI.¹⁴⁴

Meanwhile, Section 7 of the Privacy Act of 1974 generally prohibits states from denying benefits to individuals who refuse to disclose their SSNs, unless the disclosure is required by federal statute.¹⁴⁵ Only a few federal benefits programs require that applicants for benefits have SSNs. Although federal law requires applicants for Medicaid,¹⁴⁶ SCHIP, TANF, and Food Stamps to provide their SSNs, states risk violating the Privacy Act if they require non-applicants to disclose their SSNs as a condition for approving the applicant's eligibility for the benefits. While states are not prohibited from requesting the SSNs of non-applicants, states that do so are required under the Privacy Act to inform the non-applicant whether the disclosure is voluntary or mandatory and what uses will be made of any SSN provided.¹⁴⁷

Although federal policy, Title VI, and the Privacy Act all govern state inquiries into citizenship, immigration status, and SSNs, actual application procedures vary from program to program and state to state. For example, as a general rule, Medicaid and SCHIP allow individual children to apply for, and receive, benefits. For these programs, therefore, states must require disclosure of the citizenship, immigration status, or SSN only of the person for whom benefits are being sought, and the immigration status of other household members is irrelevant to the applicant's eligibility.¹⁴⁸

On the other hand, under TANF and Food Stamps, families or households are generally required to apply for benefits as a unit. Under Food Stamps, if a household member does not establish his or her citizenship or immigration status, or provide a SSN, that household member is determined to be ineligible to receive benefits, but the state agency cannot deny benefits to otherwise-eligible household members. The amount of the benefit will be reduced to reflect a smaller family size or household unit, and the benefit that the household or family will ultimately receive will be less than if all family or household members qualified. Similar voluntary or mandatory opt-out provisions are available under TANF in some states.¹⁴⁹ In other words,

in Medicaid, SCHIP and Food Stamps, states cannot deny benefits to otherwise eligible family or household members because other family or household members have failed to disclose their

¹⁴³42 U.S.C. § 2000d, *et seq.*

¹⁴⁴Department of Health and Human Services and Department of Agriculture, *Policy Guidance Regarding Inquiries Into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*, at <http://www.hhs.gov/ocr/immigration/triagency.html> (last modified Sept. 21, 2000).

¹⁴⁵Department of Health and Human Services, *Policy Guidance Regarding Inquiries Into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*, at <http://www.hhs.gov/ocr/immigration/finalqa.html>, (last modified Sept. 20, 2000).

¹⁴⁶This requirement is for Medicaid, not Emergency Medicaid.

¹⁴⁷Department of Health and Human Services, *Policy Guidance Regarding Inquiries Into Citizenship, Immigration Status and Social Security Numbers in State Applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*, <http://www.hhs.gov/ocr/immigration/finalqa.html>, (last modified Sept. 20, 2000).

¹⁴⁸*Id.*

¹⁴⁹*Id.*

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immigration status or provide an SSN. In TANF, states have the flexibility to adopt policies and procedures to ensure that eligible family members are not denied benefits because ineligible family members do not disclose this information.¹⁵⁰

With respect to other federal and state benefits programs, the general rule is that states may only require information about citizenship or immigration status if the program's authorizing statute limits eligibility on such grounds, or if the program provides a federal, state, or local public benefit. Advocates seeking public benefits for battered immigrant clients should consult the specific program requirements before assisting their clients in applying for aid. Only applicants who qualify for benefits should be encouraged to apply for them.

Obtaining Work-Related And Non-Work Social Security Numbers¹⁵¹

Battered immigrants who have approved VAWA self-petitions receive deferred action status. This status means that ICE is aware of their presence in the United States and has made the decision to not start deportation proceedings against them. Persons who receive deferred action status are eligible to apply for, and receive, work authorization. Once VAWA-approved battered immigrants receive work authorization, they will need to apply for a work-authorized SSN. In order to receive a work-authorized social security number, an individual must be a U.S. citizen or must be an immigrant authorized to work in the United States.

If an individual is not authorized to work in the United States but has a valid non-work reason for applying for a number, the Social Security Administration will issue a non-work social security number. Such social security numbers may be required for undocumented battered immigrants or lawfully present battered immigrants without work authorization to apply for public benefits. A SSN may be assigned for a non-work purpose to an immigrant who cannot provide evidence of immigrant status that allows them to work under 20 C.F.R. § 422.107(e), if the immigrant meets certain conditions, including proof of residence either in or outside the United States, or a territory of the United States, and proof that a social security number is required by law as a condition of the immigrant receiving a federally funded benefit to which the immigrant has an established entitlement.¹⁵²

Individuals seeking Medicaid (except Emergency Medicaid), SCHIP, TANF, and Food Stamps are required under federal law to provide a social security number (SSN) when applying for such assistance. Some states may also require SSNs for other federal, state, or local benefits, even though these requirements, when not federally mandated, could pose Privacy Act or Civil Rights Act violations discussed above.

Advocates need to understand the process by which an undocumented immigrant can obtain a non-work SSN in order to better serve undocumented battered immigrant women and their children who qualify for benefits under VAWA based on a *prima facie* determination or an approved petition. In general, if an applicant for Medicaid, TANF, or Food Stamps does not have a social security number, the state agency must assist the individual in applying for one.¹⁵³ Advocates, however, are strongly encouraged to accompany their clients to the Social Security Administration to ensure that their clients are actually provided a non-work SSN, because caseworkers may not fully understand the process and eligibility requirements involved in issuing non-work SSNs, and may have no knowledge of battered immigrant eligibility under VAWA.

ELIGIBILITY

¹⁵⁰ *Id.*

¹⁵¹ We wish to gratefully acknowledge the contribution of Edna Yang of American University's Washington College of Law in preparation of this section.

¹⁵² Non-work social security numbers are also issued to immigrants if the state government requires a social security number to administer statutes governing the issuing of a driver's licenses and the registering of motor vehicles. It can also be argued that in jurisdictions where the courts ask for social security numbers of parties applying for divorce, child support, paternity, and marriage licenses, non-work social security number should be issued. See *Memorandum regarding §466(a)(13) of the Social Security Act*. See also SSA Program Operations Manual System, Records Manual 00203.510, available at <http://policy.ssa.gov/poms.nsf/lnx/0100203510!opendocument>.

¹⁵³ *Id.*

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A non-work SSN will be processed for undocumented immigrants who are entitled to the following public benefits:¹⁵⁴

- Temporary Assistance to Needy Families (“TANF”);
- Medicaid;
- Food Stamps;
- Supplemental Security Income (SSI);
- Social Security Disability Insurance (SSDI);
- Old Age Survivors Disability Insurance (OASDI);
- Benefits for end-stage renal disease patients under Title XVIII.

A SSN will not be processed for any undocumented immigrant who:¹⁵⁵

- Is ineligible for benefits or payments under the programs listed above (TANF, Medicaid, Food Stamps, SSI, SSDI, OASDI, and Title XVIII);
- Is an SSI-ineligible spouse, parent, or child;
- Is appointed a representative payee for an SSDI, OASDI, or SSI beneficiary;
- Is eligible only for emergency services under Medicaid, since emergency Medicaid is open to all immigrants and having a SSN is not a condition of eligibility for emergency Medicaid;
- Alleges a need for a SSN for tax or similar purposes.

APPLICATION PROCEDURES

Work-Authorized SSN

In order to obtain a work-authorized SSN, the applicant must be: (1) a US citizen (US-born or foreign-born), or (2) an immigrant (either US-born or foreign-born) who is authorized to work in the United States. The applicant must also be able to prove the following:

- Age, through documents including, but not limited to, a birth certificate, a religious record showing age or date of birth, a hospital record for birth, or a passport;¹⁵⁶
- Identity, through documents including, but not limited to, a driver’s license, identity card, school record, medical record, marriage records, passport, or Immigration and Naturalization Service document;¹⁵⁷
- U.S. citizenship or work authorized lawful immigrant status.¹⁵⁸

Non-Work SSN

In order to obtain a non-work SSN, the applicant must prove:

- Age, through documents including, but not limited to, a birth certificate, a religious record showing age or date of birth, a hospital record for birth, or a passport;¹⁵⁹
- Identity, through documents including, but not limited to, a driver’s license, an identity card, a school record, a medical record, marriage records, a passport, or an Immigration and Naturalization Service document;¹⁶⁰

¹⁵⁴*Id.* at 00203.560(A)(2), available at <http://policy.ssa.gov/poms.nsf/lnx/0100203560!opendocument>.

¹⁵⁵*Id.* at 00203.560, available at <http://policy.ssa.gov/poms.nsf/lnx/0100203560!opendocument>.

¹⁵⁶20 C.F.R. § 422.107(b).

¹⁵⁷*Id.* § 422.107(c).

¹⁵⁸*Id.* § 422.107(d). Approved VAWA self-petitioners with deferred action status and work authorization from BCIS have “work authorized lawful immigrant status.”

¹⁵⁹*Id.* § 422.107(b).

¹⁶⁰*Id.* § 422.107(c).

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- The legal requirement for a SSN as a condition of the applicant receiving a federally funded benefit or service;¹⁶¹ OR
- That the state government requires a SSN to administer statutes governing the issuing of driver's licenses, the registration of motor vehicles, and the issuance of divorce decrees, child support orders, and paternity actions.¹⁶²

It is strongly recommended that advocates and attorneys help battered immigrants gather the documentation they will need to file for a work-authorized SSN or a non-work SSN, and that advocates and attorneys accompany battered immigrants to the Social Security Administration Office when their battered immigrant clients apply. Advocates and attorneys should bring with them a copy of both the section of the regulations and the Program Operations Manual System (POMS) that govern issuance of work-related or non-work SSNs, whichever is applicable. Copies of the regulations and the POMS have been included in the appendix to this manual.

LOSS OF NON-WORK SOCIAL SECURITY CARD

Once a battered immigrant obtains a non-work SSN, an attorney or advocate *must* stress the importance of her keeping the card in a safe place where she will not lose it. The Social Security Administration will not issue replacement non-work social security cards for undocumented immigrants. For battered immigrants, the original non-work SSN card must be kept at the home of a trusted relative or friend or kept for her by her advocate or attorney. This will ensure that the card will be in a place where the abuser cannot take it away from her or destroy it.

If an immigrant's non-work SSN card has been lost, stolen, or destroyed and she needs evidence of her SSN for an allowed purpose (including payment of a federally funded benefit, obtaining a driver's license, or filing for divorce) the advocate or attorney should contact the Social Security Administration and provide them with the name and phone number of the benefits case-worker, the court clerk, or the third-party agency that needs to know the immigrant's non-work SSN. The Social Security Administration will then contact the third-party agency and notify them of the immigrant's SSN. No replacement card will be issued.

SSNs FOR U.S.-BORN CHILDREN

With respect to SSNs for the U.S.-born children of battered immigrant clients, advocates should be aware that the Social Security Administration automatically assigns a Social Security Number (SSN) to children at birth under its "Enumeration at Birth" (EAB) Project, *regardless* of whether or not the parents have a valid social security number.¹⁶³ Some Social Security Administration staff members have been erroneously advising parents who do not have social security numbers themselves that they cannot apply for a social security number for their U.S. citizen children. If an immigrant client is going to have a child, she should be informed that her child can and should be assigned a social security number regardless of whether she has one. If the hospital does not mention this, she should speak to the hospital worker who fills out the form for the birth certificate.

Conclusion

Providing battered immigrants and their children with access to the welfare safety net is essential to fulfill VAWA's original intent. Battered immigrant spouses and children will only be able to take action to protect

¹⁶¹ *Id.* § 422.107(e). The traditional legal requirements for non-work SSNs have not included state statutes requiring social security numbers for the issuance of divorce decrees, child support orders, and paternity actions. These requirements, however, are a logical extension of the use of non-work SSNs, because they are located in the same state statutes, and fulfill the same purposes, as the legal requirement of a SSN as a prerequisite for driver's licenses and motor vehicle registration.

¹⁶² *Id.*

¹⁶³ SSA Program Operations Manual System, Records Manual 00202.142, available at <http://policy.ssa.gov/poms.nsf/lnx/0100202142!opendocument>.

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themselves and their children from ongoing abuse if they can survive independently of their abuser's economic control. Thus, battered women's advocates and attorneys who understand immigrant eligibility rules for public benefit programs will be better prepared to advocate for battered immigrants and will be able to secure more successful outcomes in resolving public benefits problems. If you or a member of your staff needs technical assistance with public benefits problems in your state, contact the National Immigrant Women's Advocacy Project at info@niwap.org.

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4.3

Barriers to Accessing Services: The Importance of Advocates Accompanying Battered Immigrants Applying For Public Benefits¹²

By Anna Pohl, Hema Sarangapani, Amanda Baran, and Cecilia Olavarria

The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA or Welfare Reform Act) and The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) substantially reduced unqualified immigrants' access to certain federal benefits programs.³ Despite these laws, many immigrants remain eligible for critical public benefits. Numerous systemic barriers keep battered immigrant women and their children from accessing the benefits to which they are actually entitled, however. These barriers include:

- language barriers,
- confusion or misunderstanding about eligibility for benefits:

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² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/public-benefits>.

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- on the part of the immigrant victim,
- on the part of the state eligibility workers,
- fear of deportation or other negative BCIS action,
- fear that receiving benefits will result in denial of lawful permanent residence on grounds that the immigrant is a “public charge.”

The Impact of Welfare Reform on Immigrant Families

Welfare reform has had a chilling effect on immigrants' access to public benefits. Research demonstrates that between 1994 and 1999, non-citizen use of public benefits not only substantially declined, but did so at a faster rate than citizens' use of public benefits.⁴ Although welfare use declined among both citizens and non-citizens, the decreases for non-citizens were greater than for citizens.⁵ Among families with one or more adult(s) who are legal permanent residents, there was a significant decline in use of TANF, SSI, food stamps, and Medicaid benefits from 1994 through 1999.⁶ Legal permanent residents' participation in TANF decreased 60 percent from 1994 to 1999,⁷ and non-citizens use of food stamps decreased 48 percent.⁸ Legal permanent residents' participation in SSI decreased 32 percent.⁹ The least dramatic change was the 15 percent decrease in Medicaid use.¹⁰ Furthermore, the overall declines in participation rates for legal permanent resident families exceeded the declines demonstrated by citizen families for TANF, SSI, and food stamps, although not for Medicaid.¹¹

These declines *are not* accounted for by changes in benefits eligibility after the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) or increases in income among immigrant populations.¹² Rather in 1999, half of immigrant families were poor, poor legal immigrants were far more likely to be uninsured than similarly situated citizens and children of immigrants were more likely to be without food than children of citizens.¹³

Welfare reform not only reduced benefit use by non-citizens, but also reduced participation among U.S. citizen children who live in immigrant families. Families that include children and parents of different citizenship and immigration statuses are “mixed-status” families. About one in 10 American children live in a household where at least one parent is a non-citizen and at least one child is a citizen.¹⁴ For example, families may include U.S. citizen children, one legal permanent resident parent and a second parent who may be a legal immigrant or undocumented. Three-quarters of all children living in immigrant-headed households are U.S. citizens.¹⁵ All children born in the U.S. are eligible for public benefits on the same terms and extent as all other children, whether they are children born to citizens, legal residents, or undocumented parents. Among low-income immigrant families with U.S. citizen children, only 7.8 percent received TANF in 1999, compared with 11.6 percent of low-income citizen families with children.¹⁶ Similarly, only 19.8 percent of mixed-status low-income families received food stamps in 1999, compared with 27.9 percent of low-income citizen families.¹⁷ For both programs, the participation of mixed-status families declined significantly from

⁴ See Michael Fix & Jeffrey Passel, *The Scope and Impact of Welfare Reform's Immigrant Provisions*, THE URBAN INSTITUTE (2002), available at <http://www.urban.org/url.cfm?ID=410412>.

⁵ *Id.* at 12.

⁶ *Id.* at 15.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Randy Capps, *Hardship among Children of Immigrants: Findings from the 1999 National Survey of America's Families*, No. B-29, THE URBAN INSTITUTE: ASSESSING THE NEW FEDERALISM POLICY BRIEF SERIES B (2001).

¹⁴ Michael Fix & Jeffrey Passel, *The Scope and Impact of Welfare Reform's Immigrant Provisions*, THE URBAN INSTITUTE (2002), available at <http://www.urban.org/url.cfm?ID=410412>.

¹⁵ *Id.* at 17 (citations omitted).

¹⁶ *Id.* at 18

¹⁷ *Id.*

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1994-1999.¹⁸ Medicaid participation rates among mixed-status low-income families remained essentially the same, however, with 42.7 percent in 1994 versus 43.4 percent in 1999.¹⁹

Welfare reform has had a particularly devastating effect on low-income refugees, even though refugees are a protected population under PRWORA, and are exempted for five to seven years from the law's bars on federal public benefits.²⁰ Before PRWORA, participation rates for low-income refugee families with children were much higher than the rates for citizen or legal permanent resident families.²¹ Between 1994 and 1999, participation rates for low-income refugees decreased 78 percent for TANF, 53 percent for food stamps, and 36 percent for Medicaid.²² By 1999, rates for refugee families were roughly at the same level as those of citizens for TANF, food stamps, and Medicaid.²³

The stable Medicaid use rates for low-income legal resident and refugee families are at least in part explained by three important factors. These are the introduction of expanded health care coverage under the State Children's Health Insurance Program (SCHIP), increased state and local outreach for child health insurance, and the impact of new federal guidance clarifying that the use of health benefits would not be a bar to obtaining legal permanent residence or citizenship.²⁴ However, the generally high and sustained levels of Medicaid and SCHIP participation by low-income families was not found for low-income working-age individuals. Between 1994 and 1999, Medicaid use by working-age persons decreased 8 percent among citizens, 23 percent among legal permanent residents, and 58 percent among refugees.²⁵ Increases in the proportion of each population without health insurance were accounted for almost entirely by these decreases in Medicaid use. Reductions in Medicaid use are not being offset by other forms of health insurance, but are leading to total loss of coverage.²⁶

Between 1994 and 1999 there was a substantial increase in the number of naturalized citizen families in the U.S.²⁷ The rise in naturalizations was accompanied by a significantly greater increase in the number of naturalized families receiving some benefits.²⁸ The share of the naturalized population receiving benefits remained relatively modest, however, and the increases account for only a small fraction of the reductions in usage among legal permanent residents.²⁹ In addition, rising incomes were generally not the cause of the significant decreases in benefits use among legal immigrants.³⁰

Barriers

Welfare reform has created complex application procedures and other barriers that deter many immigrants who are eligible to receive benefits from applying for and receiving them. Lack of access to welfare benefits is particularly harmful for qualified immigrant victims of domestic violence for whom access to the benefits safety net is critical. Immigrants who have limited English proficiency face barriers when communicating with intake caseworkers and other staff at state social service agencies. Limited fluency with and comprehension of English often results in significant agencies who interact with battered immigrants are neither bilingual nor adequately trained in assisting battered immigrants with limited English proficiency.³¹ As a result, battered immigrants with limited English proficiency are often turned away by the agency office

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id. at 18.*

²¹ *Id. at 18-19.*

²² *Id.*

²³ *Id.*

²⁴ *Id. at 22.*

²⁵ *Id. at 23.*

²⁶ *Id. at 23-24.*

²⁷ *Id. at 29.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ OFFICE FOR CIVIL RIGHTS, DEP'T OF HEALTH AND HUMAN SERV., POLICY GUIDANCE: TITLE VI PROHIBITION AGAINST NATIONAL ORIGIN DISCRIMINATION AS IT AFFECTS PERSONS WITH LIMITED ENGLISH PROFICIENCY 1 (2001), *available at* <http://www.hhs.gov/ocr/lep/guide.html> [hereinafter *OCR LEP Policy Guidance*].

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staff or intake workers and forced to find their own interpreter, subjected to extensive waits in agency offices, or required to make repeated visits to the benefits office until an interpreter is available.³²

The rules that determine whether an immigrant is eligible for public benefits are complex. Therefore, many immigrants are unaware of their eligibility to receive certain benefits. For example, a battered immigrant woman may not know that even if she is personally ineligible for benefits, she may still apply for benefits for her U.S. citizen children. Given the complexity of benefits rules and the high importance of such benefits to battered immigrant women, serious problems arise when caseworkers in benefits offices misunderstand, or are unclear about or unaware of, the special eligibility of battered immigrants for certain public benefits.

Lack of access to the benefits safety-net locks battered immigrants into abusive relationships by robbing them of any means to survive economically and to support their children when they have an abusive relationship. Congress granted benefits access to VAWA-eligible battered immigrant spouses and children of citizens and lawful permanent residents with pending and approved immigration cases so that victims would be freed from economic dependence on their abusers.³⁰

It is essential that advocates be familiar with the rules and guidelines for accessing public benefits so that they are better able to assist battered immigrant clients to obtain the full range of benefits to which they and their children are entitled. This chapter explains policy guidance from the Department of Health and Human Services relating to both agency requests for disclosure of citizenship, immigration status and/or social security numbers during the benefits application process and the prohibition on discrimination against persons with limited English proficiency. The chapter will prepare advocates to anticipate barriers that their clients may face during the benefits application process, and to intervene with agency staff and caseworkers to ensure their clients receive the benefits to which they are entitled.

Department of Health and Human Services Guidance:

HANDLING QUESTIONS ABOUT CITIZENSHIP, IMMIGRATION STATUS, AND SOCIAL SECURITY NUMBERS DURING THE BENEFITS APPLICATION PROCESS

Many battered immigrant women, including those who, as a matter of law, are eligible for public benefits, fear that applying for benefits will lead to their deportation. A Social Security Number and information on citizenship or immigration status are required in order to obtain certain public benefits, but can only be required for the person who will be receiving such benefits. States often unlawfully require the disclosure of citizenship or immigration status information and/or Social Security Numbers for all family or household members of persons applying for benefits. Many eligible immigrants, and mothers of U.S. citizen children applying on behalf of their children, are deterred from applying for benefits because they are concerned about disclosing the Social Security Numbers of immigration status of non-applicant family or household members during the benefits-application process. State Welfare workers should not, as a matter of law, be making these inquiries.

In September 2000, the U.S. Departments of Health and Human Services (HHS) and Agriculture (USDA) issued a policy guidance³¹ (“HHS Policy Guidance”) clarifying when states may or may not request information about citizenship, immigration status, and/or Social Security Numbers on applications for TANF, SSI, Medicaid, or food stamps benefits. The policy guidance also clarifies when states may or may not deny benefits when an applicant does not provide information that state welfare workers are authorized to request by the policy guidance..

³² *Id.* At § A.

³⁰ Leslye E. Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next steps*, 7 WM. & MARY J. WOMEN & L. 597, 621 (2001).

³¹ DEP'T OF HEALTH & HUMAN SERVICES & DEP'T OF AGRICULTURE, POLICY GUIDANCE REGARDING INQUIRIES INTO CITIZENSHIP, IMMIGRATION STATUS AND SOCIAL SECURITY NUMBERS IN STATE APPLICATIONS FOR MEDICAID, STATE CHILDREN'S HEALTH INSURANCE PROGRAM (SCHIP), TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF), AND FOOD STAMP BENEFITS (2000), at <http://www.hhs.gov/ocr/nationalorigin/triagency.html> [hereinafter *HHS Policy Guidance on Citizenship*].

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HHS issued the policy guidance after finding that many states require non-applicants for public benefits to disclose immigration status and/or Social Security Numbers, even though this information is not legally required. HHS further found that U.S. citizen children and other eligible persons who live in immigrant families are deterred from applying for benefits out of fear that states will request information about non-applicant family members' immigration status, and provide such information to immigration authorities.³² To the extent that states' application requirements and processes have the effect of deterring eligible benefits applicants and recipients who live in immigrant families from enjoying equal participation in, and access to, these benefit programs, states may be inadvertently violating the prohibition on national origin discrimination contained in Title VI of the Civil Rights Act of 1964.³³

Advocates must understand that, under federal law, states are required to establish the citizenship or immigration status and Social Security Numbers of applicants for Medicaid (except emergency Medicaid), State Children's Health Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food stamps. However, under federal law, states may not require applicants to provide Social Security Numbers or information about the citizenship or immigration status of any non-applicant family or household member who will not also be applying for, or receiving, additional benefits for themselves. States may not deny benefits to an applicant because a non-applicant family or household member has not disclosed her or his Social Security Number or citizenship or immigration status.³⁴ The rules regarding who is "an applicant" vary depending upon the benefit program. Advocates need to be familiar with these rules so they can help their clients access the benefits to which they are entitled. The rules for each program are outlined below.

Medicaid and SCHIP

Individual children are encouraged to apply for and receive benefits under Medicaid and SCHIP. For both Medicaid and SCHIP, states are required to establish the citizenship or immigration status of *only* those individuals who will be receiving the benefits.³⁵ Parents must be able to apply for Medicaid and SCHIP benefits for their children. If a mother is applying for Medicaid or SCHIP benefits on behalf of her child and not for herself, the state may only ask immigration statuses of the applicant child. States cannot require a mother to disclose her citizenship or immigration status or the status of anyone else in the household who is not applying for, and will not be receiving, the benefits. In addition, the state may not deny benefits to an eligible applicant because the applicant or a person acting on behalf of the applicant did not certify or document the citizenship or immigration status of people in the applicant's household, if those people are not themselves seeking benefits.³⁶ The child's application for benefits cannot be denied because the mother did not disclose her immigration status or that of any other household member.

As with immigration status, under federal law, states are required to obtain Social Security Numbers *only* for applicants and recipients of Medicaid and Medicaid expansion programs under SCHIP.³⁷ States have the option of requiring a Social Security Number for applicants requesting benefits in separate, non-Medicaid-related, child health care programs under SCHIP.³⁸ If an applicant who qualifies for Medicaid or SCHIP does not have a Social Security Number, the state must assist that person to apply for one. States may ask non-applicants for their Social Security number if they clearly indicate that providing a Social Security Number is voluntary, and explain how the information will be used. States may not deny benefits because an applicant did not provide Social Security Numbers of family or household members who are not applying for or receiving benefits.³⁹

In accompanying battered immigrants applying for Medicaid or SCHIP benefits for themselves or their children, advocates or attorneys need to tell benefits workers that they are not to ask immigration status

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

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questions about non-applicant family members. If benefits workers ask for Social Security Numbers of non-applicants, advocates should ask benefits workers to disclose how that information will be used, and inform both the benefits worker and the battered immigrant client that answering Social Security Number questions with regard to persons, including the battered immigrant, who are not themselves applying for benefits is voluntary, and cannot legally impact the outcome of the benefits award.

Emergency Medicaid Services

Applicants for emergency Medicaid are not required to provide a Social Security Number or proof of citizenship or immigration status. States may not deny emergency Medicaid benefits to an applicant who does not provide a Social Security Number or information about citizenship or immigration status. States may only ask for a Social Security Number if they clearly inform the applicant that providing the number is voluntary. The benefits worker and the victim's advocate should inform clients that failing to provide a Social Security Number cannot result in denial of emergency Medicaid benefits. States which request voluntary disclosure whether or not a client has a social security number must inform the applicant about all the ways that state will use that information.⁴⁰

Food Stamps

Food stamp eligibility and benefits are based on the circumstances of *all* household members. Therefore, all household members must demonstrate their citizenship or food-stamp eligible immigration status.⁴¹ If a household member does not demonstrate citizenship or eligible immigration status, the state agency may declare that household member ineligible for benefits, but *may not deny* benefits to eligible citizens or qualified immigrant household members. The federal Department of Health and Human Services (HHS) encourages states to allow individual household members to declare early in the application process that they are not applying for Food Stamps for themselves, and wish to be excluded from calculation of the Food Stamp benefits amount. Such persons will not need to disclose their Social Security Number or citizenship or immigration status.

One of the key reasons advocates and attorneys need to accompany immigrant victims applying for Food stamps for their children and/or themselves is to make sure victims are able to immediately inform Food Stamp eligibility workers that the victims themselves and/or any ineligible household members are declaring that they are not seeking Food Stamp benefits. Advocates may then also need to intervene to prevent workers from seeking Social Security Numbers, citizenship, or immigration-status information about these ineligible family members. Non-applicant household members, however, will still be required to answer questions on matters that affect the eligibility of applicant household members, such as income, resources, striker status,⁴² and intentional program violations.⁴³ States cannot, however, deny benefits to otherwise eligible household members simply because non-eligible members have chosen not to disclose their Social Security Number, citizenship, or eligible immigration status.⁴⁴

Temporary Assistance to Needy Families (TANF)

Like Food Stamps, as a general rule, TANF eligibility and the level of TANF benefits are based upon the circumstances of all household members. All household members who will be receiving benefits must demonstrate their citizenship, or eligible immigration status. States have considerable flexibility in administering TANF, however, and may have policies that provide for the mandatory or voluntary exclusion of family members. Excluded family members would be “non-applicants” who do not need to provide

⁴⁰ *Id.*

⁴¹ See Chapter 5 for a discussion of immigrants eligible to receive food stamps.

⁴² While definitions may vary by state, a “striker” is anyone involved in a strike or concerted stoppage of work by employees.

⁴³ While definitions may vary by state, an “intentional program violation” generally occurs when a benefits recipient intentionally misrepresents, conceals, or withholds facts in an attempt to receive benefits to which they are not entitled.

⁴⁴ See HHS Policy Guidance, note 31.

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Social Security Numbers, or documentation of citizenship or immigration status. Twenty-one states require some adults who are not parents or caretakers, such as stepparents who are not legally responsible for a stepchild, to be included in the assistance unit. Twenty states allow some adults who are not parents or caretakers, such as essential persons and caretakers' spouses, to be included in the assistance unit at the family's adoption.⁴⁵ All states allow for "child-only" cases, where needy children are eligible to receive TANF benefits even if the other family members are non-applicants or ineligible. Family members may be non-applicants for TANF because they are not applying for benefits themselves, because they are not qualified, or because they are qualified immigrants who are subject to a five-year bar from participation in federal means-tested public benefits and therefore, TANF ineligible. These "child-only" policies are an example of how TANF programs operate for families that include members with differing citizenship and immigration statuses.

States may ask non-applicants for a Social Security Number only if they clearly indicate that provision of Social Security information is voluntary. Further, they must indicate how Social Security Number information, or information that an applicant lacks a Social Security Number will be used. Since a factor in TANF eligibility is household income, non-applicant family members who cannot be asked immigration status questions and who cannot be required to provide Social Security information must still provide income information as part of the TANF application for TANF-qualified family members. States may require non-applicants to provide information on factors that affect the family's finances or other eligibility factors, such as income received by non-applicant parents through any type of employment, property rentals, prize-winnings, etc.⁴⁶ States, however, may not deny benefits to eligible family members because a non-applicant did not provide a Social Security Number or documentation of citizenship or immigration status.⁴⁷

Joint Application Forms

Most states have consolidated their application forms and use joint applications for Medicaid, SCHIP, TANF, food stamps and other benefits, which eliminates duplication, and helps ensure that applicants receive all the benefits to which they may be entitled. HHS recommends an approach that reflects an understanding that many families will include household members who qualify for some or all benefits programs and other family members who will not due to immigration status or other reasons. HHS urges states to design their joint application forms so that families and households complete the information needed to apply for Medicaid and/or SCHIP first, since neither of these programs requires a family or household to apply as a unit.

This assures that children and other household members who qualify for Medicaid SCHIP receive much-needed health care without regard to whether they or other family members qualify for other federal public benefits. States should inform families and households that families and individual family members may apply for individual benefits programs independent of other programs. Eligibility for one program will not be affected if the family or individual chooses not to apply for other programs.⁴⁸ A family or individual family member may apply for any combination of benefits for which they qualify. For example, the applicant may qualify for and receive SCHIP and TANF, but not Food Stamps. States should designate the information that is mandatory for each individual benefit program.⁴⁹ In addition to state efforts, advocates should continue to accompany clients applying for benefits to help them understand and complete the forms. HHS provides recommended sample language that clarifies which information must be provided in order for applicants to receive specific benefits.⁵⁰ Advocates should accompany clients to assist them in completing the Joint

⁴⁵ State Policy Documentation Project, *Categorical Assistance for TANF Cash Assistance*, available at <http://www.spdp.org/tanf/categorical/categsumm.htm>.

⁴⁶ See, e.g., DC Department of Health and Human Services available at http://www.dhs.dc.gov/pdfs/benefit_app/part_c.pdf.

⁴⁷ HHS Policy guidance, note 31.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ DEP'T OF HEALTH & HUMAN SERVICES & DEP'T OF AGRICULTURE, POLICY GUIDANCE REGARDING INQUIRIES INTO CITIZENSHIP, IMMIGRATION STATUS AND SOCIAL SECURITY NUMBERS IN STATE APPLICATIONS FOR MEDICAID, STATE CHILDREN'S HEALTH INSURANCE PROGRAM (SCHIP), TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF), AND FOOD STAMP BENEFITS: SAMPLE NOTICE (2000), available at <http://www.hhs.gov/ocr/nationalorigin/sample.html>

Application Forms, since the variations in information required by each program makes completion of the forms confusing.

Policy Guidance from the Department of Health and Human Services: Facilitating Access to Public Benefits for Persons with Limited English Proficiency

Battered immigrant women with limited-English-proficiency are frequently unable to obtain basic information on how to access public benefits. Many intake workers and other front-line employees are neither bilingual, nor trained in assisting people who have limited English proficiency (LEP).⁵¹ LEP persons are often turned away from public benefits agencies, forced to wait substantial periods of time, forced to find her own interpreter who may not be qualified to interpret, or required to make repeated visits to an agency's office until an interpreter is available to assist in conducting the interview. As a result, battered immigrant women may be denied necessary benefits to which they are entitled, or may experience significant delays in obtaining such benefits.

Legal Protections for Persons with Limited English Proficiency

Courts have held that persons with limited English proficiency are protected under Title VI of the Civil Rights Act of 1964,³³ and the Title VI regulations against national origin discrimination. Further, on August 11, 2000, President Clinton issued Executive Order 13166, directing agencies to ensure access by persons with limited English proficiency to federally funded programs.³⁴ The failure of a federally funded state agency to take reasonable steps to provide LEP persons with meaningful opportunity to participate in HHS-funded programs may constitute a violation of Title VI, as well as HHS's own implementing regulations. Department of Health and Human Services' regulation requires all recipients of federal financial assistance from HHS to provide meaningful access to LEP persons.³⁵ "Federal financial assistance" includes grants, training, use of equipment, donations or surplus property, and other assistance.³⁶

The Department of Health and Human Services' (HHS) Office for Civil Rights has released a Policy Guidance to assist state benefits agencies, among others, in providing services to LEP persons without discriminating against applicants on the basis of LEP status/national origin. The LEP Policy Guidance has two goals: (1) ensuring that federal public benefits programs do not exclude individuals simply because they face language barriers to communicating in English, and (2) finding methods of minimizing the financial and administrative burdens of LEP requirements on small businesses, small local governments, and small, federally assisted non-profits.³⁷

To achieve this goal, the Policy Guidance suggests the use of the following four part balancing test to determine whether the agency is in compliance with LEP policy: The agency is to consider (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program, activity, or service provided by the recipient; (2) the frequency with which LEP individuals come in contact with the

⁵¹ OCR LEP Policy Guidance, note 28, at 1.

³³ 42 U.S.C.S. § 2000d (2003).

³⁴ Exec. Order No. 13166 (August 11, 2000).

³⁵ 45 C.F.R. 80.3(b)(2)(3) (2001).

³⁶ Includes hospitals, nursing homes, home health agencies, and managed care organizations; universities and other entities with health or social service research programs, state, county, and local health agencies; state Medicaid agencies; state, county and local welfare agencies; programs for families, youth, and children; Head Start programs; public and private contractors, subcontractors and vendors; physicians and other providers who receive Federal financial assistance from HHS.

³⁷ OCR LEP Guidance, note 28, at § F.

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recipient's program, activity, or service; (3) the nature and importance of the recipient's program, activity, or service, balanced against the resources available to the agency and administrative costs.³⁸

In putting forth this balancing test, HHS states a commitment to limiting burden on smaller recipients of federal financial assistance while providing meaningful access to benefits for LEP persons may be achieved. HHS plans to work with representatives of state health and social service agencies, hospital associations, medical and dental associations, managed-care organizations, and LEP persons, to identify and share model plans, examples of best practices, and cost-saving approaches to fulfilling the HHS mandate.³⁹ An interagency working group on services to LEP individuals has developed a Web site⁴⁰ to assist in disseminating policy information to federally funded state agencies, federal agencies, and the communities being served.⁴¹

What is Required of Agencies? Compliance with LEP Requirements

To avoid discrimination on the basis of national origin, state benefits agencies must provide the language-assistance necessary to ensure meaningful access for LEP persons, at no cost to the individual.⁴² The type of language-assistance that agencies are required to provide depends upon a variety of factors, including the size of the agency, the frequency with which particular languages are encountered, and the frequency with which LEP persons come in contact with the program.⁴³ The key to providing meaningful access for LEP persons is to ensure that the agency and the individual can communicate effectively. The agency must ensure that an LEP person is given adequate information, is able to communicate the relevant circumstances of her situation is able to understand the benefits available, and is able to receive benefits to which she is entitled.⁴⁴

Availability of translated agency materials and oral interpretive services are the most common policy issues that agencies must confront to comply with LEP guidelines. The Policy Guidance provides specific examples of documents that may be considered "vital" for purposes of facilitating agency access for LEP individuals, and for which translations, therefore, are required in order to comply with Title VI. A document will be considered "vital" if it is crucial for obtaining federal services and/or benefits, or is required by law. Vital documents include, for example: applications; consent and complaint forms; notices of rights and disciplinary action; notices advising LEP persons of the availability of free language assistance; and letters or notices that require a response from the beneficiary or client.⁴⁵ For instance, if a complaint form is necessary in order to file a claim with an agency, that complaint form would be vital. "Non-vital" information includes documents that are not critical to access such benefits and services. Vital documents must be translated when a significant number of the population eligible to be served, or likely to be directly affected by the program/activity, needs services or information in a language other than English to communicate effectively.

Similarly, the OCR LEP Guidance recognizes oral communication between LEP clients and agencies as a necessary part of the exchange of information. Thus, an agency that limits its language assistance to simply providing written materials may not be allowing LEP persons "effectively to be informed of or to participate in the program."⁴⁶ Agencies may take a number of steps to ensure oral communication between the LEP individual seeking services and the agency. They range from hiring competent bilingual staff or staff interpreters, to contracting with qualified in-person or telephonic interpreter services, to arranging formally for the services of qualified community volunteer interpreters who are bound by confidentiality agreements. It is generally not acceptable for agencies to rely upon an LEP individual's family members or friends to

³⁸ OFFICE FOR CIVIL RIGHTS, DEP'T OF HEALTH AND HUMAN SERV., POLICY GUIDANCE: TITLE VI PROHIBITION AGAINST NATIONAL ORIGIN DISCRIMINATION AS IT AFFECTS PERSONS WITH LIMITED ENGLISH PROFICIENCY: APPENDIX A QUESTIONS AND ANSWERS 1 (2001), <http://www.dhhs.gov/ocr/lep/finalproposed.html>.

³⁹ *Id.*

⁴⁰ See Meaningful Access for People Who Are Limited English Proficient at <http://www.lep.gov>.

⁴¹ *Id.* See www.lep.gov for further discussion of LEP requirements.

⁴² See OCR LEP Policy Guidance, note 28, § C.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

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provide the interpretive services.⁴⁷ The agency should supply competent language services free of cost to be in compliance with the requirements of Title VI and Executive Order 13166. The particular option an agency takes will depend upon the resources of the agency, and the frequency with which an agency encounters a particular language.

While the Department of Health and Human Services has taken steps towards ending discrimination on the basis of national origin against persons with limited English proficiency and improving access to the critical federal benefits application process, there is little data concerning enforcement of state-agency compliance with LEP policies. Advocates for LEP clients should be aware of the requirements for state benefits in agencies in providing appropriate language services to LEP persons, and should coordinate with agencies to ensure that languages encountered in the community are adequately served. It is crucial that advocates accompanying battered immigrant women during the benefits application process be knowledgeable of the HHS Policy guidance, be vigilant of the extent to which agencies comply with the guidelines described above, and be prepared to intervene and demand adequate services for the LEP clients from public benefits agencies.

Steps for Advocates: Accompanying Battered Immigrants to Benefits Agencies

- ACCOMPANY BATTERED IMMIGRANT CLIENTS APPLYING FOR PUBLIC BENEFITS FOR THEMSELVES AND/OR THEIR CHILDREN TO AGENCY OFFICES.

Battered immigrant women applying for benefits face numerous difficulties during the benefits application process that make accompaniment by the knowledgeable advocates essential. Advocates can ease these difficulties by accompanying battered immigrant women to public benefits agencies when they are applying for benefits on behalf of their children and/or themselves as qualified immigrants under the Violence Against Women Act.

- ANTICIPATE AND PREPARE YOUR CLIENT FOR BARRIERS SHE MAY FACE DURING THE BENEFITS APPLICATION PROCESS.

During the benefits-application process, battered immigrant women may face linguistic and/or cultural barriers to accessing benefits agencies, discomfort with disclosing immigration status due to fear or deportation, complicated application forms and/or procedures, lack of awareness or training on issues of domestic violence or immigration on the part of the benefits agency staff, or confusion over the differing requirements for various benefits programs.

- DETERMINE THE BENEFITS TO WHICH YOUR CLIENT AND/OR HER CHILDREN ARE ENTITLED.

When accompanying their clients, advocates should use the information in the Public Benefits chapter of this manual to determine whether the child or the battered immigrant herself qualifies for Medicaid, SCHIP, TANF, Food Stamps, and/or Child Care. Advocates should take copies of any documentation showing that their clients qualify for the benefits listed above.

- UNDERSTAND AND USE WITH AGENCY CASEWORKERS HS POLICY GUIDANCE ON DISCLOSURE OF IMMIGRATION STATUS AND SOCIAL SECURITY INFORMATION.

When accompanying their clients to benefits agency offices, advocates should have with them a copy of the HHS Policy Guidance with respect to disclosure of immigration status/Social Security Numbers and be prepared to intervene should their clients feel coerced into “voluntary” disclosure of such information for any non-applicant family member. Confusion over disclosure requirements

⁴⁷ *Id.*

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and/or benefits eligibility of battered immigrant women may be common among agency caseworkers; intervention by advocates may prevent incorrect denial or delay of benefits.

- UNDERSTAND AND USE WITH HHS OCR LEP GUIDANCE TO ENSURE ADEQUATE ACCESS TO THE BENEFITS APPLICATION PROCESS FOR CLIENTS WITH LIMITED ENGLISH PROFICIENCY.

Advocates should also take to benefits agency officers a copy of the OCR LEP guidance on providing agency access to individuals with limited English proficiency, and prepared to demand competent, expedient interpretive services for their LEP clients. Generally, advocates for bilingual clients should work with local benefits agencies to ensure appropriate translation or interpretive services or LEP individuals.

- BE PREPARED TO RESPOND IF YOUR CLIENT IS DENIED BENEFITS APPROVAL.

If the battered immigrant woman is turned away from the agency without benefits approval, advocates should insist that the application be accepted, demand an explanation for the denial, document names of agency workers and their action or inaction with the application, and be prepared to file an appeal.

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5.1

Battered Immigrants and Civil Protection Orders¹²

By Leslye Orloff, Cecilia Olavarria, Laura Martinez, Jennifer Rose, and Joyce Noche

Introduction³

Civil protection orders are available in all fifty states, Puerto Rico, the District of Columbia, and all U.S. territories⁴ and are designed to protect battered individuals from their abusers.⁵ The civil protection order

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² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples

(<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ This chapter strives to be useful both to attorneys and advocates who work in the area of domestic violence who will learn about particular issues that arise in protection order cases of battered immigrants. At the same time, this chapter will include some basic information on protection orders that will be useful to volunteer attorneys and immigrant rights advocates and attorneys who may not be previously familiar with civil protection order cases. For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/protective-orders>.

Protection Orders

aims to offer the victim protection from future abuse and can be crafted to uniquely address and counter abuse, power, and control in each particular relationship. When civil protection orders are appropriately drafted and consistently enforced, they can provide effective protection for victims of domestic violence.⁶ Most importantly, civil protection orders provide a victim-initiated and controlled justice response to domestic violence that does not require criminal justice system involvement. Civil protection orders are initiated by the victim, thus a victim can choose to pursue this justice-system remedy without reliance on the criminal courts. For example, a victim of domestic violence can obtain a civil protection order even if her abuser is not being criminally prosecuted for the abuse. Victims of domestic violence can obtain civil protection orders whether or not there is also a criminal prosecution of their abuser. Criminal prosecution of abusers is designed to hold abusers accountable for their behavior. Victim needs may or may not be addressed as part of the criminal case; thus, it is recommended that victims whose abusers were criminally prosecuted also obtain civil protection orders.

Civil protection orders may be one of the most effective means to protect victims from further abuse, particularly when the orders are drafted to fit the specific needs of the victim. The most effective protection orders are obtained when a victim is represented by counsel or a trained domestic violence advocate.⁷ This allows the court to address the victim's particular needs, while generic protection orders may exclude specific provisions necessary to ensuring the victim's safety. Advocates or attorneys assisting battered immigrants need to understand how protection orders can positively affect the victim's ability to attain legal immigration status. They must listen to and respond to the fears and concerns of the victim and understand the manner in which abusers may be exerting power and control over immigrant victims.⁸

Protection orders can effectively reduce domestic violence and offer protection and assistance to battered immigrant women, particularly because non-citizen abusers can be deported for a protection order violation. It is important to note, however, that in 20 to 30% of domestic violence cases, a protection order may have little effect in ending abuse. These particular cases have a high level of lethality and are extremely dangerous for the victims and their families. In such situations, advocates and attorneys can play a key role in helping battered immigrants survive abuse as well as helping obtain protection orders, through a criminal prosecution and possible deportation of the abuser.

What is a protection order?

In most jurisdictions, protection orders offer a wide array of relief that can provide vital protection against repeated violence for victims, even those who are not ready to separate from their abusers. A civil protection order can be an effective tool to shift the balance of power between an abuser and a victim. Studies have demonstrated that in 70% of domestic violence cases, the issuance of a civil protection order decreased physical violence and made petitioners feel more secure.⁹ Adding forms of relief beyond violence prevention provisions to a civil protection order can increase the effectiveness of violence prevention. It is important to note that protection orders do not guarantee an end to violence, and may not always deter an abuser. Advocates and attorneys should explain to their clients that a civil protection order is not for every victim. Safety must be the first and foremost consideration. Often a civil protection order is a crucial component of the victim's safety plan; in some situations, because violence escalates upon separation or immediately after separation from the abuser, a civil protection order may exacerbate the abuse.

Since victims have more control over the protection-order process, they can choose when, whether, and how to enforce protection orders, taking into account the potential for the abuser's deportation and whether that deportation might enhance danger to the victim and her family members. Protection orders can also provide

⁴ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993).

⁵ *Id.* at 811.

⁶ *Id.* at 813.

⁷ PETER FINN & SARAH COLSON, U.S. DEPARTMENT OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT X (1990).

⁸ See Chapter 1 of the manual for an overview of power and control used against immigrant victims.

⁹ See Finn & Colson.

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crucial evidence of reoccurring abuse and therefore can help battered immigrants who file for immigration benefits, including battered spouse waivers, self-petitions, or cancellation of removal applications under the Violence Against Women Act and the crime visas (U and T-Visas).

There are two types of protection orders available to victims of abuse, an emergency or temporary protective order and a full protection order. A majority of states authorize the issuance of an emergency or temporary protection order after a hearing demonstrating the victim's immediate danger.¹⁰ Generally these hearings are held ex parte, without the opposing party (abuser) being present. Such orders are short-term (typically last 14-30 days) and are temporary remedies until the court can schedule a full hearing.¹¹ A full protection order is of longer duration and is granted after a full hearing. Full protection orders typically last one to three years, however orders may be extended upon demonstrated need.¹² In the vast majority of states, victims can choose whether to obtain a temporary protection order or whether to initiate protection order proceedings by filing directly for a full protection order. Obtaining a temporary protection order first is usually the appropriate procedure when the victim and the abuser reside together at the time the victim seeks a protection order. This helps against immediate retaliation when the abuser is served with notice of the protection order proceedings. Temporary protection orders are also particularly useful as a means to remove the abuser from the family home, helping deter efforts to make extra copies of house keys and to take or destroy papers in the home.

Psychological Barriers to Accessing Civil Protection Orders

A civil protection order can help deter physical and psychological abuse and can help battered immigrants regain a sense of well-being. It is one of the most effective tools for ending domestic violence and works best when the protection order is tailored to fit the particular needs of each victim, taking into account the victim's and abuser's immigration status. Yet, the psychological trauma of domestic violence and the power and control exerted by the abuser can often keep victims from obtaining a protection order and from reporting violations to the police.

The psychological impact of physical, psychological, and sexual abuse can also interfere with a battered woman's ability to participate in a protection order hearing.¹³ The victim may appear angry and hostile, socially withdrawn and passive, highly anxious and disorganized, or numb and detached.¹⁴ While these are normal reactions to trauma, not all battered women will appear the same and many may exhibit a combination of these emotions. A battered woman's demeanor and oral testimony at a protection hearing may be strongly affected if she is encountering the batterer for the first time after being separated.¹⁵ However, a victim with support from family and friends may appear assertive, confident, and strong. Advocates should be aware of the many factors that impact a battered woman's psychological response to violence.¹⁶

Battered immigrant women face distinct psychological barriers regarding civil protection orders. Many immigrant women fear the legal system. Even women with legal immigration status often believe that

¹⁰ *Id.* at 1035.

¹¹ David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST.L.J. 1153, 1191-92 (1995).

¹² *Id.* at 1192; Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1859 (2002).

¹³ Cf. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993) (stating that expert witnesses must understand the numerous ways that domestic violence victims will respond to violence); Hughes, M.J. and L. Jones (2000). "Women, Domestic Violence, and Posttraumatic Stress Disorder (PTSD)." *Family Therapy* 27(3): 125-139; Kessler, R.C., A. Sonnega, et al. (1995). "Posttraumatic Stress Disorder in the National Comorbidity Survey." *Arch Gen Psychiatry* 52(12): 1048-60.

¹⁴ Hughes, M.J. and L. Jones (2000). "Women, Domestic Violence, and Posttraumatic Stress Disorder (PTSD)." *Family Therapy* 27(3): 125-139; Kessler, R.C., A. Sonnega, et al. (1995). "Posttraumatic Stress Disorder in the National Comorbidity Survey." *Arch Gen Psychiatry* 52(12): 1048-60.

Id.

¹⁵ American Psychiatric Association (2000). *Diagnostic and Statistical Manual DSM-IV-TR*. Washington, D.C. *Id.*

¹⁶ Thompson, M.P., N.J. Kaslow, et al. (2000). "Partner Violence, Social Support, and Distress Among Inner-City African American Women." *American Journal of Community Psychology* 28(1): 127-143. *Id.*

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reporting domestic violence will result in their deportation.¹⁷ Battered immigrants are also less likely to call the police or turn to the courts for help.¹⁸ Many were raised in countries where the judiciary was the arm of a repressive government, and where the persons who prevailed in court were the ones with the most influence, the strongest ties to the government, and the most economic resources.¹⁹ Additionally, in many such legal systems, a man's word is inherently more credible than a woman's.²⁰ Battered women who have learned not to expect justice from such legal systems find it difficult to believe that our system will function any differently, and thus feel isolated and alone.²¹ Because of these fears it is likely that a battered woman's testimony at a protection order hearing will be affected.

Protection orders can be particularly effective for battered immigrants when the abuser is an immigrant and/or naturalized citizen. For example, non-citizen abusers may be more afraid of the repercussions from protection order violations (i.e., deportation) and therefore, may be more willing to comply with the provisions of the order. If the abuser is a non-citizen and is found guilty of violating a protection order, the abuser can be deported. For battered immigrant women, the complexities arising from reporting a violent act can be compounded by the fact that the report may trigger the deportation of a non-citizen abuser.²² For some women, the deportation of their abusers can help them recover tremendously by allowing them to remove violence from their lives. For other women, the opposite is true. The abuser's deportation may create enhanced dangers related to economic survival, her ability to attain legal immigration status, and her safety and the safety of family members both here and abroad.²³ Advocates for battered immigrant women should ascertain whether criminal prosecution, following an arrest for violating a protection order, will enhance or undermine an individual victim's safety. Different women will have completely different needs that must be met if the abuser is deported.²⁴ By looking at the problem from different angles, advocates can help battered immigrant women make the best choices.

Advocates and attorneys should be aware of cultural restraints, which may inhibit the victim from leaving the abuser. Many victims choose not to separate themselves from their abusers. A battered immigrant may opt to live with her abuser, as long as the individual receives therapy and agrees to stop the abuse. Attorneys and advocates should view the victim's willingness to obtain a protection order, while she continues to reside with her abuser, as an important step towards building her self-esteem and taking action to protect herself and her children. A protection order without a stay-away provision should also be offered as an alternative if a victim suddenly wants to drop the protection order altogether. Many times, an abuser will promise to stop abusing the victim if she promises not to pursue the protection order. In this situation the protection order can serve as a deterrent to the abuser and shift the power balance to the victim.

Obtaining a Protection Order

Protection orders are important for battered immigrants seeking to leave an abusive citizen or lawful permanent resident or immigrant visa holder, because the order will legally document evidence of violence for her immigration case.²⁵ Most state statutes recognize the relevance of past abusive acts and violence to provide a context to evaluate present fear and danger.²⁶ Hence, in most jurisdictions, protection order laws do

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION, 19 (August 1994).

²¹ See Orloff Address.

²² ANN BENSON AND JOSEPH JUSTIN ROLLINS, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS IN WASHINGTON STATE, (Seattle: Washington Defender Association 2001).

²³ Leslye E. Orloff, et al., *Ensuring That Battered Immigrants Who Seek Help from the Justice System are not Reported to the INS*, in SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN: A "HOW TO" MANUAL FOR BATTERED WOMEN'S ADVOCATES AND SERVICE PROVIDERS, 279, 206 (1999).

²⁴ Edna Erez and Joanne Belknap, *In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses*, 13 VIOLENCE AND VICTIMS 251 (1998).

²⁵ See Leslye E. Orloff, et al., *With No Place to Turn: Improving Legal Advocacy For Battered Immigrant Women*, 29 FAM. L. Q. 313 (1995).

²⁶ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 901 (1993).

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not specify time limits after a violent incident has occurred within which a victim must file for a protection order.²⁷ Courts regularly consider the parties' history of violence as evidence of the need for a current protection order.²⁸ If the last incident or threat against a battered immigrant woman took place months before filing a protection order, the advocate or attorney should help gather evidence of the history of abuse. The attorney should present this evidence to the court and demonstrate that additional protection is needed. Explaining that the victim may need this protection when filing for immigration relief separate from that of her abuser, should serve to underscore the need for additional protection.

Despite statutory authority allowing courts to issue protection orders without regard to the date of the most recent incident of physical violence or criminal behavior, a few courts may not grant an order if the most recent threat or incident occurred several months prior to the filing of a civil protection order petition. Moreover, some courts also require before the issuance of the protection order a finding of family violence and that there is a likelihood that violence will continue. When this occurs, advocates and attorneys working with battered immigrants who need protection orders should be prepared to demonstrate to the court the need for the victim to have future, ongoing protection. They should demonstrate the dynamic of power and control and how it may escalate if the case is denied for a lack of a recent incident of abuse. The battered immigrant may want to consider locating an attorney who can help with an appeal.

Who can obtain a protection order?

Any person can obtain a protection order, including all immigrants, because protection orders are designed to deter criminal acts against intimate partners, spouses, or family members. Regardless of immigration status, all persons are entitled to this protection. To deny access to family court relief because of immigration status is a violation of Equal Protection and Due Process.²⁹ If protection orders were not available for all persons, then abusers would be free to abuse immigrants and escape the criminal ramifications of such action. No justice system official, including police, prosecutors, court staff or judges, should be asking victims about their immigration status or if they have a social security number when they call for help or seek a protection order.³⁰

State statutes vary on which relationships are covered under protection order laws. Advocates and attorneys should determine if the relationship between the client and her abuser is covered by the state's protection order statute. The relationship between the parties generally included in state protection order statutes are defined as follows:³¹

- Current or previous spouses;
- Family members related by blood or marriage (i.e., parents, minor children, adult children, aunts, uncles, siblings, grandparents, and in-laws);
- Current or previous household members regardless of their marriage or blood relation;
- Unmarried spouses of different genders who have lived as spouses or currently living as spouses;
- Persons who have a common child;
- Persons who were previously or are currently in a dating or intimate relationship;
- Persons who were previously or are currently in a same-sex relationship, regardless of whether they live or have lived together;
- Household members of an abuse victim that is stalked or harassed; and
- A few states allow protection orders to be extended to those that offer refuge to victims of domestic violence as well as to the victim's employers.

²⁷ *Id.*

²⁸ *Id.*

²⁹ 42 U.S.C.S. § 1981(a); See also, *Plyer v. Doe*, 457 U.S. 202, 210-213, 102 S. Ct. 2382, 72 L.Ed.2d 786 (1982).

³⁰ If such inquiries are being made in your jurisdiction, contact the National Immigrant Women's Advocacy Project (NIWAP) for technical assistance: 4910 Massachusetts Ave NW, Suite 16, Washington, DC 20016; 202-274-4457; info@niwap.org.

³¹ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 814-46 (1993).

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At least two state statutes specify that an adult may file for another adult who is unable to go to court.³² Most states allow an adult to file on behalf of an incompetent adult or a child.³³ Some states allow certain teenage minors to petition for their own protection order.³⁴ Depending on the relationship of the parties, state statutes may provide different types of civil protection order remedies, and/or may require parties to litigate the case in a particular court. For example, in some jurisdictions, if the parties are intimate partners, have a child in common, or were previously intimate partners, the protection order is sought in Family Court. If a family member of the abused person seeks a protection order against the abuser (perhaps for stalking or making threats to the family home), some jurisdictions require the litigants to go to District Court or to obtain a “no-contact” order that does not statutorily provide other remedies (including the catch-all and creative remedies discussed in this chapter).

Parties do not need to separate in order for the victim to obtain a protection order. Many people believe that victims of domestic violence can easily leave an abusive home or relationship, but this is not necessarily true.³⁵ Violent relationships are often characterized by power disparities that make leaving very difficult, particularly for women with children.³⁶ Economic control is an important component of the abuser’s system of maintaining control over the victim.³⁷ A woman who decides to leave her abuser faces great economic challenges regardless of her income level because she frequently has to leave behind her only financial resources or support.³⁸ Women also face social pressure to maintain their relationship. They may believe that society, the legal system, and their communities consider dissolution of their relationships undesirable. Victims courageous enough to take the first step in overcoming all these obstacles by seeking a protection order need to be able to access protection orders whether or not they are currently planning to separate from their abusers.

A battered immigrant woman may prefer to remain with the abuser because of religious or cultural reasons. In many cases, the victim’s immigration status is linked to the abuser and she may just now have learned that she can apply for lawful permanent residence on her own through VAWA. In other cases, the immigrant victim’s legal status may be tied to a spouse with a legal work visa. These immigrant victims may qualify to apply for immigration benefits under the VAWA 2000 crime victim visa provisions, but since this process can take some time, victims may want to continue living with their abusers until they can receive legal immigration status through the U-visa process.³⁹ This is particularly true since INS has not yet issued regulations for processing U-visas. In cases in which battered immigrants plan to try to continuing living with their abuser, the protection order should require that the abuser attend an intervention program and refrain from assaulting, threatening, or harassing the victim. This type of protection order would not include an order that the abuser stay a minimum distance away from the victim, rather it emphasizes that the abuser cease harmful behavior. Some battered immigrants may prefer this sort of temporary arrangement until the INS approves their self-petition, or victim of crime case (U-visa) and grants them work authorization, after which they may choose to try to leave their abusers. Once the victim separates from her abuser, her protection order may be modified to include a separation or “no contact” clause.

Grounds for Issuance of a Protection Order

Generally, state statutes condition issuance of a protection order on the existence of an underlying act of abuse which constitutes a criminal act, including: assault, battery, burglary, kidnapping, criminal trespassing, interference with child custody, sexual assault, rape, threats and attempts to do violence or bodily harm,

³² *Id.*

³³ *Id.* at 846.

³⁴ *Id.* at 820-21.

³⁵ See Sara M. Buel, *Fifty Obstacles to Leaving, A.K.A. Why Victims Stay*, 28 COLO.LAW. 19 (1999).

³⁶ See Ethan Brennan Lauer, *Housing and Domestic Abuse Victims: Three Proposals for Reform in Minnesota*, 15 LAW & INEQ. 471, 477 (1997).

³⁷ Numerous victims are forced to go back to their abusers because of lack of money or housing. U.S. Gen. Accounting Office, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 7-8 GAO/HEHS 99-12 (1998) (detailing evidence that desire for economic control underlies many brutal crimes against women).

³⁸ Leslye E. Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 616-19 (2001).

³⁹ INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U).

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interference with personal liberty, unlawful or forcible entry into a residence, child abuse, false imprisonment, stalking, , and destruction of property.⁴⁰ Some states will issue protection orders based on emotional abuse and harassment that might not have directly caused physical harm to the victim.⁴¹

Jurisdiction⁴²

Courts have jurisdiction to issue protection orders generally in one of two locations: in the state where the acts of abuse or threats have occurred, or the state in which the victim is currently present.

Under the Violence Against Women Act of 1994,⁴³ federal law requires that each state, tribe, or territory give full faith and credit to a sister state's protection order (including an emergency order) as long as due process requirements were met in the state where the order was issued. The full faith and credit provision of the Violence Against Women Act says that a valid protection order must be enforced throughout the United States. This means that if a victim receives a valid protection order, it is good in the community where it was issued as well as in all other jurisdictions or locations in the United States. These full faith and credit provisions apply to protection orders issued in all 50 states, Indian tribal lands, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, American Samoa, the Northern Mariana Islands, and Guam.⁴⁴

Whether a tribe, state, the District of Columbia, or a U.S. territory issues a protection order, if the order complies with federal requirements, it is entitled to full faith and credit if it is valid under the full faith and credit law. A protection order is valid if the issuing court had authority over the victim and the abuser and had authority to hear and decide the case, and the abuser was given notice and an opportunity to be heard.⁴⁵ Protection orders issued with due process are enforceable in any US jurisdiction. Victims should be able to call police in a neighboring state to have their protection orders enforced. Some jurisdictions require that a victim moving to a new jurisdiction follow specified steps to have her protection order recognized and enforced.⁴⁶

If the victim is planning to move away from the original jurisdiction in which she obtained the protection order, contact the state domestic violence coalition or another domestic violence program in the new jurisdiction to verify what the procedures are in the different jurisdiction. These procedures need to be followed in order for the protection order to be enforced. For programs working with migrant worker victims of domestic violence, familiarity with VAWA full faith and credit provisions is essential. It is also useful for programs to develop relationships with other domestic violence and legal services agencies in the communities migrant workers come from or typically travel to for work. Find out if registration of the protection order is required, and if any fees are required. Recommend that the victim obtain a certified or court-issued official copy of the protection order. The victim should be instructed to carry the order with her and staple to it a copy of the statutory language of the VAWA full faith and credit provisions.

Although states are required to recognize another state's protection order, some states have not enacted legislation implementing VAWA's full faith and credit provisions. In these states, the police may not want to enforce an out-of-state protection order, despite the federal law requirement. State domestic violence programs and coalitions can be helpful in advocating with police to enforce protection orders issued in other states.

⁴⁰ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 849-50 (1993).

⁴¹ *Id.* at 866-73.

⁴² For a more detailed discussion on jurisdiction please refer to Immigrant Status and Family Court Jurisdiction section of Chapter 8.

⁴³ 42 U.S.C. § 13981 (1994).

⁴⁴ Ctr. on Full Faith & Credit & Pa. Coalition Against Domestic Violence, *Increasing Your Safety: Full Faith and Credit for Protection Orders*, VIOLENCE AGAINST WOMEN ONLINE RESOURCES, at <http://www.vaw.umn.edu/FinalDocuments/survivorbrochure.asp> (last modified Sept. 15, 2003).

⁴⁵ *Id.*

⁴⁶ *Id.*

Obtaining Effective Remedies – Creative Protection Order Remedies

To be most effective, protection orders should contain all the relief a battered immigrant woman needs to address the abuse, taking into consideration the unique “power and control” issues experienced within the particular relationship. Relief in the protection order should be as detailed as possible, and should ensure that the individual needs of the victim are addressed. Gaps in the relief listed in the order, or a lack of specificity, may lead to further violence and may make the order difficult, and, in some cases, impossible to enforce.

Protection orders can contain a wide range of remedies that can be used to address the specific needs of a battered immigrant. For example, certain protections are critically needed by most victims when the abuser and victim have children. The protection order should always contain orders regarding custody. Advocates and attorneys should also consider naming the children explicitly as protected parties in their mother’s protection order. Additionally, when immigrant women take steps to protect themselves against further abuse, abusers may retaliate against the woman’s family members. Protection orders therefore also should include prohibitions against contact or harassment of the immigrant victim’s family members.

We will first discuss traditional protection order provisions that are explicitly listed in most state statutes. As we discuss each provision, we will highlight how they can be best used creatively to help immigrant victims. Second, we will discuss other creative protection order remedies that courts can order under their catch-all provisions to offer further life saving help to immigrant victims. Although a client may or may not directly request each of the following provisions, it is important that she is aware all the potential options available to her.

TRADITIONAL PROVISIONS OF A CIVIL PROTECTION ORDER

- *The respondent shall not assault, molest, harass, or in any manner threaten or physically abuse the petitioner and/or his/her child(ren).*

A “no further abuse” clause is essential to every protection order. Enforcement through criminal or contempt prosecution is very difficult without this clause. The clause should be clearly worded so the abuser is aware of exactly what types of actions are prohibited.

If a battered immigrant chooses to live with her abuser, the protection order may include only this provision. The advocate or attorney should keep in mind that the battered immigrant does not need to leave her abuser in order for a protection order to be issued. Advocates and attorneys should interview victims and identify their fears, needs, and barriers to leaving their abusers. The advocate should be aware of cultural and religious traditions that might hinder the victim from seeking a protection order that requires separation. The victim may simply want a protection order, which requires the abuser to receive counseling and refrain from violent behavior. When the parties have children, full contact protection orders that allow the parties to continue to live together can also contain provisions that award custody to the victim should the parties separate. Such orders can also require that child support payments begin while the parties still reside together, which can be helpful when the abuser has been denying the victim access to money she needs to buy food or other essential items for the household and the children. Obtaining an order that child support commence while the parties still reside together provides the victim the greater economic security of having this already in place, should she decide to separate from the abuser in the future.

These types of protection orders are valid in all jurisdictions. In fact, protection orders in these cases can help shift the balance of power in relationships, reduce the violence the victim has been experiencing, and should be evaluated as an initial option for any battered immigrant. It is important that the battered immigrant obtain a protection order, despite the abuser’s promise that he will change his behavior. Advocates should remind the victim that if the abuser is serious about changing his ways, then he should be willing to make a formal promise in court. The judge can then issue a protection order stating that the abuser agrees to stop further abuse and harassment of the victim.

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There are two important advantages to obtaining a protection order even when the parties plan to continue living together. First, if the order is violated, the respondent can be charged with a criminal offense and the police will respond seriously when called for help. Second, the protection order provides crucial evidence that will support the victim's VAWA or U-visa immigration cases. Battered immigrants need not leave their abusers to obtain VAWA immigration relief⁴⁷.

- *The respondent shall stay 200 yards away from the petitioner's home, person, school, place of worship, workplace, day care provider, community center, and other specified locations.*

It is very important to **clearly define** where the respondent is forbidden to go. Include in the provision all locations frequented by the petitioner, including homes of relatives and friends, the petitioner's community center and place of worship, the petitioner's hairdresser and health care provider.

In preparation for the CPO hearing, advocates and attorneys should carefully review with the petitioner all of the various locations the abuser should be ordered to stay away from. Problems can arise when the parties are both active in the same church, community establishment, or other religious meeting place. One possible solution to this problem is to order that the abuser may only attend a church, community event, or religious event at specified times that are at different times from when the victim will be attending. When such an order is entered, the petitioner should provide copies of the order to church personnel, community personnel, or other religious personnel so that they can help her enforce the order if needed.

If the petitioner is in hiding, the provision should not reveal her exact location, but merely state that the respondent is required to stay away from her person and her residence. It is also important to state that respondent is not allowed to locate or attempt to locate the petitioner either directly, or through third parties. The order may also specify a minimum distance that the respondent is required to stay away from the petitioner and from specified locations.

It is also crucial to specify that the respondent must refrain from contacting the petitioner's workplace. A battered immigrant may only be able to work at a workplace that INS has approved when granting her a work-related visa and may lose her job because of the respondent's harassment. This could cause her to violate the terms of her legal immigration visa, making her more susceptible to deportation, or may cause the victim to lose her job.

- *The respondent may not contact the petitioner and/or his children in any manner, either personally, by telephone, in writing, by computer communication, or through third parties.*

Batterers often find other ways to harass the victim after the issuance of a protection order. This may include threatening phone calls, e-mails, letters, sending unwanted deliveries to her home (i.e., flowers), and other forms of communication. While these activities are still attempts to maintain power and control, the batterer may not be in violation of the specific provisions of the protection order. It is therefore important that the above clause be included in the protection order. To obtain evidence of violations of this provision, the victim can screen phone calls through an answering machine or caller ID. This will provide documentary evidence of the respondent's attempt at communication. The victim should also keep copies of any written communication and take photos of (with date stamps, if possible) any things delivered to the house by the abuser. Any third party contact and/or communications (e.g., through his family members) should also be documented.

- *The respondent shall vacate the residence at (location) immediately. The (local) police department shall accompany the respondent and respondent allow 15 minutes to collect his personal belongings. Personal belongings may include toiletries, clothes, one set of sheets, and pillowcases. The petitioner's permission is required to remove any other items. The police shall take all keys and garage openers from the respondent, test them to make sure they are the right ones, and then return them to the petitioner.*

⁴⁷ See Chapter 10 in this manual for more information.

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Vacate orders require the respondent to vacate the home shared with, owned by, or co-owned with the petitioner. Advocates and attorney should check with local law enforcement and follow language in the state statute and expand if possible. The order should also specify the exact manner in which the vacate provision should be carried out. It should establish time limits on the respondent and include additional provisions, which prohibit him from reentering the home, and should order the respondent to surrender all keys, to refrain from damaging the property or premises, and to refrain from tampering or interfering with utilities or mail service.

In cases involving battered immigrant women, it is important that vacate orders go into effect immediately. If abusers are given advance notice of a vacate order, they may destroy, remove, or hide essential documents and evidence that the battered immigrant will need to win her domestic violence-related immigration case. When the victim has fled the family home and has sought a protection order to remove the abuser and return her and the children to possession of the family home, there may be financial records in the home that the victim will want access to. When this is true, the vacate order can explicitly state that the abuser is not allowed to remove any financial records or other papers from the home when he vacates it. This way, the victim can gain access to financial records in the home that could be useful to her in obtaining child support, spousal support, or an equitable distribution of property.

When an advocate or attorney helps a petitioner obtain a vacate order, it is important to also follow up with telephone and utility companies making needed changes in account numbers and asking that only persons with special, secure passwords be able to access the account information or make any changes in account service. Advocates and attorney should consider including in the protection order (both in the temporary and final order) language that requires the respondent to not interfere with utility services and also including enforcement language (e.g., if respondent violates the provision, respondent is ordered to pay \$500 fine or up to six months in jail or both for each violation). Immigrant victims should immediately cut off the abuser's ability to make calls using telephone service either directly, using calling cards, making collect calls, or charging calls to her number. This will prevent the abuser from running up her telephone bill with international phone calls. It may inhibit his ability to harass or threaten her relatives abroad. Most importantly, it may help her prevent the phone company from cutting off her service for non-payment thereby cutting her off from an ability to call the police for help. If victims already have high phone bills left when the abuser vacates, there are two possible options: he can be ordered to pay the phone bills or advocates and attorneys can obtain help, for example, from a local church or charitable organization, to pay her outstanding bill so that her phone with a new number can be reconnected. Advocates and attorneys may also want to consider negotiating with utility companies on the victim's behalf to structure a payment plan and maintain minimum service.

In some states, utility companies have begun requiring social security numbers to open accounts. For immigrant victims of domestic violence who obtain vacate orders and need to transfer utility accounts into their own names, this can create real dangers. Victims may be able to remove abusers from the family home but then face the danger of having the electricity, gas, or water service turned off. There is no federal requirement that social security numbers be provided for utility services. Utilities services are not government agencies. Advocates and attorneys working with immigrant victims should contact utilities with such requirements and seek waivers for immigrant victims, explaining the dangers posed for the victim and her children, and explaining any immigration relief available to the particular victim. In the alternative, advocates should seek to have the utility company allow her to use the social security number of one of her U.S. citizen children, or the number of the account, or should allow a friend or family member to co-sign the contract using his/her social security number. As a last resort, as part of the protection order or in a motion to modify the protection order, if the abuser is ordered to leave the home, he should also be ordered to leave the utilities in his name with his social security number, and not to interfere with the service. When talking with utility companies about such cases, advocates should consider advocating that utility companies change these newly imposed social security requirements because of the danger they pose to immigrant victims of domestic violence and child abuse.

- *The respondent shall relinquish possession and/or use of the following personal property (list specifically itemizing property in question) as of (date and time).*

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This provision orders that the respondent relinquish personal property, such as the family vehicle and particular documents. This is very important for battered immigrants who have left their home and need to retrieve documents she will need for any immigration case she has or may file.⁴⁸ The order should also include essential documents she will need for herself and the children for identification, health care, school, and child support. Prior to the hearing, the petitioner should make a list of the items that she needs. It may be possible, if the respondent is represented, for the belongings to be brought to the hearing. If this is not possible, advocates and attorneys should make sure that petitioner has a way of picking up items and/or having a place to store the items. The list of property should include items that are irreplaceable and that have sentimental value to her so that the abuser will not be able to maintain power and control by taking or destroying these items, e.g., family photos and heirlooms. Abusers of immigrant victims may try to take control of, or destroy, items that have sentimental or cultural value to the victim. Further, when the immigrant victim needs the car for transportation to work, granting her use and possession of the car can be of particular importance. If the protection order has a vacate provision, the order can request that the respondent relinquish possession of all property except for personal belongings and other items listed in the order. The language should also specify that a police escort accompany either the abuser or battered immigrant back into the home to retrieve belongings.

- *As of (date and time) the respondent shall turn over to the (local) police department any and all weapons that the respondent possesses or owns and all licenses that allow the respondent to possess or purchase weapons.*

This provision prohibits the respondent from possessing a weapon or firearm. It also revokes the respondent's weapon's license. This will prohibit the respondent from purchasing or receiving a weapon during the duration of the protection order. To further prohibit the respondent from possessing a weapon, the provision can order the local police to search for and confiscate weapons during the vacate order, when they are called for assistance in enforcing the protection order, when they are ordered by the court, by the victim's request, or they can be sent to the abuser's home to confiscate weapons. The court should require the respondent to produce a receipt proving that the weapons were relinquished. If the respondent is a police officer or in the armed forces, some jurisdictions may waive this requirement for battered immigrant women. The advocate or attorney should ask the victim what, if any, weapons the abuser owns or were used against her. The order should include anything used, including knives and machetes.

- *The respondent shall participate in and successfully complete the following (treatment program).*

The protection order may require the respondent to attend a treatment program in addition to other provisions. These programs may be batterer intervention, substance abuse, parenting classes, or mental health counseling. Only those batterer intervention programs that are certified as having a specific expertise in working with domestic violence abusers should be used. In cases of domestic violence, joint or family counseling is not appropriate, and should not be ordered or agreed to by the victim. Research indicates that family counseling can actually increase danger to the victim. The batterer should only be ordered to attend programs without the victim's presence. If the batterer is a substance abuser, he should first attend a substance abuse program and, once he has completed this program, he should be ordered to attend a batterer's intervention program. Advocates and attorneys should be familiar with the range of treatment programs available and should also seek a signed authorization from the respondent, allowing counsel to obtain information from the treatment program regarding respondent's completion, or participation. It is important to note that in certain jurisdictions, it may be difficult for courts to enforce and/or monitor compliance. There are very few programs available for batterers, thus making it difficult to mandate participation and compliance.

If the respondent is not fluent in English, he should be ordered to attend a certified program in a language in which he is able to communicate. If there is no program in the respondent's language, he should be ordered to arrange for an accompanying interpreter for all sessions. In some jurisdictions, the abuser can

⁴⁸ For a full list of documents she may need for immigration case, see Chapter 3 of this manual for evidence checklists.

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be ordered to use a court certified interpreter that he pays for on a sliding scale. If there is no counseling in the respondent's native language, he will likely use this as an excuse not to attend. This specific issue must be addressed whenever the respondent's native language is not English. If alternate provisions are not listed in the order, it is likely that the respondent will not attend counseling sessions.

Advocates for victims whose abusers are not English speaking should identify potential interpreters in advance whom the abuser could pay to interpret during treatment sessions. Church-based groups or community groups who work with immigrants may be able to identify potential interpreters. These groups could also assist in providing interpreters that could be trained in domestic violence by the local domestic violence coalition or shelter. These interpreters could assist victims at hearings and when victims wish to participate in battered women's counseling groups.⁴⁹ Domestic violence programs should include a line item in their budget to cover the costs of interpreters on an as-needed basis.⁵⁰ Battered women's advocates involved in coordinated community response teams should also encourage other community agencies (police, treatment programs, courts, probation officers, legal services, etc.) to hire bilingual staff and include interpreter line items in their budgets.

- *Temporary custody of the minor child(ren) is awarded to the petitioner until further order of the court, or until the expiration date of this order.*

It is important to include a custody order whenever children are involved in an abusive relationship. Research has found that approximately 70% of batterers also abuse their children, this demonstrating that children can also be physically harmed by domestic violence.⁵¹ Even if children may not have been directly abused, studies have proven that children living in violent homes are negatively affected.⁵² After separation, the batterer may use children as a form of control over the victim. If legal custody is not specified in the protection order, a battered immigrant may be forced to work out child custody with the abuser, posing enhanced danger to the victim and the children.

It is essential that the protection order include a custody clause if the children are involved. Generally, battered immigrant women should resolve custody questions as part of the immediate relief they receive in their protection order. The batterer may also tell the victim that she will lose her children if she leaves him. A protection order without a custody clause could therefore cause the victim to believe that she will lose legal custody over her children and may cause her to return to the abusive relationship.

If custody is not awarded in the protection order, it is more likely that the victim will return to the abuser. Few battered immigrants are aware of the U.S laws regarding custody, particularly those that favor awarding custody to the non-abusive parent even when the abusive parent is a citizen and the non-abusive parent is not.⁵³ What battered immigrants do know is often told to them by their abusers. Battered immigrants often assume that as in their home country, U.S. courts will automatically assign custody to the male head of the household, or to the parent with the greater earning capacity or superior immigration or citizenship status. Misinformation combines with incorrect assumptions and fear that their abuser will cut them off from their children altogether, making battered immigrants hesitant to seek child custody as part of their protection order or other family law case.

Advocates should explain the child custody process to the victim and that American courts often award custody to immigrant victims and other battered women instead of granting custody to their abusers. This explanation should include a discussion of the best interest of the child standard used by courts across the country in making child custody determinations. Factors that courts consider in making best interest determination in the local jurisdiction could include the wishes of the child's parent or parents as to his or her custody; the wishes of the child as to his or her custodian; the interaction and

⁴⁹ Battered women should not be ordered into counseling as part of their civil protection order.

⁵⁰ See Chapter 10 of this manual for a fuller discussion of interpreter services.

⁵¹ Bowker, Arbitell, & McFerron,., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, (Kersti Yilo & Michelle Bogard, eds., 1988).

⁵² See e.g., HOWARD A. DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION, American Bar Association Center on Children and the Law. (1994).

⁵³ *Id.*

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interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest; the child's adjustment to his or her home, school and community; and the mental and physical health of all individuals involved, and who, if anyone, perpetrated domestic violence in the relationship.⁵⁴ Immigration status of a parent is not a factor that is properly considered as part of this best interest test.⁵⁵

When courts allow the abuser to raise immigration status in custody cases, the abuser can use the court process to further intimidate and threaten the victim with the loss of her children and possible deportation. If immigration issues are raised, the battered immigrant should find counsel to represent her. If she does not have counsel and does not have a way to address immigration issues in open court, then it is likely that she will return to her batterer. For more information on how to respond when the abuser raises immigration status in a custody or protection order case, please see the chapter on immigration and child custody included in this manual.

In preparing a battered immigrant for any family court case at which custody could be contested, attorneys⁵⁶ and advocates should be prepared to put on evidence including the battered immigrant's testimony, testimony of other witnesses, and other evidence (e.g., photographs, police reports, school and medical reports) that demonstrate:

- The client is the primary caretaker of the children (have her testify about a typical day with the children and who is responsible for what childrearing tasks);
- Respondent is not the primary caretaker of the children (have her testify about respondent's typical day, e.g., respondent leaves the home for work and does not return until very late at night, etc.);
- How respondent interacts with the children, how he disciplines the children, etc.;
- The history of DV and how it has affected the children (if the children have counselors, health care providers, schoolteachers, or advocates who can address this effect, they should be called as witnesses);
- Whether the children were abused directly or affected by witnessing the abuse;
- Who has been responsible for the children's health care, schooling, religious activities;
- How well the children are adjusted in their current school and community; and
- In a highly contested case, attorneys should consider having an expert witness testify about the effects of domestic violence on these children.

Depending on the age of the child/ren, attorneys can consider requesting the court to confer with the child/ren in chambers.

Battered immigrants contemplating moving with the children to another, safer jurisdiction should consult a family lawyer who can advise them on how to best make such a move without the battered immigrant woman becoming subject to parental kidnapping charges. The Hague Convention,⁵⁷ the Federal Parental Kidnapping Prevention Act,⁵⁸ state parental kidnapping acts, and State Uniform Child jurisdiction and enforcement acts⁵⁹ can all be factors in this decision.⁶⁰ It is very important that battered immigrant women who are considering moving with their children do so in a manner that does not violate these

⁵⁴ National Coalition Against Domestic Violence, *Myths and Facts Regarding Domestic Violence and Child Custody Disputes*, August 1997; Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1071 (1991); Elizabeth Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1234-35 (1998) (stating that the Uniform Marriage and Divorce Act is the model for several states' custody statutes).

⁵⁵ For more information see Chapter 8 of this manual.

⁵⁶ While trained advocates can effectively help immigrant victims obtain culturally effective protection orders, attorney resources in your community should be particularly used in contested custody cases involving immigrant victims.

⁵⁷ Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10494 (March 26, 1986).

⁵⁸ Parental Kidnapping Prevention Act, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568 (1980) (codified in 28 U.S.C. § 1738A (1994)). The Act requires states to give full faith and credit to custody decisions of other states that conform with the Act.

⁵⁹ UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115 (1988); UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 257 (1997).

⁶⁰ See Chapter 8 of this manual, which discusses the interaction of these laws and provides for a framework for advising battered immigrants on these issues.

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statutes. Criminal kidnapping charges that could result from violating these statutes could result in the non-citizen parent's deportation⁶¹ and/or loss of custody and visitation.

- *The respondent has rights of visitation with the minor child(ren) under the following conditions (requirements).*

If a custody clause is included in the protection order, a clause granting visitation to the respondent will generally be included as well. In 60% of cases, respondents retain visitation rights, and in only 11% of cases is the respondent required to have supervised visitation only.⁶² The National Council of Juvenile and Family Court Judges recommends supervised visitation until the batterer has completed a domestic violence treatment and a substance abuse program. Supervised visitation can be arranged at a supervised visitation center or with an approved third party. If a supervised visitation center is not available, advocates should work with the victim to find third parties with whom the victim feels comfortable, to ensure the safety of herself and her children. Possible third parties could be friends, family members, clergy, or social workers.

If the petitioner does not wish to request supervised visitation, orders authorizing unsupervised visitation should clearly state all of the specifics of abuser's visitation rights. The provisions should specify when, where, and how visitation should take place. If there is to be no contact between the abuser and the victim, the order should clearly state a drop off and pick up arrangement that will not require contact between the parties. A third party can be involved in picking up and dropping off the children. A third party's home can also be used as the site of the pick up and drop off. If this is not possible, the exchange of children should occur at a public place, such as a restaurant. In this situation, the victim should ensure that a third party accompanies her to the exchange location. This can offer her protection and ensure that she has a witness with her should there be problems with the abuser during the exchange of children. The victim can also exchange children at the local police precinct. This ensures her safety and provides police witnesses should problems arise such as the abuser's failure to return the children. The police can also require that the abuser remain at the precinct for fifteen minutes after the victim leaves the children so that if she is living at an undisclosed location, he is prevented from following her after she picks up the children.

The visitation provision can also order that the respondent not use drugs or alcohol during or in the 24 hours prior to the visitation. If the respondent is found in violation of this provision, the court should be asked to make clear to the respondent that visitation rights can be suspended.

If visitation is awarded, it is important that the order set forth a visitation arrangement that is detailed, sets particular pick up and drop off times, and provides a clear arrangement for exchange of children that ideally does not require contact between the parties. Ambiguous and non-specific visitation provisions create situations in which the abuser can continue to have contact with the victim. More importantly, non-specific visitation clauses often allow the abuser to use the children to maintain power and control over the victim.

If the petitioner's and/or children's safety cannot be ensured during visitation, the petitioner should ask that visitation be suspended until further court order. It is very difficult to convince the court to suspend an abuser's visitation rights or to require supervised visitation. When such relief is needed to protect the victim and the children, the victim will need to secure the assistance of counsel. The attorney should be ready to show why visitation is not feasible and argue that suspending visitation rights is in the child's best interest. Depending on the jurisdiction, it may be appropriate if the battered immigrant is planning on divorcing the abuser, and there is strong argument for supervised visitation, that counsel for the victim ask the court to defer visitation for the divorce action.

⁶¹ You may also contact NIWAP for technical assistance on these matters: 4910 Massachusetts Ave NW, Suite 16 lower level, Washington, DC 20016; 202-274-4457; info@niwap.org.

⁶² Keilitz, Hannaford & Efke, 1997.

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- *The respondent shall pay child support for (minor child) in the amount of (dollar amount), biweekly, weekly, or monthly and/or spousal support for the petitioner in the amount of (dollar amount), biweekly, weekly, or monthly.*

Protection orders for all battered women with minor children should also include child support awards and, if applicable, spousal maintenance awards. The state's child support guidelines should be used to determine the amount of the award. It is important to ensure that the child support amount is paid through wage-withholding, so the respondent cannot use child support payments to exert control over the victim. With wage-withholding, the payments come directly from the abuser's paycheck and are paid by the abuser's employer directly to the victim through the court.

Other creative arrangements can require the respondent to pay specific bills, rent, mortgage payments, health insurance, or spousal support. If health insurance is ordered, the respondent must be ordered to provide to the court by a specific date, evidence that the children have been included in his health insurance coverage. The abuser can be ordered to file income tax returns and to turn over to the victim all or a specified proportion (at least half) of the tax refund. The protection order can state that the petitioner, not the respondent, has the legal right to claim the children as dependents on income tax returns. This can be ordered even when the abuser is paying child support, since the costs associated with supporting the children are usually significantly more than the child support award.

Financial support is important for battered immigrants who do not have work authorization, who are undocumented, or who have pending VAWA self-petitions and are only able to receive limited public assistance. If battered immigrants do not have financial support, they may be more likely to return to the abuser. For battered immigrants, obtaining child support can also strengthen a battered victim's INS case, as it will demonstrate that she is a person of good moral character who has taken all possible steps to ensure that her children have financial support. Obtaining a child support order can help her attain lawful permanent residency through VAWA, as the support order can be used to demonstrate sources of income that she is entitled to receive now and in the future. This can help her demonstrate that she will be able to support herself and will not have to rely on public benefits.

- *The respondent shall pay for all medical expenses the petitioner incurred as a result of the respondent's violence and shall pay for the repair of the door to the petitioner's house and all costs associated with the changing of the petitioner's locks.*

The protection order can include a provision that orders the batterer to provide other specific forms of monetary relief to the petitioner. Victims can receive court ordered reimbursement for economic losses, including repair of damaged property, medical costs, attorney's fees, and court costs. In addition, if the parties are married, the court can order that the abuser maintain the victim on his medical insurance. Payment of medical expenses and costs associated with damage to property is especially important for immigrants and their children. Ordering the abuser to pay for damage to property may help prevent the victim's eviction from her home. It can be difficult for immigrant women to find alternative housing, as they may have difficulty establishing employment history and landlords may discriminate against renting to immigrants or domestic violence victims.

By ordering the abuser to pay for medical expenses, the victim can receive needed medical treatment. Medical bills will not accumulate and there may be less need for the battered immigrant to become reliant on public benefits, thus strengthening her immigration case.

- *The (local) Police Department or Sheriff shall assist the petitioner in enforcing this order and shall pay special attention to calls for assistance from petitioner and/or (petitioner's address).*

The protection order may provide a provision with instructions for law enforcement to assist with vacate orders, transport the petitioner to a shelter, accompany the petitioner home, serve process, or carry out orders regarding the abuser's relinquishment of personal property or weapons. The protection order may also state that law enforcement officials monitor the victim's residence and respond quickly to future calls from the petitioner's residence.

Catch-All Provisions

Catch-all provisions can be used to creatively obtain specific culturally competent relief for battered immigrant women. In virtually all jurisdictions, protection order statutes contain catch-all provisions. These provisions can provide victims with relief specifically needed in each case to help cut off the abusers' ability to exert continued control over their victims and reduce the abusers' opportunities for ongoing abuse. These provisions can be used to remove barriers that prevent victims from being able to leave their abusers. Through catch-all provisions, protection orders can address areas of potential conflict. Creative use of catch all provisions can also address petitioner's cultural and/or immigration status related needs.

Catch-all provisions can be broadly interpreted and allow the courts to exercise discretion to order additional relief as necessary to prevent abuse. For example in *Powell vs. Powell*,⁶³ the District of Columbia Court of Appeals determined that the courts had the authority under the statute's catch-all provision to grant monetary relief in civil protection order proceedings, though the remedy was not specifically provided by statute.⁶⁴ The court broadly interpreted the District of Columbia's intrafamily offenses act and concluded that

y interpreted the District of Columbia's intrafamily offenses act and concluded that interpreted the District of Columbia's intrafamily offenses act and concluded that

[W]hile it is true that monetary relief is not specifically mentioned...the plain intent of the legislature was an expansive reading of the Act, which we think must be accorded to the catchall provision as well.⁶⁵

In *Maldonado v. Maldonado*,⁶⁶ the court confirmed the wide range of relief provided by a catch-all provision and included provisions to assist the battered immigrant petitioner:

[T]he husband shall relinquish possession and/or use of the wife's pocketbook, wallet, working permit, ID Card, bank card, Social Security card, passport and any other item of the children's personal belongings, table, four chairs and dishes...the husband shall not withdraw the application for permanent residence that he had filed on behalf of the wife.⁶⁷

Specific Protection Order Provisions That Assist Battered Immigrants

It is important to screen a battered immigrant to determine her eligibility for immigration relief under the Violence Against Women Act (VAWA), the crime victim visa (U-visa) or other forms of immigration relief when assisting her in obtaining a protection order. The INS requires that a battered immigrant prove that she has been a victim of domestic violence (battering or extreme cruelty) when applying for domestic violence-related immigration relief. The protection order provides documentary proof that she has been a victim of domestic violence and she can submit a copy of the protection order to INS as evidence. In addition to proving domestic violence, she must also prove to INS that she has a valid marriage, that her abuser is a citizen or lawful permanent resident, and that she is married to her abuser. Provisions contained in the protection order can be used to help the immigrant client obtain evidence that she can then use to prove each of the required elements of immigration her case. A protection order that uses the catchall provisions to address the client's needs for evidence for her immigration case will likely reduce the client's fear of deportation, as well as reduce the likelihood that she will actually be deported. When the evidence she

⁶³ *Powell v. Powell*, 547 A.2d 973 (D.C. 1993)

⁶⁴ *Id.* at 975.

⁶⁵ *Id.*

⁶⁶ *Maldonado v. Maldonado*, 631 A.2d 40 (D.C. 1993).

⁶⁷ *Id.* at 41.

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obtains through the protection order helps her prove her domestic violence-related immigration case, it can also help her attain legal immigration status.

While in court, it is important that any battered woman or any battered immigrant seeking creative catch-all relief demonstrate that the specific provisions sought are designed to help curb the violence. She should pay special attention to showing how the requested creative relief will help prevent future harassment to her or her children and/or will enhance her ability to flee her abuser and create a safe life for herself and her children.

Some judges may not be willing to incorporate these provisions into a protection order. If faced with this dilemma, advocates and attorneys must educate local judges on the importance of these provisions for protection orders to offer the most effective, culturally appropriate protection possible. Part of this training should provide an overview, with examples, of the imperfect role traditional protection order provisions play for battered immigrants. If judges in a particular jurisdiction have not ordered creative relief, advocates should insure that battered immigrants seeking such relief have legal representation. Counsel for immigrant victims seeking creative relief would demonstrate to the court through evidence why the relief sought should contribute to reducing the abuser's power and control and the potential for future abuse of the petitioner. Immigrant victims needing creative protection order remedies should include evidence of immigration-related abuse in the petition for a protection order. Then, if the protection order is issued by consent, there is evidence in the record (the victim's uncontested affidavit). If creative relief is requested, evidence supporting the request was presented to the court, and the relief was denied, counsel should consider appealing the court's decision to deny relief.

Attorneys should request all the relief that a client needs as a battered immigrant. If for some reason, the judge denies such relief, the advocate or the attorney must state: "Objection, your Honor. Could you please state for the record why this relief is being denied?" This will create a record so an attorney can appeal the decision. (See discussion of appeals below.)

The following are examples of creative provisions that can be particularly helpful to battered immigrants:

- *The respondent shall give petitioner access to, or copies of, any documents related to or needed for petitioner's immigration application.*

If the battered immigrant's husband has filed her immigration papers for her, she may need these documents and copies of information he filed with INS to support her own individual immigration case. Any immigration case that the abuser has filed on the victim or the children's behalf will contain information that can be used to prove his immigration status and to prove other aspects of her VAWA immigration case. Advocates should assist the petitioner in consulting with an immigration attorney⁶⁸ to find out what the petitioner may qualify for and which specific documents will be necessary for the client's case. Connection between this relief and violence: Helping the petitioner access documents and papers she will need to attain legal immigration status without the abuser's knowledge or assistance will counter the batterer's threats of deportation and allow the client to obtain legal immigration status on her own. It will rob the batterer of a powerful tool (deportation) he has over the battered immigrant, and facilitates her ability to attain any legal immigration status for which she qualifies.

- *The respondent shall not withdraw an application for permanent residency that he has filed on the petitioner's behalf, and shall take any and all action to ensure that the petitioner's application for permanent residency is approved.*

Batterers who have filed immigration papers on behalf of the victim often use this fact as a means to control and threaten the victim with deportation. The batterer may threaten to withdraw the application if the victim leaves him or reports violence to local authorities. The batterer therefore can exert powerful control over the victim and can use this to further abuse and harass. Protection orders can require abusers not to undermine their spouse's immigration case, and can prevent abusers from withdrawing

⁶⁸ The immigration lawyer will know when and whether it is necessary to contact INS about the client's case.

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applications, thus allowing the victim to obtain legal permanent residency. The amount of evidence required to obtain legal permanent residency through an application filed by a citizen or lawful permanent resident husband is substantially less than the burden of proof required for VAWA relief. Therefore, it is important in some cases to try to get the abuser to complete the petition that he has filed. By ordering the abuser not to withdraw her petition, it may also prevent him from taking steps to have the petitioner deported before she can file for VAWA immigration relief.

- *The respondent shall not contact any government agency, including, but not limited to, the INS, the (particular) Embassy, or the (particular) Consulate about the petitioner, absent permission from the court, a police employee, or a subpoena.*

In addition to contacting the INS to withdraw or harm the petitioner's immigration case, the respondent may also attempt to interfere by contacting the U.S. Embassy and/or Consulate processing the case. Protection order provisions limiting the abuser's ability to contact INS or other government agencies about the victim lessens the abuser's ability to interfere with the processing of her immigration case, thus lessening his ability to threaten her. Ordering the respondent not to contact INS, the U.S. Consulate, or Embassy about the victim's case can be particularly helpful to victims whose options for legal immigration status have been included in their spouse's immigration case. Further, many immigrant victims either have or are able to attain legal immigration status based on an immigration visa or immigration case initiated by the abuser. Ordering him to follow through on such a case, or not to withdraw her application based on a case he may have filed, can help many battered immigrant victims (e.g., derivative spouse's of work visas, asylees, workers for international organizations).

Once she has obtained a protection order and has informed INS that her spouse is an abuser by filing a VAWA case (by providing INS a copy of the protection order or any other means), VAWA confidentiality provisions preclude the INS from using unfavorable information provided by the abuser against the petitioner. This provision protects the victim from being harmed if the batterer continues abuse through the withdrawal of her immigration papers. This provision essentially lessens the amount of control that the batterer has over the victim and lessens his ability to abuse the victim through immigration-related abuse. It is important to note that research has found that immigration-related abuse almost always occurs in relationships that are also physically and sexually abusive. The existence of immigration-related abuse corroborates physical or sexual abuse or is a lethality factor that predicts the potential for escalation of the abuse in the relationship.⁶⁹ When there is immigration-related abuse in the relationship, it is advisable to seek the assistance of counsel for the protection order case. Counsel should present evidence to the court about the immigration-related abuse and demonstrate how the abuser uses these threats to control her. Counsel should also consider having a local immigration attorney testify as an expert witness about the petitioner's immigration options and to be available to answer any of the court's immigration-related questions. Creating a record connecting immigration-related threats and abuse would provide support in the record for the court to award the victim the immigration-related relief she seeks.

An order restricting an abuser's ability to communicate with government agencies about the victim can withstand any first amendment free speech challenges.⁷⁰ If a batterer contends that the protection order is restricting his ability to contact government officials concerning his wife and infringes on his free speech rights protected by the First Amendment, advocates can challenge the assertion in two ways. First, attorneys for the victim can assert that any threats a batterer makes to report a victim to immigration authorities constitutes non-speech elements of communication and are in essence, conduct that warrants no First Amendment protections.⁷¹ Second, attorneys should assert that "no contact with

⁶⁹ See generally Mary Ann Dutton, Leslye E. Orloff, & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (Summer 2000).

⁷⁰ A brief on this issue *Ruiz v. Carrasco* is included in the appendix to this chapter.

⁷¹ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the Supreme Court held that words threatening injury to a person, i.e., "fighting words," are not deserving of First Amendment protection, in that "their very utterance inflict injury or tend to incite an immediate breach of peace." *Id.* at 572. See also *Cox v. Louisiana*, 379 U.S. 536 (1965), where the Supreme Court further stated that "It had never been deemed an abridgment of freedom of speech or press to make a

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government agencies provisions” were designed not as an effort to restrain speech, but rather, as a remedy for a batterer’s past conduct.⁷² Courts using a balancing test have consistently upheld restrictions on batterers’ speech (threats, harassment, communication with victims) because these restrictions are narrowly crafted so as to restrict only speech that harms or can cause harm to the domestic violence victim. If an abuser files an appeal or otherwise contests entry of such order, victims should obtain the assistance of counsel to oppose his motions and appeals to invalidate this or other protection order provisions on constitutional grounds. **Any attempts to make these arguments must be done with the assistance of an attorney.**

- *The respondent shall pay any and all fees associated with the petitioner’s and/or children’s immigration cases.*

This provision requires the batterer to pay immigration fees for the victim and her children, and ensures that financial burdens will not hinder her immigration application. In some cases, requesting fee waivers can delay the immigration case or cause an immigration official to question whether she is likely to become a public charge.⁷³ The connection here between relief and abuse is that in many cases but for the abuser’s refusal to file, or the withdrawal of the petitioner’s immigration case, she would have legal immigration status. He would have filed and paid the fees for filing an immigration case for her. Ordering the abuser to pay filing fees or other fees related to the victim’s immigration case removes financial disincentives to her filing and helps assure that her case will be resolved quickly and successfully. Further, by his payment to her of these costs, it enhances the likelihood that she will be granted lawful permanent residence without encountering public charge problems.

- *The respondent shall immediately relinquish possession and/or use of and transfer to the petitioner the following items:*

Petitioner’s Property

This should include clothing, personal affects, jewelry, and toys of the petitioner’s children, as well as cultural and personal items, such as family photos from the petitioner’s home country, mementos from the petitioner’s home country, personal religious items such as statues, rosaries and bibles, pictures of the petitioner’s children, gifts from family members, clothing, letters, books, the petitioner’s pocketbook, and any other items of personal importance or sentimental value to the petitioner. This provision will prevent the batterer from inflicting emotional abuse through the destruction or sequestering of petitioner’s or the children’s property.

-Petitioner’s Property (needed to prove or attain legal status)⁷⁴

These include the petitioner’s essential documents, such as the petitioner’s work permit, ID card, social security card, border-crossing card, pay stubs, bank card, alien registration receipt card, passport, or passport stamp to prove permanent residency. If the battered immigrant is a lawful permanent resident or a non-immigrant visa holder with permission to work and live in the U.S, she will need these essential documents to prove her status and her ability to work legally. Connection between relief and violence: This helps the victim prove her legal status, as well as her right to work and reside in the U.S. It prevents the batterer from withholding or destroying these essential documents, thereby making it harder for her to work.

course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written, or printed.” *Id.* at 555-56 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 409, 502 (1949)).

⁷² See *Thorne v. Bailey*, 846 F.2d 241 (4th Cir. 1988), where the Fourth Circuit held harassment is not protected speech. *Id.* at 243. See also, *Maldonado v. Maldonado*, 631 A.2d 40 (D.C. 1996), where the court assumed that threats to harm another person constitute conduct that the state may prohibit, rather than speech protected by the First Amendment. *Id.* at 43. See also, *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994) where the Supreme Court upheld an injunction prohibiting a course of unlawful conduct, not because of the content of speech, but rather as a remedy for prior unlawful conduct. *Id.* at 763 n.2.

⁷³ Advocates and attorneys can also explore whether domestic violence organizations, faith-based organizations or other groups in your community have established programs designed to help battered immigrants pay the fees associated with filing immigration cases.

⁷⁴ For a detailed list of the documents that will be helpful to an immigrant victims filing a VAWA immigration case, see Chapter 3 of this manual.

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NOTE: A police escort should also be included in this provision if necessary.

The following documents should also be obtained through a protection order. They can be very important for battered immigrants attempting to gain immigration relief, especially if they are married to, or are the children of, abusive U.S. citizens or lawful permanent residents. This provision can allow the petitioner to obtain evidence needed to prove a VAWA, crime victim visa (U-visa), or other domestic violence-related immigration cases.

-Copies of Information or Documents of the Respondent (VAWA related)⁷⁵

These items are essential for the victim's VAWA related case and may be needed to prove specific elements of the case, such as the respondent's immigration status. Examples of these documents include: the respondent's passport, work permit, certificate of naturalization or citizenship, alien registration card or passport stamp to prove permanent residency, bank card, ID card, Social Security card, abuser's baptismal certificate, birth certificate, military card, and copies of any documents the abuser may have filed with the INS on the client's or the children's behalf. Connection between relief and violence: The battered immigrant must prove that her abuser is a lawful permanent resident or citizen in order to be granted immigration benefits under VAWA. If the abuser refuses to produce evidence of his immigration status, he can continue to control the victim's access to legal immigration.

-Evidence of a Good Faith Marriage⁷⁶

Evidence of a good faith marriage may be necessary to prove that the battered immigrant entered into a good faith marriage, one aspect of a VAWA immigration case. Examples of evidence include: the parties' marriage license application, marriage certificate, wedding photos, joint bank accounts, income tax returns, deeds, correspondence addressed to both parties, photos from family trips or events, papers, documentation, or other objects relating to the marriage, copies of the respondent's divorce certificates from any previous marriages, and/or information about where such divorce decrees may be obtained. Connection between relief and violence: This provides essential evidence for a VAWA case and undermines the ability of her abuser to harm her immigration case by not withholding or destroying these documents.

-Other Materials which the INS needs to establish that the parties have resided together and that the petitioner currently resides in the United States, or that abuse against her occurred in the United States⁷⁷

As part of the petitioner's VAWA case she must prove that for some period of time she resided with the abuser. She must also prove that she currently resides in the United States or that one or more incidents of abuse occurred in the United States.⁷⁸ She may need evidence that may be in the abuser's control to prove these facts. Examples of this type of evidence includes leases, rent receipts, children's school records, utility bills, cancelled mail addressed to either or both of the parties at the same addresses during the same time frame, and income tax returns. Connection between relief and violence: It lessens the ability of the abuser to control the victim and allows the petitioner to gather evidence for her immigration case.

The battered immigrant needs access to property, documents and information that may be in the abuser's control. This is true when she remains in the family home and evicts him and when she leaves the family home. The process for obtaining the information under a protection order may be different depending on whether she leaves or removes the abuser from the home. If she leaves, her protection order should include a provision ordering that the police accompany her to the family home and stand by to ensure that the petitioner collects all items listed in the order in each of the categories discussed above. If the abuser refuses to turn over documents, the police can charge him with violation of the protection order. If he claims that he does not have listed items, the police should document that in a police report so that the victim can return to court

⁷⁵ Refer to VAWA Chapter 3 for a full list.

⁷⁶ Refer to VAWA Chapter 3 for a full list.

⁷⁷ Refer to VAWA Chapter 3 for a full list.

⁷⁸ This is true unless her abuser is a member of the U.S. military or a U.S. government employee stationed abroad.

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to have her order modified to require the abuser to pay any costs associated with replacing the missing documents.

If the abuser will be evicted from the family home, the police should be ordered to:

- accompany the victim to the home;
- serve the abuser with the protection order or temporary protection order; and
- stand by while the respondent removes only those items that are his personal clothing, personal effects, and items that the protection order says he can remove.

It is best that the victim prepare a full list of what the respondent can take with him in advance, and ideally have it attached to or included in the protection order. If she has not included these items in the protection order, she can work with her advocate to prepare this list and present it to the police. It is not advisable to put the battered immigrant victim in the position of negotiating with the abuser in front of the police regarding which items the abuser can and cannot take. With any potentially disputed items and any items the abuser may claim are his, which the victim may need for her immigration case or for a custody case or child support case, use and possession of these should be granted to the petitioner as part of her protection order.

If the battered immigrant is concerned that her abuser may try to destroy documents in his control that she may need for her immigration case and if she can show she is in imminent danger, she should obtain a temporary protection order removing the abuser from the house and ordering him to stay away. Once the abuser is removed from the house, if the documents that she needs cannot be located at the house, she can either ask that the abuser turn them over to her in open court, on a certain date, or ask that the abuser pays the cost of her securing duplicate documents as part of her full protection order, or as part of a modified protection order. (See previous section on modification.)

-The respondent shall pay to the petitioner through the court all costs associated with replacing documents destroyed, hidden or claimed to be missing by the respondent, including the petitioner's or the children's passports, alien registration cards, social security cards, birth certificates, bank cards, work authorization documents, driver's licenses, or papers in any immigration case filed on behalf of the petitioner or the children.

By requiring the respondent to assume financial responsibility for destroyed documents, he is less likely to destroy essential documents. The destruction of documents can affect a battered woman's legal right to work, ability to establish her or her children's identity and right to legal immigration status. If the abuser does destroy or hide immigration documents or other documents or papers the victim may need for immigration or a child support case, the respondent should be ordered to pay for replacements so that the respondent's actions will not succeed in interfering with her immigration case.

The respondent's destruction of documents also has cultural ramifications as in many countries official documents are essential to functioning in normal society, and the respondent may feel that by destroying these documents he is exerting control over the victim. Many abusers who have destroyed or hidden documents may deny they are exerting control and may try to minimize in court the importance of document destruction. By downplaying these actions they hope to convince the judge that the document destruction is unimportant. Many judges who have not received training to understand the particular role that identity documents play in other countries may wrongly dismiss evidence about document destruction as irrelevant. Counsel for battered immigrants need to present evidence to help judges understand that document destruction is strong evidence of the abuser exerting power and control. It is important to hold the abuser responsible for document replacement. The connection between document destruction and abuse: Ordering the abuser to replace destroyed, lost, or missing documents will further the victim's ability to work legally, and obtain public benefits and, in some states, a driver's license.

-The respondent shall sign a document in open court in which he provides under oath, both orally on the official court record, and in writing, the following information: the state, city and country of his birth, and the hospital in which he was born. The respondent shall sign the state form required to obtain a copy of his birth certificate in open court.

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This allows the petitioner to obtain a copy of the respondent's birth certificate, which may be necessary to prove his citizenship for a VAWA immigration case. His birthplace information is provided in open court. Some statutes require a signature for release of birth certificate information. In such cases, the judge may need to set another court date at which the respondent shall sign necessary forms. This second hearing will be needed to allow petitioner's counsel or advocate to obtain the proper forms from the state in which the abuser was born. Connection between violence and relief: Granting the victim direct access to proof of the abuser's citizenship makes it easier for her to proceed with her VAWA immigration case.

-The respondent shall sign a prepared FOIA (Freedom of Information Act) INS form with the results of this form to be sent the petitioner or the petitioner's attorney.

A signed FOIA form can be used to obtain copies of a respondent's immigration case file and any case the respondent may have filed on behalf of the petitioner or the children. His immigration files may include the respondent's immigration case in which he obtained lawful permanent residency, the file in which he became a naturalized citizen, or the file that he completed on behalf of his abused spouse or children. This provision is useful if the respondent has been withholding information from the petitioner regarding the status of the immigration petition that he filed on her behalf and/or documentation of her legal status. The petitioner will be unable to access this information from INS unless the respondent signs an FOIA form. A signed FOIA form can also be useful if the INS has in its records information that is needed to prove that the respondent is a citizen or lawful permanent resident or needed to prove the respondent's prior divorces. (See Appendix for sample FOIA form). Connection between violence and relief: Lessens the batterer's control over the victim's immigration status, thus lessening his ability to abuse her.

-The respondent shall turn over his A-number or a copy of his U.S. passport in open court along with a copy of documentation proving that he has provided the correct number.

An essential requirement of a VAWA immigration case is providing proof of the abuser's immigration status. Foreign born naturalized citizens and lawful permanent residents will have been assigned an "A-number" – an immigration case number – when they applied for lawful permanent residency. Obtaining this number is the most effective way for an immigrant victim to prove the immigration status of her abusive spouse or parent. Submitting the A-number as part of her VAWA immigration case allows the Department of Homeland Security to search its own records to verify that her abusive spouse is a naturalized citizen or lawful permanent resident. Similarly obtaining a copy of a U.S. born citizen's passport provides evidence of citizenship that the victim will need for her VAWA immigration case. Connection between violence and relief: Granting the victim direct access to proof of the abuser's citizenship or lawful permanent residency status makes it easier for her to proceed with her VAWA immigration case.

-The respondent shall under oath, sign a document in open court stating whether he has been previously married and identifying the jurisdiction in which each prior marriage was terminated, including the date each prior divorce or annulment order was issued. He shall also state whether or not he has copies of his divorce or annulment decree(s) and shall turn over to the petitioner copies of each decree.

It is best if battered immigrants can include in their VAWA self-petitions evidence of the abuser's prior divorces. Battered immigrants who can prove that they went through a formal marriage ceremony with the abuser can file for VAWA relief even if the abuser was a bigamist. However, until the statutory change included in VAWA 2000 is incorporated in new INS regulations, it may be easier to request that the abuser provide this information. This provision helps the petitioner safely obtain this information and gives the petitioner access to proof that will facilitate swifter approval of her VAWA self-petition.

-The respondent shall not remove the children from the court's jurisdiction and/or the United States absent a court order, and shall relinquish the children's passports to the petitioner or the court.

As a control tactic, batterers often threaten to abduct children and, in many cases, actually carry out these threats. In 1988, the Department of Justice estimated that parents or family members abducted 354,000

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children in the United States.⁷⁹ It is suspected that 31.8% of these abducted children were taken out of the U.S.⁸⁰ If batterers manage to remove children to other countries, it may be particularly difficult to trace or retrieve the children. If a provision designed to prevent removal of the children from the United States is included in the protection order, a copy of the order must be forwarded to the Office of Passport Services within the Bureau of Consular Affairs of the United States Department of State to prevent the issuance of passports or duplicate passports for the children if the respondent attempts to obtain them.⁸¹ The children should also be registered in the State Department's Children's Passport Alert Program that will notify the victim if the abuser tries to obtain another passport for the children.⁸² Connection between violence and relief: The dangers of international child abduction are real. Too often courts and attorneys do not take these threats seriously. Anytime the abuser makes threats that he will take the children and/or that he will prevent the victim from seeing the children ever again, it is important to explore with the victim the likelihood of future international child kidnapping situation. Some of the questions to ask include the following:

1. Does the abuser have family members or friends living abroad?
2. Does the abuser have the financial means to travel abroad with the children?
3. Has he in fact taken trips abroad in the past to visit family living abroad?
4. Has the abuser himself lived abroad?
5. Is the abuser's country of origin a member and signatory to the Hague Convention?
6. Has the abuser made threats to kidnap or sequester the children or prevent her from seeing them?
7. Did the abuser recently lose or leave his job here in the United States?

Obtaining a protection order containing provisions that require that the abuser not remove the children from the court's jurisdiction can help prevent international kidnapping. Orders restricting the respondent from kidnapping the petitioner's children, and/or requiring respondent to turn over the children's passports, lessen his ability to threaten and abuse the victim. This provision should be included in the protection order whenever the abusive relationship has included threats of parental kidnapping.

The order should also address the mechanics of how and to whom the passports should be turned over. They can be turned over in open court to the petitioner at a hearing before the judge in a few days time. The turn over of the passports could also occur at a visitation center on a date certain specified in the protection order. The passports could also be turned into the court to be held in the court record and turned over by the court to the petitioner.

-The respondent shall sign a statement that will also be signed by the petitioner and the judge informing a (particular) embassy or consulate that it should not issue a passport (in the case of dual national children) or for U.S. citizen children a visitors' visas or any other visa to the child(ren) of the parties absent an order of the court.

This provision provides an additional mechanism to prevent possible international kidnapping. A copy of the protection order must be filed by the petitioner with any potentially relevant consulates, passport offices, embassies, and airlines to prevent the issuance of a visa and the removal of the parties' children from the United States. Connection between relief and violence: In many cases, this provision has been very effective in preventing the removal of U.S. citizen children from the United States by their abusive father.

-The respondent shall post a \$_____ bond that shall be forfeited if the respondent removes the children from the jurisdiction or from the country. The respondent shall purchase for the petitioner a full fair open unrestricted airline ticket to the respondent's country of origin and provide the ticket by ___ date to the petitioner.

⁷⁹ LINDA K. GIRDNER, PHD AND PATRICIA M. HOFF, ESQ. OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN. Department of Justice- Office of Juvenile Justice and Delinquency Prevention. 1 (1994).

⁸⁰ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 981 (1993).

⁸¹ For a more detailed discussion on the removal of children, see the Hague Convention chapter, Chapter 8.

⁸² See chapter 8 of this manual for more information on how to use the Children's Passport Alert Program.

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Both these provisions either separately or together can be included in a protection order to deter international child abduction. The bond should be set at a sufficient level to effectively serve as a deterrent to flight. Purchase of the airline ticket ensures that, should the children be abducted, the petitioner will have the means to travel to the abuser's home country in connection with legal actions to secure the return of her abducted children. Connection between relief and violence: In many cases, this provision has been very effective in preventing the removal of U.S. citizen children from the United States by their abusive father.

Trial Issues⁸³

SERVICE OF PROCESS

Most states require that notice of the protection order hearing and any *ex parte* order be served personally on the respondent by either the local police sheriff, or a process server hired by the petitioner. If petitioner does not know where respondent is, attorneys should find out if petitioner knows where respondent's parents, brother, sisters, and other relatives or friends who may know the respondent's whereabouts. Petitioner may be able to file motion for substituted service instead of personal service. Many states require that the police serve the respondent. Some states allow for service by publication, if personal service is not possible.⁸⁴ If the battered immigrant will be arranging for service through a process server, she should consider having service carried out at the abuser's work place, where it may be safest. If the petitioner has obtained a temporary protection order removing the abuser from the family home, that order should be served by the police on the respondent when they accompany her to the home.

STANDARD OF PROOF IN *EX PARTE* PROCEEDINGS

The standard of proof in *ex parte* proceedings is usually good cause, but may vary by state. Good cause can be proven through testimony and other evidence that establishes (1) the respondent abused the petitioner; and (2) the petitioner's reasonable fear of future abuse. Case law suggests that the petitioner must show that she is at risk of imminent harm⁸⁵ and that she must show this by a preponderance of the evidence.⁸⁶ In most, if not all jurisdictions, evidence of recent physical violence is sufficient proof of imminent harm.⁸⁷ Further case law illustrates that a broad range of acts, threats, or situations are sufficient to constitute imminent harm, including petitioner's fear that respondent would kidnap their children, the respondent's visitation violations, and an anonymous tip to the police that the batterer was going to kill the petitioner.⁸⁸

STANDARD OF PROOF IN FULL PROTECTION ORDER PROCEEDINGS

The standard of proof in full protection order hearings is generally a preponderance of the evidence, but this may vary by state.⁸⁹ This standard of proof can be established by showing that the petitioner has been the victim of recent abuse by the respondent. Some jurisdictions have removed the requirement of a recent act from their state's statute. In order to determine whether the standard of proof has been met, courts have acknowledged that past abuse is a factor that the court will consider. Thus, it is highly recommended that the petitioner include not only a listing of recent abuse but also an overview of the history of violence in her protection order petition. The petitioner should include as many specific incidents of violence and threats as she can remember with approximate dates. The petitioner should also include a sentence in her petition stating that "the abuse in the relationship began in (year) and has continued to date with violent incidents occurring approximately every (week, month, etc.) and with incidents typically including (hits, burns, kicks, punches, insults, threats, threats of deportation, sexual assault, etc.)." This is particularly important because it

⁸³ See Chapter 3 of this manual for evidence checklist that can be useful in preparation for a protection order hearing.

⁸⁴ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 877-80 (1993).

⁸⁵ *Id.* at 1036.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1043-48. Preponderance of the evidence is generally considered that the credibility scales tip toward believing the petitioner (51%).

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gives notice to the abuser that the entire history of the abusive relationship is at issue. It allows the petitioner to submit evidence at the protection order hearing of any and all abusive incidents that occurred during the relationship. In addition, a statement that there have been other incidents of violence, including but not limited to those within the affidavit.

A petitioner's testimony alone can meet the standard of proof for issuance of a protection order. Thus it is very important that advocates and attorneys working with battered immigrants carefully explain that her testimony *is* valid evidence in the United States legal system. The testimony of immigrant victims will be more credible if the victim's fears about the legal system are addressed, if she has correct information about the system and if she has had an opportunity to see how the judicial system protects battered women before she will need to testify in her case. In addition to the battered immigrant's testimony, attorneys and advocates should assist battered immigrants in gathering and presenting other evidence that will be helpful to the court. Examples include witnesses, photographs, police reports, and medical reports to corroborate the victim's testimony. Presenting these types of evidence will help victims obtain comprehensive remedies addressing their specific needs. These forms of corroborating evidence will also assist the petitioner in proving her case if the respondent contests the case, seeks custody of the children, or comes to court with an attorney.

PREPARATION

Advocates and attorneys should prepare battered immigrants thoroughly for the protection order hearing or any open legal proceeding, including a review of the court procedures, potential questions that will be asked, proper courtroom attire, and behavior. Before explaining how the U.S legal system functions, ask immigrant clients about their expectations of the legal system and help them understand how our system differs from the legal system in their home countries. Battered immigrants are often unfamiliar with the U.S. legal system. Unless they are informed otherwise, they expect it to function much like the legal system in their country of origin. In their home country, oral testimony may not be valid evidence; judges are both the prosecutor and the judge and may not be impartial, and the person with the most money and political connections wins (this is usually the abuser).

When immigrant victims are being prepared to present testimony at the protection order trial, it is very important for attorneys and advocates to explain that testimony is valued evidence in the U.S, and that a woman's testimony has the same value as a man's. Failure to identify and address the battered immigrant's concerns or misinformation about our legal system could affect the quality of her testimony and ultimately her credibility. Reviewing these issues with a client may significantly improve the client's credibility as a witness, as she will be able to better understand the proceedings and therefore be more forthcoming with details of her abuse. The client will testify more effectively if she thinks the court will believe her, if she knows that in our system testimony is valid evidence, and if she knows that the respondent is an equal party and cannot bribe the judge or court officials. This will allow the client to witness the importance of a victim's personal testimony, and see the court issue a protection order crediting the victim's oral testimony. It may be helpful to take the immigrant victim to court in advance of her hearing to watch other cases in order to bolster her confidence in our system and make her a more credible witness. It is recommended that an attorney prepare the immigrant victim through moot trials, so that she is comfortable with the line of questioning, the role of the judge, opposing attorney, and various other key participants and witnesses in her case. To summarize: advocates and attorneys can do the following to help prepare battered immigrant clients for

- civil protection order hearings;
- ask clients about what they expect of the legal system;
- describe how the U.S. legal system works;
- describe the difference between the U.S. system and that in her country of origin;
- review procedures used in the local court;
- offer to take the client to court to see protection order proceedings in other cases;
- review the questions that may be asked should a hearing be necessary with the client;
- review the questions that the defense attorney and/or the judge may ask; and
- explain proper courtroom behavior and dress.

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When preparing the client for her testimony in court, it is important to recognize the psychological impact of physical, psychological, and sexual abuse that may interfere with the quality and credibility of her testimony. The victim may appear angry, hostile, withdrawn, passive, anxious, terrorized, or numb. Each of these presentations may be a “normal” reaction to trauma. A battered immigrant’s demeanor and oral testimony in court may be strongly affected if the victim is encountering the batterer for the first time again. However, a victim with strong support from family, friends, and advocates will appear more assertive, strong, and competent as a witness.⁹⁰

It is also important to recognize the cultural factors that may restrict the client from discussing intimate abuse, especially in the presence of her abuser and other male strangers. Advocates and attorneys need to work through these issues beforehand, to ensure that the client gives a complete, accurate, and uninhibited account of her abuse. It may be the first time she has shared such intimate and traumatic details with anyone, so she may not be emotionally prepared to tell her “story” in a manner that can be used as testimony. Specifically, attorneys and advocates should explore whether the respondent ever forced the petitioner to engage in sexual relations against her will, and if so, how often. Often times, clients will believe that if they are married to their abusers it is not against the law to force her to have sex.

It is important to make sure that a professional interpreter is available if needed. The court may not always have the resources to provide interpreters, they may charge fees for interpreting services, or they may have interpreters who, while certified and free, are not trained in domestic violence issues. Interpreters from the petitioner’s family or tight-knit cultural community may not translate appropriately due to shame, embarrassment, or loyalty to the respondent. It is possible to find qualified interpreters through nonprofit organizations in the petitioner’s community, through a local university, or a domestic violence organization with bilingual staff. Interpretation should not only be available at the court hearing; it should also be available to lawyers/advocates who need interpretation to communicate with their clients. It is important to have interpreters trained in domestic violence issues and cost-effective (or free) professional interpreters throughout the advocacy process.

Attorneys and advocates should take steps in advance to address the interpretation needs of clients. Hiring bilingual staff that can provide interpretive service is the best way to address this need for significant language minority population.⁹¹ Paid staff could include part-time interpreters who have been trained on domestic violence issues. They can be on-call, and paid on an as needed hourly basis. Part-time interpreters may be recruited from local universities, church groups, social services agencies, and immigrant rights groups. Other ideas include funds in the agency budget to hire interpreters from the Language Line, and other similar resources for languages spoken by immigrant victims who are isolated from others who speak their language. In the long run, the best and most cost-effective approach is for advocates and attorneys to urge local domestic violence coordinating councils to advocate for passage of an interpreter statute or court rule that requires state or local jurisdiction to establish an interpreter service that is provided by the court to all who need its services in criminal and family court. These services should be free to indigent clients and available on a sliding fee scale for other litigants with some means to pay.

OBTAINING A JURISDICTIONALLY SOUND PROTECTION ORDER

Advocates and/or attorneys should attempt to negotiate a consent order with the respondent or the respondent’s counsel (if represented). If the respondent does not agree to the provisions listed, the battered immigrant’s attorney should be prepared to litigate the case. As more and more battered immigrants seek protection orders, courts are seeing higher caseloads, and are seeking ways to dispose of these cases more quickly. In response, some jurisdictions have begun to encourage greater numbers “of consent” protection orders.

⁹⁰ Dr. Mary Dutton & Giselle Haas, AMERICAN BAR ASSOCIATION MANUAL ON VAWA CASES. (forthcoming 1999).

⁹¹ Leslye E. Orloff & Rachel Little, SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN: A “HOW TO” MANUAL FOR BATTERED WOMEN’S ADVOCATES AND SERVICE PROVIDERS, 67-76 (Ayuda 1999).

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It is absolutely essential that battered immigrants NOT agree to accept a consent protection order that, on its face, states that it is being issued without any finding of abuse or admission by the respondent, as such orders can undermine the petitioner's immigration case. Protection orders that explicitly state that no findings of abuse are being made by the court risk being found on appeal to be jurisdictionally unsound.

Subject matter jurisdiction in a civil protection order case under all state protection order statutes is conferred when an incident of domestic violence, as defined by the state statute, has occurred. Without any type of finding by the court that domestic violence has occurred, the court lacks the authority to issue a protection order. Parties by consent cannot confer subject matter jurisdiction on a court that does not have it.⁹² Subject matter jurisdiction is fundamental to the court's authority to issue a protection order.⁹³ Thus, courts should not be issuing protection orders that on their face state that the order is being issued "without findings" and/or that the court is entering the order without making any finding as to abuse.

Such orders are dangerous for abuse victims for a number of reasons. First, an order without findings may undermine the ability of courts to have abusers turn over weapons. Second, it limits victims' access to immigration relief and public benefits. Third, it allows the abuser to avoid accepting responsibility for his violent and abusive behavior, thereby undermining the protection order's effectiveness.

This does not mean, however, that courts cannot issue protection orders by consent of the parties. The court can issue a valid jurisdictionally sound protection order in one of three ways:

1. *The abuser can admit facts sufficient to support the issuance of a protection order either in the process of consent negotiations or to the court.* Although the victim may have included numerous incidents of abuse in her petition, the abuser need only be willing to admit one offense, however minor (e.g. a push, shove, or threat of violence) that qualifies under the domestic violence statute. Courts often successfully issue consent protection orders on this basis.
2. If the abuser is willing to consent to the issuance of a protection order with the remedies the victim is seeking but is unwilling to admit the abuse specifically, *the court can base subject matter jurisdiction on the uncontested affidavit of the petitioner.* The court should review the affidavit and determine whether it contains facts that constitute domestic violence under state law. If the facts in the petitioner's affidavit are sufficient to support the issuance of a protection order, the court can treat it as any other uncontested civil court action and grant the protection order based upon the uncontested affidavit of the petitioner that the court finds to be credible. In practice, any time the parties agree to relief, the court, after reviewing the petitioner's affidavit, can issue the consent protection order on the standard form that contains a reference to the statutory authority for issuance of protection orders. The petition must plead facts that would constitute an intra-family offense. That gives that court statutory authority to issue the protection order. When the court issues a consent protection order, the court should issue the order on the standard court form just as it would do after a hearing. The provisions of the protection order can be those agreed upon by the parties. Courts in jurisdictions across this country currently issue consent protection orders in this manner.
3. If the respondent is unwilling to admit any abuse and is unwilling to agree to the relief the petitioner is seeking, or is only willing to agree to the issuance of a protection order "without a finding," *the petitioner should ask the court for a hearing.* Issuance of a protection order without findings can be harmful to the battered immigrant for several reasons:
 - It can undermine her domestic violence-related immigration case;
 - It can be more difficult for the battered immigrant to be awarded custody of the parties' children;

⁹² Bush v. U.S., 703 F.2d 491 (11th Cir. 1983); Latin American Cas. Ins. Co. v. Hi-Lift Marina, Inc., 887 F.2d 1477 (11th Cir. 1989); American Policyholders Ins. Co. v. Nyacol Products, Inc. 989 F.2d 1256 (1st Cir. 1993).

⁹³ See generally Billingsley v. CIR 868 F.2d 1081 (9th Cir. 1989).

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- It can allow the abuser to retain his firearms avoiding federal laws that require that abusers with protection orders be barred from purchasing fire arms and obtaining a fire arms license;
- It can make it less likely in a divorce case for the battered immigrant to be able to retain the family home or to obtain an equitable distribution of the family assets; and
- It can facilitate access to welfare benefits for battered immigrants, particularly those who are lawful permanent residents.

Advocates and attorneys must encourage battered immigrant clients to object to these consent orders, and request a full protection-order hearing. If the judge refuses to hold the hearing, the petitioner should object and appeal the decision. If the judge holds the hearing but retaliates in some way against the petitioner for demanding this hearing, she should appeal.

Particularly in a strongly contested situation, it is important that the survivor be prepared to prove her case. The victim's ability to win a hearing and/or appeal will be much improved if she has come to court ready to testify and with some evidence corroborating at least one incident of abuse. By doing so, the petitioner should be able to successfully argue that courts do not have the jurisdiction to issue protection orders without a finding or admission of abuse.

It should be noted that the process of obtaining a consent protection order is a *negotiation*. Domestic violence cases, including a battered immigrant case, should never be mediated. If the respondent does not agree to consent to the protection order, the petitioner should ask the judge to hold a hearing and issue an order at that hearing. In negotiations to determine if a consent protection order can be issued, advocates and attorneys working with battered immigrants should advise the client to litigate the case or sign the consent order based on the strength of the case, the court's willingness to grant specific provisions sought, the need for a judicial finding of domestic violence for future immigration, welfare, or custody cases, and the client's desire to testify and/or hold the batterer accountable. It is important to prioritize the client's safety, including how her safety will be enhanced by her ability to obtain immigration relief without her abuser's cooperation.

Obtaining a protection order at trial. It is important when working with battered immigrants to come to court on the date of the protection order hearing prepared to litigate. Advocates and attorneys working with battered immigrants should help the petitioner prepare and provide testimony and evidence informing the court about:

- The history of violence in the relationship;
- Any of the petitioner's or the petitioner's children's injuries;
- The affect of violence on the petitioner and/or children, including threats to abduct and/or harm the children;
- How the abuse has affected the children, and the children's counseling needs;
- The petitioner's role in the care and custody of the parties' children;
- Evidence supporting the petitioner's request that the respondent's visitation be supervised;
- The respondent's use of control over the petitioner's access to her immigration status as a tool to maintain power over her and perpetuate violence and abuse, and any threats or actions taken to call INS to report the petitioner, or other attempts to have her deported;
- Information about the respondent's financial status, employer, and earnings, so that the petitioner can be awarded support;
- A list of documents and items of which the victim needs to take possession, including documents that will help in the petitioner's immigration case;
- The respondent's possession of, threats about, or ability to obtain weapons;
- Threats against the petitioner and/or family members, both in the U.S. and abroad;
- The respondent's abuse of drugs and/or alcohol;
- Any history of mental illness of the respondent;
- The respondent's threats of suicide; and
- The criminal record of the respondent.

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To prove that the battered immigrant is entitled to a protection order, to prove each of the facts listed above, and to prove that the battered immigrant is entitled to the relief she is requesting be included in her protection order, the battered immigrant will need to provide testimony to the court. Additionally, she should identify persons who witnessed the abuse, the affects of the abuse, or her injuries, and who would be willing to testify at the hearing on her behalf. Testimony is particularly helpful from persons who may have witnessed the violence itself, have seen the injuries that resulted from the abuse, or who may have arrived at the home while the violence was taking place or shortly thereafter (e.g., police). Law enforcement officials will be less subject to intimidation from the abuser than other witnesses, so it is particularly useful to have them as witnesses in cases in which the abuser has threatened other witnesses.

There can be significant benefit to having potential witnesses arrive with the petitioner at the court. First, should the abuser be unwilling to consent to the issuance of the protection order, or should he contest relief she is seeking, the petitioner will be able to proceed directly to a hearing and will not have to worry about whether her witnesses will arrive on time. Second, the presence of the witnesses may encourage the abuser not to contest the issuance of the order containing the requested relief, because he may be less willing to have a hearing when he knows that there are witnesses ready to testify on the victim's behalf. This is particularly true when police officer witnesses come to court on the victim's behalf. Finally, witnesses can provide support to the victim who may be seeing her abuser for the first time since the last incident of domestic violence. Advocates should check the local court rules for issuance of witness subpoenas, to ensure that witnesses are present at the time of the hearing.

In addition to coming to court with witnesses, battered immigrant women's advocates and attorneys need to gather various forms of documentary evidence and be prepared to issue this evidence should there be a hearing. Examples of documentary evidence might include photographs of injuries and/or the crime scene; items torn, burned, or destroyed during the violence; transcripts or tapes of 911 calls; police records; and medical records.

Other Issues Regarding Protection Order Trials

Right to a Jury. The respondent does not have a right to a jury in proceedings for the issuance or modification of protection orders.⁹⁴

Right to Counsel. The respondent does not have a right to an appointed counsel at a court proceeding to issue or modify a protection order, even if custody is an issue.⁹⁵

Double Jeopardy. Since issuance of a protection order is a civil matter, the abuser cannot raise the defense of double jeopardy to prevent the issuance or modification of a protection order. Criminal prosecution would never preclude the victim from filing for a protection order based on the same incident of domestic violence. Battered immigrants should always try to obtain a civil protection order, even if a stay-away order has been issued in a criminal case. This provides protection for the victim in case the prosecution dismisses or does not successfully obtain a conviction in the criminal case. When the criminal case ends, so does the protection of the criminal stay-away order, even if the victim needs continued protection. The civil protection order will continue to protect her from her abuser without regard to the outcome of the criminal case.

Dangers of Mutual Protection Orders and Criss-Cross Protection Orders for Immigrant Victims

MUTUAL PROTECTION ORDERS

A mutual protection order is a protection order issued against both parties, although only one party has filed a petition and effected service on the opposing party. A mutual order is entered against both parties and

⁹⁴ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1070 (1993).

⁹⁵ *Id.*

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requires both parties to abide by restraints and other forms of relief in the order. Rather than filing official petitions against their victims, some batterers may allege during a civil protection order hearing that they have also been abused. If this situation arises, courts may sometimes issue mutual protection orders under the mistaken belief that such orders will prevent future violence against either party. However, if mutual protection orders are issued against innocent victims, abusers are successfully manipulating the system. Courts and police are less willing to enforce mutual protection orders against the abuser and may find that the immigrant victim has violated the protection order that could make her deportable. Mutual orders therefore heighten danger for victims because the respondent has not been held fully responsible for his actions. For these reasons, mutual protection orders are unenforceable under the full faith and credit provisions of the Violence Against Women Act. Jurisdictions that receive VAWO funding are required to certify that they have laws and policies in place that prevent issuance of mutual protection orders.

To prevent the issuance of mutual protection orders, the Violence Against Women Act will only grant full faith and credit to protection orders that meet the following safeguards:

1. a petition has been filed articulating the jurisdictional grounds for issuance of each protection order;
2. the person against whom the protection order was entered was served with notice of the petition;
3. the person against whom the order was entered had an opportunity for a hearing before a court; and
4. the court made specific findings that each party was entitled to such an order.⁹⁶

All petitioners, including battered immigrants, should strongly contest the issuance of any protection order that does not meet these criteria.

Mutual orders that are entered against the petitioner without the respondent filing a petition, presenting evidence of abuse, and obtaining a court ruling that the petitioner committed an act of domestic violence should be opposed and appealed, since they violate the petitioner's due process rights.⁹⁷ Mutual orders can also undermine a battered immigrant's ability to gain legal custody of the children, immigration protection, and welfare benefits provided to battered immigrant women. Battered immigrants should **NEVER** consent to the issuance of a mutual protection order, or any protection order against them. If a judge tries to impose a mutual order on her, she should object, stating that the order violates her due process rights, and she should request a full hearing.

CRISS-CROSS PETITIONS

While mutual protection orders are unenforceable under VAWA's full faith and credit provisions, abusers can go to court and file a separate petition for a protection order against the victim, alleging that he has also been a victim of domestic violence. If this occurs, the battered immigrant must go to trial and oppose the issuance of an order against her. She should defend herself with evidence from witnesses, photographs, medical records, and police reports. A non-citizen victim should **NEVER** agree to a protection order issued against her and should appeal any judge's decision to issue her such an order. If a protection order is entered against the victim, she could be deported if a court finds that she has violated the order.

For this reason, battered immigrants whose abusers file protection order cases against them should be helped to obtain the assistance of counsel. Attorneys working with immigrant victims whose abusers have filed protection order cases against them should carefully interview the client to determine each of the following issues:

- Is there any merit to his claims that she committed an act of domestic violence against him?
- If she harmed him in any way, and were the acts that she claimed she committed against him committed in self-defense?
- Who is the primary perpetrator of abuse in the relationship?
- What is the history of domestic violence in the relationship?

⁹⁶ 18 U.S.C. § 2265(c)(1)(2) (1994).

⁹⁷ Klein & Orloff at 1074-78.

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- Are there letters, recorded telephone conversations, or copies of e-mails that will help prove that he is the abuser who has been threatening or who has harmed her?

If after conducting this interview, the attorney finds that there is no validity to the charges he filed against her or that she was acting in self-defense, the victim should contest the case. The attorney should be prepared to go to trial and should arrive at court with testimony prepared, witnesses and evidence to prove that she is the actual victim of abuse, and, if applicable, was acting in self-defense. A victim should not be encouraged under any circumstances to consent to the issuance of a protection order against her. If the victim goes to trial and loses, the harm is no greater than if she has a protection order issued against her by consent. Additionally, in some cases the abuser will have been the first to go to court to seek a protection order against the survivor. If she would qualify for a protection order against her abuser, she should file for her own protection order against him and serve him with a copy of her petition for a protection order prior to the date she is required to appear in court for a hearing on his protection order case.

In some instances the attorney will interview the client and discover that she may not have been acting in self-defense on this particular occasion although she has been a victim of domestic violence. When this occurs, if the client is a non-citizen, it is advisable that, rather than agree to issuance of a protection order against the immigrant client by consent, counsel assist the victim in filing a divorce, legal separation, or custody case in which the parties could agree to an injunction in the family court case that does not constitute a civil protection order.

In jurisdictions where a respondent can consent to a protection order without a finding, a battered immigrant respondent, with assistance from her attorney or advocate, must weigh the possibility of going to trial and getting a finding versus agreeing to a consent order with no finding. Another issue to also consider in a criss-cross petition situation is that, in jurisdictions where a finding of abuser creates a presumption against custody, the battered immigrant may lose her children if she goes to trial on the civil protection order case.

It is particularly important for battered immigrants to successfully contest the entry of any protection order against them, either in the form of a mutual protection order, or a protection order filed by her abuser. To intimidate the victim into dropping her protection order case, abusers may file protection orders against the victim falsely claiming to be victims of abuse. Often the victim takes legal action to protect herself from the abuser. If the victim attacked the abuser in self-defense, she must prove her claims and have all cases dismissed against her. It is very important that she secure the assistance of counsel to represent her in contesting the issuance of a protection order against her. Having a protection order issued against her brings her one step closer to potential deportation for domestic violence and should be avoided if at all possible. If a protection order is issued against the battered immigrant, it is important for her to understand that any violation of the order could lead to her deportation.

Modification of Protection Orders

If a battered immigrant wishes to amend any provisions of her protection order, she may file a motion to modify the order. Advocates and/or attorneys should inform her that she has the right to modify the order and support her in making that decision. She may wish to seek modification for a variety of reasons. She may not have received a form of relief in her original protection order that she now needs. For example, she may have wanted to continue living with her abuser originally, and now wishes to separate because there has been ongoing abuse or threats. In this case, she can choose to file a motion to modify her order based on continued abuse and ask the court to remove the abuser from the family home and grant her custody and child support, or she can file a motion for criminal contempt and modification of the order (see discussion of motions for contempt below in the section on enforcement).

On the other hand, she may have been separated from her abuser at the time she received her protection order and now wants to reunite with him. If she wants to reunite with her abuser, she may do so without being

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prosecuted for having violated her own protection order.⁹⁸ However, judges in contempt actions may be more lenient in sentencing abusers when the victim and abuser have reunited after the protection order was issued. Generally, judges will be willing to enforce the protection order should future violence occur despite reunification, even when the protection order was not modified. However, it may be more difficult should the victim want the abuser to move out and wish to enforce and modify the order to state “no contact” provisions without future violence or threats. If the petitioner wants to reunite or has reunited with her abuser, it is advisable that she seek modification of her protection order. Advocates or an attorney should remind her that she can always come back for legal assistance or advocacy in reinstating the old provisions of her protection order, if the parties again separate. It is vital that attorneys and advocates work with her to develop or revise a safety plan that uniquely addresses her situation upon reconciliation with the batterer.

Another reason women often seek modification of their civil protection orders is that they want to give the abuser generous visitation time with the children because they believe he is a “good father.” This is especially true when the abuser has not physically hit or injured the children. Abusers will often times use their visitation time to inflict more abuse by manipulating the children, bad-mouthing the victim, or by trying to use the children to find out information about their mother. In these situations, a motion to modify may be essential to protect the safety of the victim and children.

Protection Order Enforcement

Upon leaving the courthouse with a signed protection order, the advocate and/or attorney should explain enforcement procedures to the client, and make sure that she understands what actions she can take to enforce her order. Protection order violations are criminal offenses in all states. If a violation occurs, states can prosecute the respondent for criminal violation of the protection order.

The battered immigrant should also be informed that there are two ways to enforce a protection order if the abuser violates it. First, she can call the police to have her order enforced. When police and state prosecutors enforce protection orders, the enforcement proceeding will be a criminal case brought by and controlled by the prosecutor. Second, the victim can also file a contempt action if the respondent violates the protection order. Victims may file civil or criminal contempt actions to enforce protection orders. These cases are controlled by the victim. A civil contempt proceeding may be desirable when the provisions of the protection order the victim is seeking to enforce involve the abuser’s compliance with these types of protection-order violations:

- failure to vacate the family home;
- failure to turn over documents, items, or articles that the court has ordered the abuser to place in the petitioner’s possession;
- failure to pay child support, spousal support, rent, or mortgage payments or other payments;
- failure to turn over the children’s passports;
- failure to provide the victim with a copy of the abuser’s passport, birth certificate, or INS-issued “A” number; or
- failure to return children after visitation.

Generally, at the conclusion of a civil contempt proceeding, the abuser is given a specific time by which to pay the money or turn over the materials. If he fails to do so he is jailed until he complies. It is important to note that civil contempt proceedings for violation of the provisions of the protection order other than provisions that preclude violence, threats, attempts, harassment, and stalking, will not make the abuser deportable.⁹⁹

⁹⁸In all states, except Hawaii and Iowa, the protection order is between the court and the abuser, only the abuser may be prosecuted for protection order violations. Victims should not be prosecuted for aiding and abetting the abuser’s violation of the court order, if the parties resume living together in violation of court orders. A sample amicus brief in the case of *Harrison v. Harrison* articulating the legal arguments against enforcing protection orders against victims is included in the appendix to this chapter.

⁹⁹INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227 (a)(2)(E)(ii) (“Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a

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The battered immigrant may also enforce the order through a criminal contempt process. In a criminal contempt case, the victim brings charges for violation of the protection order against the abuser. This is a way to criminally enforce the order, potentially jailing the abuser as punishment for his protection order violations, in a case that the victim controls. Criminal contempt can be charged for:

- any further abuse
- harassment
- threats
- stalking
- violation of the stay away/no contact provisions
- failure to turn over the children after visitation
- kidnapping or sequestering the children

Convictions for violations of a protection order in a criminal contempt proceeding are deportable offenses for non-citizen abusers, as are criminal enforcement of the protection orders by police and prosecutors. Advocates and attorneys working with immigrant victims whose abusers are non-citizens should undertake safety planning to determine whether the immigrant victim can safely cooperate in the prosecution of the abuser for criminal contempt or criminal prosecution for violation of the protection order.

It is important to recognize that an abuser who commits a domestic violence-crime against a victim in violation of a protection order may be subject to two types of actions in criminal court: (1) a criminal contempt action by the survivor, and (2) a criminal prosecution by the local prosecutor for the crime itself. The victim can bring her own criminal contempt action against the abuser, without prosecution for the underlying domestic violence crimes, so long as she seeks criminal contempt convictions for violation of the protection order only and not for commission of the underlying crime.

Survivors who believe that a criminal prosecution against the abuser is possible therefore should carefully structure their enforcement actions to avoid the problem of double jeopardy. Double jeopardy occurs if the respondent is being simultaneously or subsequently prosecuted for the same exact crimes by both the court in the contempt case and the court in the criminal case. The petitioner can avoid a double jeopardy violation by filing a contempt action for the respondent's violation of the protection order, not his criminal actions that he committed when he also violated the protection order.¹⁰⁰

Take, for example, a case where the abuser violated the protection order on two separate occasions. In the first incident, he hit the petitioner with a frying pan, and in the second, he pushed her down a flight of stairs. The petitioner would file a criminal contempt action alleging these facts and ask that he be convicted of violating the protection order provisions that required that he not harm her in the future. After a hearing, the court would enter an order finding that the respondent did in fact violate the protection order on two occasions causing the petitioner injury and sentence him for criminal contempt. The local prosecutor would not be barred by double jeopardy from also prosecuting the abuser for assault with a deadly weapon (for the frying pan incident) and assault (for pushing her down the stairs). Both prosecutions can go forward. The criminal contempt provides the victim immediate relief and the state's prosecution punishes him for his domestic violence crimes.

Advocates should encourage the survivor to call the police if she is in danger, yet also support her decision not to call the police. This is particularly important if after lethality assessment and safety planning, she decides that her abuser's deportation actually enhances danger to her and her family members and/or may lead to attacks against herself, her children, or family members living in the United States or abroad.

protection order that involves protection against credible *threats of violence, repeated harassment, or bodily injury* to the person or persons for whom the protection order was issued is deportable.”(Emphasis added).

¹⁰⁰ For a full discussion, see Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1122-1128 (1993).

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When considering enforcing a civil protection order, victims should be informed that non-citizen abusers are deportable if convicted of violating protection orders. Advocates and attorneys working with battered immigrants considering enforcing protection orders need to do a thorough safety assessment to determine whether she can safely enforce her protection order if by doing so her abuser would be deported. Safety for some battered immigrants will be increased if the abuser is deported. For some other battered immigrants the danger to the victim and her family members could be worse if the abuser is deported. Further, if this is the first protection order violation and the victim experienced no substantial injury, she may wish to give the abuser the opportunity to seek treatment and comply with the order, even if his deportation will not endanger her.

Bringing criminal contempt actions, as opposed to having the protection order enforced by local police and prosecutors, can provide an opportunity for a battered immigrant victim to enforce her order and to coerce her abuser's compliance without necessarily making him deportable. If the battered immigrant brings a criminal contempt case and that case is opposed by the abuser, yet a finding of criminal contempt is entered by the judge trying the case, that finding is a deportable domestic violence offense. If, on the other hand, the abuser is willing to try to change his behavior, but the victim still wants the court system's help in curbing and controlling her non-citizen abuser's behavior, she can file a criminal contempt case. At the hearing before the judge, she may ask that the protection order be modified to include new relief needed (e.g., batterer's counseling). She may also ask the court to continue the criminal contempt case without a finding of abuse or any admission by the abuser and set the case for a status hearing before the judge in six months. If the abuser complies with the order and there is no further violence in six months or at a second status hearing, the court could dismiss the criminal contempt case in a year without prejudice.

Should there be future protection order violations, the victim could come back to court to hold the abuser in contempt, both for the first incident, and the second. If, on the other hand, the abuser again violates the protection order after the case has been continued for six months, the victim can return to court and ask that the court continue with the criminal contempt case against the abuser. In many cases, holding open a criminal contempt case can be a very effective means of court intervention to force non-citizen abusers to stop their domestic violence. Abusers may choose to control their behavior because they understand that failure to do so will lead to deportation.

There are important steps advocates and attorneys can encourage victims to take whether or not they are initially willing to use the justice system to enforce their protection orders. Attorneys working with immigrant victims must carefully explain to the victims the potential immigration consequences of enforcement. The following are steps clients can be encouraged to take whether or not they currently plan to enforce their protection orders:

- Calling the police to report violations even when the client is not asking the police to make an arrest or take other action. Most police departments have procedures for taking police reports of criminal activity after the fact and for handling cases in which they or the victim are not seeking an arrest at the time. Filing of such reports in a timely manner relatively soon following an incident, or to document past unreported incidents when the victim has delayed in coming to the advocate or attorney for help, can document the domestic violence should there be future incidents of abuse or should the survivor in the future decide that she needs to enforce her protection order.
- Keep a journal or make notations on a calendar of all protection-order violations.
- Document the effect that protection order violations have had on themselves and on their children.
- Tell someone else: a friend, a co-worker, a therapist, a trusted family member, or a member of the clergy about ongoing abuse and protection order violations.
- Take photographs of injuries, destruction of property, unwanted gifts.
- Keep letters, e-mails, and phone messages.
- Report injuries to health professionals.

It is important to explain to battered immigrant clients that having this type of documentation may increase their protection in the future. Should violence and/or violations of the protection order increase, immigrant

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victims who have been helped to gather this documentation will be better able to enforce their protection orders.

Advisals

When protection orders involve non-citizens as petitioner, respondent, or both, the issuance of a protection order can have certain benefits and/or consequences particular to non-citizen victims and respondents. Advocates and attorneys involved in coordinated community responses to domestic violence, in judicial training, in court systems advocacy, and/or in representation of battered immigrants seeking protection orders, should urge judges to provide critical information to both parties in all protection order cases. It is best if these advisals from the bench be given in all cases because the court, attorneys, and advocates can never know for sure whether one of the parties is an immigrant. If the courts are unwilling to do this in all cases, judges may be willing to do so in cases in which a party requests one or more of the advisals listed below, or in cases in which the court becomes aware that one or both of the parties is a non-citizen. When training judges, it is important to emphasize that it is not advisable for the court to seek out information about any party's immigration status. The court can convey the needed information to all parties, and any particular party's immigration status is not relevant to any family court or protection order proceeding.¹⁰¹

There are four issues courts should address in advisals to the parties in all protection order cases:

1. Any person can seek and receive a protection order without regard to immigration status.
2. The issuance of a protection order has no immigration consequences for either party.
3. Issuance of a protection order may provide evidence that could be helpful to a petitioner in her immigration case; and
4. Violation of a protection order is a deportable offense.

When the court opens proceedings each day, along with advising courtroom attendees that the petitioners are to sit on one side of the courtroom and respondents on the other, the court should inform all parties that the issuance of a protection order does not have any immigration consequences. Further, the judge should state that any person who has been abused might seek and obtain a protection order without immigration consequences. The court may also wish to advise respondents at this time that any violation of a protection order is a deportable offense for any non-citizen. Courts should be urged to provide the information that the issuance of a protection order could help petitioner's immigration case only upon issuing the protection order, so that having provided this information is not perceived by the court as influencing the victim's testimony should a hearing be necessary.

Recommended advisal at opening of protection order proceedings: "This court's role in these proceedings is to issue orders of protection in cases in which the court believes that a domestic violence offense under the statutes of this state occurred. The court will issue such orders without regard to the immigration status of either the petitioner or the respondent. Further, the issuance of a protection order will not have negative immigration consequences for either party. However, violation of a protection order issued by this court will be a deportable offense for any respondent who is a non-citizen."

Advisal upon issuing the protection order: Additionally, before issuing a consent protection order, or after holding a hearing on the issuance of a protection order, and before issuing the order the court should issue the following advisal in open court to both parties on the record:

"The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as codified at 8 U.S.C. Sec. 1227(a)(2)(E)) makes a violation of this Order a deportable offense. If you are not a U.S. citizen, *which includes being a lawful permanent resident or other lawfully present non-citizen*, violation of this Order may result in your being deported.

¹⁰¹ See full discussion of immigration status and jurisdiction in Chapter 8 of this manual.

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The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 also makes a conviction for a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment a deportable offense. If you are not a U.S. citizen, *which includes being a lawful permanent resident or other lawfully present non-citizen*, and you violate this order or are convicted for one of the above listed offenses, you may be deported.¹⁰² Petitioners who have been awarded protection orders by the court should know that immigrant victims of domestic violence might be eligible to receive legal immigration status as victims of domestic violence. Any non-citizen who wants a referral to a battered women’s services agency that can advise her of her legal rights to immigration benefits and other services available for victims of domestic violence should ask the courtroom clerk for a brochure that will provide petitioners information about services available in our community to help victims of domestic violence.”

¹⁰² Suggested OFP Relief for Battered Immigrants. Centro Legal (3/16/98)

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5.2

Ensuring Access to Protection Orders for Immigrant Victims of Family Violence¹²

By Leslye Orloff, Joyce Noche, Jennifer Rose, and Laura Martinez

Introduction³

Some family court judges under the false impression that issuing protection orders will confer immigration status upon undocumented battered women have been reluctant to grant protection orders to immigrant victims of domestic violence. This chapter addresses the importance of protection orders as a tool to prevent domestic violence and discusses the authority and obligation of family court judges to issue protection orders to all survivors of intimate partner violence. Most importantly, this chapter explains the distinct separation

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² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/protective-orders>.

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between the powers of family court judges to issue protection orders and other family court remedies to survivors of domestic violence and the federal authority to grant or revoke immigration status.

No action taken by a family court or criminal court judge can fully determine whether the Department of Homeland Security will confer legal immigration status on a battered immigrant or any other immigrant seeking legal immigration status.⁴ It is important for judges to understand that none of the forms of legal immigration status designed to help immigrant victims of domestic violence can be obtained by proof of domestic violence alone. For example, immigration relief based upon either the Violence Against Women Act (VAWA) or the Crime Victim Visa (U-Visa) requires submission of credible evidence proving a number of factors, each of which must be established to attain legal immigration status. Proof of domestic violence is only one required factor that in and of itself will not result in the immigrant victim being granted legal immigration status.

Purpose and Effectiveness of Protection Orders

Intimate partner violence is the single largest cause of injury to women in the United States.⁵ Significant legal reforms over the past thirty years have been aimed at preventing domestic violence, as well as creating legal remedies for battered women.⁶ One such measure has been the issuance and enforcement of civil protection orders (CPOs), also commonly known as “orders of protection” or “restraining orders.” A CPO is a court order prohibiting or restricting a person from “harassing, threatening, and sometimes merely contacting or approaching another specified person.”⁷ Currently all fifty states, the District of Columbia, Puerto Rico and all U.S. territories make CPOs available to victims of domestic violence.⁸ Most state statutes authorize CPOs to include broad protective relief for victims of violence including no further abuse, no contact, custody, economic relief, eviction orders and orders for the perpetrator of the abuse to stay away from the victims’ residences.⁹ Battered women in the United States typically make between 2.4 and 5 attempts to leave their abusers before they ultimately succeed.¹⁰ In light of this fact, it is particularly important that protection orders are awarded to both battered women who remain with or return to their abusers and to those who separate from their abusers.

CPOs grant immediate relief to victims of domestic violence by prohibiting batterers from committing further violence against a family or household member.¹¹ CPOs also protect victims of domestic violence from further harm by offering a civil court option¹² in cases where the victim may be reluctant or unwilling to

⁴ Actions taken by family and criminal court judges can affect the immigration case in a variety of ways. E.g., divorce can cut off family-based immigrant application from relief; criminal convictions can lead to a non-citizen’s deportation; and protection orders can provide evidence of domestic violence.

⁵ H.R. REP. NO. 103-395, 1, (1993). See Jacqueline C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH, [NEED First page], 1089 (2003); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 809 (1993) (citing Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 1, 58 (1992); Evan Stark & Anne Flitcraft, *Violence Among Intimates: An Epidemiological View*, in HANDBOOK OF FAMILY VIOLENCE 293, 301 (Van Hassett et al. eds., 1987)).

⁶ Klein & Orloff at 810.

⁷ BLACK’S LAW DICTIONARY (7th ed. 1999) (definition of “restraining order”).

⁸ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 810 (1993). For an overview of statutory provisions recommended by judges, battered women’s advocates, batterer’s defense attorneys, prosecutors, and other domestic violence legal experts, see, MODEL CODE ON DOMESTIC & FAMILY VIOLENCE (Nat’l Council of Juvenile & Family Court Judges 1994).

⁹ *Id.*

¹⁰ Lewis Okun, *Termination or Resumption of Cohabitation in Women Battering Relationships: A Statistical Study*, in COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 107 (Gerald T. Hotaling et al. eds., 1988).

¹¹ Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 425-426 (1990).

¹² *Gaab v. Ochsner*, 636 N.W.2d 669, 671 (2001) (The statute governing protection orders is construed liberally, with a view toward affecting its objects and promoting justice. The legislature intended the adult abuse laws to fill the void in existing laws in order to protect victims of domestic violence from further harm. “The purpose of a civil protection order is to prevent domestic violence in the future.” 636 N.W.2d at 671 (quoting *Peters-Riemers v. Riemers*, 624 N.W.2d 83 (N.D. 2001)); *Reynolds v. Reynolds*, 2001 WL 62442 *4 (2001) (Civil protection orders are intended to prevent domestic violence before it occurs and their purpose would be annulled if they could not be imposed in time to prevent the violence, rather than simply immediately before it occurs.); *Parish v. Parish*, 765 N.E.2d 359, 363 (2002) (“The purpose of a civil protection order ... is to provide protection from domestic violence and, incidental to that relief, to provide for support and shelter”).

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charge their abusers criminally with domestic violence for safety or other reasons.¹³ The abuser does not have to be present for a victim to get a CPO. While the assistance of an attorney in obtaining a CPO is not required, access to protection orders without such assistance can be particularly difficult for immigrant victims for whom language and cultural issues pose significant barriers to obtaining these orders *pro se*.

Under VAWA's Full Faith and Credit provisions, , all states are required to enforce protection orders, regardless of the state or court in which the original order was issued.¹⁴ Accordingly, a state must enforce an out-of-state order, even if the order protects individuals who would not otherwise be eligible for relief under that state's domestic violence statute.¹⁵

A 1998 study by the National Institute of Justice concluded that victims' views on the effectiveness of protection orders vary with the accessibility of the courts to the victims.¹⁶ Before receiving a protection order, study participants experienced abuse ranging from intimidation to injury with a weapon.¹⁷ The majority of women surveyed felt that civil protection orders protected them from further incidents of physical and psychological abuse, helping them regain a sense of well-being.¹⁸ The simple act of even applying for a CPO was associated with helping to improve the participants' sense of well-being.¹⁹ In the initial interviews, 72% of participants reported that their lives had improved.²⁰ During follow-up interviews, the proportion reporting life improvement increased to 85%, with more than 90% reporting increased self-esteem, and 80% feeling safer.²¹ After receiving CPOs, 72% in initial interviews and 65% in follow-up interviews reported no continuing problems with their abusers.²² The researchers acknowledged the limitations of protection orders in restraining abusers with a history of violent offenses. However, researchers found that VAWA offered a "pivotal opportunity" to increase awareness of and access to protection orders, and to strengthen their enforcement by encouraging changes in justice system practices.²³

Research has shown that the effectiveness of civil protection orders for victims of intimate partner violence depends on how specific and comprehensive the orders are, and how well they are enforced.²⁴ The number of domestic violence victims killed by their batterers decreased considerably when the women were offered protection and services.²⁵ Unfortunately, widespread enforcement of civil protection orders is lacking.²⁶ It is extremely important for all victims of domestic violence to have full access to the enhanced safety offered by protection orders, without regard to immigration status.

Battered Immigrant Women and the Violence Against Women Acts of 1994 and 2000

In addition to the obstacles that all victims face in leaving an abusive relationship, battered immigrant women face further barriers, resulting from factors such as immigration status, language, and culture. In drafting the

¹³ Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 426 (1990).

¹⁴ 18 U.S.C. §§ 2265-2266 (1994).

¹⁵ See generally Barbara J. Hart, Full Faith and Credit for Protection Orders and Federal Domestic Violence Crimes, Presentation to the National College of District Attorneys by the Associate Director of the Battered Women's Justice Project (1995).

¹⁶ UNITED STATES DEPARTMENT OF JUSTICE & NATIONAL INSTITUTE OF JUSTICE, CIVIL PROTECTION ORDERS: VICTIMS' VIEWS ON EFFECTIVENESS 1 (1998).

¹⁷ *Id.* at 1-2.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 2.

²⁴ *Id.* at 1.

²⁵ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 813 (1993); see Jacqueline C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH, (2003). Studies show that the numbers of shelters and services available in a state to assist battered women positively correlates with a drop in the numbers of women killed by intimate partners. Karen D. Stout, "Intimate Femicide": *Effects of Legislation and Social Services*, 4 AFFILIA 25 (1989).

²⁶ S. REP. NO. 101-545

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Violence Against Women Act 1994 (VAWA 1994), Congress recognized the special need to offer immigration relief to undocumented immigrant victims of domestic violence. The legislative history of VAWA 1994 makes it clear that Congress recognized that U.S. immigration laws reflected the larger failure of many other U.S. laws in general to adequately address domestic violence.²⁷ The U.S. House of Representatives Committee on the Judiciary, while drafting VAWA 1994, found that domestic violence was greatly exacerbated in marriages where the non-citizen spouse's legal status depended on her marriage to the abuser.²⁸ Since U.S. immigration laws placed the alien's opportunity to gain legal status in the hands of her citizen or permanent resident spouse, the threat or fear of deportation would deter the battered non-citizen from taking actions such as filing for a C.P.O., filing criminal charges, or calling the police in order to protect herself and her children.²⁹ Immigrant battered women fear continued abuse if they stay in the relationship and deportation if they report the abuse or attempt to leave.³⁰ As a result, many immigrant victims feel trapped and alone in abusive homes, afraid to talk to anyone about the violence or to seek help.³¹

The immigration provisions of VAWA 1994 were designed to help remedy this problem by providing battered immigrant women, abused by their U.S. citizen or lawful permanent resident spouses, a way to secure lawful immigration status without their abusers' cooperation or knowledge.³² The abused spouses and children helped by VAWA 1994's self-petitioning and suspension of deportation (cancellation of removal) provisions were immigrant victims who, but for the actions or inactions of their abusive citizen or lawful permanent resident spouse or parents, would have legal immigration status. Congress specifically amended existing immigration laws to provide battered women and children with an escape route.³³ VAWA's immigration provisions also provided the protection of legal immigration status as an incentive, freeing many battered immigrants to assist in the prosecution of their abusers.³⁴ VAWA's immigration provisions were designed to stop abusers from using tactics of control over their victims' immigration status and from using threats of deportation to make themselves immune to any risk of criminal prosecution or punishment for domestic violence.³⁵ When judges allow abusers to raise their victims' immigration status as an issue in protection order cases, or decide to not issue protection orders to victims because they are immigrants, these judges are acting to undermine the congressional intent of VAWA.

VAWA 1994's immigration relief was, however, limited to battered immigrant victims whose abusers were their citizen or legal permanent resident spouses or parents. As a result, VAWA 1994 did not extend relief to individuals who: 1) had divorced their citizen or LPR batterers; 2) were married to someone not a citizen or lawful permanent resident; or 3) were not married to their abusers.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)³⁶ and the Antiterrorism and Effective Death Penalty Act (AEDPA),³⁷ which severely limited legal immigration and harshly penalized violators of immigration laws.³⁸ Notwithstanding the restrictive nature of these Acts, statutory language in IIRAIRA preserved access to VAWA's immigration protections, increased availability

²⁷ H.R. REP. NO. 103-395, at 26 (1993); Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 110 (2002).

²⁸ H.R. REP. NO. 103-395, at 26.

²⁹ *Id.*

³⁰ *Id.* at 26-27.

³¹ H.R. REP. NO. 103-395, at 26-27; Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 110 (2002).

³² As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Congress added to the Violence Against Women Act's [hereinafter VAWA] immigration protections certain confidentiality provisions barring the INS or Justice Department officials from releasing any information about the existence of a VAWA immigration case to any person, including the abuser. This guaranteed that battered immigrants could file for relief under VAWA without their abuser's knowledge. IIRAIRA § 384, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. 1367).

³³ Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 113 (2002).

³⁴ Violence Against Women Act of 1994 § 40703(a), 8 U.S.C.A. § 1254(a) (amending INA § 244(a)) (repealed 1996)[hereinafter VAWA 1994].

³⁵ Orloff & Kaguyutan at 113 (citing VAWA 1994 § 40701(a), 8 U.S.C. § 1154(a)(1) (amending INA § 204(a)(1)); VAWA 1994 § 40703(a), 8 U.S.C.A. § 1254(a) (amending INA § 244(a)) (requiring petitioners to demonstrate a history of battery or extreme cruelty by the citizen or lawful permanent resident as a criterion of the petition) (repealed 1997)).

³⁶ IIRAIRA, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

³⁷ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.).

³⁸ Orloff & Kaguyutan, at 118.

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of public benefits for battered immigrant spouses and children of U.S. citizens and lawful permanent residents, and secured some further legal protections for battered immigrants.³⁹ Despite restricting immigrant access to benefits generally through the 1996 Professional Responsibility and Work Opportunity Reconciliation Act (PRWORA),⁴⁰ in IRAIRA, Congress added battered immigrants to the list of non-citizens who were “qualified aliens,” authorized to receive federal and state public benefits.⁴¹ Congress did this because it recognized that battered immigrants would not be able to leave their abusers, cooperate in their abusers’ prosecutions, or seek protection orders or other relief from the courts without independent economic stability.⁴² Without battered immigrant access to the public benefits safety net, the congressional purposes of VAWA 1994 would have been frustrated.⁴³

VAWA 2000 and the U-Visa

VAWA 1994 is an important piece of federal legislation, created to help reduce domestic violence and to protect immigrants abused by U.S. citizen or lawful permanent resident spouses.⁴⁴ This legislation, taken along with the VAWA 2000 amendments,⁴⁵ enabled a much broader range of battered immigrants to attain lawful permanent residence (green cards) without the cooperation of their abusive spouse or intimate partner.⁴⁶ For battered immigrant victims and children abused by citizen or lawful permanent resident spouses or parents, VAWA’s immigration provisions provide two forms of relief: VAWA self-petitions⁴⁷ and VAWA cancellation of removal.⁴⁸

Generally, to qualify for relief under VAWA as a self-petitioning spouse, the applicant must prove six things:⁴⁹ 1) she is the spouse of a U.S. citizen or lawful permanent resident abuser;⁵⁰ 2) the abuse took place in the United States;⁵¹ 3) she was battered or subjected to extreme cruelty during the marriage (or is the parent of a child who was battered or subjected to extreme cruelty by the U.S. citizen or lawful permanent resident spouse during the marriage)⁵²; 4) she is a person of good moral character⁵³; 5) she entered into the marriage in good faith;⁵⁴ and 6) she either currently resides *or* has resided in the past with the abuser.⁵⁵ Unlike VAWA self-petitions, which the battered immigrant may initiate at any time, VAWA cancellation of removal is a defensive mechanism used only when the immigrant has been placed in removal (deportation) proceedings.

³⁹ *Id.*

⁴⁰ “Qualified aliens” are immigrants who were made statutorily eligible by PRWORA to receive some public benefits. See PRWORA § 402 (codified as amended at 8 U.S.C. § 1612), § 403 (codified as amended at 8 U.S.C. 1613), § 431 (codified as amended at 8 U.S.C. § 1641).

⁴¹ 8 U.S.C. § 1631(f) (1999 & Supp. 2001).

⁴² Orloff & Kaguyutan, at 122.

⁴³ *Id.*

⁴⁴ Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1902-1955 (Sept. 13, 1994).

⁴⁵ Violence Against Women Act of 2000 in the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 1501–1513, 114 Stat. 1464 (2000) [hereinafter “VAWA 2000”].

⁴⁶ Orloff & Kaguyutan, at 113.

⁴⁷ INA § 204(a), 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv), (a)(1)(B)(ii)-(iii), 8 C.F.R. § 204.2(c), (e).

⁴⁸ INA § 240A(b)(2), 8 U.S.C. § 1229a(b), 8 C.F.R. §§ 1240.11(a), 1240.20. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) [hereinafter IIRAIRA] renamed the “suspension of deportation” provisions to “cancellation of removal.”

⁴⁹ See 8 C.F.R. § 204.2(c)(2)(iv), (e)(2)(iv) (specifying the evidence that will support a self-petition).

⁵⁰ A self-petition may be filed if the marriage was terminated by the abusive spouse’s death within the two years prior to filing. A self-petition may also be filed if the marriage to the abusive spouse was terminated, within the two years prior to filing, by divorce related to the abuse. 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa), 8 C.F.R. § 204.2(b)(1)(ii).

⁵¹ This requirement does not apply in cases where the abusive spouse is an employee of the United States government or a member of the uniformed services of the United States.

⁵² INA § 204(a)(1)(A)(iii)(I)(bb) (citizen), (B)(ii)(I)(bb) (permanent resident); 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(bb), (B)(ii)(I)(bb), as amended by VAWA 2000, § 1503(b)(1)(A) & (c)(1).

⁵³ INA § 204(a)(1)(A)(iii)(II)(bb), (iv) (citizen abuser), (B)(ii)(II)(bb), (iii) (permanent resident abuser); 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb), (iv), (B)(ii)(II)(bb), (iii). The good moral character requirements are listed in INA § 101(f), 8 U.S.C. § 1101(f).

⁵⁴ INA § 204(a)(1)(A)(iii)(I)(aa) (citizen), (B)(ii)(I)(aa) (permanent resident), 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(aa), (B)(ii)(I)(aa).

⁵⁵ INA § 204(a)(1)(A)(iii)(II)(dd) (citizen spouse abuser), (iv) (citizen parent abuser), (B)(ii)(II)(dd) (permanent resident spouse abuser), (B)(iii) (permanent resident parent abuser), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(dd), (iv), (B)(ii)(II)(dd), & (B)(iii), as amended by VAWA 2000 at § 1503(b)(1)(A), (2), (c)(1), (c)(2).

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To qualify for relief, she must first generally meet the other requirements that would be necessary for approval of a self-petition. In addition, she must have been physically present in the U.S. for three years immediately preceding the filing of the application for cancellation of removal and show extreme hardship to herself or her children if she is deported.⁵⁶ Also, unlike the requirements for VAWA self-petitioners, cancellation of removal does not require that the applicant was ever married to be abuser, only that she is the parent of the abuser's child.⁵⁷

In addition to the VAWA self-petition, VAWA 2000 also created the U-Visa, a nonimmigrant visa for immigrant victims of crime.⁵⁸ This new visa offers relief to individuals without immigration status where the victim has:

“suffered substantial physical or mental abuse as a result of criminal activity . . . possesses information about the criminal activity. . . [and] has been helpful, is being helpful, or is likely to be helpful . . . [in] investigating or prosecuting the criminal activity.”⁵⁹

This legislation was enacted with the dual purpose of “strengthen[ing] the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking and other crimes . . . committed against aliens,” and offering protection to victims of such offenses.⁶⁰ If granted, this visa gives the applicant immediate legal immigration status as a nonimmigrant and the possibility of lawful permanent residency in the long-term.

Generally, in preparing a U-Visa application, a nonimmigrant must prove four things: 1) that a crime occurred; 2) that as a result of that crime, she suffered substantial physical or mental injury; 3) that she is being, will be, or has been helpful in a criminal investigation or prosecution; and 4) that a governmental official has certified her helpfulness.⁶¹ Evidence to support VAWA self-petitions, cancellation of removal, or U-Visa applications may include a variety of types of evidence.⁶² Such evidence may include, but is not limited to photocopies; the victim's testimony; copies of any protection order issued for the applicant or her children; medical records documenting abuse; abuser's arrest records for domestic violence; and affidavits from neighbors, friends, shelter workers, or police attesting to the battery, or having witnessed injuries sustained by applicant as a result of abuse.

Protecting Victims: Domestic Violence Statutes and Judicial Accountability

It is critical that judges are aware of the severe impact of domestic violence on victims and make efforts to remain informed about recent domestic violence legislation.⁶³ Judges can play a leadership role in educating attorneys, and the community at large about domestic violence issues and the civil and legal remedies that exist for victims.⁶⁴ Cultural and linguistic barriers within the justice system hinder access to the legal system for immigrant victims of domestic violence. For these reasons, it is particularly important that judges play a role in assuring that their courts are accessible to all victims of domestic violence abused in or living in their jurisdiction, without regard to the immigration status, national origin, or language spoken by the victim.⁶⁵

Disappointingly, despite extensive efforts to raise awareness in the legal community on the importance of protecting victims of intimate partner violence, judges in some jurisdictions have refused to award protection

⁵⁶ See INA § 240A(b)(2)(A); 8 U.S.C. § 1229b(b)(2)(A).

⁵⁷ Compare with INA §204(a)(1)(A)(iii), B(ii); 8 U.S.C. § 1154(a)(1)(A)(iii), (B)(ii).

⁵⁸ See VAWA 2000, Pub. L. No. 106-386, §§ 1501–1513, 114 Stat. 1464 (2000); see BREAKING BARRIERS, U Visa Chapter.

⁵⁹ INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U); see BREAKING BARRIERS, U Visa Chapter.

⁶⁰ 146 Cong. Rec. S10188 (daily ed. Oct. 11, 2000) (The Violence Against Women Act of 2000 Section by Section Summary).

⁶¹ 8 U.S.C. § 1184(p)(1).

⁶² 8 U.S.C. § 1184(p)(4).

⁶³ Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 432 (1990).

⁶⁴ *Id.*

⁶⁵ See 42 U.S.C. § 2000d; Executive Order 13166 (federal requirements on language access to Limited English Proficiency persons).

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orders to undocumented immigrant victims of domestic violence, wrongly believing that the order can confer legal immigration status upon the victim. This practice is contrary to the mandate of domestic violence statutes in every U.S. jurisdiction and is dangerous for victims, their children, and the communities in which the abusers of immigrant victims are not held accountable for their criminal actions.

State domestic violence statutes base the issuance of a protection order on the existence of an underlying criminal act against the victim. Abuse that serves as the basis for a protection order includes, but is not limited to assault, battery, burglary, kidnapping, criminal trespassing, interference with child custody, sexual assault, rape, threats and attempts to do violence or bodily harm, interference with personal liberty, unlawful or forcible entry into a residence, child abuse, false imprisonment, stalking, harm to pets, and destruction of property.⁶⁶ Further, some states will issue protection orders based on emotional abuse and harassment, even though such actions may not have directly caused physical harm to the victim.⁶⁷

In granting protection orders, the National Council of Juvenile and Family Court Judges recommends that judges issue any constitutionally defensible relief that is necessary to provide the victim with sufficient protection from ongoing abuse.⁶⁸ By interpreting their statutory mandate broadly, courts have the power necessary to craft remedies that will counter the wide variety of perilous situations faced by victim of domestic violence. In 1988, the court in *Powell v. Powell* articulated a philosophy embraced by enlightened courts and legislatures across the country.⁶⁹ The *Powell* court held that the domestic violence statute must be interpreted broadly in light of its purpose, explaining that courts have broad discretion to fashion any remedy appropriate to stop violence and to effectively resolve the matter.⁷⁰ Quoting a report issued by the District of Columbia Council, Committee on the Judiciary, the *Powell* court noted, "It has been stated repeatedly ... that the current interpretation ... by the local courts has been extremely narrow, such that truly effective remedies are not ordered in some cases."⁷¹

When victims of domestic violence present evidence of domestic violence and of a qualifying relationship with their abuser, proving that they statutorily qualify for a protection order, courts must assume the role of impartial fact finder and issue protection orders. The potential that any other action may be filed in family or criminal court, or with immigration authorities, regarding these parties is not an issue that should properly affect the adjudication of protection order relief.

In 1994, the National Council on Juvenile and Family Court Judges published a Model Code on Domestic and Family Violence that outlined the best practices for family court judges handling domestic violence cases. Section 304 of the Model Code specifically states that petitioners for protection orders are "not barred from seeking an order because of other pending proceedings."⁷² Given the explicit purpose of state domestic violence statutes to offer victims protection from ongoing abuse, and the legislative purpose of VAWA to free battered immigrant women from the endless cycle of power, control and violence, denial of protection orders to undocumented immigrant women who would otherwise qualify to receive protection orders on the basis of their immigration status constitutes an abuse of judicial discretion.

⁶⁶ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 849 (1993); see, e.g., CONN. GEN. STAT. ANN. § 46B-38A(3); D.C. CODE ANN. § 16-1002; LA. REV. STAT. ANN. § 46:2132; N.Y. FAM. CT. ACT § 812..

⁶⁷ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 807, 866-73 (1993); see, e.g., 10 DEL. CODE ANN. § 1041 ("engaging in a course of alarming or distressing conduct in a manner which is likely to provoke a violent or disorderly response or which is likely to cause humiliation, degradation, or fear in another person"); IDAHO CODE § 39-6303; 725 ILL.COMP.STAT. 5/112A-3; MINN. STAT. ANN. § 518B.01; MO. REV. STAT. § 455.010; NEV. REV. STAT. ANN. § 33.018; N.J. REV. STAT. § 2C:25-19; N.M. STAT. ANN. § 40-13-2 (including telephone contact and repeatedly driving by residence or workplace); N.Y. Fam. Ct. Act § 812(1); R.I. GEN. LAWS § 15-15-1 (criminal statute); W. VA. CODE § 48-27-202; WIS. STAT. ANN. § 813.122.

⁶⁸ National Council of Juvenile and Family Court Judges, Family Violence Project, *Family Violence: Improving Court Practice, Recommendations from the National Council of Juvenile and Family Court Judges*, 41 JUV. & FAM. CT. J. 17 (1990) [hereinafter Family Violence Project].

⁶⁹ 547 A.2d 973 (D.C. 1988).

⁷⁰ *Id.*

⁷¹ *Id.* at 974.

⁷² NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE 36 (1994).

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Appellate courts recognize the important role judges play in protection order cases. In an important articulation of this role, the Maryland Court of Appeals, in *Katsenelenbogen v. Katsenelenbogen*⁷³ has emphatically reaffirmed the court's role as an impartial fact finder in protection order cases. The court held that the role of judges in issuing protection orders under the state domestic violence statute should be focused solely on determining whether the petitioner has suffered abuse at the hands of the defendant and what remedy may best protect the victim from further acts of violence.⁷⁴ Mrs. Katsenelenbogen sought a protection order on behalf of herself and her child after they were shoved and threatened with further violence by Mr. Katsenelenbogen. The trial court granted the petitioner protective relief by prohibiting her husband from further contact with her and ordering him to leave the marital home. On appeal, the intermediate appellate court vacated the protection order, in part out of concern that the order may negatively impact Mr. Katsenelenbogen in his pending divorce action. The court expressed concern that the domestic violence statute "could be used to seek an advantage with respect to issues properly determined in a divorce, alimony, or custody proceeding."⁷⁵

The Court of Appeals of Maryland rejected this holding and cautioned courts against deviating from the obligation and essential purpose of the domestic violence statute, in which the legislature entrusted the judiciary to offer protection to victims of domestic violence.⁷⁶ In light of the statutory limitations placed on the right to relief⁷⁷ and the broad discretion of courts to fashion appropriate remedies for victims upon a finding of abuse, judges must limit themselves to "their traditional judicial role and hear both sides to the dispute fairly and without pre-judgment."⁷⁸ The appropriate role of the judiciary in protection order cases, as accepted by courts across the country, was summarized by the court in *Katsenelenbogen* as follows:

It is likely true, as the Court of Special Appeals noted, that the issuance of a protective order and the provision of this kind of relief in it may have consequences in other litigation. A judicial finding, made after a full and fair evidentiary hearing, that one party had committed an act of abuse against another is entitled to consideration in determining issues to which that fact may be relevant. Living arrangements established as the result of a protective order may have relevance in determining custody, use and possession, and support in subsequent litigation. That is *not* the concern of the court in fashioning appropriate relief in a domestic violence case, however. The concern there is to do what is reasonably necessary—*no more and no less*—to assure the safety and well-being of those entitled to relief.⁷⁹

Granting civil protection orders to prevent further violence to survivors of abuse without consideration of the impact of the order on other pending litigation is both legally required by state protection order statutes and is consistent with the legislative intent of VAWA. VAWA contained provisions designed to foster uniform and effective procedures for issuance and enforcement of protection orders. For example, VAWA made mutual protection orders issued without notice and an opportunity to be heard unenforceable across state lines. VAWA denied jurisdictions access to domestic violence funding if courts issued mutual protection orders or charged any court fees in relation to issuance or enforcement of protection orders. Full faith and credit for protection orders was established as part of VAWA. Additionally, through VAWA, many immigrant victims were granted access to legal immigration status, removing barriers to accessing protection orders, criminal prosecution of their abusers, and the full range of relief open to citizens who are victims of domestic violence. The *Katsenelenbogen* court so clearly stated, all victims who qualify for protection orders must be able to receive them, irrespective of any potential effect on other litigation. This approach is correct, without regard to whether the subject of the other litigation or legal relief sought is immigration, divorce, or custody.

⁷³ *Katsenelenbogen v. Katsenelenbogen*, 775 A.2d 1249(Md. 2001).

⁷⁴ *Id.* For further discussion of *Katsenelenbogen v. Katsenelenbogen*, see Richard A. DuBose III, Comment, *Katsenelenbogen v. Katsenelenbogen: Through the Eyes of the Victim – Maryland's Civil Protection Order and the Role of the Court*, 32 U. BALT. L. REV. 237 (2003).

⁷⁵ *Katsenelenbogen v. Katsenelenbogen*, 762 A.2d 198, 208 (1999).

⁷⁶ *Katsenelenbogen*, 775 A.2d at 1258.

⁷⁷ Relief only available to petitioners who can prove they have suffered abuse, usually by having been the victim of criminal acts committed against them by a family member.

⁷⁸ *Katsenelenbogen*, 775 A.2d at 1258.

⁷⁹ 775 A.2d. at 1258.

Federal Preemption Bars State Court Judges from Determining Outcomes of Immigration Cases

Concern that the issuance of a protection order may confer immigration status upon an undocumented victim of domestic violence is further unfounded as a matter of federal law. Regulation of immigration is exclusively a federal power, and therefore overrides any action by a state court or legislature.⁸⁰ Immigration law derives its authority from the Naturalization Clause of the Constitution. The textual requirement of the clause, that there be a single naturalization rule that is “uniform... throughout the United States,” has been interpreted to establish federal exclusivity.⁸¹ The Supreme Court, to the extent that it has considered the nature of immigration power, has repeatedly concluded that this power cannot be transferred to the states.⁸²

Since immigration falls within the exclusive jurisdiction of the federal government, a state family court’s decision to grant a protection order cannot, as a matter of law, determine the outcome of an immigration case. Furthermore, as discussed previously, while civil protection orders may provide *some* evidence to support a battered immigrant woman’s application for legal immigration status pursuant to VAWA, proof of domestic violence alone is insufficient.

Congressional intent to provide battered immigrants with unique immigration-related protective remedies is clear from the legislative history of VAWA.⁸³ Federal court precedent makes it abundantly clear that state courts cannot, and should not, as a matter of law, engage in immigration policy and decision-making.⁸⁴ Within the context of issuing protective relief for survivors of domestic violence, considering immigration issues in a protection order or other family law case would be unwise, inefficient, and could potentially result in family law decisions incorrectly based on immigration law. Such decision-making on the state level would be fundamentally discriminatory against battered immigrants, thereby eroding the anti-discrimination principle at the heart of the Constitution.⁸⁵

The total exclusivity of federal immigration is a fairly recent occurrence. Prior to the Immigration Act of 1990, state court judges had the authority, with a Judicial Recommendation Against Deportation (JRAD), to recommend against deportation.⁸⁶ JRADs were a way for the judiciary to review the decisions of the INS and to give an alien an independent means of review.⁸⁷ If the issuance of the JRAD was procedurally correct, it was binding and not subject to review.⁸⁸ In an effort to consolidate and regulate federal immigration power, Congress repealed the JRAD in 1990 and ended the ability of individual state court judges to directly affect the outcome of immigration cases. The revocation of the JRAD eliminated the power of state court judges to get involved in and materially control immigration matters. Furthermore, by removing JRAD authority from state court judges, Congress indicated its intention to empower the federal government with exclusive control over immigration. Against this background, it is clear that by issuing a protection order behalf of an undocumented battered immigrant woman or any non-citizen battered woman, the state court judge issuing that order is not, as a matter of federal law, engaging in an action that will control whether or not a battered immigrant can receive an immigration benefit.

⁸⁰ Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 509 (2001).

⁸¹ *Id.* at 544, n.215.

⁸² *Id.* at 532. See, e.g., *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“The power to regulate immigration is unquestionably exclusively a federal power.”); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (stating that federal immigration power is “incapable of transfer” and “cannot be granted away”); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”).

⁸³ H.R. REP. NO. 103-395, at 26 (1993); Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women*, 10 AM. U. J. GENDER SOC. POL’Y & L. 95, 110 (2002).

⁸⁴ Wishie at 552.

⁸⁵ *Id.* at 553.

⁸⁶ Lisa Fine, *Preventing Miscarriages of Justice: Reinstating the Use of “Judicial Recommendations Against Deportation”*, 12 GEO. IMMIGR. L.J. 491, 506 (1998).

⁸⁷ *Id.*

⁸⁸ *Id.*

Protection Orders

Furthermore, it is important for courts to understand how abusers of immigrant victims use control over immigration status as an effective tool to perpetuate their power to continue abuse.⁸⁹ When courts allow abusers to raise the immigration status of victims in protection order or other family court proceedings, courts in effect support the abusers' use of this tool to exert power and control over their non-citizen victims. It is exactly this form of power and control over immigrant victims that VAWA's immigration provisions were designed to prevent. Virtually all undocumented immigrant victims of domestic violence who qualify under state law to receive a protection order will qualify for a form of VAWA or U-Visa related immigration relief. When abusers tell courts that victims are seeking protection orders to qualify for immigration relief that they otherwise would not be able to attain, this is simply not true. Often it is the case that the undocumented immigrant victim could have attained legal status through the abusive citizen or lawful permanent resident spouse, former spouse or parent, were not the abuser using power over the immigration case against the victim. Other immigrant victims of domestic violence qualify for immigration relief as crime victims, willing to cooperate with law enforcement in the criminal prosecution of their abusers.

VAWA and U-Visa immigration relief provide battered immigrant women a means to accessing legal immigration status without their abusers' help, cooperation or knowledge. However, to access this relief, immigrant victims must meet relatively high burdens of proof, with one element of required proof being proof of abuse. Civil protection orders are accepted as one form of proof of abuse by the batterer for VAWA self-petitions, cancellation of removal, and the U-Visa applications. While CPOs alone are insufficient to confer immigration status upon an undocumented battered woman, they may be used, along with other forms of evidence, in a battered women's application for legal status. C Nevertheless, in each instance, the victim must submit many other forms of evidence in order to receive an immigration benefit, which can include proof of a valid marriage, and of good moral character or proof of cooperation in a criminal investigation or prosecution.

Courts must not decline to offer immigrant victims and their children the critical life saving protection available through civil protection orders. There is no statutory basis for such a denial if an immigrant victim otherwise qualifies for a protection order. Immigrant victims of domestic violence crimes must have the same access to protection as all other family violence victims. Any other result would be contrary to the purpose of all state protection order statutes as well as, contrary to the express purpose of the federal VAWA immigration provisions.

⁸⁹ See generally Symposium, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. POVERTY LAW & POL'Y 245, 292-95 (2000). For further discussion see BREAKING BARRIERS, Dynamics Chapter.

Protection Orders

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5.3

Jurisdictionally Sound Civil Protection Orders¹²

By Alicia (Lacy) Carra, Leslye Orloff, Jason Knott, Darren Mitchell

What is a protection order?³

A protection order, sometimes called a 'restraining order,' is an official court document that provides specific restraints on the actions of an abuser and/or assailant. A victim of domestic violence, sexual assault, trafficking, or other criminal activity may want a protection order to keep physical distance between herself and her assailant, to protect her family and home, or to try to prevent further violence. Protection orders were developed to offer a civil remedy to victims without involving the criminal justice system.⁴ For a more detailed explanation of what protection orders

¹ "This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women."

² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/protective-orders>.

⁴ D.C. *Intrafamily Offenses Act, 1969: Hearings on H.R. 8781 Before Subcomm. No. 1 To Establish Family Court System*, 91st Cong. (1969). For more information about protection orders look to: LESLYE E. ORLOFF & CATHERINE F. KLEIN, DOMESTIC VIOLENCE: A MANUAL FOR PRO BONO LAWYERS, (Ayuda) (2d ed. 1992). For an amicus brief on protection orders

are and how an immigrant survivor can access a protection order, please see the protection order chapter in this manual.⁵

Why is jurisdiction important in receiving a protection order?

A protection order tells an abuser/assailant they cannot commit certain acts. In order for a court to have the jurisdiction to restrict someone's activities the court must have a legally valid reason for doing so. In the case of a protection order there must be a finding of violence or the threat of violence. If a court tries to restrain someone's activities without a statutorily recognized reason for doing so they lack any constitutional justification for limiting someone's actions, which means they lack the subject matter jurisdiction to control someone's actions.⁶

A protection order without a finding of domestic violence is an order issued by a court without subject matter jurisdiction, and is therefore invalid.⁷ Protection orders issued without findings violate the Violence Against Women Act's (VAWA) full faith and credit provisions and are unenforceable across state lines.⁸ Some judges may accede to requests from a domestic violence perpetrator and issue a protection order that is not based upon findings of domestic violence and may believe that such orders offer protection to victims.⁹ A court's jurisdiction for issuing a protection order depends on the court having subject matter jurisdiction. The subject matter jurisdiction for a protection order is based on an occurrence of domestic violence such as assault, battery, or other acts covered by the state domestic violence statute including stalking, threats, sexual assault, and attempts to cause bodily injury. When a judge issues a protection order without a finding of domestic violence, the order is unenforceable because the court does not have the subject matter jurisdiction to issue the order.¹⁰

see: Brief for Ayuda et. al. as Amici Curaie Supporting Petitioner at 9, *United States v. Dixon*, 509 U.S. 688 (1993) (No. 91-1231) ("The Criminal Justice System Alone Cannot Ensure Victims' Safety"); NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES', FAMILY VIOLENCE PROJECT (1990).

⁵ Immigrant victims of domestic violence, sexual assault, stalking, or other forms of violence against women often encounter systematic barriers when accessing the justice system and victim services in the United States. They can be particularly useful for immigrant victims who may not want to become involved in the criminal justice system because of lack of information, immigration status concerns, cultural stigma, or language access issues. All victims may obtain protection orders regardless of their immigration status.

⁶ See *Schramek v. Bohren*, 429 N.W.2d 501, 502 (Wis. Ct. App. 1988); *Gilbert v. State*, 659 So.2d 233 (Fla.1995); *Master v. Eisenbart*, No. 90-2897, 1991 Wisc. App. LEXIS 1270 (Wis. Ct. App. Sept. 18, 1991). See also generally NANCY LEMON, DOMESTIC VIOLENCE LAW (West) (2006).

⁷ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 849-50 (1993). See also *Broaca v. Broaca*, 435 A.2d 1016, 1018 (Conn. 1980); *People v. Wade*, 506 N.E.2d 954, 956 (Ill. 1987); *Robertson v. Commonwealth*, 25 S.E.2d 352, 358 (Va. 1943); 46 AM. JUR. 2D *Judgments* § 24 (2005) ("When a suit is dismissed for lack of jurisdiction, rulings on the merits rendered prior to the dismissal are nullities, void ab initio. . . . A judgment rendered without jurisdiction may be attacked and vacated at any time, either directly or collaterally.").

⁸ 42 U.S.C. § 13981 (1994).

⁹ "No findings" protection orders can be issued in a variety of ways. The order may be issued on a court form that the judge alters inscribing "no findings" on the face of the order. The court may issue a protection order and may cross out the information on the standard court form that crosses out or deletes the reference to the state statutory section that defines the subject matter jurisdictional basis for issuance of a protection order. In a few instances court forms have been erroneously developed that include a check box stating that the order is being issued and no findings have been made. Generally, court forms using this approach have been revised once subject matter jurisdictional concerns have been raised.

¹⁰ *Bryant v. Williams*, 161 N.C. App. 444 (N.C. Ct. App. 2003) (vacating protection order where woman consented to order, but court had dismissed domestic violence complaint because no domestic violence found cannot approve even a consent order because order is to make domestic violence cease); *El Nashaar v. El Nashaar*, 529 N.W.2d 13 (Minn. Ct. App. 1995) (granting husband writ of prohibition where civil protection order granted by lower court because no findings accompanied civil protection order, so no basis for civil protection order); *Price v. Price*, 133 N.C. App. 440 (N.C. Ct. App. 1999) (reversing civil protection order because no evidence/findings of violence, only suspicion of husband); *John P.W. ex rel. Adam W. v. Dawn D.O.*, 214 W. Va. 702, 707 (W. Va. 2003) (issuing civil protection order at father's request without findings of domestic violence- reversed); *Brandon v. Brandon*, 132 N.C. App. 646 (N.C. Ct. App. 1999) (reversing civil protection order because accompanied by unclear findings of fact); See also *Capron v. Van Noorden*, 6 U.S. 126, 126 (1804); 20 AM. JUR. 2D *Courts* § 99 (2005) ("jurisdiction over the subject matter cannot be affected by agreement or consent").

Protection Orders

All protection orders, including consent protection orders, need subject matter jurisdiction. Parties cannot consent to give a court jurisdiction that the court would not otherwise have.¹¹ A consent protection order without a finding of domestic violence can be vacated for lack of jurisdiction.¹² A consent protection order must include findings to support subject matter jurisdiction for the court issuing the order. This does not mean that the judge must always hold a full hearing and issue a formal domestic violence finding to obtain subject matter jurisdiction to issue a civil protection order. The court may base its subject matter jurisdiction on an admission by the respondent of one or more acts that qualify as domestic violence under the state protection order statute. Alternatively, when the parties are willing to consent to a protection order, subject matter jurisdiction can be obtained based upon the uncontested affidavit or pleading of the protection order petitioner. When there is no admission and all of the allegations in the protection order petition are contested the court must hold a hearing and issue a protection order based upon findings of domestic violence.

Why do judges issue Protection Orders without subject matter jurisdiction?

Judges may want to issue orders without any findings for a variety of reasons. The court may do so to promote more consent orders and avoid holding hearings.¹³ The court may be responding to an abuser's request that he maintain access to firearms¹⁴ or to avoid triggering presumptions against awarding custody to an abuser.¹⁵ In divorce proceedings that occur after a protection order has been issued, opposing counsel may attempt to argue that a no-findings protection order has already decided that there was no domestic violence in the relationship. In each of these instances if the court issues a "no findings" protection order when it lacks subject matter jurisdiction to do so, the court denies a victim of domestic violence the protection that was afforded to her under state protection order laws, and jeopardizes the health and safety of a victim and her children.

Some state court judges may issue court orders specifically designed to avoid treatment of that court order as an order under state protection order laws. These orders are not included in the state electronic protection order enforcement system (e.g. the California Law Enforcement Telecommunication System (CLETS) or Domestic Violence Restraining Order System (DVROS). Such orders are not protection orders and are unenforceable as protection orders. These orders offer protection to no one.

When a victim files for protection order relief the court should grant that relief after trial or by consent of the parties if the pleadings contain facts of abuse that qualify for issuance of a protection order under state law. If the court holds a hearing and does not find facts sufficient to support issuance of the protection order, the request for the order should be denied. In practice there may be proof problems in some protection order cases that do not sustain issuance of an order. In

¹¹ See *Capron*, 6 U.S. at 126; 20 AM. JUR. 2D *Courts* § 99 (2005) ("jurisdiction over the subject matter cannot be affected by agreement or consent"); *Bush v. United States*, 703 F.2d 491 (11th Cir. 1983); *Latin Am. Cas. Ins. Co. v. Hi-Lift Marina, Inc.*, 887 F.2d 1477 (11th Cir. 1989); *Am. Policyholders Ins. Co. v. Nyacol Products, Inc.*, 989 F.2d 1256 (1st Cir. 1993).

¹² *Bryant v. Williams*, 161 N.C. App. 444 (N.C. Ct. App. 2003).

¹³ See Jennifer Heintz, *Safe at Home Base? A Look at the Military's New Approach to Dealing With Domestic Violence on Military Installations*, 48 St. Louis U. L.J. 277, 280 (2003) ("Mutual or consent orders of protection are often issued without a hearing or a specific finding of abuse . . ."); Klein et al., *supra* note 4, at 1074 ("Courts, relying on a sworn petition, also issue consent civil protection orders between the parties without a finding of abuse.")

¹⁴ See Lisa D. May, *The Backfiring Of The Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 34-35 (2005) ("Rather than properly applying state laws that would trigger the federal statutes, some judges misapply the state laws for the very purpose of circumventing the application of the federal firearms bans.")

¹⁵ See Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody To Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 664-65 (2001).

these cases, the judge's role is to deny issuance of the protection order and not give the petitioner victim less than the law requires. In other cases judges issue orders that are not jurisdictionally sound protection orders when asked to do so by the parties. This usually occurs when the abuser is represented and the victim who is not represented has been coerced into agreeing to a stipulated order that is not legally a protection order because the parties have agreed to leave findings of domestic violence out of the Agreed to Order.

When Judges agree to go along with this request, danger to domestic violence victims is enhanced. The victim receiving a court order that does not comply with the state protection order laws is misled into believing that she has received a valid enforceable protection order. The abuser may know that the order is not a jurisdictionally sound protection order and is not enforceable by law enforcement authorities. If the victim is operating under the illusion of a valid order and falsely relies on the order to protect her against future abuse, she may fail to take other steps to protect herself and her children from ongoing violence. The lack of subject matter jurisdiction for her order, as well as her reliance on that order, may place her in greater danger.

Practice Pointer- personal and subject matter jurisdiction¹⁶

If possible from a safety perspective, it is best to obtain a protection order in the jurisdiction in which the abuse occurred. A family law attorney will have to do a safety assessment with the survivor to determine if that is a viable option. Once the victim obtains a protection order in the state where the violence occurred, that protection order is enforceable in any U.S. jurisdiction to which the victim moves under the Violence Against Women Act's (VAWA) Full Faith and credit provisions.¹⁷ The victim can obtain the protection order in the original jurisdiction and then move to a new jurisdiction without the abuser knowing to which state she has relocated. When a victim has children with the abuser, laws governing interstate custody jurisdiction and parental kidnapping will need to be a part of this assessment.¹⁸ If the victim has already fled to a new jurisdiction, or the determination is made that a victim is safer moving and then obtaining the protection order, the attorney should interview the client to determine whether there is subject matter jurisdiction to file the protection order in the victim's new location. Harassing phone calls, threats, and stalking can be continuations of the abuse, giving the new jurisdiction subject matter jurisdiction.¹⁹ The presence of danger to the petitioner, such as when the abuser has come to the jurisdiction but has not yet contacted the survivor, can be enough of a threat for subject matter jurisdiction, and therefore to issue a protection order in the new jurisdiction.²⁰ Review your state's long arm jurisdiction statute to determine the specific requirements for personal jurisdiction over the abuser and the minimum contacts needed, which in some locations may depend on the threats and or actions taken by the abuser since the survivor has moved to the new jurisdiction.

1) Legal ramifications

When a protection order is issued without a finding of domestic violence a victim is left without protection and may suffer further legal consequences.

Reversal

When there is no jurisdiction for a court to have issued a protection order, the order can be reversed. In *Andrasko v. Andrasko* the Minnesota Court of Appeals held that "the trial court erred

¹⁶ For a complete analysis of protection orders, see LESLYE E. ORLOFF & CATHERINE F. KLEIN, DOMESTIC VIOLENCE: A MANUAL FOR PRO BONO LAWYERS (Ayuda) (2d ed. 1992).

¹⁷ 42 U.S.C. § 13981 (1994); National Center on Full Faith and Credit, <http://www.fullfaithandcredit.org>.

¹⁸ See chapters on Interstate Custody and Jurisdiction in LEGAL MOMENTUM, BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (2006).

¹⁹ *In re Anthony T.*, 510 N.Y.S.2d 810 (N.Y. 1986); *Adair v. United States*, 391 A.2d 288 (D.C. 1978); *United States v. Baish*, 460 A.2d 38 (D.C. 1983).

²⁰ *Pierson v. Pierson*, 147 Misc.2d 209 (N.Y. Fam. Ct. 1990).

by failing to make findings regarding domestic abuse” and reversed the civil protection order.²¹ Similarly, the court in *Bryant v. Williams* stated that under North Carolina law “[t]he court’s authority to enter a protective order or approve a consent agreement is dependent upon finding that an act of domestic violence occurred and that the order furthers the purpose of ceasing acts of domestic violence.”²² Similarly, in *Sandoval v. Mendez* the court affirmed the trial court’s refusal to enter a civil protection order for lack of subject matter jurisdiction because a necessary statutory provision had not been met.²³

Protection Order Is Not Valid and Enforceable Under the Violence Against Women Act’s Full-Faith and Credit Provisions

Under the Violence Against Women Act of 1994 (VAWA)²⁴ federal law requires that each state, tribe, or territory give full faith and credit to a sister state’s protection order (including an emergency order) as long as due process requirements were met in the state where the order was issued. The full faith and credit provision of VAWA requires that a *valid* protection order must be enforced throughout the United States. When there are no findings to give a court jurisdiction to issue a protection order, it is not a valid protection order and courts in other states may refuse to give the order full faith and credit.²⁵

In making protection orders enforceable across state lines, Congress limited full faith and credit protections to orders that meet the following requirements:

- 1) a pleading has been filed;
- 2) the restrained party was provided notice and an opportunity for a hearing; and
- 3) the order was based upon findings that the restrained party had committed acts deemed domestic violence under the protection order statute of the state issuing the order.²⁶

Congress took this approach to assure that the restrained party had been provided due process before a protection order was issued and to deter the practice of courts issuing mutual protection orders restraining both the abuser and the victim.²⁷ When judges issue “no findings” protection orders these orders are contrary to VAWA, are unenforceable beyond the boundaries of the issuing state, and risk rendering the legal order ineffective.²⁸

2) Impact on survivor

²¹ 443 N.W.2d 228, 230 (Minn. Ct. App. 1989).

²² 588 S.E.2d 506, 508 (N.C. Ct. App. 2003); *cf. Ditlefsen v. Feyereisen*, No. 86-1151, 1987 WL 267486 (Wis. Ct. App. Feb. 3, 1987) (“[w]ithout findings on the criteria set out in [Wisconsin’s statute], there is no basis for determining subject matter jurisdiction” in custody case).

²³ 521 A.2d 1168 (D.C. Ct. App. 1987).

²⁴ 42 U.S.C. § 13981 (1994).

²⁵ Heintz, *supra* note 10, at 280 (finding order did not comply with Violence Against Women Act’s “requirement of reasonable notice or opportunity to be heard” because of lack of findings). *cf. In re Jorgensen*, 627 N.W.2d 550, 564 (Iowa 2001) (refusing to apply New York custody order because New York court failed to make factual findings and thus lacked subject matter jurisdiction).

²⁶ 18 U.S.C. §2265-6; U.S. ATTORNEY’S OFFICE W. DIST. N.Y. & ST. UNIV. OF N.Y. AT BUFF. SCH. OF LAW FAMILY VIOLENCE CLINIC, OBTAINING AND ENFORCING VALID ORDERS OF PROTECTION IN NEW YORK STATE, 37 (U.S. Dep’t of Justice), http://www.usdoj.gov/usao/nyw/victim_witness/pdf/OOPmanual.pdf; NATIONAL CENTER ON FULL FAITH AND CREDIT PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCREASING YOUR SAFETY: FULL FAITH AND CREDIT FOR PROTECTION ORDERS, <http://www.vaw.umn.edu/documents/survivorbrochure/survivorbrochure.html> (last visited Jan. 24, 2008); Edward S. Snyder & Laura W. Morgan, *Domestic Violence Ten Years Later*, GP-SOLO LAW TRENDS & NEWS: FAMILY LAW, August 2005, <http://www.abanet.org/genpractice/newsletter/lawtrends/0508/family/domviolence.html>.

²⁷ BATTERED WOMEN’S LEGAL ADVOCACY PROJECT, INC., MUTUAL ORDERS OF PROTECTION: INFORMATION FOR JUDGES, ADVOCATES, AND BATTERED WOMEN (2003), <http://www.bwlap.org/TAPs/mutualOFP.pdf> (explaining the problems with mutual protection orders).

²⁸ 18 U.S.C. §2265(a)-(b)

Protection Orders

In addition to problems with reversal and full-faith and credit, a ‘no findings’ order causes several other problems for victims of domestic violence. Orders issued without jurisdiction, because of no findings of domestic violence, are dangerous for domestic violence victims because the order:

- Allows the abuser to avoid accepting responsibility for his violent and abusive behavior, thereby undermining the protection order’s effectiveness.
- Can avoid state laws designed to avoid awarding custody to the non-abusive parent and make it more difficult for the battered victim to be awarded custody of the parties’ children;²⁹
- Can allow the abuser to retain his firearms avoiding federal laws that require that abusers with protection orders be barred from purchasing fire arms and obtaining a fire arms license;³⁰
- May undermine the ability of courts to have abusers turn over weapons;
- Can undermine an immigrant victim’s domestic violence-related immigration case³¹ and access to public benefits;³²
- Can delay or hinder access to welfare benefits for battered women and children; and
- Can make it less likely in a divorce for the battered victim to be able to retain the family home or to obtain a distribution of the family assets that takes domestic violence into account.

3) Issuing Jurisdictionally Sound Protection Orders – Including Consent Protection Orders

To issue a valid protection order there must be a finding of domestic violence, which gives the issuing court subject matter jurisdiction. This does not mean that there must be a full hearing. Ideally, the court can obtain abuser consent to the issuance of a protection order so that the court may avoid a full hearing on the subject of abuse. In consenting, the abuser must be agreeing to a finding of domestic violence,³³ otherwise there is no subject matter jurisdiction, regardless of an abuser’s agreement to the order.³⁴

As in any uncontested civil court case, the court can issue a valid order resting its subject matter jurisdiction upon the uncontested affidavit or pleading of the petitioner.³⁵ When the abuser does not contest to the issuance of the protection order and the protection order petition alleges facts sufficient to constitute domestic violence under the state protection order statute, protection order courts across the country have subject matter jurisdiction to issue valid consent protection

²⁹ See *Zimmerman v. Zimmerman*, 569 N.W.2d 277, 279 (N.D. 1997) (reversing custody order because court had not “carefully delineate[d] relevant and specific facts in support of its [domestic abuse] determination”); CLARE DALTON, LESLIE DROZD, & FRANCES WONG, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE’S GUIDE (2d ed. 2006); AMERICAN BAR ASSOCIATION, CIVIL PROTECTION ORDERS (CPO’S) AND CHILD RELATED ISSUES (2004) (summary of State CPO laws including child custody for non-abusive parents); Mark Hardin, *Ramifications for Spouse and Partners*, A.B.A. CRIMINAL JUSTICE MAGAZINE, Spring 2002, available at <http://discussions.abanet.org/crimiust/mo/premium-cr/cimag/17-1/ramifications.html>; HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (Aug. 1994).

³⁰ See, e.g., 18 U.S.C. § 922(g)(8) (2005) (prohibiting possession of firearms by any person who is subject to a court order that issues after a hearing and “includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child”).

³¹ See 8 U.S.C. § 1229 (2000); 8 U.S.C. § 1101(a) (amended by Pub. L. No. 109-162 on Jan. 5, 2006); LEGAL MOMENTUM, *supra* note 15, at §§ 3, 5, 6.

³² LEGAL MOMENTUM, *supra* note 15, at §§4:1-2.

³³ Some courts may ask the abuser to admit that one or more incidents of domestic violence have occurred. Other courts require only a general agreement from the abuser to the court’s issuance of a domestic violence finding, coupled with an uncontested pleading by the petitioner alleging domestic violence. Both approaches are sufficient for subject matter jurisdiction.

³⁴ *Bryant v. Williams*, 161 N.C. App. 444 (N.C. Ct. App. 2003) (vacating protection order and dismissed domestic violence complaint where woman consented to order because no domestic violence found cannot approve even a consent order since order is to make domestic violence cease).

³⁵ See *Vogt v. Vogt*, 455 N.W.2d 471, 474 (Minn. 1990); LEGAL MOMENTUM, *supra* note 15, at §5:1.

Protection Orders

orders. If the abuser insists on a consent civil protective order, without any finding of abuse, the court should reject the abuser's position, hold a full hearing, and issue a civil protective order if it finds that the victim has shown the required facts.

All protection orders should be issued on unaltered court forms or other court orders that contain one of the following:

- A citation to the state protection order statute defining domestic violence for purposes of issuance of a protection order;
- A statement that the court finds that the petitioner is entitled to a protection order under the state protection order statute;
- A statement that the court has found that it has subject matter jurisdiction to issue a protection order;
- A statement that the respondent admits an act or act of domestic violence as defined by the state protection order statute; or
- A finding of fact by the court that the respondent has committed an act or acts that qualify as domestic violence under the state protection order statute.

Each of these rulings provides a sufficient factual finding to support subject matter jurisdiction for issuance of a protection order. When one or more of the above findings are clear from the text of the civil protection order issued by the court, no specific oral or written finding of abuse is required for a protection order to be valid.³⁶

What are the gun ownership ramifications of a protection order?

There are some federal laws that limit gun ownership and may affect a judge's desire to issue a no findings protection order. The law that directly mentions protection orders and firearms is 18 U.S.C. section 922 (g) (8). Often 18 U.S.C. section 922 (g) (9) (also called the Lautenberg amendment) is mistakenly assumed to be activated by a protection order. There are also several other laws that may affect an abuser's ability to receive firearms from others or increase the penalties for an abuser who lies in order to get a firearm.³⁷

18 U.S.C. 922 (g) (8)

922 (g) (8) prohibits some abusers subject to a protection order from possessing firearms and ammunition. In order for a protection order to deny an abuser access to firearms under this law the protection order must:³⁸

- 1) have been issued after a hearing with a) Notice to the respondent, and b) Opportunity for the respondent to participate
AND
- 2) restrain
 - a. stalking, harassing, threatening –OR–
 - b. other conduct that places partner or their child/children in reasonable fear of injuryAND
- 3) include a finding of credible threat –OR– explicitly prohibit the use of force/ harm to partner or child
AND

³⁶ Oral approval by the judicial officer based on the pleadings and consent of the parties is sufficient to establish jurisdiction. Explicit on the record specific factual findings are not required.

³⁷ 18 U.S.C. § 922(a)(6), (d)(8)-(9), (g)(1)-(7). See also OFFICE OF VIOLENCE AGAINST WOMEN & NAT'L CTR ON FULL FAITH AND CREDIT, ENFORCING DOMESTIC VIOLENCE FIREARM PROHIBITIONS: A REPORT ON PROMISING PRACTICES 6-10 (2006) (noting various state statutes).

³⁸ OFFICE OF VIOLENCE AGAINST WOMEN & NAT'L CTR ON FULL FAITH AND CREDIT, *supra* note 34. See also 18 U.S.C. §922(g)(8).

Protection Orders

- 4) protect a petitioner who is or was an “intimate partner”
 - a. spouse or former spouse –or-
 - b. parent of a child with abuser –or-
 - c. person who cohabits or has cohabitated with abuser

Some judges and attorneys mistakenly believe that a no findings protection order does not satisfy the requirements of section 922(g)(8) and, consequently, that the abuser would be free from any federal firearms prohibition. However, section 922(g)(8) applies even to a no findings order provided the order satisfies the other requirements of the federal statute and the terms of the order expressly prohibit the use, attempted use, or threatened use of physical force (see element 3 above, which provides for two alternatives). Most protection orders include provisions containing the required “physical force” prohibition; therefore, the failure to include a factual finding concerning credible threat would not evade the firearms prohibition in section 922(g)(8). To best ensure that protection orders comply with the federal statute, attorneys and judges should encourage the development of standard protection order forms that include a non-discretionary, explicit prohibition on the use, attempted use, or threatened use of physical force.

The Lautenberg Amendment (18 U.S.C. section 922 (g) (9))

This amendment prohibits those who have been **convicted** of a **misdemeanor crime of domestic violence** from possessing firearms and ammunition. A finding of domestic violence that is the basis of a protection order is NOT a conviction of a misdemeanor of the crime of domestic violence. A judge may mistakenly believe that they will be denying an abuser access to firearms under this amendment when they base a protection order on a finding of domestic violence; however, this is not the case. Although 18 U.S.C. 922 (g) (8) may prohibit access to firearms depending of the nature of the protection order, the Lautenberg Amendment will not.

Conclusion

By following these suggestions, courts may avoid the potential pitfalls of “no findings” protection orders and better protect victims of domestic abuse by providing jurisdictionally sound protection orders. If the respondent is unwilling to admit any abuse and is unwilling to agree to the relief the petitioner is seeking, or is only willing to agree to the issuance of a protection order “without a finding,” *the court must still find domestic violence to issue a protection order*. Without a finding of domestic violence there is no subject matter jurisdiction for the court to issue a protection order.

Protection Orders

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6.1

Countering Abuser's Attempts to Raise Immigration Status of the Victim in Custody Cases¹²

By Leslye Orloff, Joyce Noche, Cecilia Olavarria, Laura Martinez-McIntosh, Jennifer Rose, and Amanda Baran

Chapter Approach

This chapter is designed to help family lawyers prepare to counter attempts by abusers to raise immigration status in custody cases. Attorneys are encouraged to use the information in this chapter to educate judges hearing custody cases about the fact that they should not consider immigration status in making custody decisions in the best interests of children. The contents of this chapter are written in a format that could be

¹ "This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women." This chapter was prepared with the assistance of Amy M. Klosterman of the Case Western Reserve University School of Law, Lejla Zvizdic of the Creighton University School of Law, Allyson Mangalanzo of the Boston University School of Law, and Emily Kite of Columbia Law School.

² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender

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incorporated into a bench brief to a trial court in a custody matter, or that could be included in materials for educating judges.³ Many attorneys who have used the approach described in this chapter have successfully won custody of children for immigration victims of domestic violence. However, attorneys working with immigrant victims of domestic violence may encounter judges who are not open to listening to the arguments discussed here. Some judges may have strong negative feelings about immigrants that will greatly influence their decision-making. Other judges may not believe that domestic violence is a serious matter, or that domestic violence should affect the perpetrator's ability to gain custody of his children.

It is important for attorneys litigating custody cases on behalf of battered immigrants to learn how the judges they will appear before approach cases of domestic violence or cases involving immigrant victims so that they can prepare to respond to issues that the judge may raise. It will also be important when attorneys anticipate problems with a particular judge, to present, as part of the case and as part of the bench brief filed with the judge, evidence on the effect that domestic violence has on children. Attorneys also should consider presenting expert testimony, both on the issue of domestic violence and its effects on children, and to counter the abuser's attempts to raise immigration status. Expert testimony by a local immigration attorney can provide the court with factual information about how the U.S. Citizenship and Immigration Services (USCIS)⁴ operates locally in the area and on the family-based immigration process and remedies for immigrant victims under the Violence Against Women Act (VAWA).

Since abusers and their counsel often raise issues of immigration status during trial, it is recommended that attorneys representing immigrant victims in custody cases put together packets of materials they can use to counter these arguments ahead of time. These materials can be used as needed to submit as evidence at a hearing or trial, to make arguments on motions before the judge or to use as a basis for developing a bench brief for the judge. These materials could include:

- A copy of the immigrant children's chapter of the ABA report on the Impact of Domestic Violence on Children;
- An overview of VAWA and U-visa immigration relief;
- Information and articles on immigration related abuse and the dynamics of domestic violence experienced by immigrant victims.

Overview

Every day, non-profit organizations, non-governmental agencies, national, local, and state governments, and judicial systems confront the adverse effects of domestic violence. Often, immigrant women are victims. Legislators crafting the Violence Against Women Act of 1994,⁵ found high levels of abuse in households where citizens and lawful permanent residents were married to immigrant spouses who were dependent on them for attaining lawful immigration status.⁶ As a result, Congress clearly stated that one of the purposes of enacting VAWA was to allow "battered immigrant women to leave their batterers without fearing deportation."⁷

³ Persons interested in using the material contained in this chapter for these purposes should contact the National Immigrant Women's Advocacy Project (NIWAP) for technical assistance (202) 274-4457. This manual is available electronically at <http://niwaplibrary.wcl.american.edu/reference/manuals/domestic-violence-family-violence>. NIWAP only asks that we be given credit for use of the materials. For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/custody>.

⁴ The agency formerly known as Immigration and Naturalization Services (INS) and later as the Bureau of Citizenship and Immigration Services (BCIS) under the administration of the Department of Homeland Security was recently renamed the U.S. Citizenship and Immigration Services (USCIS). USCIS has three components: USCIS for affirmative applications including VAWA self-petitions, U.S. Immigration and Customs and Enforcement (ICE), the enforcement arm, and Bureau of Customs and Border Protection (CBP). We will be referring to the appropriate component throughout this document.

⁵ Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified in scattered sections of 8 U.S.C.) [hereinafter VAWA].

⁶ H.R. REP. NO. 103-395, at 25 (1993); S. REP. NO. 101-545, at 38-39 (1990); see generally, Robin L. Campo et al., *Family Violence Prevention Fund et al., Untold Stories: Cases Documenting Abuse by U.S. Citizens and Lawful Residents on Immigrant Spouses* (1993).

⁷ H.R. REP. NO. 103-395, at 26-7 (1993).

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When children are concerned, however, immigrant victims may be unwilling to leave the abuser and access VAWA protections. Many battered immigrants are reluctant to leave abusive relationships for fear of losing their children. Fear of losing custody of or access to children is a significant factor that keeps battered women from leaving their abusers or seeking help to stop the abuse.⁸ This fear is substantiated by the fact that, in many child custody cases, abusers of immigrant victims raise the issue of the victim's lack of legal immigration status in order to tip the custody scales in their favor. Abusers use child custody litigation as a vehicle to maintain control over the victims.⁹

While abusers often use victims' lack of legal immigration status in custody cases, it is crucial to highlight that victims are often undocumented because their abusers have refused to file immigration papers for them. The abuser's refusal is precisely a tool of power and control over the victim, and becomes a key part of the pattern of abuse. In other instances, the victim's access to a legal immigration visa is based on her marriage to a work-based temporary visa holder who controls whether she can legally remain in the United States.

Abusers keep victims undocumented, without legal status, or cause revocation of legal status previously granted, and then use the victims' lack of legal status, or lack of permanent legal status, and threats of deportation to keep them from calling the police about the abuse, seeking a protection order to stop the abuse, or talking to anyone about the abuse. Fathers who abuse their children's mother are twice as likely to seek sole physical custody than are non-violent fathers.¹⁰ Family courts should be hesitant to validate an abuser's custody arguments that he should be granted custody because he is a citizen or has legal immigration status and the victim does not. To allow such arguments to prevail perpetuates the abuser's control over the victim and dependent children and enhances danger to the children rather than offering them protection.¹¹

ABA APPROACH

Judicial actions affecting the care of children are frequently determined by the "best interests of the child" standard.¹² In applying this "best interests" standard, an adjudicator weighs a variety of factors to make a custody determination.¹³ "All states recognize [that] the welfare or 'best-interests' of the child . . . [is the] paramount concern" in any custody decision.¹⁴ Additionally, the Uniform Marriage and Divorce Act¹⁵ defines a child's best interest as encompassing the following factors:

1. The wishes of the child's parent or parents as to his or her custody;
2. The wishes of the child as to his or her custodian;
3. The interaction and interrelationship of the child with his or her parent or parents, his or her siblings and any other person who may significantly affect the child's best interest;
4. The child's adjustment to his or her home, school and community;
5. The mental and physical health of all individuals involved.¹⁶

Most, but not all, states require "that [the] courts consider domestic violence when determining the best interest of a child."¹⁷ However, inclusion of domestic violence as only one factor to be considered in custody

⁸ Mary Anne Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 301 (2000).

⁹ Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOCIAL WORK 51, 53 (1994); Barbara Hart, *Family Violence and Custody Orders*, 43 JUV. & FAM. CT. J. 29, 33-34 (1992).

¹⁰ AMERICAN PSYCHOLOGICAL ASSOCIATION, *VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE* (1996) [hereinafter APA REPORT].

¹¹ NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *MYTHS AND FACTS REGARDING DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES* (Aug. 1997).

¹² *Id.* at 13.

¹³ Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1071 (1991).

¹⁴ Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335 (1982).

¹⁵ UNIFORM MARRIAGE AND DIVORCE ACT § 402 (amended 1970 and 1973), 9 U.L.A. 561 (1998).

¹⁶ National Coalition Against Domestic Violence, *Myths and Facts Regarding Domestic Violence and Child Custody Disputes*, August 1997; Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1071 (1991); Elizabeth Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1234-35 (1998) (stating that the Uniform Marriage and Divorce Act is the model for several states' custody statutes).

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decisions is not proving to be enough to protect victims of domestic violence and their children.¹⁸ In the vast majority of cases, domestic violence is either deemed irrelevant to custody decisions or is not taken seriously.¹⁹ The existence of domestic violence should be proof enough that at least one parent has taken actions that threaten the best interests of the child.²⁰ Courts must not separate issues of abuse from custody. Domestic violence must be recognized as harmful to the entire family.²¹ Limiting the courts' focus on actions that directly affect the child prevents courts from considering how abuse of a parent also harms the children.²² Since domestic violence has uncontrovertibly injurious effects on children, shifting the custodial standard to require examination of domestic violence in the parents' relationship is imperative.²³ For these reasons, the ABA has taken the position that any history of abuse toward an adult in the home of the parent seeking custody must be considered the primary factor in applying the "best interests" standard.²⁴

In 1994, the American Bar Association's Center for Children and the Law issued a report²⁵ that discussed the negative effects children suffer in households rife with domestic violence. The ABA specifically recognized that battered immigrant women and their children face distinct problems.²⁶ The report found that abusers whose victims are immigrant parents often use threats of deportation to shift the focus of family court proceedings away from their violent acts.²⁷ Where abusers are allowed to successfully raise immigration status in custody cases, the best interests of the child are compromised when this action results in the court placing the child in the custody of the abusive parent.²⁸ In this arrangement, it is the child who suffers:

Batterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution for battering and to shift the focus of family court proceedings away from their violent act...[w]hen the judicial system condones these tactics, children suffer...[p]arties should not be able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce, or child support proceedings... [t]his... will ensure that children of domestic violence victims will benefit from... laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all other children.²⁹

Mandating consideration of domestic violence as merely one of numerous factors does not ensure understanding of the impact of abuse on the victim and on the children.³⁰ Studies have shown that merely witnessing domestic violence has a severe effect on children.³¹ "Socially, children who witness domestic violence tend to choose either passive or aggressive behavior to resolve interpersonal conflicts. They exhibit shyness, depression, anxiety, low self-esteem and feelings of shame, guilt, and confusion as a result of their experiences." Additionally, children who witness family violence are significantly more likely to lag behind

¹⁷ The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L. Q. 197, 201 (1995). These states include: Alabama (ALA. CODE § 30-3-131), Alaska, Arizona, California, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi (MISS. CODE ANN. § 93-5-24(9)(a)(i)), Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York (N.Y. DOM. REL. LAW § 240(1)(a)), North Carolina (N.C. GEN. STAT. § 50-13.2(a)), North Dakota, Ohio, Oklahoma, Oregon (OR. REV. STAT. § 107.137(1)(d)), Pennsylvania, Rhode Island, South Dakota (S.D. CODIFIED LAWS § 25-4-45.5), Texas, Virginia, Washington, Wisconsin, and Wyoming.

¹⁸ Molly A. Brown, *Child Custody In Cases Involving Domestic Violence: Is It Really In The "Best Interests" Of Children To Have Unrestricted Contact With Their Mother's Abusers?*, 57 J. MO. B. 302, 305 (2001).

¹⁹ Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1072 (1991).

²⁰ Brown. at 305.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (Aug. 1994).

²⁵ *Id.* at 13.

²⁶ *Id.* at 19.

²⁷ *Id.* at 20.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1072-74 (1991).

³¹ See Patricia K. Susi, *The Forgotten Victims of Domestic Violence*, 54 J. MO. B. 231-32 (1998).

their peers in all areas of development, including behavioral, emotional and cognitive.³² Children living in households with domestic violence are more likely to become direct victims of physical abuse.³³ Fifty-seven percent of children under the age of 12 who are murdered, are killed by a parent.³⁴ Domestically violent households skew children's conceptions of healthy families, thus perpetuating violence in their future lives.³⁵ Many adults exposed to violence during childhood become violent in their own relationships.³⁶ This can be seen particularly with young boys. A boy's exposure to his father abusing his mother is the strongest risk factor for transmitting violent behavior from one generation to the next.³⁷ Numerous adolescent boys incarcerated for violent crimes and exposed to family violence also believed that "acting aggressively enhances one's reputation or self-image."³⁸ This risk is compounded when the child himself is abused.

A child's best interests are preserved when the child is in a non-abusive household with a non-abusive parent. Offering the non-abusive parent protection and support for her attaining legal custody so that she can remove her children from an abusive home is the most successful manner in which to alleviate the long-lasting effects of domestic violence on children.³⁹ Raising the immigration status of the victim in a custody determination flies in the face of the "best interests" standard because it claims that it is better for children to live with an abusive person rather than with a non-abusive parent who may lack legal immigration status or permanent legal immigration status. In effect, it places children in the hands of the parent who has created the abusive household, and who in many cases has been responsible for assuring that the non-abusive immigrant parent remains without legal immigration status, as a result of abusive behavior. Accordingly, a non-abusive parent's immigration status should not be raised nor should it be considered pertinent in custody, protection order, divorce, or other family law proceedings.⁴⁰ In order to ensure fairness in our legal system, courts must guarantee that children of immigrant domestic violence victims receive equal treatment and legal rights to a safe household that all children receive.⁴¹

IMMIGRATION-RELATED ABUSE AND FEAR OF LOSING CHILDREN: KEY POWER AND CONTROL TOOLS

Historically, immigration laws have made legal permanent residents and citizens responsible for filing immigration papers on behalf of their spouses and children. In non-abusive relationships, the citizen or lawful permanent resident spouse would file immigration papers, either before or shortly after the marriage, requesting that their spouse be granted lawful permanent residence.⁴² If the couple has been married for less than two years at the time they attend their USCIS or consular interview, the immigrant spouse is granted conditional residence.⁴³ At the end of a two-year period following receipt of conditional residence, the couple must file a "joint petition" to remove the condition, or the immigrant spouse must file for a waiver of the joint petition, otherwise the immigrant spouse's lawful status terminates.⁴⁴ The three available waivers are a battered spouse waiver, an extreme hardship waiver and a waiver based on divorce. After the joint petition or waiver has been granted, the immigrant spouse's permanent residence cannot lapse unless she commits an immigration or criminal violation and is ordered removed. If the couple has been married longer than two years at the time of the interview, then the immigrant spouse will receive unconditional lawful permanent residence.

³² Jeffrey Edleson, *Problems Associated with Children's Witnessing of Domestic Violence*, Violence Against Women Online Resources (Apr. 1997), at <http://www.vaw.umn.edu/documents/vawnet/witness/witness.html> (last revised Apr. 1999).

³³ *Id.*

³⁴ *Id.*

³⁵ VIOLENCE POLICY CENTER, *VIOLENCE BEGETS MORE VIOLENCE* (May 1996).

³⁶ See APA REPORT.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Susan Schecter & Jeffrey L. Edleson, *Domestic Violence and Children: Creating a Public Response*, developed for the Open Society Institute's Center on Crime, Communities & Culture, pp. 5-6 (2000).

⁴⁰ HOWARD DAVIDSON, *THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION* 20 (Aug.1994).

⁴¹ *Id.*

⁴² See APA REPORT.

⁴³ See Immigration and Nationality Act § 216, 8 U.S.C. § 1186a.

⁴⁴ *Id.* § 1186a(c)(1)(A).

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This procedure from USCIS places an enormous amount of control in the hands of legal permanent residents and citizens over the immigration status of their spouses. The citizen or permanent resident spouse can withdraw the petition filed with USCIS on the immigrant spouse's behalf at any time. In addition, once the immigrant spouse receives conditional residence, the citizen or legal permanent resident spouse can refuse to sign the required joint petition for removal of the condition on the victim's residence, resulting in the potential denial of lawful permanent residence for the immigrant spouse. When abusive citizen or permanent resident visa-holding spouses are granted so much control over the immigration process, an abuser's control over his spouse is strengthened.⁴⁵ Congress has recognized that there is a clear connection between control over immigration status and domestic violence.⁴⁶

Abusers of immigrant women use immigration-related abuse as a powerful form of emotional abuse in order to trap battered immigrant women and their children in these dangerous relationships.⁴⁷ Evidence of immigration-related abuse might include: threats of deportation, threats to turn her into USCIS if she tells anyone about the abuse, refusal to file or threats to withdraw immigration papers for the victim or her children, or threats to raise her immigration status in a custody, protection order or divorce case.⁴⁸

Immigration-related abuse is closely intertwined with some of the most serious and harmful forms of emotional abuse, including intimidation, isolation, economic abuse, and employment-related abuse.⁴⁹ These pernicious forms of abuse cut off immigrant battered women from help, support, and a way out of the abusive relationship.⁵⁰ Threatening an immigrant victim that the police will turn her into USCIS if she calls the police for help isolates the immigrant victim and her children from police and justice system protection and shields the abuser from prosecution for his violence. An abuser's refusal to file immigration papers based on the marriage, or threats to withdraw papers if the victim does not comply with the abuser's demands, prevent immigrant victims from attaining legal immigration status and work authorization. Stalking and harassing a temporary worker at her workplace so that she loses her only form of USCIS-authorized employment are both employment-related and immigration-related abuse. Immigrant victims have deep-seated fears of deportation. In a survey conducted among Latina and Filipina immigrants, 64% of Latina and 57% of Filipina immigrant victims stated that fear of deportation was their primary reason for not reporting abuse.⁵¹

Research has found abuse rates to be significantly higher among immigrant women who have been married or formerly married (59.5%) than for the general population of immigrant women (49.3%).⁵² For undocumented immigrant Latinas whose spouses or former spouses are citizens or lawful permanent residents, the battering rate may rise as high as 67%.⁵³ Among abusive citizen or lawful permanent resident spouses who could file immigration papers for their immigrant spouse to attain legal immigration status based upon the marriage, 72.3% never file such immigration papers. The 27.7% who do file delay filing for an average of almost four

⁴⁵ *Id.*

⁴⁶ "[T]he Battered Immigrant Women Protection Act of 2000. . . Title V continues the work of the Violence Against Women Act of 1994 ("VAWA") in removing obstacles inadvertently interposed by our immigration laws that may hinder or prevent battered immigrants from fleeing domestic violence safely and prosecuting their abusers by allowing an abusive citizen or lawful permanent resident spouse to blackmail the abused spouse through threats related to the abused spouse's immigration status. . . VAWA 2000 addresses the residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or have arisen since as a result of 1996 changes to immigration law." Violence Against Women Act of 2000 Section by Section Summary, 146 CONG. REC., S10,195 (daily ed. Oct. 11, 2000).

⁴⁷ Mary Anne Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 293 (2000).

⁴⁸ Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 98-99 (2002).

⁴⁹ Giselle Aguilar Hass et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in DOMESTIC VIOLENCE: GLOBAL PERSPECTIVES, 103-13 (2000).

⁵⁰ *Id.*

⁵¹ Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1421 (1993); See also CHRIS HOGELAND AND KAREN ROSEN, COALITION FOR IMMIGRANT AND REFUGEE RIGHTS AND SERVICES, DREAMS LOST, DREAMS FOUND: UNDOCUMENTED WOMEN IN THE LAND OF OPPORTUNITY (1991); Tien-Li Loke, *Trapped In Domestic Violence: The Impact Of United States Immigration Laws On Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 591 (1997).

⁵² Hass at 101-03.

⁵³ Domestic Violence Needs and Assessment Survey Among Immigrant Women conducted between 1992 and 1995 (unpublished data, on file with Legal Momentum).

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years, holding the abused immigrant spouse hostage in that relationship during that time.⁵⁴

Further, immigration-related abuse almost always exists when physical or sexual abuse is also present.⁵⁵ Immigrant women who were victims of physical or sexual abuse or both suffer from immigration-related abuse, including their abusers' threats of deportation, threats of refusal to file immigration papers, and threats to call the U.S. Immigration and Customs Enforcement (ICE), at over seven-times the rate experienced by psychologically abused immigrant women.⁵⁶ When immigration-related abuse occurs in relationships that do not include physical or sexual abuse, this factor may be a predictor that the lethality of the relationship's violence is likely to escalate.⁵⁷

Abusers are aware of the connection between fear of deportation and losing child custody. Abusers manipulate those fears effectively to keep their victims from leaving the relationship. Courts should consider it significant that 48.2% of battered immigrant women who reported still living in an abusive relationship cited the fear of losing child custody as an obstacle to leaving that relationship.

Many immigrant women are willing to suffer for the sake of family preservation because they fear that leaving their husbands will result in losing their children.⁵⁸ If they leave, and their leaving results in their abuser's securing legal custody of the children because of his superior immigration status, who will protect the children from a father's violence? Often, battered immigrants stay because they believe that leaving means losing custody of and access to their children.

Generally, immigrant women are cultural, racial, and linguistic minorities in the United States and, as such, tend to lack the family support network they would have had if in their countries of origin.⁵⁹ This lack of a support system and cultural community unrelated to their abusers undermines their ability to leave their abusers and forces them to try alternative strategies for protecting themselves and their children from domestic violence.⁶⁰ The following stories, compiled by victims' advocates and attorneys, demonstrate that a battered immigrant woman's fears are real and deep-seated.

Julia came to the United States from Mexico. Since the beginning of their marriage, her husband Luis, a legal permanent resident, physically abused her. Even after Julia left Luis, he continued to harass and threaten her, constantly appearing at her apartment to say he would take away the children and have her deported. Once, Luis punched Julia in the chest and threw her into the street, in front of her children. Although Julia has filed a protection order against Luis, he has made it clear that he wants sole custody of the children. Luis has previously violated court orders by taking the children away from Julia. Julia needs to become a lawful permanent resident, so that she can protect her children from Luis' violence. She cannot return to Mexico because Luis could easily follow her to Mexico, where there would be no consequences for his abuse. If Julia is forced to return to Mexico, leaving the children in the U.S. would jeopardize their safety as well.⁶¹

Nancy and Jesus met in Mexico in 1969, and were married two years later. Eight days after they were married later, Jesus began physically abusing Nancy. When Nancy was three months pregnant, Jesus left her in Mexico so he could work in the United States. Jesus stayed in the U.S. for most of the year, returning to visit Nancy once a year for a month or so. Every time he returned, Jesus would beat Nancy. Once, he beat

⁵⁴ Mary Anne Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 259 (2000) (noting that 72.3% of citizens or permanent residents that batter their spouses never file immigration papers while 27.7% file the papers after approximately four years).

⁵⁵ Hass at 106-09.

⁵⁶ Dutton at 292.

⁵⁷ Hass at 109; Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 111 (2002).

⁵⁸ Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN'S L.J. 99, 136 (1996).

⁵⁹ *Id.* at 124.

⁶⁰ Susan Schecter & Jeffrey L. Edleson, *Domestic Violence and Children: Creating a Public Response*, developed for the Open Society Institute's Center on Crime, Communities & Culture, p. 5 (2000) (noting that battered women with children must protect themselves from physical danger, risk homelessness and poverty, expose themselves to different and dangerous physical surroundings, face loss of health insurance, and grapple with disrupting their children's lives).

⁶¹ LESLYE ORLOFF ET AL., NEW DANGERS FOR BATTERED IMMIGRANTS: THE UNTOLD EFFECTS OF THE DEMISE OF 245(i) 44 (July 20, 2000), available at <http://www.house.gov/judiciary/orlo0720.htm>.

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her so severely that she lost feeling in her face. Nancy and Jesus continued to live in this manner for years until Nancy asked Jesus to submit petitions for herself and their children. By this time, they had had five children together. The family moved to Illinois together and the beatings continued. Finally, Nancy obtained a protection order against Jesus. Jesus continued harassing his family in violation of the protective order. Nancy's oldest son is now in high school and suffers from severe depression as a result of the constant violence that took place in their home. The other children exhibit behavioral problems and are in need of long-term counseling. Most of Nancy's relatives live in the United States. If she and her children were forced to return to Mexico, Jesus could continue to harass and abuse them. Additionally, Nancy's children would not have access to the counseling services they desperately need as a result of their father's abusive behavior.⁶²

These stories illustrate how factors such as financial dependence on the batterer, lack of proficiency in the English language, fear of losing custody of children, and lack of opportunities based on employment skills, assist the abuser in utilizing immigration-related threats to inhibit a victim from seeking help. Many immigrant women are unaware that legal recourse is available to help immigrant victims of domestic violence attain legal immigration status.⁶³ This lack of awareness is due chiefly to incorrect or insufficient information provided to battered immigrant women by their abusers.⁶⁴ Legal strategies and law-enforcement services provide many women "a means to escape, avoid, and stop the violence and abuse against them."⁶⁵ However, calling the police, seeking legal services, and obtaining a protection order all require large amounts of courage, especially by undocumented immigrants who must overcome systemic obstacles, including lack of knowledge of the protections available to them.

Battered immigrant women unfamiliar with the ways of a new country may not even realize that domestic violence is against the law in the United States.⁶⁶ These women are often reluctant to access the American justice system because they do not believe the courts or the police will help them.⁶⁷ If a battered immigrant woman is from a country that views the police as repressive, it is only natural that she fears the police.⁶⁸ Additionally, her experiences with the legal system in her native country may make her hesitant to turn to the judicial system for help.⁶⁹ In countries where the judiciary is an arm of a repressive government and does not function independently, those who prevail in court are the people with the most money or the strongest ties to the government.⁷⁰ Against this background, battered immigrant women may have a hard time believing that the legal system will protect or help them.⁷¹

When the justice system allows the victim's immigration status to be raised as a factor in any case, immigrant victims of domestic violence are discouraged from seeking protection and from cooperating in criminal prosecutions of their abusers. These adverse effects, in turn, perpetuate the cycle of violence, a battered immigrant woman's isolation, and continued exposure of the immigrant victim's children to ongoing violence. Since immigration status of a spouse is not pertinent in cases involving child custody, divorce proceedings, or the securing of a protection order, when introduced in custody cases, it is contrary to the best interests of the children.

⁶² *Id.* at 53.

⁶³ Violence Against Women Act of 2000, Title V of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (see chapters on VAWA self-petitions, VAWA cancellation of removal, and U-visa protections).

⁶⁴ *Id.*

⁶⁵ Mary Anne Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 290 (2000).

⁶⁶ *Id.*

⁶⁷ UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION, VOLUME I: THE MOUNT PLEASANT REPORT 75 (Jan. 1993) [hereinafter CIVIL RIGHTS REPORT].

⁶⁸ See H.R. REP. NO. 103-395, at 26 (1993).

⁶⁹ See CIVIL RIGHTS REPORT at 75; Leslye E. Orloff, Address at the American Medical Association National Conference on Family Violence: Health and Justice, Conference Proceedings (Mar. 11-13, 1994) [hereinafter Orloff Address].

⁷⁰ See National Immigrant Project of the National Lawyers Guild, *New Immigration Relief Under the Violence Against Women Act for Women and Children Suffering Abuse* 16 (1995); See also Orloff Address.

⁷¹ Tien-Li Loke, *Trapped In Domestic Violence: The Impact Of United States Immigration Laws On Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 591 (1997)..

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An abuser's attempt to raise the other parent's immigration status, outside of the context of immigration proceedings,⁷² is evidence of on-going abuse. In light of the research demonstrating that immigration-related abuse coexists with or predicts escalation of physical or sexual abuse, abusers' attempts to raise immigration status in custody cases should be viewed by courts as corroborative evidence of abuse. Often, the reason a battered immigrant woman does not have legal status is because the abuser did not file immigration papers for her. Abusers will use the immigration process as a way to maintain his power and control. This tactic underscores the presence of abuse in the household and provides the court with additional evidence in favor of granting custody to the battered immigrant woman. Accordingly, in cases involving domestic violence, courts should carefully evaluate evidence of immigration status in the case as a component of the pattern of power and control in the abusive relationship. The non-abusive parent's immigration status should not be used to justify awarding custody to an abusive parent, betraying the children's best interests.⁷³

THE VIOLENCE AGAINST WOMEN ACT: THE HISTORY, SCOPE AND PURPOSE OF VAWA

Congress passed the Violence Against Women Act in 1994 following years of investigation into the serious domestic violence problem existing in the United States. Its legislative history reflects the serious, pervasive toll that domestic violence takes on society:

- At least 3 to 4 million women in the United States are abused by their husbands each year, and over sixty percent of victims are beaten while pregnant.⁷⁴
- One fifth of all reported aggravated assaults involving bodily injury have occurred in domestic situations.⁷⁵
- One third of domestic attacks are felony rapes, robberies or aggravated assaults. Of the remaining two thirds, involving simple assaults, almost one-half resulted in serious bodily injury.⁷⁶
- More than one of every six sexual assaults per week is committed by a family member.⁷⁷
- One third of all women who are murdered die at the hands of their husbands or boyfriends, and one million women seek medical attention each year for injuries caused by their male partners.⁷⁸

These statistics, relied on by Congress in formulating VAWA, actually underestimate the extent of the problem, as recent research indicates that between 50% to 80% of intimate partner abuse incidents go unreported.⁷⁹

Consistent with its purpose to remedy domestic violence, Congress amended the nation's immigration laws to address the distinct predicament faced by immigrant women who are caught in an abusive relationship.⁸⁰ Congress recognized that immigration laws actually fostered the abuse of many immigrant women by placing their ability to gain permanent lawful status in the complete control of the abuser – their U.S. citizen or lawful

⁷² Even in immigration proceedings, federal law has limited an abuser's ability to influence USCIS with regard to his spouse's immigration status. Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 § 384, 8 U.S.C. § 1367 (2001). This federal law bars USCIS from releasing information about a victim's immigration case to anyone except law enforcement officers who need access to the information for legitimate communication with abusers. Use of information further precludes USCIS communication with abusers and use of information supplied by abusers to harm the victim's immigration case.

⁷³ HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION 20 (Aug. 1994).

⁷⁴ H.R. REP. NO. 103-395, at 26 (1993). However, most national estimates are derived from surveys or studies that typically exclude those who are very poor, who do not speak fluent English, whose lives are especially chaotic, or who are hospitalized, homeless, institutionalized, or incarcerated. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 809 (1994). Experts taking these factors into account have put the number of women battered each year closer to six million. See *id.* (citing Senator J. Biden, Remarks in the Rotunda of Russell Senate Office Building at the Opening of an Art Exhibition on Domestic Violence (Oct. 26, 1994)).

⁷⁵ STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 32 (Comm. Print 1992).

⁷⁶ S. REP. NO. 103-138, at 41 (1993).

⁷⁷ *Id.* at 38.

⁷⁸ *Id.* at 41.

⁷⁹ See U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 49-54 (noting that female respondents to the survey reported only one fifth of all rapes, one quarter of all physical assaults, and one-half of all stalkings by intimates to the police).

⁸⁰ 146 CONG. REC., S10,195 (daily ed. Oct. 11, 2000).

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permanent resident spouse.⁸¹ Congress enacted VAWA's immigration protections⁸² to alleviate this problem by giving battered immigrant women and children some measure of control over their immigration status.⁸³

Again, in October 2000, bipartisan efforts led to the passing of the Battered Immigrant Women Protection Act as part of the Violence Against Women Act of 2000 ("VAWA 2000").⁸⁴ These amendments were designed to aid battered immigrants by repairing residual immigration law obstacles impeding immigrants seeking to escape from abusive relationships.⁸⁵ In passing VAWA 2000, Congress recognized that "battered immigrants are again being forced to remain in abusive relationships, out of fear of being deported or losing their children."⁸⁶ To help ensure that greater numbers of battered immigrants could attain legal immigration status without risking deportation or loss of custody of their children, Congress significantly expanded VAWA's immigration protections to improve VAWA self-petitioning and cancellation of removal protections, and to offer immigration relief for the first time to immigrant victims of domestic violence whose abusers may not be citizens or lawful permanent residents and who may not be married to their abusers. As a result, many undocumented domestic violence victims, as well as immigrant victims of domestic violence with temporary immigration status will be able to attain legal immigration status. Many immigrant victims who come before courts in custody, divorce, or protection order cases in which custody is an issue will qualify for VAWA self-petitions, VAWA relief from deportation (cancellation of removal) or will qualify for the new crime-victim (U-visa) protections.

It is important for family court judges to follow the lead of Congress and defer to Congress's decision under federal immigration laws to offer special protection to immigrant victims of domestic violence to help them protect themselves and their children from ongoing abuse. Family court judges can do this by following the recommendations of Congress and the ABA and not allowing abusers to raise the victim's immigration status as an issue in custody cases. Instead, when abusers attempt to raise this issue in custody cases, courts should use the fact that a party is raising the immigration status of the other party, as direct evidence of abuse. This approach both protects the best interests of children and furthers the goals of Congress in creating federal immigration protections for battered immigrants.

COUNTERING ALLEGATIONS THAT IMMIGRANT VICTIMS ARE LIKELY TO FLEE THE JURISDICTION WITH THE CHILDREN IF GRANTED CUSTODY

Advocates and attorneys seeking to prevent an abuse victim's immigration status from becoming an issue in court must act strategically. Abusers may try to persuade the court that the victim's immigration status is relevant in custody cases, using the reasoning that if the victim is undocumented, then she will be more likely to flee the jurisdiction with the child. Research data on immigrants demonstrate that this view is erroneous. Many immigrants who are ultimately granted legal immigration status have lived in the United States for many years in undocumented status. Out of 8.8 million legal permanent residents present in the United States in 1993, almost one-third were formerly present in the United States as undocumented immigrants.⁸⁷ Currently "one in ten American children live in a household where one or more of the parents is a noncitizen and one or more of the children is a citizen."⁸⁸ Many such families contain a family member who is undocumented. The laws governing which noncitizens will be granted legal permission from the USCIS to live and work legally in the United States are ever-changing. This data confirms that people who are undocumented are not, by virtue of their undocumented immigration status, necessarily any more likely to be interested in leaving or planning to leave the country; on the contrary, many try to remain and improve their lives here.

⁸¹ H.R. REP. NO. 103-395, at 26-27 (1993).

⁸² VAWA § 40703, 8 U.S.C. § 1254(a)(3).

⁸³ H.R. REP. NO. 103-395, at 25 (1993).

⁸⁴ Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 28, 42 and 44 U.S.C.) (2000).

⁸⁵ 146 CONG. REC., S10,195 (daily ed. Oct. 11, 2000).

⁸⁶ *Id.* at S10,170 (statement of Sen. Kennedy).

⁸⁷ MICHAEL FIX & JEFFREY S. PASSEL, THE URBAN INST., IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 21 (1994), available at <http://www.urban.org/UploadedPDF/setting.pdf>.

⁸⁸ MICHAEL FIX & JEFFREY S. PASSEL, THE URBAN INST., THE SCOPE AND IMPACT OF WELFARE REFORM'S IMMIGRANT PROVISIONS: DISCUSSION PAPERS 17 (2002), available at http://www.urban.org/Uploadedpdf/410412_discussion02-03.pdf.

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Further, the statistics cited above underscore the fact that the lack of legal immigration status does not mean that an undocumented immigrant is likely to be deported. The fact that an immigrant may be undocumented does not mean that she does not currently or will not in the future qualify to attain legal immigration status. This is even more true in domestic violence cases, since many immigrant victims of domestic violence will qualify for immigration relief under either the Violence Against Women Acts of 1994 or 2000 if their abuser is their U.S. citizen or lawful permanent resident spouse, former spouse or parent, or under the VAWA 2000 crime victim visa (U-visa) provisions regardless of the status of the abuser. In fact, deportation will not be an imminent reality for the vast majority of immigrant domestic violence victims who turn to the family courts for help.

Allegations of flight in cases of battered immigrants should be treated like any other family court case in which one parent alleges that another parent is likely to flee the jurisdiction with the children. Since lack of documentation does not equal flight, parents who are in court to seek custody should only be asked the questions that are regularly asked in cases where one party charges the other party with being a flight risk. Generally, the parent alleging that the other parent will flee with the children must prove that flight is imminent. This usually requires proof that may include but is not limited to:

- possession/purchase of airline tickets;
- plans to move to another location;
- proof of contacts, family or a job in another location;
- the economic capacity to make the move; or
- other evidence that the other parent is planning to leave with the children.

It is generally extraordinarily difficult to convince a family court judge that a child's parent is planning to flee with the child, and to get the court to issue orders designed to prevent such flight.⁸⁹ One remedy that can be used when a party believes flight is imminent is the writ of *ne exeat*, which prevents the other parent from leaving the jurisdiction with the children.

Ordinarily, a party seeking to get a writ of *ne exeat* against the other parent must demonstrate that the other parent will probably depart or has threatened to depart the state or country with the general intent to evade jurisdiction (see the evidentiary examples above).⁹⁰ The case of *Roberts v. Fuhr* provides an example of how the writ of *ne exeat* is used to prevent parental kidnapping. In *Roberts v. Fuhr*, an ex-husband who only had visitation rights took the child to Germany during one of his summer visits, where the child was retained.⁹¹ To secure the children's return from Germany, and to prevent future retention of the children in violation of court orders in response to the filing of a writ of *ne exeat*, the ex-husband agreed to a consent order in which he received visitation rights for only one month in the summer, and other specified dates. In addition, the ex-husband had to post a \$20,000 bond to ensure his compliance with the order due to his previous noncompliance.⁹²

In cases where writs of *ne exeat* are requested, the party requesting the writ of *ne exeat* has no reason to inquire regarding the immigration status of the person they are accusing of being a flight risk. The party who is fearful that an abduction might take place should be prepared to show three things: the risk of abduction, what the costs of recovering the child from an abduction would be, and the effect an abduction would have on the child.⁹³ These factors are not spelled out in statutes, but are collected from various cases, such as *State ex rel. Khawly v. Knuck*, which states that "there exists the requirement that the issuance of a writ of *ne exeat* must be supported not only by allegations of a threatened departure from the jurisdiction of the court, but also

⁸⁹ This is generally true when a battered woman claims that her abuser is likely to flee with the children. It is not at all clear however, that all judges will require that an abuser show the same quantum of evidence when he claims that the mother of his children is likely to flee the jurisdiction with her children. Thus, attorneys representing battered immigrants against such charges should muster all the evidence they can to counter the abuser's allegations that a battered immigrant is likely to flee with the children. Attorneys should contact NIWAP for technical assistance in these cases. (202) 274-4457 or info@niwap.org.

⁹⁰ 65 C.J.S. *Ne Exeat* § 4 (1986); 57 Am. Jur. 2d *Ne Exeat* § 9 (2002); see also *People ex rel. B.C.*, 981 P.2d 145 (Colo. 1999).

⁹¹ *Roberts v. Fuhr*, 523 So.2d 20, 22 (Miss. 1987).

⁹² *Id.* at 22-23.

⁹³ Telephone Interview with Patricia Hoff, Esq. (June 28, 2002).

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by an allegation that the effect of such departure will be to enable the defendant to avoid his obligation to the plaintiff and render any ensuing judgment against the defendant ineffectual.”⁹⁴

The risk of abduction has been found to be particularly acute in the case of parental separation and divorce between parents of mixed-culture marriages.⁹⁵ When the separation involves a parent who is a citizen or dual-citizen of another country, or who otherwise has strong ties to his country of origin, he may try to take unilateral action by returning with the child to his family of origin.⁹⁶ Several behavioral indicators include: 1) threats to take the child; 2) has no financial or emotional ties to area; 3) has resources to survive in hiding; 4) rejects or dismisses child’s mixed heritage; 5) feels separation/divorce constitute severe loss or humiliation; and 6) has family and social support in country of origin.⁹⁷ The Hague Convention is an international treaty that provides for the prompt return of wrongfully removed or retained children,⁹⁸ and parents of children abducted to non-Hague Convention countries face potentially higher obstacles to the child’s return than parents of children abducted to Hague Convention countries.⁹⁹

It is crucial to note that many of these factors can easily be dispelled or found irrelevant with respect to particular battered immigrant women. It is important that advocates refer battered immigrants whose abusers will be contesting custody to family lawyers who can represent them and help them counter efforts by the abuser to use immigration status and parental kidnapping allegations as factors in custody cases. Attorneys should do a detailed analysis of how they can best defend their clients when flight or deportation due to the victim’s immigration status is raised. Attorneys representing immigrant victims in cases in which abusers justify raising immigration status as de facto evidence of imminent deportation or flight should counter such allegations in the following ways:

- Urge the court to require evidence that flight is imminent;
- Present evidence to the court that responds to the evidentiary criterion related to flight listed in this chapter demonstrating little or no risk of flight (lack of airline tickets, no plans to leave, no threats to leave, victim established here, has not traveled to her home country in years, etc.).

To counter allegations of deportation:

- Determine whether the immigrant victim qualifies for immigration relief under VAWA or the crime victim U-visa;
- Help her apply for immigration relief before the case is heard by the family court either by handling the case yourself or referring the case to an immigration attorney or advocate with training on domestic violence immigration cases;
- Identify an immigration expert in your community who can be called to testify to explain to the family court judge that the battered immigrant parent qualifies for immigration benefits under existing immigration law or that her deportation is probably not imminent and why.

Attorneys should also be aware that sometimes persons who are ordered to post bonds of *ne exeat* may also be required to post their passport or other necessary travel documents, if the moving party so requests.¹⁰⁰ In such cases, if it appears that the attorney for the battered immigrant will not be able to avoid issuance of a writ of *ne exeat* against the client, the attorney then must establish that the moving party has given a sufficient reason why, in addition to a bond, the victim’s passport or travel documents should be posted. Further, in any

⁹⁴ *State ex rel. Khawly v. Knuck*, 418 So.2d 1185, 1186 (Fla. Dist. Ct. App. 1982).

⁹⁵ JANET R. JOHNSTON ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, EARLY IDENTIFICATION OF RISK FACTORS FOR PARENTAL ABDUCTION 3-7 (2001), available at <http://www.ncjrs.org/pdffiles1/ojdp/185026.pdf>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING 47-48 (2002), available at <http://www.ncjrs.org/pdffiles1/ojdp/190448.pdf>, for a list of countries that are treaty partners of the United States for the Hague Convention.

¹⁰⁰ See, e.g., *id.* at 47.

writ of *ne exeat* case, the moving party “has the burden of demonstrating that this restraint of liberty is a necessary, and not merely coercive and convenient, method of enforcement.”¹⁰¹

Finally, in cases in which there is a risk that the abuser might flee the jurisdiction or the country with the children, advocates and attorneys working with battered immigrants should seriously consider using the writ of *ne exeat* to prevent the abduction. Advocates should refer victims in cases in which there is a potential for kidnapping to family law attorneys who can help battered immigrants intervene to prevent the abuser from removing the child from the jurisdiction or the country. Other remedies that can be used to prevent child abductions include getting prevention provisions in custody orders,¹⁰² and asking the Office of Children’s Issues in the State Department to flag a U.S. passport application for a child, or to deny issuance of a U.S. passport for a child.¹⁰³ For a more in-depth discussion of these issues see Criminal and Civil Implications for Battered Immigrant Fleeing Across State Lines With Their Children of this manual, which discusses prevention of parental kidnapping.

Case Strategy Recommendations

The information provided in this chapter, the ABA Report on the Impact of Domestic Violence and Children and the published research data can be used to help immigrant victims gain custody of their children in a variety of circumstances. The approach to using these materials to help immigrant victims will vary depending on the circumstances of her case. Many cases will fall into one of the following examples. For each we recommend a strategy that counsel for immigrant victims should explore using.

1. Parties are Married and Victim is Undocumented Because Abuser Controls Her Immigration Status

When the immigrant victim is married or was within the past two years married to a U.S. citizen or lawful permanent resident abuser, the victim will in most circumstances qualify for relief under the Violence Against Women Act’s immigration provisions. In these cases if the victim does not have legal immigration status it is because the abusive citizen or lawful permanent resident spouse never filed immigration papers for her. In these cases, counsel for the immigrant victim should consider presenting evidence to demonstrate that the reason that the victim does not have legal immigration status and legal work authorization is because the abuser never filed immigration papers for her. Counsel may want to consider raising this affirmatively even when immigration status is not raised by the abuser. This evidence can be used to demonstrate that immigration related abuse is corroborating evidence of domestic violence to support a finding that the children should not be placed in the custody of an abusive parent. Additionally, evidence of the abuser’s failure to file immigration papers for his spouse can be introduced as evidence that he cannot be considered “friendly parent” under state custody laws. It is recommended that counsel representing battered immigrants in custody cases who will be making these arguments prepare and file the VAWA self-petition case and ideally secure approval of that case before raising these issues affirmatively in the custody action. This approach provides the immigrant victims the greatest possible protection against the abuser’s retaliatory actions that could include trying to report her to immigration authorities for deportation.

2. Parties are Not Married, Victim is Undocumented and the Abusive Father is a Citizen or Has Another Form of Legal Immigration Status

The first step for counsel for the victim in these cases is to determine whether the victim qualifies for the crime victim U-visa protections of VAWA 2000. When the victim has a strong U-visa case the victim should swiftly file for U-visa interim relief.¹⁰⁴ If the immigrant victim can be awarded U-visa interim relief before the custody litigation begins, when the abuser raises immigration status in the custody case, counsel for the immigrant victim may want to consider using that fact to demonstrate immigration related abuse as evidence

¹⁰¹ 57 Am. Jur. 2d *Ne Exeat* § 4 (2002).

¹⁰² OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING 10-13 (2002), available at <http://www.ncjrs.org/pdffiles1/ojdp/190448.pdf>.

¹⁰³ *Id.* at 13-14.

¹⁰⁴ U-visa interim relief is made available on to victims of serious crimes. For more information, see BREAKING BARRIERS, *U-visa* chapter.

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that the abuser should not be awarded custody and that he will not be a “friendly” parent. In the alternative, counsel should object to the abuser raising immigration status in the custody cases using the ABA Report and other materials contained in this chapter. This latter approach should be used in any case, in which the victim is undocumented and has not yet applied for any VAWA-related form of legal immigration status. These same arguments should also be made in cases of immigrant victims whose abusers are undocumented.

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Criminal and Civil Implications for Battered Immigrants Fleeing Across State Lines with Their Children¹²

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The Need to Relocate: Introduction to “Parental Kidnapping”/“Custodial Interference”³

The period immediately following an individual’s decision to leave her abusive partner is often accompanied by a significant escalation in danger to the safety and welfare of the survivor and her children.⁴ While some

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² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) ([United States v. Windsor](#), 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/parental-kidnapping>.

⁴ See Sara M. Buel, *Fifty Obstacles to Leaving*, A.K.A. *Why Abuse Victims Stay*, 28 COLO. LAW 19 (1999).

survivors are able to navigate legal and social services systems to access basic legal protection, shelter and other emergency benefits, survivors fleeing their abusers generally face numerous systemic obstacles to attaining the physical, emotional, and economic security they need during this critical period. The experience of immigrant victims of violence who leave their abusers is marked by the additional obstacles of linguistic and cultural barriers, limited access to public benefits, and a fear of deportation that further hinder their access to critical protective services.⁵

For survivors who attempt to establish a safe, new life for themselves and their children in the community or geographic area to which they are accustomed, the threat of an abuser's violent retaliation is never very far away. While civil or criminal protection orders may deter some abusers from retaliating against their former partners, abusive behavior, such as physical violence, stalking, harassment, threats of violence, and threats to take away the children frequently occurs in violation of such orders after a survivor's decision to leave her abusive partner.⁶ The abuser's disregard of prohibitions on such behavior coupled with widespread lack of enforcement of protection orders only serves to empower the batterer to continue his abusive tactics.⁷ It is no surprise that many survivors, determined to put an end to their ex-partners' continuous attempts to maintain control over their lives, decide to flee with their children to a confidential out-of-state location to truly regain safety and autonomy from their abusers. In other cases, a victim may wish to flee out-of-state to live with her family members who offer her and her children a safe, caring, supportive, and familiar environment while healing from the physical and psychological injuries resulting from the abuse. Immigrant women and women of color who flee their abusers most often choose to move to houses of friends of family members rather than use domestic violence shelters.⁸ Moving to find shelter with friends or relatives offers many immigrant victims safety in a culturally and linguistically comfortable environment.

While the decision to flee a pattern of abuse and regain physical, emotional, and economic autonomy in a location unknown to the abuser may appear to be in the best interest of the survivor and her children, many survivors and advocates may be surprised to learn of the severe legal consequences that may arise from such a decision. Individuals who, without the consent of the other parent, leave with their children to confidential locations in or out of their home state may face serious criminal penalties under state parental kidnapping statutes.⁹ Further, survivors may also face restrictive state civil statutes on child custody and related case law that encourage adverse custody decisions to penalize parents who deprive the other parent of access to or contact with their children.¹⁰

However, through the work of attorneys and advocates for survivors of intimate partner violence, legislative reform of numerous state criminal and civil statutes that affect survivors who flee the state with their children has been possible. Currently, many states have special statutory provisions that require consideration of domestic violence perpetrated against the fleeing parent as a mitigating factor or defense in criminal parental kidnapping proceedings and/or against adverse custody decisions.

The following section will provide an overview of the impact of state criminal parental kidnapping or custodial interference statutes on immigrant survivors of domestic violence who already have left or wish to

⁵ See Catherine E. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1020 (1993).

⁶ Buel, *supra* note 1, at 19.

⁷ SARAH COLSON & PETER FINN, NAT'L INST. OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT 2, 7 (1990).

⁸ Presentation of paper by Angela Brown on "Domestic Violence in Context: A Forum on Race, Immigration, and Poverty," University of New Hampshire, 6th International Family Violence Research Conference (1999).

⁹ Parental kidnapping statutes may also be referred to as custodial interference, child snatching, or child abduction statutes. Most state criminal statutes distinguish parental kidnapping from general child abduction and address these crimes in separate statutes. While many general state kidnapping statutes are designed to be inapplicable to parental kidnapping cases, it is always advisable to check your state's relevant kidnapping and custodial interference statutes for the most current and accurate information on the statutory applicability to your client's case. For a compilation of parental kidnapping statutes through July 31, 2002, see the American Prosecutors Research Institute website at http://www.ndaa.org/pdf/parental_kidnapping.pdf.

¹⁰ See, e.g., Joan Zorza, "Friendly Parent" Provisions in Custody Determinations, 26 CLEARINGHOUSE REV. 921, 923 (1992); Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and their Children in the Family Court System*, 37 FAM. & CONCILIATION COURTS REV. 273 (1999).

leave their state with their children.¹¹ Specifically, it will discuss the criminal implications of intrastate versus interstate custodial interference; the varying applicability of custodial interference statutes for parents who do and do not have court-ordered custody of their children; statutory exceptions or defenses available to survivors of domestic violence facing prosecution on charges of criminal parental kidnapping; and immigration consequences related to a conviction under such statutes. This section will also provide an overview of the implications of interstate parental relocation on civil family court custody determinations.

A BRIEF OVERVIEW OF THE UCCJA, UCCJEA, AND THE PKPA

Battered women and their attorneys should be aware that fleeing with a child across state lines, even if for safety reasons, may not automatically justify the removal of the child in the eyes of the court. Similarly a battered woman whose child is abducted by the batterer must be well informed of the legal basis for securing the expedient return of the child. An understanding of the laws that govern interstate custody is crucial to serving the best interests of battered clients in such situations.¹²

This section will provide a brief overview of three types of statutes governing custodial jurisdiction that commonly arise in interstate custody proceedings: the Uniform Child Custody Jurisdiction Act (UCCJA), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and the federal Parental Kidnapping Prevention Act (PKPA). The most common statutory obstacles faced by survivors of domestic violence fleeing the state with their children arise under UCCJA/UCCJEA state custodial jurisdiction statutes, the federal PKPA, state criminal custodial interference/parental kidnapping statutes, and state civil custody/visitation statutes and case law addressing the impact of relocation on custody/visitation determinations. A more extensive discussion of these provisions may be found in the Jurisdiction Chapter of this manual, which discusses in detail the fact that, as a matter of law, battered immigrants have the same access to the courts in family law matters as U.S. citizens without regard to documented or undocumented immigration status. The provisions of state custody statutes and the UCCJA, UCCJEA and PKPA jurisdictional statutes apply equally to both immigrant and nonimmigrant women and thus will be discussed generally here as they apply to all domestic violence victims.

Generally, the UCCJA, UCCJEA and PKPA help courts to determine which state has the authority to make a custody decision when the children and their parents do not all reside in the same state. These statutes govern jurisdictional determinations regarding which state's courts must decide custody, and when states are required to offer another state's custody order full faith and credit. They *do not* provide guidelines to assist courts in determining who gets custody or what kind of visitation arrangements should be made.

In situations involving domestic violence, the most common circumstances in which the UCCJA, the UCCJEA and/or the PKPA used are:

- Where a battered woman and her child flee to another state before a custody or visitation order has been issued or in violation of a custody or visitation order;
- Where a batterer abducts the child in violation of a custody or visitation order.

UCCJA

The UCCJA stands for the Uniform Child Custody Jurisdiction Act.¹³ Created in 1968, the UCCJA was designed to foster uniformity among the state laws governing jurisdiction over, and enforcement of child

¹¹ Battered immigrants who flee to another country with their children to escape abuse will face complex international law custody and jurisdiction provisions. For an extensive discussion on the implications of fleeing the country with ones children, see BREAKING BARRIERS, Implications of the Hague International Child Abduction Convention: Cases and Practice.

¹² NOW LEGAL DEFENSE AND EDUCATION FUND, INTERSTATE CUSTODY: UNDERSTANDING THE UCCJA, THE UCCJEA, AND THE PKPA (1999).

¹³ See Uniform Child Custody Jurisdiction Act (UCCJA), available at <http://www.law.cornell.edu/uniform/vol9.html#child>, for links to state UCCJA statutes. (To date, the following states have adopted the UCCJA: Delaware, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virgin Islands, Wisconsin, Wyoming.)

custody determinations through provisions aimed at minimizing or preventing parental kidnapping, forum shopping, jurisdictional conflicts, and re-litigation of custody decisions issued by courts in other states. The UCCJA specifies *which court* may decide a custody case, and does not govern the substance of how such a case should be decided. While these guidelines have been adopted in some form by all fifty states, as of January 2004, thirty-five states have repealed their prior state UCCJA statute and have enacted statutes that conform to a newer uniform law, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is further discussed below.¹⁴

The primary feature of the UCCJA is its codification of the four bases by which a court may assume jurisdiction over a custody matter: “home state,” “significant connection,” “emergency,” and “more appropriate forum.”¹⁵ The “home state” is the state where the child lived with a parent or a person acting as a parent for at least 6 months immediately before the custody action was filed. *Home state* jurisdiction exists in the child’s current home state or in a state that was the child’s home state within 6 months before the case began.¹⁶ A state has *significant connection* jurisdiction if the child and at least one parent can establish a significant connection with the state by demonstrating substantial evidence about the centrality of the child’s care, protection, training, and personal relationships in that state. A court may exercise *emergency* jurisdiction if the child is physically present in the state, and the child has been abandoned, or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse, or is otherwise neglected.¹⁷ Finally, a court may exercise jurisdiction upon a determination that the state is a *more appropriate forum* when no other state is successfully able to establish jurisdiction over the matter *or* when another state declines to exercise jurisdiction based upon a determination that the other state provides a more appropriate forum for the adjudication of the custody matter.¹⁸

When a battered client flees to a UCCJA state to escape abuse, the best initial move may be to attempt to secure temporary emergency jurisdiction in their new state. “Emergency jurisdiction” is the temporary power of a court to make decisions in a case to protect a child from harm.¹⁹ This type of jurisdiction is temporary and is invoked solely for the purpose of protecting the child until the state that has jurisdiction enters an order. An order issued by a court exercising “emergency jurisdiction” is not a permanent order regarding custody or visitation. However, as discussed above, the court with jurisdiction over the matter may decline jurisdiction if it is convinced that it is an inconvenient forum and that the other state will provide a more appropriate forum for the custody proceeding involved.

¹⁴ See Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), available at <http://www.law.cornell.edu/uniform/vol9.html#child>, for links to state UCCJEA statutes. (To date, the following states have adopted the UCCJEA: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia.)

¹⁵ For an extensive explanation of the UCCJA and UCCJEA, see Breaking Barriers Immigration Status and Family Court Jurisdiction Chapter 8.

¹⁶ Adapted from Deborah Goelman & Christine McLeod Pate, Applying Jurisdictional Statutes in Interstate Custody Cases to Protect Survivors and Their Children (Power Point Presentation, 2004).

¹⁷ *Id.* “Emergency jurisdiction” is the temporary power of a court to make decisions in a case to protect a child from harm. See UCCJA § 3(3)(ii); UCCJEA art. 2, § 204; 28 U.S.C. § 1738A(c)(2)(C)(ii). This type of jurisdiction is temporary and is invoked for the sole purpose of protecting the child, as well as the child’s parent or siblings under the PKPA and UCCJEA, until the state that has jurisdiction enters an order. Thus, an order issued by a court exercising “emergency jurisdiction” is not a permanent order regarding custody or visitation. In some states, the state’s version of the UCCJA or case law extends emergency jurisdiction to domestic violence cases where a parent was abused or threatened, even if the child was not physically abused.

¹⁸ *Id.* A court having jurisdiction, as explained above, may decline to exercise jurisdiction if it is an inconvenient forum and a court in another state is a more appropriate forum. Courts may consider factors, such as: 1) whether another state has a closer connection with the child or the child’s family; or 2) whether the exercise of jurisdiction by a court of this state contravenes any of the purposes stated in the UCCJA. Domestic violence is not explicitly included as a factor in the model statute, but case law in many states has held that courts may consider domestic violence in making inconvenient forum decisions. Further, the “clean hands doctrine” permits courts to decline to exercise jurisdiction where a party has wrongfully taken the child from another state or engaged in similar misconduct. Case law in many states has held that the “clean hands doctrine” should not be used to penalize victims of domestic violence who flee across state lines with their children to escape abuse. Nevertheless, a survivor runs the risk that a court may find that she has acted with “unclean hands” under such circumstances.

¹⁹ See UCCJA § 3(3)(ii).

Battered Immigrants and Family Law Issues: Custody, Support and Divorce

Under the UCCJA, emergency jurisdiction is not explicitly applicable if the other parent abused the fleeing parent, but not the child. In such a situation, strong advocacy is necessary to establish secure emergency jurisdiction and attempt to convince the other court, the court of the home state, to decline jurisdiction. Further, in some states, the state UCCJA or case law extends emergency jurisdiction to cases involving domestic violence where a parent was abused or threatened, even if the child was not physically abused.²⁰

UCCJEA

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), created in 1997 to help reconcile discrepancies between the UCCJA and federal laws such as the Parental Kidnapping Prevention Act (PKPA) and the Violence Against Women Act (VAWA), again only addresses which court should decide a custody case, and does not address how such a case should be decided. Like the UCCJA, the UCCJEA also utilizes the four jurisdictional bases of home state, significant connection, emergency, and more appropriate forum. Unlike the UCCJA, however, the UCCJEA prioritizes home state jurisdiction and, except in the case of emergencies, prohibits a court from exercising jurisdiction if a proceeding consistent with the UCCJEA is pending elsewhere.²¹

The UCCJEA positively impacts survivors of domestic violence in several ways. Under the UCCJEA, a court may exercise emergency jurisdiction in cases where the child, or a *parent or sibling of the child*, has been abused by the other parent.²² This expands the basis for emergency jurisdiction provided for by the UCCJA to more fully include and protect a battered parent's decision to escape from her abuser with her children. While a temporary emergency jurisdiction order is still subject to the actual "home" state's issuance of a final custody order, the factors a state must consider in declining jurisdiction offer greater protection for survivors of domestic violence. When making inconvenient forum decisions, the first factor a court must consider is whether domestic violence has occurred and is likely to continue, and which state could best protect the parties and the child.²³ If a court declines jurisdiction, the UCCJEA allows a temporary emergency jurisdiction order to become permanent, when the issuing state becomes the home state.²⁴ Under both the UCCJA and UCCJEA, a court may decline to hear a case if the party making the request appears to have "unclean hands," or has acted wrongfully with respect to the custody matter at hand. The UCCJEA clarifies that "domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal."²⁵

PKPA

The PKPA stands for the Parental Kidnapping Prevention Act.²⁶ It is a federal law enacted in 1980 and largely motivated by the same principles as state UCCJA statutes. The PKPA was designed to discourage interstate conflicts, deter interstate abductions, and promote cooperation between states about interstate custody matters. As part of the Violence Against Women Act of 2000, the PKPA's definition of "emergency jurisdiction" was broadened to cover domestic violence cases consistent with the UCCJEA. The PKPA is a "full faith and credit" statute. It tells courts when to honor and enforce custody determinations issued by courts in other states or Native American tribal jurisdictions. Unlike the UCCJA/UCCJEA, the PKPA does not instruct courts as to when they should exercise jurisdiction over a new custody matter. Rather, courts must follow the PKPA when 1) they are deciding whether to enforce a custody determination made by a court in another state or tribe; 2) they are deciding whether to exercise jurisdiction even though there is a custody proceeding already pending in another jurisdiction; and 3) they are asked to modify an existing custody or visitation order from another jurisdiction.²⁷

²⁰ Adapted from Deborah Goelman & Christine McLeod Pate, *supra* note 14.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ UCCJEA art. II § 208, Comment, available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uccjea97.htm>.

²⁶ See 28 U.S.C. § 1738A (1999).

²⁷ Adapted from Deborah Goelman and Christine McLeod Pate, *supra* note 14.

The PKPA shares the same jurisdictional bases as the UCCJEA. The PKPA recognizes continuing jurisdiction in the state that issued the initial custody determination consistent with the PKPA. A court may modify a custody or visitation order from another state if it has jurisdiction to do so, and the court of the initial state no longer has, or has declined to exercise, jurisdiction over the custody matter.²⁸

While the PKPA does not explicitly carry criminal consequences, the Federal Fugitive Felon Act does operate in conjunction with the PKPA to locate parents who have crossed state lines with their children without the knowledge or consent of the other parent.²⁹ The implications of the applicability of the Federal Fugitive Felon Act on survivors of domestic violence fleeing across state lines with their children to escape from abuse are discussed below.

Criminal Parental Kidnapping Statutes

Parental kidnapping or custodial interference statutes are generally designed to ensure parents equal access to their children by criminally sanctioning a parent who hides the child from the other parent.³⁰ Currently, almost every state criminally forbids custodial interference by parents or relatives of the child.³¹ While these statutes may share similarities in name, purpose and structure, statutory provisions concerning the definition of lawful custodian, the availability of statutory exceptions or defenses, and the severity of the criminal penalty for conviction vary greatly between states. An advocate for a survivor who has already left or wishes to leave the state with her children should carefully consult the relevant statutes in the client's home state to best inform the client of the potential legal ramifications of her decision to flee. The following section will generally address the legal implications of some common varied approaches taken by state statutes.

THE DEFINITION OF "CUSTODY" OR "LAWFUL CUSTODIAN" IN PARENTAL KIDNAPPING STATUTES

States vary with respect to how they define "parental kidnapping." While some states assume that all parents inherently share joint custodial rights to their children, others only recognize legally established custodial relationships. Therefore, to begin assessing the potential criminal implications of a client fleeing domestic violence with her children across state lines, it is important to determine the legal relationships that exist between the battered immigrant client, the other parent, and the child. Depending on the state in which she resides, factors such as: 1) whether your client is married to the father of her children; 2) has established paternity of the children if she is unmarried; or 3) has entered into a legal custody or visitation order, may affect the applicability of custodial interference statutes to the client's situation. Examine the state custodial interference statute to see how it defines custodial relationships. Then determine whether the relationship between the battered immigrant client and her abuser fits within the statutory definition. Once it has been established that their relationship falls under the statute, counsel should next examine whether flight will or has occurred after a custody order was entered. The following provides an overview of the potential criminal consequences and legal options for survivors who leave in violation of a court order of custody/visitation, as well as those who flee in the absence of any legally established order of custody/visitation.

²⁸ *Id.* The PKPA does not define "jurisdiction under the law of such State." It is likely that when the PKPA was enacted, this provision referred to the UCCJA, and that it now also includes the UCCJEA. Some advocates have argued, however, that this could refer to a state's protection order statute. Courts have not ruled on such an argument.

²⁹ See 28 U.S.C. § 1738A; 42 U.S.C. § 653-655, 663; 18 U.S.C. § 1073 note (Parental kidnapping and interstate or international flight to avoid prosecution - "(a) In view of the findings of the Congress and the purposes of sections 6 to 10 of this Act [28 U.S.C. § 1738A and note, among other things; for full classification of this Act, consult U.S.C. Tables volumes] set forth in section 302 [42 U.S.C. § 502], the Congress hereby expressly declares its intent that section 1073 of title 18, United States Code, apply to cases involving parental kidnapping and interstate or international flight to avoid prosecution under applicable State felony statutes.)

³⁰ THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, FAMILY ABDUCTION: PREVENTION AND RESPONSE ix (2002), at http://www.missingkids.com/en_US/publications/NC75.pdf. (NCMEC defines parental kidnapping, also called family abduction, child abduction, or child snatching, as "the taking, keeping, or concealing of a child or children by a parent, other family member, or person acting on behalf of the parent or family member that deprives another individual of his or her custody or visitation rights. Family abductions can occur before or after a court issues a custody determination. The term custodial interference is frequently used in criminal statutes, and the definition of the offense varies from state-to-state.")

³¹ See end section on state custodial interference statutes.

Fleeing in Violation of a Court Ordered Custody or Visitation Award

All criminal parental kidnapping/custodial interference statutes apply in the event that a survivor flees her abuser with her children in a manner that violates an existing legal custody or visitation order. In addition to a variety of civil penalties she may face as a result of her violation of a custody/visitation order discussed below, a survivor may face enforcement of the original custody/visitation order pursuant to the federal Parental Kidnapping Prevention Act (PKPA). The PKPA is only applicable when a valid custody/visitation order already exists or there is a proceeding between the parents.³²

While the PKPA addresses numerous jurisdictional issues that arise as parents relocate with children across state lines without the knowledge or consent of the other parent, the primary focus of this section will be on the criminal implications that arise from attempts to enforce state custody orders under the PKPA. The PKPA allows requests to the Federal Parent Locator Service to locate abductor parents and abducted children.³³ It further clarifies that the federal Fugitive Felon Act, 18 U.S.C. § 1073, applies to state felony parental kidnapping cases. This provision is of critical significance to survivors fleeing across state lines with their children, given that a majority of states classify interstate custodial interference as a felony. If the fleeing parent is charged with a felony under state law, that charge may be entered into the National Crime Information Center (NCIC).³⁴ Further, if that parent's whereabouts are unknown, and state or local law enforcement wish to enlist the assistance of federal agents, the federal Fugitive Felon Act allows for the issuance of an Unlawful Flight to Avoid Prosecution ("UFAP") warrant at the request of a state prosecutor.

The requirements that must be met prior to the Federal Bureau of Investigation's (FBI) commencement of a federal Unlawful Flight to Avoid Prosecution (UFAP) investigation in parental kidnapping cases are as follows: (1) the existence of a state felony warrant; (2) probable cause [for the FBI] to believe that the fugitive has fled the jurisdiction of the wanting state; (3) the written request of an appropriate state authority for federal assistance; and (4) the assurance that the fugitive will be extradited to the jurisdiction where sought for prosecution for the state charge. After these requirements are met, the FBI then will seek authorization for the filing of a request for a federal UFAP warrant from the U.S. Attorney and will present the facts to a U.S. magistrate or judge. Once a UFAP warrant is issued, the FBI will attempt to locate the absconding parent; if the FBI locates the parent and/or children, the federal charges are dropped and extradition and prosecution under state law will proceed.³⁵

One option for survivors who intend to modify an existing custody order or petition for custody for the first time in the new state is to attempt to secure temporary emergency custody jurisdiction in their destination state pursuant to the UCCJA/UCCJEA. The process and likelihood of successfully securing emergency jurisdiction will vary by state depending on whether a state has adopted the UCCJEA or UCCJA and will further depend on individual judicial discretion.

Fleeing in the Absence of a Court-Ordered Custody or Visitation Award

Despite common misconceptions, status as the parent and primary caretaker of a child does not automatically authorize a parent to leave the state with their children without the consent of the other parent or guardian. In

³² See 28 U.S.C. § 1738A, available at <http://www4.law.cornell.edu/uscode/28/1738A.html>. (The PKPA, which gives full faith and credit to custody determinations, is only applicable in cases where a temporary or final custody or visitation award has been granted by a court.)

³³ The Federal Parent Locator Service is a service of the U.S. Department of Health and Human Services, Administration for Children & Families. See <http://www.acf.hhs.gov/programs/cse/newhire/fpls/fpls.htm>.

³⁴ Crimes may be entered into the NCIC by federal, state, and local law enforcement agents. See <http://www.fas.org/irp/agency/doi/fbi/is/ncic.htm>. (The purpose for maintaining the NCIC system is to provide a computerized database for ready access by a criminal justice agency making an inquiry and for prompt disclosure of information in the system from other criminal justice agencies about crimes and criminals. This information assists authorized agencies in criminal justice and related law enforcement objectives, such as apprehending fugitives, locating missing persons, locating and returning stolen property, as well as in the protection of the law enforcement officers encountering the individuals described in the system.)

³⁵ PATRICIA M. HOFF, PARENTAL KIDNAPPING: PREVENTION AND REMEDIES (1997), available at <http://www.abanet.org/ftp/pub/child/pkprevnt.txt>.

many states, the absence of a legal custody order, or even status as the sole legal custodian of a child, may not immunize an individual from prosecution under relevant state parental kidnapping laws.

Generally, state parental kidnapping or custodial interference statutes may be divided into the following categories of applicability:

1. Only applicable with legal custody/visitation order or after commencement of custody proceedings
2. Applicable with or without a legal custody order
3. Applicability ambiguous in the absence of a custody order – *see case law on applicability*.

Statute Applicable Only with Legal Custody/ Visitation Order or Proceedings

Currently, thirteen states³⁶ have criminal custodial interference statutes that are only applicable in situations where a custody proceeding has begun or a valid court order of custody/visitation exists and is violated. Thus, battered women who have not begun a custody/visitation proceeding may be able to flee the state without facing criminal consequences.

However, it should be noted that the absence of criminal consequences does NOT eliminate serious civil consequences, such as the likely possibility of the abuser filing for and challenging the survivor's right to custody of the children.

Statute Applicable with or Without Legal Custody/Visitation Order

Several state criminal custodial interference statutes are at least partially applicable to parents who flee with their children across state lines regardless of whether or not a valid custody or visitation order exists.³⁷ These statutes typically assume that parents inherently share equal rights to their child regardless of whether such rights have been documented through a custody order. These statutes are often characterized by broad definitions of the meaning of custody that emphasize the natural rights of parents as sufficient to merit protection under criminal custodial interference statutes.

In these states, an individual fleeing domestic violence may be subject to criminal conviction unless she is able to invoke a statutory or common law criminal defense in the custodial interference prosecutions.

Applicability Ambiguous: See Case Law

Unfortunately, numerous state custodial interference statutes do not, on their face, clearly indicate whether or not a custody or visitation order is required to trigger applicability of the statute.³⁸ An examination of relevant case law may be helpful in clarifying the jurisdiction's position on the applicability of such statutes in the absence of clear statutory language.³⁹

For example, in New York State, this issue of statutory applicability remains unsettled. Interstate custodial interference in New York State is a class E felony.⁴⁰ The offense is established by showing that "a relative of a child...intending to hold such child permanently or for a protected period, and knowing that he has no legal right to do so...takes or entices such child from his lawful custodian."⁴¹ The statutory ambiguity arises in

³⁶ These states are: Arkansas, Iowa, Louisiana, Maryland, Michigan, Mississippi, Nevada, North Carolina, Rhode Island, South Carolina, South Dakota, Texas, and Utah. See end of section for state statute information.

³⁷ These states are: Arizona, California, D.C., Florida, Georgia, Hawaii, Idaho, Illinois (if parents are married), Kansas, Maine, Minnesota, Missouri, Montana, Nebraska, New Mexico, Tennessee, and Wisconsin. See end of section for state statute information.

³⁸ These states are: Alaska, Colorado, Connecticut, Delaware, Indiana, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Vermont, Virginia, Washington, West Virginia, and Wyoming. See end of section for state statute information.

³⁹ See generally Liberty Aldrich, *Moving On: Relocation, Emergency Jurisdiction, and Custodial Interference*, in *LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM* 171, 187 (Julie A. Domonkos & Jill Laurie Goodman eds., App. Div., First Dept. of the Supreme Court of the State of New York, 1998).

⁴⁰ See N.Y. PENAL LAW § 135.50.

⁴¹ *Id.* § 135.45.

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considering whether one can “knowingly without right” take a child from its lawful custodian in the absence of a custody order through which both parents have parental rights as established through marriage or paternity. This ambiguity persists in case law: while recent case law suggests that conviction for custodial interference may occur even in the absence of a custody order,⁴² an earlier case held that prosecutors had to prove defendant’s knowledge of a court order.⁴³

Consult the state’s statutes and case law to determine how courts have ruled on the applicability of custodial interference statutes to parents who flee prior to the existence of any custody/visitation order.

POTENTIAL DEFENSES OR EXCEPTIONS THAT CAN BE USED BY DOMESTIC VIOLENCE VICTIMS WHO FLEE ABUSE WITH THEIR CHILDREN.

When prosecution under a parental kidnapping or custodial interference statute is brought against a victim of domestic violence, a battered woman fleeing abuse with her child may have statutory and common law exceptions or defenses available to her. Generally, the common law defense of necessity or “choice of evils” is defined as “a justificational defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person’s actions.”⁴⁴ A parent facing prosecution under a custodial interference statute may argue, for example, that her decision to flee the state and violate criminal custodial interference prohibitions was necessary to protect herself or the child from imminent danger from the abusive parent. A necessity defense can be raised in any criminal case and may be used even in states that have not codified such defenses in their statutes.

Many jurisdictions only allow limited application of a necessity or choice of evils defense. If the defendant attempts to present such a defense, case law requires that the it should fail if there was a reasonable, legal alternative to violating the law.⁴⁵ Under this standard, a survivor must demonstrate that her choice to violate interstate custodial interference statutes was necessary to prevent great harm to herself or her children at the hands of the abuser. Since a necessity defense assumes that the defendant had explored all available legal alternatives to stopping the threat of harm prior to committing the offense, it is conceivable that a battered woman, who flees the state with her children without having first attempted to contact the police or secure an order of protection, may find the defense of necessity unavailable to her. A survivor’s genuine fear that involving law enforcement or seeking a protective order in the courts of the jurisdiction from which she fled may result in further retaliation by the batterer may thus go unrecognized by a court. Counsel for the victim should be prepared to present evidence of the danger to the victim and/or her children and should consider presenting expert testimony on the abuser’s lethality and the validity of the victim’s fears in cases where the necessity defense will be raised.

Some states have codified imminent harm defenses into their custodial interference statutes, but specifically precludes a defendant from raising such a defense to take certain steps after the abduction, such as informing law enforcement of the reason for the abduction as well as the child’s whereabouts and contact information. Other states specifically preclude raising this type of a defense if the child was taken out of the state.⁴⁶ The rationale behind these restrictions or imminent harm defenses is to ensure that those fleeing imminent harm with their children will then proceed through established law enforcement and justice system channels to seek protection from abuse or to seek a change in the custody order.⁴⁷

⁴² *People v. Morel*, 566 N.Y.S.2d 653 (App. Div. 1991) (upheld indictment of custodial interference in the second degree despite absence of prior court order of custody/visitation).

⁴³ *People v. Lawrwo*, 447 N.Y.S.2d 213 (Dist. Ct. 1982) (state had to prove beyond reasonable doubt that defendant had knowledge that a custody order was in place).

⁴⁴ BLACK’S LAW DICTIONARY 1053 (7th ed. 1999).

⁴⁵ See *United States v. Bailey*, 444 U.S. 394 (1980).

⁴⁶ See, e.g., N. H. REV. STAT. ANN. § 633:4 (interference with custody).

⁴⁷ See Susan S. Kreston, *Prosecuting Parental Kidnapping*, NCPA UPDATE (Nat’l Ctr. for the Prosecution of Child Abuse 1998), vol. 11, No. 4, at 1, available at http://www.ndaa.org/publications/newsletters/apri_update_vol_11_no_4_1998.htm.

Through the efforts of advocates for battered women, fourteen states currently have specific domestic violence related affirmative defenses against prosecution under custodial interference statutes.⁴⁸ Of these statutes, at least five states require survivors of domestic violence to demonstrate that they have followed particular procedures relating to their flight from the violence as a condition to invoking the statutory domestic violence defense to custodial interference.⁴⁹

An example of typical procedural requirements for invoking a domestic violence necessity defense is found in the California parental kidnapping statute. The California statute is deemed inapplicable to parents who, with a “good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm,” take or conceal the child from the other parent.⁵⁰ The California statute is notably progressive in its inclusion of a fear of imminent “emotional harm” to the child, making this statutory defense available when domestic violence has been committed against the abducting parent.⁵¹

To establish that the custodial interference statute is inapplicable to a survivor’s case, California requires the survivor to follow certain procedures before benefiting from this statutory immunity. The fleeing parent must follow the following commonly prescribed procedures:

- Within a reasonable time after the taking of the child, make a report to the office of the district attorney of the county where the child resided before the action, including the name of person, the current address and telephone number of the child and the abducting parent, and the reason for the abduction.⁵²
- Within a reasonable time, commence a custody action consistent with the federal PKPA, the UCCJA or the UCCJEA,
- Inform the home state DA’s office of any change to the address or telephone number of the survivor parent and the child.

Such procedures raise an immediate concern over maintaining the confidentiality of the survivor’s location and contact information so that neither the batterer nor anyone acting for him can use the information to find, stalk, or harm the victim and/or her children. While some states, such as California, assure confidentiality of this information in cases where the reason for fleeing was domestic violence, requiring a survivor to disclose her exact location and contact information raises serious concerns regarding her physical safety in her new location.⁵³ Counsel representing domestic violence victims in interstate custody and custodial interference cases should ask the court to keep all contact and location information regarding the victim confidential. If the information is being provided to a prosecutor’s office, the prosecution should be asked to keep the survivor’s contact information confidential so that they do not become the conduit through which the abuser is able to stalk or otherwise harm the victim.

In the absence of statutory domestic violence defenses against prosecution for parental kidnapping, eleven states provide a defense to custodial interference based on imminent danger to the welfare of the child.⁵⁴ A defendant may be required to follow a sequence of procedures relating to her flight before invoking the “imminent harm to the child” defense.⁵⁵ Four states provide only for a general “good cause” defense.⁵⁶

⁴⁸ These states include: Arizona, California, D.C., Florida, Idaho, Illinois, Minnesota, Missouri, Nevada, New Jersey, Pennsylvania, Rhode Island, Washington, and Wisconsin.

⁴⁹ These states include: Arizona, California, Florida, Nevada, and New Jersey. See chart at the end of this chapter for a description of these procedures. (Typically, such states may require a fleeing parent to notify law enforcement of their reasons for fleeing, provide contact information in their destination state, and/or initiate custody proceedings pursuant to the jurisdictional statute in the home state.)

⁵⁰ CAL. PENAL CODE § 278.7.

⁵¹ *Id.*

⁵² *Id.* (In California, a “reasonable time” within which a report to the DA’s office must be made is at least 10 days; a reasonable time to commence a custody proceeding is at least 30 days.)

⁵³ *Id.* at (e). (“The address and telephone number of the person and the child provided pursuant to this section shall remain confidential unless released pursuant to state law or by a court order that contains appropriate safeguards to ensure the safety of the person and the child.”)

⁵⁴ These states are: Colorado, Hawaii, Louisiana, Maryland, Michigan, New Hampshire, New York, Ohio, Vermont, West Virginia, Wyoming.

⁵⁵ See end of section for a description of such procedures.

⁵⁶ These states are: Alaska, Montana, Utah, and Virginia.

Unfortunately, twenty states do not provide for any statutory exception or defense to prosecution for parental kidnapping.⁵⁷ In a jurisdiction where few or no defenses exist, a survivor may be able to raise a common-law “necessity” defense. When advising a client who may be subject to charges of criminal custodial interference, learn whether the state exempts domestic violence survivors from statutory applicability, provides for a domestic violence imminent harm defense, or only makes common law defenses available.

IMMIGRATION CONSEQUENCES OF CRIMINAL CUSTODIAL INTERFERENCE CONVICTIONS

Avoiding custodial interference convictions is important for all battered women. Effective legal representation of victims is essential so that victims can present all available defenses to the court in order to avoid a custodial interference conviction. If the victim agrees to a plea or is ultimately convicted of custodial interference, this conviction can be used against her by her abuser in subsequent child custody litigation. Convictions can significantly undermine the victim’s ability to obtain court orders that allow her to maintain custody of her children.

Non-citizen victims of domestic violence must be particularly careful to avoid criminal convictions for custodial interference. Custodial interference convictions are felonies in virtually every state and may be “crimes of moral turpitude” under immigration laws. When a parental abduction occurs in violation of an existing court order, the conviction may be for obstruction of justice. These criminal convictions carry with them potentially severe immigration consequences for non-citizen immigrant victims, which could possibly include any of the following:

- The possibility of a negative discretionary finding, leading to a denial of naturalized citizenship;
- Deportation based upon conviction of an aggravated felony;
- Permanent bars to returning to the United States;
- Having her VAWA immigration case discretionarily denied due to lack of good moral character; or
- Being deemed inadmissible and being denied lawful permanent residence despite approval of her VAWA self petition because she is found to lack good moral character.⁵⁸

Criminal convictions primarily affect immigration status because they are grounds of inadmissibility and grounds for deportability.⁵⁹ Any time a person applies for permission to enter the United States or to change (adjust) their immigration status to that of a lawful permanent resident (green card holder), they must prove that they are admissible under immigration law.⁶⁰ Grounds of inadmissibility include criminal convictions.⁶¹ Thus, a battered immigrant could have her VAWA self-petition approved and, despite that approval, she can be denied legal permanent residency because she is inadmissible.⁶² For battered immigrants in deportation proceedings before an immigration judge who otherwise qualify for VAWA cancellation of removal, criminal convictions could lead to denial. Grounds of inadmissibility generally apply to non-citizens in the following situations:

1. Undocumented non-citizens who entered the country illegally and have no legal status in the United States when immigration authorities initiate deportation/removal proceedings against them;
2. Any non-citizen who is seeking entry into the United States;
3. Any non-citizen who is applying for lawful permanent resident status; and
4. Lawful permanent residents who are applying for U.S. citizenship.⁶³

⁵⁷ These states are: Connecticut, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana (kidnapping), Maine, Massachusetts, Mississippi, Nebraska, New Hampshire (if interstate kidnapping), New Mexico, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, and Texas.

⁵⁸ See ANN BENSON, WASHINGTON DEFENDER ASSOCIATION, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS, PROSECUTORS AND JUDGES IN WASHINGTON STATE 1 (2001).

⁵⁹ See INA §§ 212(a)(2), 237(a)(2), 8 U.S.C.A. §§ 1182, 1227 (criminal grounds of inadmissibility; criminal grounds for deportability).

⁶⁰ See INA § 212(a)(2) (criminal grounds of inadmissibility).

⁶¹ *Id.*

⁶² *Id.*

⁶³ BENSON, *supra* note 28, at 8.

Crimes of Moral Turpitude

Battered immigrants fleeing domestic violence with their children who are convicted of custodial interference could also suffer severe immigration consequences because they have a conviction for one “crime of moral turpitude.”⁶⁴ A conviction of a crime of moral turpitude may constitute grounds for inadmissibility or deportability.⁶⁵ A crime of moral turpitude is commonly defined as: “an act of baseness, vileness, or depravity in the private and social duties which a [person] owes to his [or her] fellow [people], or to society in general, contrary to the accepted and customary rule of right and duty between [people].”⁶⁶ “In determining whether an offense involves moral turpitude, a fact-finder examines the crime as defined by the elements in the criminal statute, not the defendant’s actual conduct.” *Goldesthien v. INS*, 8 F. 3d 645 (9th Cir. 1993); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). The immigration consequences will depend upon the actions included in the language of the statute that the immigrant victims has violated, not the acts the immigrant victims actually committed.

While there is no definitive list of crimes which constitute moral turpitude, crimes of moral turpitude can include: crimes (felonies or misdemeanors) in which there is an element of intentional or reckless infliction of harm to persons or property; felonies and some misdemeanors, in which malice is an element; or crimes in which either an intent to defraud or an intent to steal is an element have been found to involve moral turpitude.⁶⁷ Generally, whether a survivor fleeing domestic violence with her children will be convicted of a crime of moral turpitude will be dependent on the language of the state statute. For example, in Washington State, experts conclude that it is unlikely that an individual with custodial interference will be found to have committed a crime of moral turpitude.⁶⁸ Within the context of custodial interference statutes, only three states require malice as an element of their custodial interference statutes.⁶⁹ However, an intent of malice requirement in the custodial interference statute makes it significantly more likely that an immigrant victim’s conviction would be deemed a crime of moral turpitude under immigration law given that an element of the crime itself is indicative of moral turpitude. Immigrant victims in these states should take particular care to avoid custodial interference convictions.

Even if a fleeing parent is found to have committed a crime of moral turpitude, she may be able maintain her admissibility by invoking the Petty Offense Exception waiver.⁷⁰ This exception is *only* available if the maximum penalty possible for the crime convicted or committed of does not exceed one year, and the immigrant was not *sentenced* to a term of imprisonment for more than 6 months (note: sentence only, not actual time served). Unfortunately, this exception is generally unavailable for battered immigrants fleeing abuse with their children across state lines. Almost every state makes interstate custodial interference a felony punishable by a sentence of over one year.

Grounds for Deportation

Any non-citizen lawfully admitted to the United States may be subject to criminal grounds for deportation.⁷¹ This is true even for immigrant victims who have lawful permanent residency (green cards). Only after naturalization does the risk of deportation due to criminal convictions disappear. A battered immigrant who is convicted of custodial interference or another crime could potentially face the following grounds for removal:

1. Crime of Moral Turpitude

- INA § 237(a)(2)(A)(i): Conviction for one crime involving moral turpitude committed within 5 years of admission to the United States, for which a sentence of one year or longer *may be imposed*.

⁶⁴ INA § 212 (a)(2)(A)(i).

⁶⁵ See INA § 212(a)(2)(A)(i)(I) (crime of moral turpitude as criminal ground for inadmissibility); INA § 237(a)(2)(A)(i) (crime of moral turpitude as basis for expedited removal).

⁶⁶ See *Jordan v. DeGeorge*, 341 U.S. 223, 235 n. 7 (1951).

⁶⁷ *BENSON*, *supra* note 28, at 60.

⁶⁸ *Id.*

⁶⁹ Including California, Florida, and New Mexico

⁷⁰ See INA § 212(a)(2)(A)(ii)(II).

⁷¹ See INA § 237(a)(2), 8 U.S.C.A. § 1227(a)(2) (criminal offenses as grounds for deportation).

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Subject to waiver under § 237(a)(2)(A)(v) – if alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

As discussed above, a conviction of interstate custodial interference is typically a felony offense that carries a possible sentence of over one year. In the event that a victim is convicted of custodial interference within five years of her admission to the United States, she may be deported. To avoid deportation, a battered immigrant would need to overcome the very high threshold of obtaining a full and unconditional pardon by the U.S. President or State Governor.

2. Aggravated Felony

Under INA § 237(a)(2)(iii), another grounds for deportability is conviction of an “aggravated felony.”⁷² The following provisions related to aggravated felonies may apply to a survivor of domestic violence fleeing across state lines with her children:

- INA § 101(a)(43)(F): A crime of violence (as defined in section 16 of Title 18) for which the term of imprisonment [is] at least 1 year.⁷³

The definition of “crime of violence” under 18 USC § 16 includes: 1) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or 2) Any felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

- INA § 101(a)(43)(S): An offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year.⁷⁴

Custodial interference/parental kidnapping, especially when in violation of an existing court order, may be considered obstruction of justice. If a UFAP warrant is issued, a victim would face conviction of an aggravated felony relating to obstruction of justice as another grounds for removal.

3. Crime of Domestic Violence

Finally, it is not uncommon for batterers to obtain retaliatory or mutual protection orders against their partners.⁷⁵ Batterers frequently use protection orders as yet another tool to control their victims by threatening to contact the police and/or immigration authorities and falsely accuse the victim of violating the protection order. If a victim is charged with violating the protection provisions of civil protection order, she may be subject to INA § 237(A)(2)(E), a grounds of removal for perpetrators of domestic violence. However, if a battered immigrant is convicted of perpetrating domestic violence either through self-defense or through violating her abuser’s retaliatory protection order, she has the following waiver available to her:

- INA § 237(a)(7) – Waiver for a victim of domestic violence who was not the primary perpetrator in the relationship if, generally, the alien was acting in self- defense; or *committed, was arrested for, or pled guilty to committing a crime—a) that did not result in serious bodily injury and b) where there was a connection between the crime and the alien’s having been battered or subjected to extreme cruelty.*

The domestic violence grounds for removal under INA § 237(A)(2)(E) specifically excludes violations of custody or child support provisions that may have been included under a civil protection order. Thus, a victim cannot be charged with this basis for removal for flight in violation of her own civil protection order that confers visitation to the abusive parent.

⁷² See INA § 101(a)(43).

⁷³ *Id.* § 101 (a)(43)(F).

⁷⁴ *Id.* § 101 (a)(43)(S).

⁷⁵ See ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000).

A survivor convicted of custodial interference also risks being determined to lack good moral character. Good moral character is a factor in:

- VAWA self-petitions
- VAWA cancellation of removal/suspension of deportation
- Lawful permanent residency
- Naturalization

In each instance, Department of Homeland Security assesses good moral character by determining first and foremost whether the applicant has criminal convictions. Applicants for VAWA are asked to provide evidence that they lack criminal convictions through a state background check, police clearance letters or fingerprints. To naturalize or become a legal permanent resident, fingerprints are required, which are material against state and national criminal records data. Convictions for custodial interference could make proving good moral character much more difficult. In order to obtain permanent residence or another benefit, victims will have to prove they qualify for a VAWA waiver.

The Impact of Interstate Flight from Domestic Violence on Civil Custody Decisions

In addition to the threat of criminal sanctions for interstate custodial interference, battered women who flee across state lines may be subjected to severe civil penalties that could include modifications of the terms of custody, or even the potential loss of custody of their children. Survivors of violence frequently must balance risks to their physical and emotional safety with risks to their custodial rights over their children in deciding whether and how to leave an abusive relationship. While many jurisdictions have begun to consider the presence of domestic violence in custody and relocation determinations,⁷⁶ jurisdictions vary enormously with respect to their treatment of the dynamics of domestic violence when considering complex custody, visitation, and relocation cases.

This section will provide a brief overview of the impact of relocation on custody determinations and options and prospects for battered women who plan to petition the court to relocate prior to leaving the state with their children.⁷⁷

FRIENDLY PARENT PROVISIONS

The most widely accepted rationale for restricting the movement of custodial parents is that children's interests are best served by ensuring frequent and continuing contact with both parents after the parents separate.⁷⁸ This rationale is accepted despite research findings that severely limit this proposition in families where domestic abuse is present. Published studies by Dr. Janet Johnston show that, when domestic violence or severe conflict is present between parents, children deteriorate markedly when subjected to frequent visitation transfers.⁷⁹

In an attempt to maintain frequent and continuing contact between parents, several state child custody statutes explicitly encourage courts to favor child custody awards to the parent considered by the court most likely to encourage an open, frequent and loving relationship between the child and the other parent. Some states accomplish this by including in their custody statute a public policy statement concerning a parent's abilities to allow an open, loving, and frequent relationship between the child and the other parent. Other states

⁷⁶ See Merry Hofford et al., *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 217 (1995).

⁷⁷ See also Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 KAN. L. REV. 433 (1998).

⁷⁸ *Id.* at 446.

⁷⁹ *Id.* at 447.

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include such provisions in their list of factors that a court is required to consider when determining the best interest of the child.⁸⁰ These provisions can be harmful to battered parents seeking custody.

In jurisdictions that have “friendly parent” provisions, battered women who intentionally flee from their abusers to protect themselves and their children from further harm are particularly vulnerable to a finding of non-cooperativeness in custody proceedings. Battered women’s advocates have vigorously opposed such “friendly parent” provisions, and have claimed that the existence of such statutes perpetuates an abuser’s ability to use the threat of losing custody of the children as a tool to further control the abused spouse.⁸¹ In 1995, the ABA’s Center on Children and the Law stated that friendly parent provisions are inappropriate in domestic violence cases, and proposed that state legislatures amend such laws.⁸² While expectations of cooperative parents persist, the work of advocates of battered women, coupled with the judiciary’s growing awareness of domestic violence, has prompted many jurisdictions to now consider the existence of domestic violence as a factor in making custody determinations.⁸³

To counter friendly parent expectations by courts and to fall within domestic violence protections, counsel representing battered women in contested custody cases should seek protection orders that provide evidence of abuse that can help ensure that custody awards are decided against the backdrop of the violence.

Such orders are extremely helpful to immigrant victims for whom fear of loss of custody of children to an abusive parent with U.S. citizenship or more permanent immigration status can discourage her from seeking any kind of justice system help at all.⁸⁴ Protection orders can award an/the immigrant victim custody without regard to her immigration status,⁸⁵ and can provide the immigrant victim important evidence that can help her immigration case.⁸⁶ Most importantly, going to court and obtaining a protection order against her abuser demonstrates to immigrant victims that despite her abuser’s claims to the contrary, the justice system will help her.⁸⁷

FLEEING THE STATE WITHOUT THE CHILDREN

As discussed throughout this chapter, battered parents attempting to flee abuse with their children face myriads of obstacles to safe relocation. Some parents are forced to leave their children behind when fleeing from a crisis situation due to lack of resources to support themselves and their children, or out of fear that flight with their children may result in their batterers’ successfully convincing prosecutors to initiate criminal proceedings against them. Rather than recognizing a parent’s decision to flee as a response to imminent physical harm to the parent or her children, in such cases, a court may read a battered woman’s flight from abuse as her abandonment of the children or as an indication of her inability to protect and care for them.

The Model Code on Domestic Violence, drafted in 1994 by a multidisciplinary advisory committee comprised of judges, battered women’s advocates, attorneys, law enforcement officers, defense attorneys and other professionals, addresses topics including criminal penalties and procedures, civil protection orders, and family and children. One of the goals of the Model Code is to establish guidelines for child-custody determinations under which, once the court finds abuse by one parent against the other, the safety and well-

⁸⁰ See The Family Violence Project Of The National Council Of Juvenile And Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 201 (1995).

⁸¹ *Id.*

⁸² *Id.* at 202. See HOWARD A. DAVIDSON, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 1 (1994) (Children are harmed “cognitively, psychologically, and in their social development” by witnessing domestic violence against a parent at home.).

⁸³ NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CUSTODY AND VISITATION DECISION-MAKING: WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE (1995).

⁸⁴ See generally Mary Ann Dutton, Leslye E. Orloff, & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL’Y 245 (2000).

⁸⁵ For a fuller discussion see Breaking Barriers Battered Immigrants and Civil Protection Orders and Ensuring Access to Protection Orders for Immigrant Victims of Family Violence Chapters.

⁸⁶ See Breaking Barriers Self-petitioning and Alternative Forms of Relief – U visas and Gender Asylum Chapter 3.

⁸⁷ See Leslye E. Orloff, et al., *Recent Development: Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43 (2003) (Research has found that obtaining a protection order is a significant factor in an immigrant victim’s decision to call the police for help.)

being of the child and battered parent are the primary consideration in determining a custody arrangement that would be in the best-interests of the child.⁸⁸ The Code contains, for example, a presumption that it is not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence, and also directs courts to give primary consideration to the safety and well-being of the child and of the parent who are victims of domestic violence.⁸⁹ Further, the Code specifically addresses the concern that abused parents' flight from abuse without the children might be viewed as abandonment, and provides battered parents with an affirmative defense against allegations of child abandonment. This approach serves to minimize any potential disadvantage a battered parent may face in subsequent custody proceedings. When assisting a client who has fled the jurisdiction due to abuse without her children, consult your state's custody statute to determine whether your client may benefit from statutory protections due to her status as a survivor of domestic violence. Counsel should also consider presenting a brief to the court on this issue based on the Model Code and the ABA Center on Children's report on recommended steps courts should take when domestic violence exists in a custody case.

FLEEING THE STATE WITH THE CHILDREN

In addition to the criminal consequences discussed above, abused parents who flee the state with their children prior to or in violation of a custody order may face disadvantages in subsequent custody proceedings for interfering with the other parent's custodial rights. The survivor may also risk offending a court's authority over the custody matter. A battered parent's act of leaving the state with her children prior to or in violation of a custody order may be viewed by a court as an attempt to deprive the other parent of contact with his children. Some courts have demonstrated an inability to recognize and unwillingness to support an abused parent's decision to deprive the abusive parent of contact with the children in the course of fleeing the jurisdiction for safety reasons, even in light of extensive history of extreme physical, emotional, and sexual abuse of the fleeing parent by the other parent. For example, in *DeCamp v. Hein*, a Florida trial court focused primarily on the father's right to visitation in granting custody to a mother who had fled the state with her children only on the condition that she return to Florida. While the appellate court finally reversed the part of the order requiring the mother to return to Florida, it was evidence of the mother's willingness to permit liberal visitation with the father, rather than the long history of domestic violence perpetrated against the mother, that finally persuaded the court to permit the relocation.⁹⁰ Examine your state statutes and relevant case law to develop a sense of how a court will respond in a custody proceeding involving a parent who has fled the jurisdiction with her children to escape abuse.

Finally, battered women who relocate with their children to avoid abuse may confront increased penalties due to a court's perception of the victim's flight from the jurisdiction as in contempt of the court's authority. Walker and Edwall describe the story of one woman who fled with her children without first informing the court out of fear that the court would punish her for her decision:⁹¹

"Lois ran away with her 2-year-old son and hid in a battered women's shelter in another state. Although she wrote the judge a letter explaining her continued fear for her own and her child's safety, he became irate at her willful disrespect of his previously issued visitation order and immediately transferred custody to her former husband . . . Nor was the risk of danger to the child important to the judge, who was exercising his power to punish Lois for not trusting the court to act in the best interests of her child."⁹²

As discussed earlier, defenses or exemptions currently available in some state parental kidnapping/custodial interference statutes are very helpful to battered women. These exceptions direct courts not to penalize abused parents if they suddenly move away in violation of a court order or if they temporarily conceal the

⁸⁸ See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 402 (Nat'l Council of Juv. and Fam. Ct. Judges 1994). [hereinafter "MODEL CODE"], available at http://www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=PUBGET&Filename=new_modelcode.pdf.

⁸⁹ See *id.* § 402(1)(a)

⁹⁰ See, e.g., *DeCamp v. Hein*, 541 So. 2d 708 (Fla. Dist. Ct. App. 1989).

⁹¹ See Lenore E.A. Walker & Glenace E. Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 127, 131 (Daniel J. Sonkin ed., 1987).

⁹² *Id.*

whereabouts of the children while they are fleeing domestic violence. In some states, family courts take into account flight from harm in custody proceedings either under state statutes or case law that require consideration of domestic violence in custody cases.⁹³

When representing a battered custodial parent who has fled from one state to another with her children, if the case is being litigated in a state that considers domestic violence in custody cases, counsel should develop and present evidence in the custody case demonstrating the nexus between the flight, domestic violence, and the safety of the victim and her children. If relevant, counsel should also consider providing evidence that the children have witnessed the abuse and as a result, have been traumatized in the same way as children who have been physically abused by a parent. In making this argument, counsel may seek an expert witness and cite relevant research to support the argument, as this view is increasingly the prevailing wisdom in child abuse and domestic violence circles. In states without such provisions in their statutes and case law, counsel should examine state statutes governing parental kidnapping and custodial interference. Where domestic violence-related defenses, exemptions, or exceptions exist in those statutes, advocates for battered women should argue that consideration of those same factors in custody cases is necessary to be consistent with the spirit and purpose of those statutes.

PETITIONING TO RELOCATE

For battered women in jurisdictions with particularly restrictive criminal custodial interference laws, one option is to petition a court for legal permission to relocate. Despite establishing a pattern of abuse, battered women who choose to seek a court's permission to relocate are not always successful in their request. However, in recent years, the growing awareness of domestic violence among the judiciary has led to an increased number of abused parents being granted permission to relocate with their children.⁹⁴

Section 403 of the Model Code articulates a rebuttable presumption that non-abusive parents should be the custodial parents, and that they should be free to move with the children to the location of their choice.⁹⁵ This provision acknowledges that a battered parent may find increased safety and support in another jurisdiction, thus supporting the notion that relocation would be in the best interests of both the parent and child.⁹⁶ The text of the Model Code and the accompanying comments that explain the approach taken by the National Council of Juvenile and Family Court Judges in making this recommendation should be provided to the court to encourage the court to follow the lead of national judicial domestic violence experts in promoting victim safety by allowing relocation of victims and their children in domestic violence cases.

While most states include domestic violence as a statutory factor that courts must consider when making custody determinations,⁹⁷ far fewer have mandated that courts consider evidence of domestic violence as contrary to the best interests of the child or to a stated preference for joint custody, or prohibit an award of joint custody when a court makes a finding that domestic violence has occurred.⁹⁸ While some jurisdictions have established a presumption against awarding sole or joint custody to an abusive parent, no state has followed the Model Code by adopting a special statutory provision for relocation cases involving domestic

⁹³ See generally Hoffard, *supra* note 197, 199

⁹⁴ See Bowermaster, *supra* note 76, at 456. Some parents are allowed to move in the initial proceeding. See Carter L.M. v. Tracey W.P., No. CN94-6456, 1995 WL 775207, at *2 (Del. Fam. Ct. Mar. 28, 1995) (allowing woman to relocate with new husband, but requiring her to pay all costs of visitation from Scotland because it was her decision to move); Schuyler v. Ashcraft, 680 A.2d 765, 781-82 (N.J. Super. Ct. 1996) (affirming permission to relocate on appeal); McGee v. McGee, 637 N.Y.S.2d 816, 818-19 (App. Div. 1996) (affirming permission to relocate on appeal); Mitchell v. Mitchell, 619 N.Y.S.2d 182, 183-84 (App. Div. 1994) (affirming permission to relocate on appeal); Swain v. Vogt, 614 N.Y.S.2d 780, 782-83 (App. Div. 1994) (affirming permission to remove on appeal); Jacoby v. Carter, 563 N.Y.S.2d 344, 345 (App. Div. 1990) (affirming permission to relocate on appeal); Dobos v. Dobos, 431 S.E.2d 861, 863 (N.C. Ct. App. 1993) (affirming permission to relocate with child on appeal). Others are able to relocate only after an appeal. See Odom v. Odom, 606 So. 2d 862, 869 (La. Ct. App. 1992) (reversing loss of custody on appeal); Sheridan v. Sheridan, 611 N.Y.S.2d 688, 690 (App. Div. 1994) (reversing order to move back to retain custody on appeal); Gruber v. Gruber, 583 A.2d 434, 440 (Pa. Super. Ct. 1990) (reversing condition of remaining in jurisdiction to retain custody on appeal).

⁹⁵ MODEL CODE § 403.

⁹⁶ Bowermaster, *supra* note 76, at 459.

⁹⁷ *Id.*

⁹⁸ See The Family Violence Project of the National Council of Juvenile and Family Court Judges, *supra* note 65 at 217.

violence.⁹⁹ Despite the distinct historical tendency to preserve the visitation rights of the non-custodial parent, recent decisions by state supreme courts indicate a growing trend toward offering the custodial parent and her children the same level of protection and respect generally accorded to any nuclear family.¹⁰⁰

The model that attorneys representing battered women should urge courts to follow includes: not awarding custody, in whole or in part,¹⁰¹ to a parent with a history of inflicting domestic violence, granting visitation to such parent only if the safety and well-being of the abused parent and children can be protected, and including in all awards of visitation explicit protection for the child and abused parent.¹⁰² Family court judges across the country who have received training on, and understand, domestic violence make custody awards to non-abusive parents using this approach.¹⁰³

Unless the statutes and case law clearly include protective measures, battered women should be prepared by counsel to understand that relief might only be granted on appeal.¹⁰⁴ Since appellate relief can only be granted if the issues have been raised below, any battered woman seeking to relocate with her children should raise every constitutional argument to support her move.¹⁰⁵ Joan Zorza suggests that a battered woman make the following constitutional arguments supporting her position that she should be allowed to relocate:¹⁰⁶

1. Her right to travel interstate is based in the Privileges and Immunities Clause of Art. IV, § 2, the Privileges and Immunities Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, the Commerce Clause, and freedom of association under the First Amendment of the U.S. Constitution.
2. A denial of the relocation would impermissibly discriminate against her on gender bias grounds, on the basis of her marital status, on the basis of her being a parent of minor children, and on the basis of her being an abused person who is being denied the ability to protect herself and/or her children, all based on Equal Protection grounds.
3. A denial of the relocation would discriminate against the child(ren)'s right to interstate travel and, potentially, their right to be protected by their custodial parent from witnessing and/or experiencing further abuse.
4. A denial of the relocation would deny the mother her fundamental rights to (re)marry (if she does intend to remarry), to create a new family, and to enjoy the privacy of the familial association.
5. If she is not relocating to flee the father, the court could consider the alternative that the father could move to be near his child(ren) rather than restrict her from moving the child(ren).

⁹⁹ *Id.* at 209.

¹⁰⁰ See Bowermaster, *supra* note 76; See, e.g., Vachon v. Pugliese, 931 P.2d 371 (Alaska 1996); *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996); *In re* Marriage of Francis, 919 P.2d 776 (Colo. 1996); Mize v. Mize, 621 So. 2d 417 (Fla. 1993); Lamb v. Wenning, 600 N.E.2d 96 (Ind. 1992); Silbaugh v. Silbaugh, 543 N.W.2d 639 (Minn. 1996); Bell v. Bell, 572 So. 2d 841 (Miss. 1990); *In re* Marriage of Hogstad, 914 P.2d 584 (Mont. 1996); Harder v. Harder, 524 N.W.2d 325 (Neb. 1994); Trent v. Trent, 890 P.2d 1309 (Nev. 1995); Holder v. Polanski, 544 A.2d 852 (N.J. 1988); Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996); Stout v. Stout, 560 N.W.2d 903 (N.D. 1997); Fossum v. Fossum, 545 N.W.2d 828 (S.D. 1996); Fortin v. Fortin, 500 N.W.2d 229 (S.D. 1993); Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996); Lane v. Schenck, 614 A.2d 786 (Vt. 1992); Bohms v. Bohms, 424 N.W.2d 408 (Wis. 1988); Love v. Love, 851 P.2d 1283 (Wyo. 1993). *But see* *In re* Marriage of Eckert, 518 N.E.2d 1041 (Ill. 1988).

¹⁰¹ Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 274, 305 (1995).

¹⁰² *Id.*

¹⁰³ For technical assistance developing these arguments in your custody case on behalf of a battered woman who fled to your jurisdiction contact The National Council of Juvenile and Family Court Judges at (775) 784-6012 or <http://www.ncjfcj.org>. For help with cases involving immigrant victims who flee, you may additionally contact the National Immigrant Women's Advocacy Project (NIWAP) at 202-274-4457 or info@niwap.org.

¹⁰⁴ Zorza, *supra* note 100, at 306.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 307.

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6. The denial of the relocation also deprives her of state constitutional rights (such as fundamental rights protected under the state constitution or the state's equal rights amendment, if the state has one).

In addition, the abused woman needs to raise her best factual arguments. These are likely to include the following:

1. That the court should take domestic violence and safety concerns into account when adjudicating any custody, including relocation, case.
2. Why other solutions are not possible or will only aggravate the situation, including why she cannot remain; what other alternatives she has explored, and why they will not work or would involve any less hardship for the father; and that couples counseling or family therapy will not help, but actually further aggravates the situation and endangers battered women.
3. Anything that the abuser has done (e.g., abusing or harassing her, not paying support, etc.) that makes it difficult for her to remain (e.g., that he has or will cause her to be evicted, lose her job, or function less effectively as a parent).
4. To the extent that the father has not had a very meaningful relationship with the child(ren) and/or only (or mainly) opposes the move to prevent her from getting on with her life, and therefore has no legally permissible reason to prevent the relocation.
5. All the reasons why the the move will benefit her child(ren), such as better work prospects for the survivor; more emotional support from family and friends; better child-care options; better financial situation, especially if she will be able to be off public assistance; that her child(ren) used to live there and still have contacts with friends, church, doctor, etc.; better schools for herself or her child(ren); better medical situation.
6. If applicable, that her child(ren) are of sufficient age to give their consent and/or desire, or at least do not oppose, the move.
7. Any reasons why the move will be desirable/necessary for her, including what definite plans she has for herself and her child(ren).

ETHICS ISSUES

Numerous ethical issues arise when a client's need to find safety for herself and her children intersects with state criminal custodial interference laws. The American Bar Association's Model Rules of Professional Conduct (Model Rules) have been adopted in some manner by approximately 41 states.¹⁰⁷ Other states either follow the American Bar Association's Model Code of Professional Responsibility (which preceded and was replaced by the Model Rules) or their own combination of rules.¹⁰⁸

Rule 1.2(d) states that a lawyer may not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. Given the existence of custodial interference statutes that criminalize a parent's flight from the jurisdiction, questions arise as to a lawyer's ethical obligations when advising a survivor who wishes to flee out of state with her children. In jurisdictions that exempt survivors of domestic violence from their criminal custodial interference statutes, a lawyer's assistance and representation of a client who wishes to flee the state is not likely to violate the Code of Professional Responsibility. Arguably, in jurisdictions where flight from domestic violence is a defense to charges of parental kidnapping, an attorney's advice to a client on the legal implications of her decision will not violate Rule 1.2(d).

¹⁰⁷ Lewis Becker, *Ethical Responsibilities of a Lawyer for a Parent in Custody and Relocation Cases: Duties Respecting the Child and Other Conundrums*, 15 J. AM. ACAD. MATRIM. LAW. 33, 33-34 (1998).

¹⁰⁸ *Id.*

Determination of what constitutes “assisting” a client can be murky. In *People v. Chappell*, an attorney represented a client in a dissolution proceeding. The client wished to leave the state with her children contrary to a custody order and mutual restraining order prohibiting either party from leaving Colorado. Chappell advised her client “as an attorney to stay, but as a mother to run.”¹⁰⁹ Chappell also informed her client about underground networks that were available to individuals in her situation, assisted her in emptying her bank accounts, and advised her as to how she could avoid being caught. The client was subsequently caught and charged with a violation of a custody order under Colorado law, a class 5 felony. The client pled guilty to the charge in exchange for a three year deferred sentence. Chappell’s conduct was found to violate:

1. R.P.C. 1.2(d) (a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent);
2. R.P.C. 3.3(a)(2) (a lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client);
3. R.P.C. 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act by aiding the lawyer's client to commit a crime); and
4. R.P.C. 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).¹¹⁰

Despite some ambiguity as to whether the “underground” resources provided to her client by Chappell were in fact domestic violence shelters, there does not appear to be any evidence of a history of domestic violence in this case. While Chappell’s attorney knowingly assisted her client in illegal conduct, an a battered parent who wishes to flee the state with her children would arguably not be in the same position as Chappell. If such a client chooses to flee the state after being advised of the legal implications of her decision, a lawyer could potentially rely on her good faith belief that her client’s conduct may be found to be legal under the statutory and common-law defenses available to victims of domestic violence in that jurisdiction. In advising a client, attorneys must be mindful of their ethical obligations and should research any possible defenses for clients fleeing domestic violence with their children.

Strategies for Advising Survivors Who Wish to Flee the State with Children¹¹¹

An attorney advising a client who is considering fleeing across state lines with her children to escape an abusive partner must consider numerous factors. Above all, a survivor will need to evaluate what will best keep her and her children safe. A survivor is best equipped to assess her own safety when considering how her abusive partner may retaliate. If she fears that her abuser will kill her or their children, and is convinced that no intervention by the legal system will prevent him from retaliating, this must guide her decision-making. Her decision will also depend upon the protections that are available to her in each state, such as family support, supportive friends, economic opportunities, responsiveness of the community to domestic violence, and services to assist domestic violence victims. Understanding the laws related to custody jurisdiction, relocation, and flight across state or tribal lines is critical to assisting the survivor to make an informed decision about her safety.

The following list of questions and answers are designed to guide attorneys though the process of determining how to advise a battered immigrant client contemplating fleeing with her children to another jurisdiction. This section of questions is followed by a chart that summarizes state statutes and provides attorneys with an overview of each state’s approach to the issues discussed in this chapter. This chart is intended to provide a starting point for your research on these issues.

¹⁰⁹ *People v. Chappell*, 927 P.2d 829 (Colo. 1996).

¹¹⁰ *Id.*

¹¹¹ Adapted from DEBORAH GOELMAN, FREQUENTLY ASKED QUESTIONS ABOUT LAWS GOVERNING INTERSTATE CHILD CUSTODY CASES 4

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1. What type of parental kidnapping, custodial interference, or child concealment law does the original state have?

As discussed above, a survivor and her attorney should understand how the law defines and treats crimes of parental kidnapping/custodial interference. While some state criminal custodial interference laws do not apply as long as no court order is in effect, other states criminalize depriving the other parent of contact with the children whether or not a custody order is in effect. Consult your state statutes to determine whether such statutes are applicable to your client. Inapplicability of criminal custodial interference statutes does not necessarily mean that your client will not be penalized for fleeing custody actions initiated subsequent to her flight.

2. Is there a defense or exemption related to domestic violence that could protect your client from criminal charges if she flees across state lines with the children?

Your client may be able to benefit from a variety of state law exemptions or affirmative defenses to parental kidnapping/custodial interference charges. Some state laws exempt flight from domestic violence from applicability under their criminal custodial interference statutes¹¹² or include flight from domestic violence as an affirmative defense under the state statute.¹¹³ A few laws permit flight from the jurisdiction, but then require survivors to meet certain conditions such as making a report to law enforcement and commencing a custody case within a reasonable period of time after fleeing the state.¹¹⁴ Others permit flight to protect the parent¹¹⁵ or the child from imminent harm.¹¹⁶ Others have a general “good cause” defense,¹¹⁷ or rely upon the criminal defense of necessity.¹¹⁸

Before fleeing with the children, survivors should know whether they might rely on any exemptions in the event that criminal charges are brought against them. Charges of parental kidnapping/custodial interference can result in jail time or loss of custody.

3. If your client is a battered immigrant and is not a citizen of the United States, what are the possibilities that either the original state or the new state could prosecute her for parental kidnapping or custodial interference and how do you assess the potential harm to her future eligibility for legal immigration status?

First assess whether your client may qualify for VAWA¹¹⁹ or U Visa¹²⁰ immigration relief, and determine whether the abusive spouse or parent has filed immigration papers for her and/or her children. Many victims will qualify to file a VAWA self-petition, a U Visa application or for VAWA cancellation of removal. Assess the strength of her immigration case and initiate that case. Determine what, if any, criminal prosecution or sanctions for violation of existing court orders could occur if the victim fled the jurisdiction with her children. Consult an expert on immigration and crimes to determine what effect any criminal conviction based on a court’s finding that the victim has violated court orders could have on her attaining approval of her domestic violence-related immigration case, and her attaining lawful permanent residence based on that conviction.¹²¹

4. What type of relocation statute does the state have?

¹¹² See, e.g., FLA. STAT. Ch. 787.03(6).

¹¹³ See, e.g., 720 ILL. COMP. STAT. 5/10-5(C)(3).

¹¹⁴ See, e.g., CAL. PENAL CODE § 278.7(C).

¹¹⁵ See, e.g., IDAHO CODE § 18-4506(2)(b).

¹¹⁶ See, e.g., *id.* § 18-4506(2)(a).

¹¹⁷ See, e.g., HAW. REV. STAT. § 707-726(2).

¹¹⁸ See, e.g., *Gerlach v. State*, 699 P.2d 358 (Alaska Ct. App. 1985) (explains necessity defense to a criminal custodial interference matter).

¹¹⁹ See *Breaking Barriers Self-Petitioning and Alternative Forms of Relief – U visas and Gender Asylum Chapter 3*.

¹²⁰ See *Breaking Barriers Alternative Forms of Relief – U visas and Gender Asylum Chapter 3*.

¹²¹ See *Breaking Barriers Battered Immigrants and the Criminal Legal System Chapter 9*. For referrals to immigration attorneys, contact: questions@asistahelp.org or info@niwap.org.

State civil laws also vary by jurisdiction as to whether, and under what circumstances, they permit a parent who has custody of the child to leave the state. Depending upon the state's relocation law and a general sense of typical court rulings, a survivor may wish to petition the court to relocate prior to leaving the state. Thoroughly consult your state's relevant statutes and case law to understand the statutory and applied parameters of such laws. Contact your state domestic violence coalition for a list of attorneys who can advise you on family court practice in your area.

5. Would a survivor be violating a court order by fleeing the jurisdiction?

Most states allow victims to file for and receive protection orders in the state to which they flee, even when the violence occurred in another state.¹²² However, the victim may choose not to obtain a protection order in the new state for safety reasons so as to not provide the abuser information about her location. The protection order case will require service of documents on the abuser. Some victims only seek orders in the new state when the abuser knows or learns she has relocated there.

Courts generally disfavor intentional violations of valid court orders. Barring immediate safety concerns, survivors should, if at all possible, ask a court to modify an existing custody or visitation order prior to leaving the state. If no order exists, a survivor may not wish to obtain a protection order prior to fleeing the state; protection orders may grant visitation to the perpetrator and thereby increase the chances that a battered parent would violate the visitation provisions of such an order if forced to leave the jurisdiction for safety reasons.

6. How have courts in each of the states typically handled interstate custody matters that involved domestic violence?

It will be useful for a survivor to know whether courts in the original state and in the new state tend to penalize victims of domestic violence in child custody cases for flight across state lines.

7. Do the two states have different custody laws related to domestic violence?

Custody laws vary greatly, and one state may consider domestic violence to a greater degree in custody decisions than the other state. This legal standard in each state may be important for a survivor to know prior to flight from abuse.

8. Do the states have different laws protecting the confidentiality of information about domestic violence survivors?

If a domestic violence survivor needs to have her identifying information such as address or telephone number kept confidential for safety reasons, she should be aware of what the different states' laws require with respect to confidentiality.

9. When can a court modify a custody or visitation order that was issued by a court in another state?

The PKPA gives continuing jurisdiction to the state that issued the initial custody determination. The issuing state then retains jurisdiction over the matter as long as it can do so under state law, and at least one parent or the child continues to live there. A court may modify a custody or visitation order from another state only if 1) it has jurisdiction to do so, and 2) the court of the initial state no longer has jurisdiction or has declined to exercise it.¹²³

¹²² Klein & Orloff, *supra* note 2.

¹²³ See, e.g., Stoneman v. Drollinger, 64 P.3d. 997 (Mont. 2003) (The protection of the parties, the years the children had resided in Washington, the significant distance between courts, the parties' disparate financial circumstances, the location of evidence and convenience of witnesses, and the familiarity factors, all supported the trial court declining jurisdiction to allow the Washington court to exercise jurisdiction after mother fled from Oregon to Washington due to domestic violence.).

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6.3

The Implications of the Hague International Child Abduction Convention: Cases And Practice¹²

By Catherine Klein, Leslye Orloff, Laura Martinez, Jennifer Rose and Joyce Noche

For many victims of domestic violence, the threat of continued violence can force them to cross international borders to achieve safety and peace. Moreover, when domestic violence is present in the relationship and the abuser is not U.S. born, abusers' threats to kidnap children and take them across international borders are a common practice. It is very important for battered women to understand the risks and to take threats of international kidnapping seriously. When a victim flees with children, the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention)³ can force a parent and her child to return to

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² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) ([United States v. Windsor](http://www.supremecourt.gov/opinions/12-307/wl2013062613.pdf), 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html> [hereinafter Hague Convention].

the country she was fleeing, thereby returning the victim to her abuser and possibly heightening her danger. When the abuser kidnaps the children, the Hague Convention could be part of a protracted search for the abducted children. This chapter will provide an overview of the Hague Convention and its applications, as well as some practical recommendations to attorneys and advocates working with victims of domestic violence who are considering leaving the country with their children or who are fearful that their abuser may leave the country with their children.

Preventing International Child Abduction⁴

Although the Hague Convention was created to assist in the prevention of international child abduction and the return of abducted children, it is difficult and expensive to use. Much of this expense is generated in legal fees. Oftentimes, good legal representation is essential in both countries to facilitate successful use of the Hague Convention in securing return of the children. Moreover, there are many countries in which the Convention does not apply because the country is not a signatory. As a result, it is very important that attorneys and advocates for battered women understand the risks involved, take threats of international kidnapping seriously, and advise their clients of the measures that can be taken to guard against international child abduction.

The ABA Center on Children and the Law worked in conjunction with three other missing children's organizations to conduct a survey of parents whose children had been abducted internationally by the other parent. The results of this survey provide some insight into common fact patterns that occur with abduction, as well as methods in which a parent might preemptively prevent abduction from taking place.⁵ The survey found some commonalities in the way in which the child was abducted, as well as the preparation that went into the abduction. Nearly one-half of the abductions reported by left-behind parents occurred during a court-ordered visitation between the abducting parent and the child. Eighty percent of parents said they believed the abductor received some assistance from family members in carrying out the abduction or making it successful. One-fifth reported that the abductor moved the child from country to country.

Some survey respondents could identify ways in which the abductor planned for the abduction. Most of this planning indicates that the abductions were premeditated. Abductors prepared by saving money, waiting for tax refunds, liquidating assets, and quitting or changing jobs. They also prepared for longer-range needs by gathering legal documents. One-third of parents who reported on planning actions said the abductor received visits from friends or family members from another country prior to the abduction. One-third said the abductor made preparatory visits to the country to which the child was later abducted. Nearly one-fourth of left-behind parents reported that the abductor kept the child late after a visit prior to the actual abduction, perhaps to prevent the left-behind parent from immediately suspecting that there was a problem when the actual abduction occurred. One-fifth of parents said they believe the abductor secretly involved the child in planning the abduction.

In many cases, the abductor made serious threats prior to the actual abduction; and eighty percent of the left-behind parents reported that these previous threats included telling them that they would never see their child again. Sixty percent reported that the abductors threatened their lives; and twenty percent reported that the abductor threatened the life of the child.

Fifty-one percent of those surveyed took measures to prevent the abduction; including seeking supervised visits, custody orders prohibiting removal of the child from the jurisdiction, and passport denial or restrictions.

⁴ This section is adapted in part from Catherine Klein and Leslye Orloff, *International Kidnapping Prevention and the Hague Convention*, in AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE ATTORNEY'S MANUAL (2004).

⁵ Janet Chiancone, Linda Girdner & Patricia Hoff, U.S. Dept. of Justice, *Issues in Resolving Cases of International Child Abduction by Parents*, JUVENILE JUSTICE BULLETIN (Dec. 2001) at 397, 399-402. The survey drew from 97 parents who had at least one child abducted.

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In addition to protection order and other family court proceedings, there are a number of actions that should be taken to prevent children from being removed from the United States. Legal remedies designed to stop international kidnapping should be taken in tandem with other advocacy strategies that help prevent children from being kidnapped internationally. This following section points out the various risk factors for international kidnapping of which a parent should be aware and highlight some U.S. based prevention strategies.

ASSESSING RISK FACTORS FOR INTERNATIONAL CHILD ABDUCTION:²

In assessing a child's risk of international abduction, a parent should carefully consider whether the other parent:

- Is currently employed;
- Is a U.S. citizen;
- Is a citizen of another country;
- Has a dual citizenship;
- Has residency in another country, or work for a company that could transfer him to another country;
- Has family and/or other connections to the United States;
- Has strong connections to his country of origin; and/or
- Has threatened to take or hide the children.

CHARACTERISTICS POSING A RISK FOR ABDUCTION:³

The following is a list of common characteristics found in a parent who poses a risk of international abduction:

- Possesses paranoid or delusional tendencies;
- Exhibits psychopathic behavior;
- Has strong ties to another country;
- Was involved in a marriage or intimate relationship with a partner who differs in ethnicity, culture and/or country of origin;
- Feels alienated from the U.S. legal system;
- Threatens to abduct or in some form has actually abducted; and/or
- Harbors suspicious beliefs that the child has been abused.

MEASURES THAT CAN BE USED TO PREVENT PARENTAL KIDNAPPING:⁴

In preventing international abduction, there are a number of measures that a parent can take, including:

- Keeping a record of important information about the other parent, for example, his social security number, driver's license number, bank account information, passport number, or immigrant visa number;
- Obtaining the passports of the children and keeping these passports in a safe place;
- Compiling contact information, such as the addresses and phone numbers of the other parent's family and friends—both within the United States and in foreign countries;
- Keeping a detailed, written description of the child and taking color photos of the child every six months; and/or
- Teaching the child to make telephone calls (especially collect calls) and instructing the child to call home if unusual circumstances occur.

CUSTODY DECREES AND FAMILY COURT PREVENTION REMEDIES:

Although it is not absolutely necessary to obtain a custody decree when using the Hague Convention to secure the return of an abducted child, a parent must still prove that she was exercising "the right of custody" when the child was taken out of the country. As a result, although a custody order is technically not

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necessary under the Convention, having a custody order facilitates the process of seeking the prompt return of the child.

“Right of custody” is not defined as sole custody⁵. Rather, the parent who possesses the “right of custody” has the right to determine where the child will live. If a parent has reason to believe that the other parent will attempt to abscond with the child to a foreign country, she should immediately seek a custody decree. When a parent has been abused, obtaining a custody award as part of a civil protection order is often the swiftest way to secure a court order granting the abused parent custody of the children. Whether the custody award is issued as part of a civil protection order or as part of another family court proceeding, the award should include certain key provisions, which contain specific preventive language. Such provisions could include language that:⁶

- Provides for supervised visitation with the child;
- Specifically prohibits the removal of the child from a particular jurisdiction, state or country without permission from either the court or the custodial parent;
- Transfers the children’s passports to the custodial parent;⁷
- Disallows the issuance of a passport on behalf of the child by the U.S. passport agency, or any country’s Embassy or Consulate;
- Orders the abuser to sign a statement, co-signed by the custodial parent and the court, stating that no Embassy or Consulate shall issue a travel visa for the children, absent further order of the court;⁸
- Provides for an agreement between the parties that the provisions of the Hague Convention shall apply in the event of international abduction;
- Requires the posting of a bond from the parent with connections to a foreign country;
- Allows law enforcement officials to assist in the recovery of the child if he/she is abducted

The Hague Convention

The Hague Conference on Private International Law (Hague Conference) is an intergovernmental organization, the purpose of which is “to work for the progressive unification of the rules of private international law.”⁶ To this end, the Hague Conference facilitates the negotiation and drafting of multilateral treaties (conventions) in the different fields of private international law. From 1893 to 2002, the Conference has adopted forty-five international Conventions.⁷ Of these, the Hague Convention on the Civil Aspects of International Child Abduction has been among the most widely ratified.

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) is a multilateral treaty that was adopted into U.S. law on July 1, 1988.⁸ Currently, at least fifty-four member countries⁹ of the Hague Conference are signatories.¹⁰ In addition, there are twenty non-member countries¹¹

⁵ Article 5(a) of the Hague Convention defines “rights of custody” as “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” Hague Convention, Oct. 25, 1980, art. 5, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

⁶ See <http://travel.state.gov/int'lchildabduction.html>.

⁷ Upon receiving such an order as part of a protection order or other family court case, counsel for the custodial parent should send copies of the order to the passport-issuing agency, informing them not to issue duplicate passports to the children without the permission of the custodial parent and/or the court.

⁸ Counsel for the custodial parent will need to take this order and forward it to the appropriate Embassies and/or Consulates of the countries of both parents.

⁶ Statute of the Hague Conference on Private International Law, July 15, 1955, art. 1, available at <http://www.hcch.net/e/conventions/text01e.html>.

⁷ For an overview of the multilateral treaties drawn up by the Hague Conference, see <http://www.hcch.net/e/conventions/index.html>.

⁸ Hague Convention, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://www.hcch.net/e/conventions/text28e.html>. For more information see generally <http://www.hcch.net/e/conventions/menu28e.html>.

⁹ Member States include: Argentina, Australia, Austria, Belarus, Belgium, Bosnia & Herzegovina, Brazil, Bulgaria, Canada, Chile, China (Hong Kong—Special Administrative Region only), China (Macao—Special Administrative Region only), Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, The former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco,

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that were not actual members of the Hague Conference, but who have chosen to uphold the Convention. The treaty only applies between countries when both countries are parties to the Convention. If a country has not formally joined the Hague Convention, either as a member country or a non-member adherent, the treaty does not apply and a parent must use alternate methods to have the child returned. Although the Hague Convention exists to assist in the prevention of international child abduction and the return of abducted children, it is difficult and expensive to use. Good legal representation is essential, sometimes in both countries, to successfully secure the return of the children, which adds to the cost of utilizing the Hague Convention.

The Convention provides civil legal remedies to protect children who have been abducted internationally. The Convention has two main goals: to establish procedures that allow for the prompt return of children who have been abducted to a foreign country, and to provide that the rights of custody and access under the laws of each member country are respected by other member countries.

Through the Convention, parents, rather than governments, may institute legal proceedings on their own behalf to seek the safe return of their children. The Convention is not meant to determine custody arrangements. Rather, it provides a process to accomplish the prompt return of children wrongfully taken. To institute proceedings for the return of a child, a parent must first file an application seeking the return of the child with authorities of the foreign country. Then, she needs to procure legal representation in the country where the child has been abducted to pursue the legal action through that country's legal system. The U.S. State Department¹² is available to assist parents in filing the application, locating the child abroad, and in providing parents with information about the foreign country's legal system and its attorneys. Each member country has a similar government office that serves as the authority to administer the duties of the Convention. The Convention provides for the return of the child if all the conditions of the treaty are met.

REQUIREMENTS

To invoke the Convention, a child must be “wrongfully removed or retained” from his or her “habitual residence,” the abduction must be reported within one year of the abduction, and the child must be below the age of sixteen. It is possible that a judicial or administrative authority will order return of the child if it was not reported within one year, but it is not guaranteed under the Treaty.

WRONGFUL REMOVAL

“Wrongful removal” is defined in Article 3 of the Convention. Wrongful removal is a central issue to proving a Hague Convention case. Article 3 states that there must be a breach of custody rights under the laws of the state of habitual residence.¹³ Rights of custody may arise in a variety of situations: by operation of law or by reason of a judicial or administrative decision, by reason of an agreement having legal effect under the law of that country¹⁴, and by the rights relating to the care of the child, e.g. determining the child's

Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, Romania, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, and Venezuela.

¹⁰ This list of signatories to the Hague Convention on the Civil Aspects of International Child Abduction is current as of June 2004. For an up-to-date list, see <http://www.hcch.net/e/authorities/caabduct.html>.

¹¹ Non-Member States include: Bahamas, Belize, Burkina Faso, Colombia, Costa Rica, Ecuador, El Salvador, Fiji, Guatemala, Honduras, Mauritius, Moldova, Nicaragua, Paraguay, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, Turkmenistan, Uzbekistan, and Zimbabwe.

¹² See U.S. Department of State Homepage, International Parental Child Abduction, at <http://travel.state.gov/int'lchildabduction.html> (describing resources provided by the U.S. Department of State to assist in instances of international child abduction).

¹³ Article 3 states that a removal or retention is wrongful when “it is in the breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention,” and that “at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.” Hague Convention, Oct. 25, 1980, art. 3, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

¹⁴ The Hague Convention terminology uses the term, “state” to refer to member countries who uphold the Hague Convention. To avoid confusion with U.S. states, we use the term country in this chapter, rather than the Hague Convention terminology of “state.”

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place of residence.¹⁵ Thus, a formal custody decree is not necessary to use the Convention for the return of an abducted child. Nonetheless, a parent must prove that he/she was exercising “the right of custody” when the child was taken out of the country.

The trend has been to interpret custody rights broadly, thereby almost always finding that the left-behind parent had, and was exercising, custody rights.¹⁶ The right of custody as defined in Article 5 of the Hague Convention is an expansive concept. For example, the Convention makes pre-decree removals (removals of children absent a court order) wrongful when the left-behind parent has custody rights under the internal law of the country of the child’s habitual residence, or the law designated by the conflicts-of-law rules of that country.¹⁷ Pre-decree abductions are the most common type of abduction, and are likely disproportionately common among domestic violence victims who take their children.¹⁸

The U.S. Sixth Circuit Court of Appeals has held that in the absence of a ruling from a court in the country of habitual residence, the only acceptable solution is to “liberally find ‘exercise’ whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.”¹⁹ The court held that if a person has valid custody rights to a child under the law of the country of the child’s habitual residence, “that person cannot fail to ‘exercise’ those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.”

In cases where there is a custody decree in place, it is clear when a breach of custody rights has occurred. When a decree grants visitation rights only, the return remedy is not triggered if the child is taken away from the parent with visitation rights.²⁰ The Second Circuit in *Croll v. Croll* held that, even if a right of access to the child is coupled with an *ne exeat* clause (which forbids a person from leaving a geographic area), it does not constitute rights of custody under the Convention.²¹ Nevertheless, foreign courts had previously held otherwise, and have subsequently rejected this holding.²² Although it is not guaranteed by the Convention, a parent can ask the foreign central authority to help arrange access to the children for visitation, pursuant to Article 21, either during the pendency of a return case, following the unsuccessful conclusion of a return proceeding, or instead of seeking return of the child. The central authority in a country upholding the Hague Convention has been designated by that country to carry out the special duties imposed by the Convention, in particular, to promote cooperation among their respective countries in securing the prompt return of children.²³ Under the Hague Convention, the central authority in the requested country has the primary responsibility for processing applications under the Convention.

¹⁵ Hague Convention, Oct. 25, 1980, art. 5, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

¹⁶ See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 636 (2000).

¹⁷ See *id.*; see also *In re Michael B.*, 80 N.Y.2d 299, 309 (N.Y. 1992).

¹⁸ See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 636 (2000). Oftentimes, victims of domestic violence must make quick decisions regarding their safety and that of their children. Utilizing the court system may heighten their danger; thus many victims choose to leave with their children without a court order. The risk of domestic violence directed both towards the child and the victim is frequently greater after separation than during cohabitation; often the risk continues after legal interventions have been initiated.

¹⁹ See *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996) [hereinafter *Friedrich II*]. The Court gave three reasons for its expansive interpretation: 1) American courts are not well-suited to determine the consequences of parental behavior under the law of a foreign country; 2) an American decision about the adequacy of one parent’s exercise of custody rights is dangerously close to the forbidden territory of the custody dispute; and 3) the confusing dynamics of quarrels and informal separations make it difficult to adequately assess the acts and motivations of a parent. *Id.* at 1065.

²⁰ Although the Convention provides remedies for a violation of access rights, these do not include the remedy of an order to return the child to their habitual residence. Hague Convention, Oct. 25, 1980, art. 21, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

²¹ See *Croll v. Croll*, 229 F.3d 133, 135 (2nd Cir. 2000). The *ne exeat* clause in *Croll* provided that the child could not be removed from Hong Kong, her place of residence, without the permission of both parents. *Croll*, 229 F.3d 133 *Id.* at 135.

²² See Merle Weiner, *Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUMAN RIGHTS L. REV. 275, 316, 335 (2002) (citing subsequent rejections of *Croll*, including the South African Constitutional Court in *LS v. AT*, 2000 SACLR Lexis 20, 26-27 (CC Apr. 12, 2000) (rejecting *Croll* holding as “contrary to the weight of authority,” and quoting *Croll*’s dissent); *Fawcett v. McRoberts*, 168 F. Supp. 2d 595 (W.D. Va. 2001) (declining to follow *Croll* in finding that rights of non-custodial mother embodied in interim order and Scottish statutory law fall within “plain language” of Treaty).

²³ Hague Convention, Oct. 25, 1980, art. 7, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

There are several cases in the United States and elsewhere, however, which have held that other types of parenting arrangements and custody orders can create custody rights. In a few decisions, U.S. courts have interpreted a restriction on a child and parent's movement to create custody rights, in some cases even if the left-behind parent only has visitation rights. In *David v. Zamira*, a New York court found that, when a mother moved her child to New York in violation of an interim order which prevented her from moving outside the Metropolitan Toronto area, the father's custody rights had been violated.²⁴ This was despite the fact that the mother had been granted custody, and the father granted visitation, in the earlier separation agreement.²⁵ In *C v. C*, the custodial parent took the child to England from New York.²⁶ Despite the fact that New York's custody order did not expressly forbid the mother from moving the child to another state or country, the English court found that the non-custodial parent's custody rights had been violated, since under New York case law, the custodial parent could not remove the child from the jurisdiction without applying for permission.

It is also possible that a right of custody can be established when the parents have deviated from the terms of their custody order, and their act is held to supercede the judicial order for purposes of the Convention. Article 3 allows rights of custody to arise, "by reason of an agreement having legal effect under the law of that [country]."²⁷

There are a few ways in which a lawyer can establish the violation of custody rights before the courts of the requested country. Under Article 14, the requested country can take notice of the law of the habitual residence without "recourse of the specific procedures for the proof of that law."²⁸ Under Article 15, the requested country may request that the applicant obtain a decision or other determination that the removal or retention from the habitual residence was wrongful. Even if it has not been required by the requested country, it may be advisable for an applicant to obtain a ruling from the courts of the country of habitual residence that the other party has interfered with or violated their custody rights and introduce it in the Hague Convention proceeding.²⁹

HABITUAL RESIDENCE

The Convention does not define the term "habitual residence". The Convention's drafters intended this to be a factual determination. There are no technical regulations or even a list of factors that courts must consider. This makes it extremely difficult to advise clients when they want to prove where the child's habitual residence would be, if faced with a Hague Convention petition.

The majority of courts seem to focus on the child's life and how settled the child is in that residence, rather than the amount of time that the child has lived in one place or another. The general standard upon which most courts have relied comes from *In Re Bates*.³⁰ In this case, the English Court focused on the degree of "settled purpose." The court stated, "[a]ll that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."³¹ Various American and foreign courts have followed this idea in determining their own loose definition of habitual residence in Hague Convention cases.³²

²⁴ See *David S. v. Zamira S.*, 574 N.Y.S.2d 429, 432 (N.Y. Fam. Ct. 1991).

²⁵ See *id.*

²⁶ See *C v. C*, [1992] 1 F.L.R. 163.

²⁷ Hague Convention, Oct. 25, 1980, art. 3, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

²⁸ *Id.* at art. 14.

²⁹ See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 20 (1994).

³⁰ See *Re Bates*, (Minor), No. CA 122/89 (Fam. Feb. 23, 1989).

³¹ See *id.*

³² See e.g., *Feder v. Evans-Feder*, 63 F.3d 217, 222-24 (3rd Cir. 1995); *Falls v. Downie*, 871 F. Supp. 100, 102 (D. Mass. 1994); *Slagenweit v. Slagenweit*, 841 F. Supp. 264, 268 (N.D. Iowa 1993); *In re Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993); *Levesque v. Levesque*, 816 F. Supp. 662, 666 (D. Kan. 1993).

While courts have generally followed the idea of a “settled purpose,” rather than relying on a certain amount of time to establish a habitual residence, there is no one interpretation of “settled purpose” and the body of case law is contradictory and confusing. The Sixth Circuit in *Friedrich v. Friedrich (Friedrich I)* stated that, “habitual residence must not be confused with domicile. To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.”³³ In *Friedrich I*, the child was born in Germany to a German father and an American mother and lived exclusively in Germany, before he was removed to the United States. The father had forced the mother and son, Thomas, out of their apartment in Germany and the mother claimed she could not find a place to live in Germany due to military restrictions. The court decided that, although Thomas was a U.S. citizen and his mother intended to return to the U.S. when she was discharged from the military, his habitual residence could not be the United States.³⁴ The court stated that the child’s habitual residence was not based on which parent was the primary caretaker, and could not shift due to who cared or provided for him. The child’s residence could only be altered, “by a change in geography and the passage of time, not by changes in parental affection and responsibility.”³⁵

In *Levesque v. Levesque*, the court, citing *In Re Bates*, found that the arrangements the two parents had made for the mother and child to go to the United States for an indefinite amount of time amounted to a “settled purpose.”³⁶ Here, the mother had taken her child, who had been living alternately in the U.S. and Germany for her entire life, to Germany on a trip. The amount of time was left open and the father had agreed that the child would go with the mother.³⁷ The father then went to Germany and took the child back to the United States.³⁸ When the mother filed a petition in the United States, the court ordered the return of the child to Germany, stating that the child’s habitual residence had shifted with the most recent trip.³⁹ The court emphasized that, even if the father had been misled about the trip, it had been a mutually agreed-upon move, and therefore “amounted to a purpose with a sufficient degree of continuity to enable it properly to be described as settled.”⁴⁰ The court also considered the fact that the mother had not concealed where she was in Germany with the child, and had even made arrangements for the father to come to Germany to visit them.⁴¹

Since this type of agreement can constitute a shift in the child’s habitual residence, this is one possible way for victims of domestic violence to leave their batterer without violating the Convention. If the victim can get the abuser to consent to her and child leaving the country, even if the terms of the trip are unclear, it is possible that a Hague Convention petition, filed by the left-behind abusive father, could be defeated based on the fact that the habitual residence had shifted.⁴² The success of this approach obviously depends on the specific circumstances of the arrangements and on which jurisdiction hears the petition.

The Third Circuit in *Feder v. Evans-Feder* also followed the general standard set forth in *In Re Bates* and *Friedrich I*, stating that the child’s habitual residence, “is a place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a ‘degree of settled purpose’ from the child’s perspective.”⁴³ Unlike the Sixth Circuit in *Friedrich I*, the court found that the child’s circumstances in the new place as well as the parent’s shared intentions regarding the child’s presence must be considered.⁴⁴ Here, the parents had moved to Australia for six months with their four-year-old child. The mother argued that she never intended to remain in Australia permanently, and always believed she would leave if her marriage did not improve.⁴⁵ When she took their child back to the U.S., the father filed a Hague petition. The court found that although the mother did not intend to stay in Australia, the parents had agreed upon the move and made arrangements to make a new home for themselves there. The court, in determining that

³³ See *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) [hereinafter *Friedrich I*].

³⁴ See *id.*

³⁵ See *id.* at 1402.

³⁶ See *Levesque*, 816 F. Supp. at 666.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.* at 665-66.

⁴² See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 649 (2000). Weiner warns that *Levesque*’s usefulness should not be overstated and that there are multiple reasons that this is a difficult way for domestic violence victims to circumvent the Convention’s habitual residence requirement.

⁴³ See *Feder*, 63 F.3d at 224.

⁴⁴ See *id.*

⁴⁵ See *id.*

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Australia had become the child's habitual residence, considered the fact that six months spent in Australia is a significant amount of time for a four-year-old child, and that the child was enrolled in school. The court also noted that the lower court had erred in emphasizing the fact that the majority of the child's life had been spent in the United States and ignoring the fact that he had been in Australia immediately preceding the controversial return to the U.S. with the mother, and the filing of the Hague petition.⁴⁶

In a recent case, *Mozes v. Mozes*, the Ninth Circuit summarized much of the case law surrounding the definition of habitual residence, categorized different relevant fact patterns, and drew its own conclusions regarding the role of the courts in determining habitual residence.⁴⁷ The court stated that, not only is a settled purpose to live in a new place important, but that a settled intention to abandon one's prior habitual residence is a crucial part of acquiring a new one.⁴⁸ The court also confronted the question of whether or not the parent's intentions should be a factor in the child's habitual residence, and found that, when intentions are relevant in the case, the intentions of the parents have to be considered. The court attributed this to the fact that it is the parents who usually decide where the child will live, and the child often has absolutely no role in this decision.⁴⁹ The court divided the various factual circumstances in which the question of habitual residence is discussed into three broad categories.

In the first instance, the parents decide to move their family to a new place but one parent has reservations about the move. Generally, when courts find that the family has taken all the necessary steps to abandon one habitual residence and take up another, the court is unwilling to let the one parent's alleged reservations about the move stand in the way of finding a shared and settled purpose.⁵⁰ In the second set of circumstances, one parent initially relocates the child from an established habitual residence for what is clearly intended to be a limited period of time, such as for vacation, but instead chooses to indefinitely stay there. In these cases, the Ninth Circuit concluded that courts have generally refused to find that the changed intentions of one parent led to a change in the child's habitual residence.⁵¹

The more challenging cases are those in which the petitioning parent had earlier consented to let the child stay abroad for an ambiguous amount of time. Sometimes the courts will find that if the parents had agreed to have the child stay indefinitely, there was a mutual abandonment of the prior habitual residence. In other cases, when the exact length of stay was left open, courts find that they cannot infer intent to abandon a previous habitual residence. The court reasons, that in these cases, the courts should examine the circumstances and defer to the district court's findings. The Ninth Circuit also has warned that the greater the ease with which habitual residence may be shifted, the greater incentive there is for parents to try. This goes against the Convention's purpose to prevent child abduction.⁵²

As evidenced by the case law in both the United States and in foreign countries, it is not the amount of time spent in one country, but the quality of the time spent in the new country, that is determinative. Most courts look closely at the parent's shared intentions regarding moving or traveling with the child. In *Pesin v. Osorio Rodriguez*, the children were in Florida for twenty-three days, and the court found that their habitual residence had not shifted from Venezuela to the United States.⁵³ The court considered that the parents' settled purpose of the trip was a family trip to Florida, finite in its duration. They had packed only for a temporary visit rather than a permanent move; had purchased round-trip tickets; and the children were

⁴⁶ See *id.*

⁴⁷ See *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

⁴⁸ The court does note that it is possible to effectively abandon a prior habitual residence without intending to occupy the next one for more than a limited period. One example of this is the case of *In Re Bates* where the family led a nomadic lifestyle. *Id.* at 1076.

⁴⁹ See *id.*

³⁸ *Id.* at 1077 (citing *Feder*, 63 F.3d at 224; *Walton v. Walton*, 925 F. Supp. 453, 457 (S.D. Miss 1996); *Prevot v. Prevot*, 855 F. Supp. 915, 920 (W.D. Tenn. 1994); *Harsacky v. Harsacky*, 930 S.W.2d 410, 415 (Ky. App. 1996); *Re F (A Minor)* (Child Abduction), 1 FAM. L. REP. 548, 555 (Eng. C.A. 1992)).

⁵¹ *Id.* (citing *Pesin v. Osorio Rodriguez*, 77 F. Supp. 2d 1277, 1285 (S.D. Fla. 1999); *In re Morris*, 55 F. Supp. 2d 1156, 1159 (D. Colo. 1999); *Freier v. Freier*, 969 F. Supp. 436, 438 (E.D. Mich. 1996); *Flores v. Contreras*, 981 S.W.2d 246, 248 (Tex. App. 1998); *Brennan v. Cibault*, 227 A.D.2d 965, 965 (N.Y.A.D. 1996); *Toren v. Toren*, 26 F. Supp. 2d 240, 242 (D. Mass. 1998)).

⁵² See *id.* at 1081.

⁵³ See *Pesin v. Osorio Rodriguez*, 77 F. Supp. 2d 1277 (S.D. Fla. 1999).

enrolled for the entire school year in a Venezuelan school immediately prior to leaving for Florida.⁵⁴ Although the respondent had at one point enrolled the children in a school in Florida, the court determined that the parents lacked a shared intention to remain in Florida.⁵⁵

Courts within the United States have issued conflicting decisions on whether the presence of domestic violence or coercion should be recognized in the determination of habitual residence. In *Ponath v. Ponath*, the court considered that the mother was coerced into staying in Germany rather than returning to the United States and stated that, “in the court’s view, coerced residence is not habitual residence within the meaning of the Hague Convention.”⁵⁶ The mother had testified that she and the minor child were detained in Germany against her wishes by means of verbal, emotional and physical abuse.⁵⁷ The court also stated that the concept of habitual residence must entail some element of purposeful design, often characterized as “settled purpose.”⁵⁸ The court agreed with other jurisdictions that while it is the habitual residence of the child that must be determined, “the desires and actions of the parents cannot be ignored by the court in making that determination when the child was at the time of removal or retention an infant.”⁵⁹

In *Tsarbopoulos v. Tsarbopoulos*, the court held that the “verbal and physical abuse of one spouse by the other is one of several factors in the Court’s determination of the existence of a ‘shared’ intent to make a place the family’s habitual residence.”⁶⁰ The court stated, “If this conduct is present in the marriage, it must be considered by the trial court in taking into account all the circumstances.”⁶¹ The court considered that the verbal and physical abuse intensified during the couple’s time in Greece and the mother was almost completely isolated during her time there.⁶² Although the family was in Greece for twenty-seven months, the court found that the mother did not acclimatize to Greece and, therefore, could not have made Greece her children’s habitual residence or joined her husband in his intent to do so.⁶³ The court took into account that the father dominated all decisions in the family’s life and controlled information in the marriage such that the mother lacked information regarding his true employment, as well as his intentions and actions taken by him to remain permanently in Greece.⁶⁴

Other courts have refused to take any coercion or abuse into account when determining habitual residence. The Eighth Circuit completely rejected *Ponath* in *Nunez-Escudero v. Tice-Menley*, and cited *Friedrich I* for the proposition that the court must focus on the child, not the parents.⁶⁵ In this case, the mother, a U.S. citizen, took her child to the United States from Mexico, where she had resided with her Mexican husband. She argued that she had been a “virtual prisoner” in Mexico, and had no intention of living there. The court rejected her argument and said that, “to say the child’s habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create an impermissible presumption that the child’s habitual residence is where the mother happens to be.”⁶⁶

In *Friedrich I*, the court did not consider the alleged coercion that occurred which led to Mrs. Friedrich leaving Germany with her son and going to the United States. The court found that, even if it accepted the fact that Mr. Friedrich had forced Mrs. Friedrich and their son to leave the family apartment in Germany, their son’s habitual residence had not shifted to the United States.⁶⁷

Another problem in deciphering the habitual residence case law is that, if a parent takes the child to a foreign country, the court in that country will be the one to decide which country is the habitual residence, not a court

⁵⁴ See *id.* at 1286.

⁵⁵ See *id.*

⁵⁶ See *Ponath*, 829 F. Supp. at 368.

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.* at 367.

⁶⁰ See *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1056 (E.D. Wash. 2001).

⁶¹ See *id.* (citing *Mozes*, 239 F.3d at 1080).

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995).

⁶⁶ See *id.*

⁶⁷ See *Friedrich I*, 983 F.2d at 1400-02.

in the United States. Foreign courts do not necessarily follow precedent set by courts in the United States or any other nation; thus, foreign determinations concerning what constitutes habitual residence are often conflicting. Because of these conflicts, some parents have chosen to go and take the child back after they were abducted from the United States so that they can have the habitual residence determined in a U.S. court. In *Meredith v. Meredith*, the mother took her minor child from Arizona on a visit to France, ultimately attempting to conceal the child's whereabouts from her father and establish permanent residency in England.⁶⁸ Nevertheless, the father was able to locate the child and brought her back to Arizona. The mother, who claimed that she resided in England, filed an action under the Convention in an Arizona court for the return of her daughter. The mother's petition was denied upon the court's finding that the child's place of habitual residence was and is Arizona and not England.⁶⁹

DEFENSES TO RIGHT OF RETURN¹²

There are several defenses under the Hague Convention that can be used to overcome the Convention's requirement that a child be returned to their state of habitual residence to have the custody case adjudicated. These defenses are contained in Articles 12, 13 and 20 of the Convention. It must be noted that these defenses only permit a court to exercise its discretion to decide not to return the child to the habitual residence, and are not mandatory.

Under the following narrowly defined circumstances, a foreign country may not order the return of the child. If one of these exceptions applies, the court of the country to which the child was taken may exercise its discretion not to order the return of the child. These exceptions include situations in which:

- More than one year has passed since the abduction and the filing of the application for return of the child, and the child is settled in the foreign country;
- The parent seeking the return was not exercising custody rights, or has consented or acquiesced to the removal or retention of the child;
- There is a risk that if the child were to be returned, the child would be exposed to harm, either physical or psychological, or an intolerable situation
- A child who is of an age to maturely express his/her desires objects to the return¹³
- The return violates the protection of human rights and fundamental freedoms of the foreign nation from whom return is requested. Furthermore, member countries may choose not to cooperate if there is a pending criminal trial against the removing parent.

1. Article 13(a): Exercising Custody Rights and Consent and Acquiescence

Under Article 13(a), a court can deny return if the petitioner was not "actually exercising" custody rights at the time of removal, or if she consented to the removal or retention. This is merely a corollary to the definition of a "wrongful removal" in Article 3.

The second part of Article 13(a) provides that, if a parent consents or subsequently acquiesces to the removal, the child does not necessarily have to be returned. There is conflicting case law interpreting what constitutes "acquiescence," but the general trend is for courts to limit the interpretation.⁷⁰ The abductor typically has the burden of proof of the consent defense and must show by a preponderance of the evidence that the petitioner consented to, or subsequently acquiesced to, the children either moving or staying with the respondent.⁷¹ Parents who negotiate custody arrangements after the abduction and who later bring actions under the Convention are sometimes faced with this defense.

⁶⁸ See *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Ariz. 1991).

⁶⁹ *Id.*

⁷⁰ Lara Cardin, *Comment: The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Nonsignatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 149 (1997).

⁷¹ See *Friedrich II*, 78 F.3d at 1067 (citing Hague Convention, Oct. 25, 1980, art. 13(a), T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html> and 42 U.S.C. §11603(e)(20)(B)).

Courts in the United States, England, and France have found acquiescence to be a subjective test.⁷² The English House of Lords has held, “Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world’s perception of his intentions.”⁷³ In the French case of *Horlander v. Horlander*, the court held that the actions of a father who negotiated to create an overall settlement of custody and property should not be construed as acquiescence, overturning other decisions from France’s lower courts that accepted broad interpretations of acquiescence to avoid returning children.⁷⁴ The high court found that acquiescence is subjective, and refused to find acquiescence where the petitioner’s intention to acquiesce was not “unequivocal.”⁷⁵

A number of courts have interpreted the defense quite narrowly. The court in *Friedrich II* held that “acquiescence under the convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written enunciation of rights; or a consistent attitude of acquiescence over a significant period of time.”⁷⁶ The court also said “subsequent acquiescence requires more than an isolated statement to a third party. Each of the words and actions of a parent during the separation are not to be scrutinized for a possible waiver of custody rights.”⁷⁷ The First Circuit found there was no acquiescence in a case in which the petitioner had failed to institute formal custody proceedings and had hand-written a note in which he purportedly acknowledged that the respondent could relocate with their child to the United States as long as the child flew back to Mexico for a few holidays each year. The Court found that this note, on its face, did not constitute a waiver of custody rights by the petitioner.⁷⁸

2. Article 13(b): Grave Risk of Harm and Intolerable Situation

This is the most litigated exception. It provides that, if the return of the child would create a “grave risk of psychological harm or otherwise place the child in an intolerable situation,” the court can deny the return. The terms “grave risk” and “intolerable situation” are not defined anywhere in the Convention, but have been interpreted narrowly. Courts have applied the defense sparingly, keeping in mind that it has the potential to turn the court’s decision into one based on the merits of custody, or a “best interest” analysis.⁷⁹ For instance, the implementing legislation in the United States, the International Child Abduction Remedies Act (ICARA)⁸⁰, requires this defense to be proven by clear and convincing evidence.⁸¹ Drafters intended this defense to apply to not just a serious, but only to a grave risk, such as physical or sexual abuse of the child.⁸²

This may be the best defense under the Convention for victims of domestic violence who flee with their child to another country, but a U.S. or foreign court will not necessarily accept it. When the Convention was drafted, the idea that the abductor may be a victim of domestic violence who flees to another country to escape her abuser was not discussed. The Convention was created to discourage abductions by parents who either lost, or would lose, custody. It was not considered that the abductor would be the primary caretaker.⁸³ More recently, courts have had to make decisions in cases that involve primary caretakers abducting their children to escape abuse. This has led to an uneven body of U.S. and foreign case law analyzing the Article 13(b) defense in relation to domestic violence.⁸⁴

⁷² *Pesin*, 77 F. Supp. 2d at 1288.

⁷³ *Re H and Others*, 2 W.L.R. 563, 573B (1997) (citing *Friedrich II*, 78 F.3d at 1060; *Wanninger v. Wanninger*, 850 F. Supp. 78 (D. Mass. 1994); *Horlander v. Horlander*, 1992 Bull. Civ. I, No. 91-18.177).

⁷⁴ See *Horlander v. Horlander*, 1992 Bull. Civ. I, No. 91-18177.

⁷⁵ See *id.*

⁷⁶ See *Friedrich II*, 78 F.3d at 1070.

⁷⁷ See *id.* (citing *Wanninger*, 850 F. Supp. at 81-82).

⁷⁸ *Whallon v. Lynn*, 230 F.3d 450, 461 (1st Cir. 2000).

⁷⁹ See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 27 (1994).

⁸⁰ International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. 11601-11610).

⁸¹ 42 U.S.C. 11603(e)(2)(A).

⁸² Lara Cardin, *Comment: The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-signatory Nations: Getting to Square One*, 20 HOUS. J. INT’L L. 141, 151 (1997) (citing the Hague Convention, 51 Fed. Reg. at 10, 510).

⁸³ See Merle Weiner, *Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUMAN RIGHTS L. REV. 275, 278 (2002).

⁸⁴ See *id.* at 277-80. Weiner states that between July 2000 and January 2001, seven of the nine cases decided by the U.S. Courts of Appeals involved an abductor who alleged she was a victim of domestic violence. Weiner believes that in some of

Although it is rare, in some cases the courts in the United States have denied the left-behind parent's petition to return the child. The return may be denied due to a pattern of violence or an extreme situation that clearly threatens the child. The First Circuit in *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000), reversed and remanded the district court's decision to grant the petitioner's request for return of the child, based upon the father's pattern of violence. This included extensive abuse towards his wife, as well as fights and threats against other people, including a fight with his son and a threat to kill a young neighbor.⁸⁵ The First Circuit found that the district court erroneously had required a showing of an "immediate, serious threat" to the children under Article 13(b). The Court said that the "Convention does not require that the risk be 'immediate,' only that it be grave."⁸⁶

The First Circuit also discussed the potential use of the "undertakings approach" that has been adopted by a number of jurisdictions. "Undertakings" are steps that can be taken by the petitioner or country of habitual residence to ensure the child's safety and well-being should he or she be returned to that country under the Convention for a custody determination. Examples of undertakings include financial assistance, a place to stay that the alleged abuser cannot enter, and an alternate temporary caretaker.⁸⁷ The court in *Walsh* stated "a potential risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings."⁸⁸ In this case, however, it was decided that there was no way, even with undertakings, to return the children without exposing them to grave risk of physical and psychological harm.⁸⁹ It should be noted that this was an extreme set of facts that included a severe and extensive pattern of spousal abuse by the father. It included beating his wife while she was six months pregnant, as well as abuse towards others.⁹⁰ A doctor in the United States diagnosed the daughter as having post-traumatic stress disorder when she was brought to the United States, which later went into remission. He believed that she would have a relapse if she returned to Ireland, where she had previously lived with her family.⁹¹

The court in *Walsh* considered the affect of spousal abuse on children and said that the district court had "inappropriately discounted the grave risk of physical and psychological harm to children in cases of spousal abuse."⁹² The court cited the fact that credible literature established that serial spousal abusers are also likely to be child abusers, and that both state and federal law have recognized that the children are at increased risk of physical and psychological injury when they are in contact with a spousal abuser.⁹³

The First Circuit, in *Danaipour v. McLarey*, has also held that sexual abuse of a child satisfies both prongs of the Article 13(b) defense: intolerable situation and grave risk.⁹⁴ The court found that the district court had

these decisions, the courts have adopted novel interpretations in an effort to avoid applying the Convention to these abductors. Weiner argues that while the courts may have reached the correct result, their departure from precedent (including foreign cases) and their rejection of uniformity are mistakes that could potentially affect the strength of the Convention as a whole.

⁸⁵ See *Walsh*, 221 F.3d at 220.

⁸⁶ See *id.* at 218.

⁸⁷ See *C v. C*, 2 All E.R. 465 (Eng. C.A. 1989). See also, *Korowin v. Korowin*, Dist. Ct. Horgen (1992) (observing that Convention would require return of mother in these specific circumstances although Court did not order it and noted that husband was willing to provide housing and costs while custody proceedings were pending in Michigan); *PF v. MF*, (1992) 2 Ir. S.C. 390 (noting Court might go further in an appropriate situation and require father to prove he had made necessary arrangements for care of family).

⁸⁸ See *Walsh*, 221 F.3d at 218. Note that not every jurisdiction has concluded that undertakings can be a sufficient reason to return a child after finding that there is a grave risk of harm. The Third Circuit, in remanding a case to the district court for a determination of whether the mother could establish an Article 13(b) defense, held that if the court ordered the return of the child, but also determined that an unqualified return order would be detrimental to the child, the court should investigate the adequacy of the undertakings by the petitioner to ensure that the child does not suffer short-term harm. *Feder*, 63 F.3d at 226.

⁸⁹ See *Walsh*, 221 F.3d at 219.

⁹⁰ See *id.* at 209.

⁹¹ See *id.*

⁹² See *id.*

⁹³ The court in *Tsarbopoulos*, holding that the Article 13(b) defense applied, cited the First Circuit in *Walsh* for having ruled, *inter alia*, that the exposure of the children to a spousal abuser would expose the children to the risk of abuse. 176 F. Supp. 2d at 1059. The court in this case stated that spousal abuse "is a factor to be considered in the determination of whether or not the Article 13(b) exception applies because of the potential that the abuser will abuse the child." *Id.*

⁹⁴ See *Danaipour v. McLarey*, 286 F.3d 1 (1st Cir. 2002).

erred in determining that the Convention did not require it to determine the issue of sexual abuse in ordering a mother to return to Sweden with her children for a forensic evaluation. The appeals court remanded the case for the district court to determine if there was any sexual abuse by the father towards his children while living in Sweden. The First Circuit relied on the United States State Department's legal analysis of Article 13(b) which states that "[a]n example of an 'intolerable situation' is one in which a custodial parent sexually abuses a child."⁹⁵ The court in *Danaipour* stated that the district court had incorrectly relied on the assumption that it could impose undertakings that would keep the children from being exposed to any grave risk of harm or an intolerable situation.⁹⁶ The court cautioned that the use of undertakings should be limited in scope, and noted that the concept is a judicial construct, based neither in the Convention, nor in the implementing legislation of any nation.⁹⁷ The Court cited *Walsh* and admitted that undertakings can be "an important tool for courts to comply with the Convention's strong presumption of a safe and speedy return of the wrongfully removed child."⁹⁸ But it also stated that there are limits to the court's ability to use undertakings to avoid an Article 13(b) defense, and that the court entertaining the petition "must recognize the limits on its authority and must focus on the particular situation of the child in question in order to determine if the undertakings will suffice to protect the child."⁹⁹

The Second Circuit also limited the use of undertakings as it expanded the Article 13(b) defense in *Blondin v. Dubois*.¹⁰⁰ While the court recognized that returning the children to the father would expose them to a "grave risk of harm" based upon the abuse that had occurred, it did remand the case back to the district court for a more "complete analysis of the full panoply of arrangements that might allow the children to be returned to the country from which they...were wrongfully abducted, in order to allow the courts of that nation an opportunity to adjudicate custody."¹⁰¹ The Second Circuit found on its second hearing that France, the country of habitual residence, could not do anything to provide the children with the necessary protection from a grave risk of harm.¹⁰² There had been a serious history of abuse, and in the course of seven years, the father had repeatedly beaten and threatened to kill both his wife and his daughter.¹⁰³ The district court had examined all social services that could be offered to the children in France, as well as the husband's financial assistance, his agreement not to make contact, and the French government's agreement not to prosecute Dubois for abduction or forgery of the children's passports. The Second Circuit accepted the district court's decision that any arrangements would fail to mitigate the grave risk of harm to the children, because returning to France under any circumstances would cause them psychological harm.¹⁰⁴

The Supreme Court of Connecticut followed the Second Circuit's lead and remanded the case of *Turner v. Frowein* for a more complete examination of possible undertakings.¹⁰⁵ The court then reversed the trial court's decision denying the return of a child after its finding that his father had sexually abused the child. The Connecticut Supreme Court held that the trial court's finding on the sexual abuse was proper, but that the court had failed to examine whether the child could be returned with certain undertakings provided. The court stated that, "the trial court offered no explanation for why the child should not be returned to Holland in the temporary custody of some appropriate and suitable party, other than the defendant, with adequate guarantees of child protection."¹⁰⁶

The Second Circuit's interpretation of the Article 13(b) defense is not followed by all jurisdictions. The Eighth Circuit specifically rejected the idea that the Article 13(b) exception applies only if the government

⁹⁵ *Id.* at 37 (citing *Blondin v. Dubois*, 238 F.3d 153, 162 n.10 (2nd Cir. 2001) [hereinafter *Blondin III*]).

⁹⁶ *Id.* at 53.

⁹⁷ *Id.*

⁹⁸ *Id.* at 55.

⁹⁹ *Id.*

¹⁰⁰ *Blondin III*, 238 F.3d 153 (2nd Cir. 2001).

¹⁰¹ *Blondin v. Dubois*, 78 F. Supp. 2d 283, 284 (S.D.N.Y. 2000) [hereinafter *Blondin II*] (citing *Blondin v. Dubois*, 189 F.3d 240, 242 (2nd Cir. 1999) [hereinafter *Blondin I*]).

¹⁰² *Blondin III*, 238 F.3d at 162.

¹⁰³ *Blondin II*, 78 F. Supp. 2d at 283.

¹⁰⁴ *Blondin III*, 238 F.3d 153 at 152. Although the Second Circuit denied the petition for return, the court did use a strict standard for proving the Article 13(b) defense, applying the standard in *Friedrich* to determine whether there was a grave risk to the children. *Id.* at 162-63.

¹⁰⁵ *Turner v. Frowein*, 752 A.2d 955 (Conn. 2000).

¹⁰⁶ *Id.*

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agencies and courts of the habitual residence are unable to protect the child if he is returned to that country.¹⁰⁷ The court said that, “[i]t is clear that Article 13(b) requires more than a cursory evaluation of the home jurisdiction’s civil stability and the availability there of a tribunal to hear the custody complaint. If that were all that were required, the drafters of the Convention could have found a clear, more direct way of saying so.”¹⁰⁸

Courts in the United States have generally ordered the return of the child when the Article 13(b) defense is argued. While the courts do not want to enter into a best interests analysis, it is unclear what the exact standard for examining the defense should be. In *Tahan v. Duquette*, the court, in holding that the child must be returned to his country of habitual residence, held that psychological profiles and evaluations of parental fitness were inappropriate on a return petition, and that the “Article 13(b) inquiry was not intended to deal with issues or factual questions which are appropriate for consideration in a plenary custody proceeding.”¹⁰⁹ The court did acknowledge, however, that the trial court’s holding that the proper scope of inquiry precludes any focus on the people involved is too narrow and mechanical, and that the court should focus on the child’s well-being and analyze “the surroundings to which the child is to be sent, and the basic personal qualities of those located there.”¹¹⁰

When applying this defense to victims of domestic violence, it is more likely that courts will only choose not to order return when the abuse or violence directly affects the child. Courts generally rely on the courts in the place of the child’s habitual residence to sort out the claims of violence or abuse, and to take the necessary measures.¹¹¹ The First Circuit in *Whallon v. Lynn* applied the language regarding “grave harm” from *Walsh*, and used the extreme conduct cited there as a bar that must be reached for there to be “grave risk of harm.”¹¹² The court found that the abuse with which the petitioner was accused did not rise to the level of the conduct of the petitioner-father in *Walsh*.¹¹³ While the mother had been abused verbally and physically, and the petitioner’s stepdaughter had been abused verbally, there were no allegations that the petitioner had abused his five-year-old daughter.¹¹⁴ The First Circuit also found that the district court had correctly considered the alleged psychological harm to the young child in question, and had concluded correctly that any such harm did not rise to the level required to sustain the Article 13(b) defense.¹¹⁵ The court also noted that, while a separation of the child from the mother would undoubtedly be difficult, that type of harm was not “*per se* the type of psychological harm contemplated by the narrow exception under Article 13(b).”¹¹⁶

In *Tabacchi v. Harrison*, a woman’s husband extensively physically abused her. She eventually left Italy where they were living and took their child to the United States.¹¹⁷ When she raised the Article 13(b) defense, citing her husband’s domestic violence, the court rejected her argument. The court said that the “primary risk of physical harm is to Harrison [the mother], not to [the child],” and noted that the child had not been hurt during any of the altercations.¹¹⁸

Although some foreign courts have made decisions denying the return, they have also generally refused to accept the defense.¹¹⁹ One Canadian example of a decision to return is the case of the Canadian decision in *Pollastro v. Pollastro*.¹²⁰ In that case, the court denied the return of the child based upon the father’s physical abuse of the mother, despite the fact that there was no evidence that the son had ever been abused. The judge

¹⁰⁷ *Nunez-Escudero*, 58 F.3d at 377.

¹⁰⁸ *Id.* (citing *Tahan v. Duquette*, 613 A.2d 486, 489 (N.J. Super. A.D. 1992)).

¹⁰⁹ *Tahan*, 613 A.2d at 489.

¹¹⁰ *Id.*

¹¹¹ See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 657-58 (2000).

¹¹² *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000).

¹¹³ *Id.* at 460.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Tabacchi v. Harrison*, NO. 99-C4130, 2000 WL 190576, 13 (N.D. Ill. Feb. 109, 2000).

¹¹⁸ *Id.*

¹¹⁹ See e.g., *Re S*, 3 FCR 43 (Eng. C.A. 2002) (finding that the child’s return to Israel, while creating “very real and worrying problems which will confront the mother and daughter,” did not produce a situation that is intolerable); *Re B*, 2 FCR 531 (C.A. 2001).

¹²⁰ *Pollastro v. Pollastro*, [1999] D.L.R. (4th) 32 (Ont. Ct. App.).

determined that returning a child to a violent environment placed him in an intolerable situation, as well as exposed him to a serious risk of psychological and physical harm.¹²¹ Although the father had never abused his son in the past, the court found that the father's ongoing hostility, irresponsibility, and irrational behavior put him at serious risk of personal harm.¹²² The court also took account of the fact that the mother was the only capable parent, creating a situation in which the child's interests were "inextricably tied to her psychological and physical security."¹²³

The same Canadian court came to the opposite conclusion in *Finizio v. Scoppio-Finizio*, constructing some boundaries in its "grave risk" analysis.¹²⁴ In this case, there had only been one violent incident towards the mother by the father, and no evidence that the children had ever been hurt. Although the court acknowledged that it is possible for a physical attack on the mother to cause psychological harm to her children, the court stated that this situation was, "far from the terrifying situation chronicled...in Pollastro."¹²⁵

The narrowest interpretation of the Article 13(b) defense is the 6th Circuit's decision in *Friedrich v. Friedrich (Friedrich II)*.¹²⁶ The court stated that a grave risk of harm could exist in only two situations. The first is when return of the child puts the child in "imminent danger *prior* to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine or disease." The second is in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.¹²⁷ In *Friedrich II*, the respondent argued that the child would be subjected to grave psychological harm if he returned to Germany, as the child had grown attached to family and friends in Ohio.¹²⁸ The respondent also hired an expert psychologist who testified that returning the child to Germany would be traumatic and difficult for him, since he was currently happy and healthy in America with his mother. There was no allegation of abuse, or anything in the record to indicate that life in Germany would be particularly difficult or harmful for the child.¹²⁹ The Court made it clear that the return of the child did not depend upon which place would be a better home for the child to grow up. It stated that the "exception for grave harm to the child is not license for a court of the abducted-to country to speculate on where the child would be happiest."¹³⁰ The court also noted that if the child were to be returned to a country that was considered dangerous or a bad place to grow up, the court would expect the court of that country to respond accordingly and award custody to the parent in the other country. The Sixth Circuit also stated that international precedent, as well as the U.S. State Department's interpretation, supported their restrictive reading of the grave harm exception.¹³¹

Several courts have considered the potential separation of a child from a parent to whom he or she is attached as harm that generally does not rise to the level of the Article 13(b) defense. The Eight Circuit in *Nunez-Escudero v. Tice-Menley* found that the district court had incorrectly factored in the possible separation of the infant from his mother in assessing whether the return would constitute a grave risk of physical or

¹²¹ *Id.* at 26.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Finizio v. Scoppio-Finizio*, [1999] 46 O.R. (3d) 226 (Ont. Ct. App.).

¹²⁵ *Id.*

¹²⁶ *Friedrich II*, 78 F.3d 1060.

¹²⁷ *Id.* at 1069. The decision in *Friedrich II* has recently been followed in *March v. Levine*, 249 F.3d 462 (6th Cir. 2001). The court held that, despite a default judgment obtained against the father after the disappearance of their daughter, there was no grave risk of returning the children to their father. The Sixth Circuit held that the inference that could be drawn from that judgment (that the father might hurt his children) "did not rise to the level of an imminent risk of grave harm." *Id.* at 472. The court also noted that the respondents had not shown that Mexico, the country of habitual residence, was incapable or unwilling to protect the children. *Id.*

¹²⁸ *Id.* at 1067.

¹²⁹ *Id.* at 1068.

¹³⁰ *Id.* at 1068.

¹³¹ The Sixth Circuit cited the international cases of *Thomson v. Thomson*, 119 D.R.L. (4th) 253 (Can. 1994) (finding exception applies only to harm "that also amounts to an intolerable situation." *Id.* at 286); *In re A.*, 1 F.L.R. 365, 372 (Eng. C.A. 1988) (finding harm required is "something greater than would normally be expected from taking a child away from one parent and passing him to another"). The State Department's analysis included the statement that the phrase "intolerable situation" was "not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an 'intolerable situation' is one in which a custodial parent sexually abuses the child." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494,10510 (March 26, 1986).

psychological harm, or place him in an intolerable situation.¹³² The Court based its reasoning on a narrow interpretation of the 13(b) clause from a Canadian court. The Canadian court had found that, although the word ‘grave’ modifies ‘risk’ and not ‘harm,’ it must be read in conjunction with the clause, “or otherwise place the child in an intolerable situation.” The use of the word ‘otherwise,’ then leads to the conclusion that the physical or psychological harm must be harm that also amounts to an “intolerable situation.”¹³³ The Eighth Circuit remanded the case to give the respondent another opportunity to present evidence that the return of the child would subject him to a grave risk of harm or otherwise place him in an intolerable situation. The court instructed the district court not to consider evidence relevant to custody or the best interests of the child.¹³⁴ The Fifth Circuit came to the same conclusion in *England v. England*, holding that the separation of a child from her parent should not be considered in the grave risk analysis.¹³⁵

There are exceptions to the concept that the potential harm of a child’s separation from a parent should not be considered in a grave risk analysis. A district court in Arizona held that the child in question should not be returned to his father, the petitioner, because he faced a graver risk of psychological harm if he was removed from his mother for any period longer than a few weeks.¹³⁶ The court acknowledged that the respondent would not be able to make the requisite showing under the Sixth Circuit’s analysis in *Friedrich*, but the court cited in support of its holding an Eighth Circuit case in which the court suggested the possibility of evidence of potential harm to a child as a result of separation from a primary caregiver, as well as a German case where the court held that a grave risk existed if the child was returned because of an intensive bond between the mother and child.¹³⁷

In the United Kingdom it is not uncommon for respondents to take one step further and argue that a parent who is unhappy because of the return would also make an unsuitable parent, creating an intolerable situation or grave risk for the child under her care.¹³⁸ In *P v. P*, the mother (respondent) argued that because she would be forced to return to New Jersey from England with the child, she would become isolated and depressed, as compared to staying in England where she was surrounded by her family and friends.¹³⁹ She argued that her children were still of the age that they were acutely sensitive to their mother’s feelings and would suffer psychological harm if forced to return with the mother to New Jersey. The United Kingdom court held that the argument that an “unhappy mother means unhappy children” was not valid in a Hague Convention hearing, and belonged in the custody dispute in the country of habitual residence. The judge stated that this type of argument is “beside the point,” because the Convention assumes that the courts in all of its signatories are capable of handling such concerns and when they adjudicate custody cases on their substantive merits.

The English Court of Appeal in *In Re C* came to the same conclusion in a case where the mother attributed her children’s risk of harm to the uncertainties and anxiety that would come from splitting up her family.¹⁴⁰ The mother would be forced to return with the children to the United States while leaving behind the children’s stepfather, who was unable to enter the United States because of immigration problems. The lower court judge had found that the mother would be “significantly handicapped from performing the functions expected of a mother of children of this age,” due in part due to the stress of leaving her husband and the risk that the mother would be prosecuted in California for the removal of the children.¹⁴¹ The Court of Appeals overturned the lower court’s decision to deny the return, finding that the lower court had given undue weight to the slight evidence of a risk of psychological harm to the children. Moreover, as the potential splitting up of the family and the possible criminal prosecution of the mother were situations created by the mother, the

¹³² *Nunez-Escudero*, 58 F.3d at 377.

¹³³ *Id.* at 374 (citing *Thomson v. Thomson*, 119 D.L.R.4th 253, 286 (Can. 1994)).

¹³⁴ *Id.* at 379. The Court in *Dalmasso v. Dalmasso*, 9 P.3d 551 (Kan. 2000), following the Eighth Circuit’s reasoning concerning the level of potential harm to the child, granted the return of the child. The court found that two incidents of spousal abuse by the petitioner towards his wife, and his wife’s testimony that the petitioner had hit their children with a belt during meals, was not enough to demonstrate an Article 13(b) defense. The court did note that there was evidence that the mother had also used corporal punishment on her children. *Id.* at 763.

¹³⁵ *England v. England*, 234 F.3d 268-69 (5th Cir. 2000).

¹³⁶ *Steffen F. v. Severina P.*, 966 F. Supp. 922 (D. Ariz. 1997).

¹³⁷ *Id.* at 928.

¹³⁸ The judge in *P. v. P.* stated that, “[a]rguments of that kind are commonly raised within this jurisdiction” but are really “beside the point.” 1 F.L.R. 155 (1992) (High Ct. Fam. Div.).

¹³⁹ *Id.*

¹⁴⁰ *Re C* (Abduction: Grave Risk of Psychological Harm), 1 Fam. L. Rep. 1145 (Eng. C.A. 1999).

¹⁴¹ *Id.*

court concluded that it would be wrong to allow her to rely upon adverse conditions that she herself had created. While the lower court had found evidence that the father had hit the children in the past, the judge concluded that there was no grave risk of physical harm if the children were returned, as any future contact with the father was to be supervised by the U.S. court. The English Court of Appeal stated their intervention cannot also reduce the risk of psychological harm.

Article 13(b) also allows for a court to refuse returning a child if the child has “attained an age and degree of maturity at which it is appropriate to take account of its views” and objects to being returned. Nevertheless, this defense has been construed narrowly. A California court ruled that a twelve-year-old girl was not of sufficient age and maturity for the court to take her views into account.¹⁴² In *Tahan v. Duquette*, the court, after reviewing the evidence from a psychologist who had interviewed the nine-year-old girl in question, held that “this standard simply does not apply to a nine-year-old child.”¹⁴³ The Fifth Circuit in *England v. England* found that a thirteen-year old girl was not mature enough for the court appropriately to consider her views under the Convention, and stated that, like the grave risk exception, the “age and maturity” exception is to be applied narrowly.¹⁴⁴ The court also pointed out that it is the party opposing the child’s return who has the burden of establishing the child’s maturity by a preponderance of the evidence, and not that of the petitioner to show that the child is too immature to have his or her views considered.¹⁴⁵ In determining the child’s maturity in this case, the court considered the fact that she had had four mothers in twelve years, had been diagnosed with Attention Deficit Disorder, had learning disabilities, took Ritalin regularly, and was scared and confused by the circumstances producing the litigation.¹⁴⁶

A Swiss court reversed a lower court that had denied a return based upon the objections of two children who were aged twelve and fourteen. The court held that the circumstances of the children and the reasons for their objections needed to be more closely evaluated.¹⁴⁷ The English court in *P. v. P.*, had said that the Convention assumes that courts of the requesting state are “equally capable of ensuring a fair hearing,” and having the child’s wishes about custody considered there.¹⁴⁸ The Court held that it was a matter of the judge’s discretion, and not in the respondent’s right, to have the child’s objections heard by the court. The court declined to hear the eight-year-old girl’s objections based upon the fact that there was no advantage to be gained and valuable time would be lost. Some courts have also refused to recognize certain types of objections, such as the child’s desire simply to stay with the abductor, or a desire that may have been influenced by the abductor.¹⁴⁹

3. Article 20: Fundamental Principles Relating to Human Rights and Fundamental Freedoms

This defense appears broad, but has been interpreted narrowly. Few courts, if any, have accepted a defense invoking Article 20.¹⁵⁰ According to the State Department, the provision was meant to be “restrictively interpreted and applied...on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process.”¹⁵¹ It is not meant to pertain to international agreements dealing

¹⁴² See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 30 (1994) (citing *Bickerton v. Bickerton* (Super. Ct. Contra Costa Cty, July 17, 1991)).

¹⁴³ *Tahan*, 613 A.2d at 490.

¹⁴⁴ *England*, 234 F.3d at 272.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 273.

¹⁴⁷ *Id.* (citing *Rajaratnam v. Rajaratnam-Hertig*, Higher Ct. (Zurick, Switz.) (July 18, 1988)).

¹⁴⁸ *P. v. P.* 1 F.L.R. 155 (1992) (High Ct. Fam. Div.).

¹⁴⁹ See e.g., *Sheikh v. Cahill*, 546 N.Y.S.2d 517 (N.Y. Sup. 1989) (finding that nine-year-old child had not attained age and degree of maturity to warrant court to take account of his view. Although the child said he wanted to stay in the U.S., the court found that “this appeared to be very much the result of his being wooed by this father during the visitation.”); *In Re S*, 2 All E.R. 683, 690 (C.A. 1992).

¹⁵⁰ As of 1997 the Article 20 defense had successfully been invoked only twice in internationally cases where the constitutionality of the Convention itself was challenged—and not at all in the United States. *Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 614 n.36 (E.D. Va. 2002) (citing *Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* (17-21 March 1997), Permanent Bureau of the Hague Conference on Private International Law, 78 (1997)).

¹⁵¹ Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, Pub Notice 957, 51 Fed Reg. 10,494,10,510 (1986).

with human rights and fundamental freedoms, but to the forum state's internal laws.¹⁵² In a recent case, the respondent argued that he had been denied due process in the Colombian courts when the Family Court there had decreed the custody arrangements between him and his former wife, and later ordered increases in support payments without notice. While noting that the facts disclosed no violations of due process rights of either of the parents, the court held that Article 20 does not require the courts to compare the due process safeguards in the petitioner's country, with those in the respondent's country or with some ideal notion of due process.¹⁵³ Victims of domestic violence will probably not be able to use this defense successfully due to its limited interpretation, as well as the fact that most countries do not incorporate freedom from domestic violence into a fundamental principle of human rights.¹⁵⁴

Application of the Convention

A. MECHANICS

The child must be below the age of sixteen for the Convention to apply.¹⁵⁵ Also, if the petition is not brought within one year from the date of the wrongful removal or retention, the court has discretion not to order the return of the child if he or she is "now settled in its new environment."¹⁵⁶ A parent does not have to have a custody order in place to use the Convention.

B. INTERNATIONAL CHILD ABDUCTION REMEDY ACT (ICARA)¹⁵⁷

The International Child Abduction Remedies Act (ICARA) is a federal implementing mechanism that allows parents to seek relief under the Hague Convention. It does not convey any substantive rights itself.¹⁵⁸ There is also no requirement under the Convention or ICARA that discovery be allowed, or that an evidentiary hearing be conducted, and the court is given the authority to resolve these cases without resorting to a plenary evidentiary hearing or a full trial on the merits.¹⁵⁹ Therefore, if there is a dispute over the evidence to be used for or against a Hague petition, the court may resolve this dispute without holding a hearing to consider the parties' arguments.

C. CRIMINAL CHARGES

There is no provision under the Convention for criminal charges. The United States implemented the International Parental Kidnapping Crime Act of 1993 (IPKCA) to make it a criminal offense to remove or retain a child who has been in the United States outside the U.S. borders.¹⁶⁰ The left-behind parent must have had "parental rights" which, for purposes of the Act, means physical custody that can arise by "operation of

¹⁵² Elisa Perez-Vera, Explanatory Report, in Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426, 462 (1982) [hereinafter Perez-Vera Report]. The *Perez-Vera* Report states, "[t]his particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently...it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles." *Id.* Ms. Perez-Vera is the official Conference reporter for the Hague Convention. Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503 (1986).

¹⁵³ *Escaf*, 200 F. Supp. 2d at 614.

¹⁵⁴ See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 665-66 (2000). Weiner contends that victims of domestic violence will have difficulty making a successful argument under Article 20 since domestic violence has only begun to be discussed as a violation of international law. A victim from the United States will have trouble making the argument as well, since there is no provision in the Constitution that people have a right to be free from private violence or its effects.

¹⁵⁵ Hague Convention, Oct. 25, 1980, art. 4, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

¹⁵⁶ *Id.* at art. 12

¹⁵⁷ International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. 11601-11610).

¹⁵⁸ *Mohsen v. Mohsen*, 715 F. Supp. 1063, 1064 (D. Wyo. 1989)

¹⁵⁹ ALR citing ICARA, § 2(a)(4), 6, 42 U.S.C.A §11601(a)(4), 11605; International Child Abduction Convention, Arts. 2, 11, 14, 18, 1988 WL 411501; *March v. Levine*, 249 F.3d 462 (6th Cir. 2001).

¹⁶⁰ 18 U.S.C § 1204(a).

law, court order, or legally binding agreement of the parties.”¹⁶¹ The Act also includes an affirmative defense for a defendant fleeing an incidence or pattern of domestic violence.¹⁶²

It is possible to bring criminal charges against the abductor outside of the Hague Convention. In considering whether to exercise this option in the case of an international abduction, a number of factors should be considered. It is possible that the threat of criminal charges will prompt the parent to return the child, but it is also possible that it will drive the parent into hiding.

The U.S. State Department advises parents to consider that, while the parent may have some degree of control over an ongoing civil procedure, they may not be able to affect the course of criminal action once the charges are filed.¹⁶³ While law enforcement authorities in the U.S. and some foreign countries may be valuable sources of information and assistance, they also may be generally unfamiliar with international child abduction. Also, neither extradition nor prosecution guarantees the return of the child, and, in some cases, may complicate, delay, or jeopardize return of the child. The primary job of the prosecutors is not to obtain return of the child, and there may be conflicting interests once a criminal prosecution begins. The parent should consider the potential reaction of the abductor to the threat of criminal prosecution, and whether it might cause the abductor to go into hiding. If a parent brings criminal charges, she must also consider whether she is prepared to participate in the prosecution if the abductor is ultimately brought to trial, including testifying against him, and possibly having her child’s father be incarcerated.

D. CRIMINAL CHARGES: STEPS THAT CAN BE TAKEN

The U.S. State Department describes the following possible options for bringing criminal charges against the abductor.¹⁶⁴

1. State Arrest Warrant

A parent can contact her local prosecutor or law enforcement authorities to request that the abducting parent be criminally prosecuted and an arrest warrant issued, if state law provides for this. In some states, child abduction or custodial interference is a misdemeanor, but in many states it may be a felony depending on the circumstances of the removal.¹⁶⁵ If the parent is able to obtain a state warrant, the local prosecutor can contact the FBI or the United States Attorney to request the issuance of a federal Unlawful Flight to Avoid Prosecution (UFAP) warrant for the arrest of the abductor.¹⁶⁶ The Federal Parental Kidnapping Prevention Act of 1980 provides for the issuance of the warrant.¹⁶⁷

2. Federal Warrant/Investigation

The abduction could also be a federal offense under the International Parental Kidnapping Crime Act (IPKCA).¹⁶⁸ An unlawful retention after 1993 could violate the statute, even though the actual removal of the child may have occurred before the date of enactment. The FBI is responsible for investigating the abduction.

If the abductor is a U.S. citizen and the subject of a federal arrest warrant, the FBI or the United States Attorney’s office can ask the Department of State’s Passport Office to revoke the person’s United States

¹⁶¹ 18 U.S.C. §1204(a)(2)(B).

¹⁶² 18 U.S.C. § 1204(c).

¹⁶³ <http://travel.state.gov/int'lchildabduction.html>.

¹⁶⁴ *Id.*

¹⁶⁵ See Breaking Barriers, *Custodial Interference Chapter*

¹⁶⁶ For more information, see Department of Justice, “United States Attorneys’ Manual,” Title 9: Criminal Resource Manual, 1962 Unlawful Flight to Avoid Prosecution (October 1997) at

http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01962.htm.

¹⁶⁷ Federal Parental Kidnapping Prevention Act, 28 USC § 1738A (2004).

¹⁶⁸ International Parental Kidnapping Crime Act of 1993, 103 P.L. 173; 107 Stat. 1998 (1993).

passport.¹⁶⁹ If the parent only has U.S. citizenship, when his passport is revoked by the Department of State, he becomes an undocumented alien in a foreign country. Some countries may deport an undocumented alien or make it difficult for them to remain in the country. This option can be useful, but it also might make a parent choose to flee with the child instead of communicating with the left-behind parent.

If the abductor is not a U.S. citizen, the existence of a federal warrant can still be helpful. It may encourage the parent to return the child voluntarily, so that the outstanding warrant will not interfere with his ability to travel to the United States. This is particularly true for abducting parents who need to travel to the United States for business or other related reasons. The warrant also serves to inform the foreign government that the abduction of the child is a violation of U.S. law and the abductor is a federal fugitive. A warrant is also needed if the parent wishes to have authorities seek extradition of the abductor from a foreign country.

3. Accomplices/Agents of Abductor

It is also possible, under some state laws, to take legal action against agents or accomplices to abduction. A parent should consider whether this might be helpful in locating or bringing about the return of her child.

4. Extradition

The State Department warns that extradition is rarely a viable approach in international child abduction cases. The United States Justice Department is responsible for pursuing extradition of wanted persons, and national law enforcement in other countries regularly cooperates in locating and apprehending international fugitives. Extradition is used only in cases that prosecutors believe can be successfully prosecuted due to the sufficiency of the evidence. Also, extradition only applies to the abductor, not to the abducted child. There is no guarantee the child will be returned if the alleged abductor is extradited. There is also a risk that the parent may hide the child with a friend or relative in the foreign country.

The offenses of parental child abduction or custodial interference are covered in only a few of the extradition treaties now in force between the United States and more than 100 foreign countries. Most of these treaties list all covered offenses, and were negotiated before international child abduction became widely recognized. Therefore, there is no valid argument under the same older treaties, that parental child abduction is a covered offense.¹⁷⁰ Newer treaties negotiated by the United States often contain a “dual criminality” provision, which means that, if an offense is a felony in both countries, it is covered in the treaty. If the underlying conduct involved in parental child abduction or custodial interference is a felony in both countries, then that conduct is an extraditable offense under an extradition treaty with a dual criminality approach.

Another problem is that most civil law countries¹⁷¹ refuse to extradite their own nationals. Nearly all the nations of Latin America and Europe are civil law countries. Also, foreign governments are generally reluctant or unwilling to extradite anyone for parental child abduction.

5. Prosecution of an Abductor in a Foreign Country

In many countries (but not in the United States), nationals of a country can be prosecuted for acts committed abroad if the same conduct would constitute a criminal offense under local law. U. S. law enforcement authorities can request such prosecution by forwarding evidence that would have been used in a U.S. prosecution to the foreign country. U.S. witnesses may have to appear to testify in the foreign proceeding.

¹⁶⁹ For the passport to be revoked, the FBI or United States Attorney must send a request for such action and a copy of the federal warrant to the Department of State's Office of Passport Policy and Advisory Services. The regulatory basis for revocation of passports is found in the Code of Federal Regulations (22 C.F.R. § 51.70, et seq. (2004).

¹⁷⁰ Even if the language used in the list of offenses appears broad, such as “abduction” or “kidnapping,” it cannot be argued that parental child abduction was included in the treaties when they were written.

¹⁷¹ Civil law (as opposed to common law) is a legal tradition that developed from Roman law and is the basis of law in many countries, especially in continental Europe and Latin America. In many countries with systems based on civil law, such as France, case law still plays a considerable role.

See Merriam-Webster's Dictionary of Law ©1996, available at <http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com&topic=1c/1c6f7dd27572e05c6139b702a5d3787>.

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The State Department also warns that this approach may be counter-productive and will not necessarily result in the return of the child.

Non-Hague Remedies¹⁷²

Even if the country to which the child is removed upholds the Convention, the parent seeking the child's return should also attempt to pursue non-Hague remedies. Pursuing alternative remedies, in addition to implementing the international child kidnapping prevention strategies discussed above is important because in many instances it is difficult to achieve the return of children through Hague. For example, in 2003 the U.S. has determined that Mexico was "non-compliant" under the Hague Convention because Mexico lacked implementing legislation, resources, and familiarity among the judiciary of the duties and responsibilities of the Convention. Since more children are abducted from the United States and taken to Mexico than any other country, these findings are particularly problematic. The best course of action in all cases for counsel and advocates representing battered women concerned about international abduction is to use all means necessary to prevent these abductions before they take place. Non-Hague remedies may include attempts to negotiate the return of children by friends and relatives of the abducting parent, or by law enforcement officials or prosecutors.

A. CHILDREN'S PASSPORT ALERT PROGRAM¹⁷³

As of July 2, 2001, both parents are required to execute the passport application for a minor child under the age of fourteen.¹⁷⁴ Information regarding the issuance of a passport is available to either parent, regardless of custody rights, as long as the requesting parent's rights have not been terminated. As a result, it is possible for a parent to obtain passport records of their children through the State Department. For this reason, the State Department advises that if a parent believes that her child, whether or not a minor, may be abducted internationally, she should immediately contact the Office of Children's Issues and inform appropriate law enforcement officials.

The Children's Passport Issuance Alert Program (CPIAP) is a service provided by the U.S. Department of State for parents and legal guardians of minor children. Through CPIAP, the State Department's Office of Children's Issues is able to notify a parent or court-ordered legal guardian before issuing a U.S. passport for his or her child. The State Department's Passport Namecheck Clearance System, which generally remains in effect until the child turns eighteen, is the system used to alert a parent when an application for a U.S. passport has been made. While the system can be used to inform a parent or court when an application for a U.S. passport is executed on behalf of a child, the CPIAP does not track or control the use of the passport once it is issued. There are no exit controls for American citizens leaving the United States.

To benefit from CPIAP, a parent, legal guardian, legal representative, or a court of competent jurisdiction must file a written request for entry of a child's name into the CPIAP program with the Office of Children's Issues. In order for the Office of Children's Issues to notify an objecting parent, the parent must have filed, in addition to the parent's written request, a copy of a document that shows the relationship between the child and the objecting parent, such as a birth certificate or court order of guardianship. In utilizing this program, it

¹⁷² For a detailed listing of resources, including references, laws and reading list, visit the U.S. Department of State, Children & Family, International Child Abduction, Child Abduction Resources, available at http://travel.state.gov/family/abduction_resources_04.html.

¹⁷³ Portions of this excerpt were taken from the U.S. Department of State home page, Passport Issuance and Denial to Minors Involved in Custody Disputes—Children's Passport Issuance Alert Program, at http://travel.state.gov/family/abduction_resources_05.html.

¹⁷⁴ Pub. L. No. 106-113, Div B, § 1000(a)(7), 113 Stat. 1536 (enacting into law § 236 of Subtitle A of Title II of Division A of H.R. 3427 (113 Stat. 1501A-430), as introduced on Nov. 17, 1999), provides that before a child under the age of 14 years is issued a passport, the following requirements shall apply:

"(A) Both parents, or the child's legal guardian, must execute the application and provide documentary evidence demonstrating that they are the parents or guardian; or

"(B) the person executing the application must provide documentary evidence that such person—

"(i) has sole custody of the child;

"(ii) has the consent of the other parent to the issuance of the passport; or

"(iii) is in loco parentis and has the consent of both parents, of a parent with sole custody over the child, or of the child's legal guardian, to the issuance of the passport."

is very important to keep the Office of Children's Issues informed in writing of any changes to contact information and legal representation. Failure to update such information could result in a passport issuance for the child without the objecting party's consent.

The CPIAP can also be used to notify a court, in addition to a parent, that the child's other parent has sought passports for the children. In domestic violence cases where there is risk of international child abduction, the court can order that it be notified if the abuser seeks issuance of passports for the children. Such order can be issued as part of a protection order or other family court order in a custody or divorce case, including temporary orders in family court cases. The protection order or other family court order should also include provisions requiring that the abuser not leave the jurisdiction or the country with the children, and that he turn over to the victim (through the court) the children's passports. With such orders in place, the court and the child's non-abusive parent will be notified when the abuser files a passport application. Counsel for the abused parent can then go to court to enforce the court order and have the abuser held in contempt. In doing so, the abused parent might effectively prevent the abduction.

Many children, although born in the U.S. or born abroad to a U.S. citizen parent, are dual citizens of both the U.S. and another country.¹⁷⁵ If a child were a dual citizen, the child's participation in CPIAP would not automatically deter the child from obtaining and traveling on a foreign passport. Each foreign country has its own entry requirements concerning citizenship, passports and visas. Consequently, there is no requirement that foreign embassies adhere to U.S. regulations regarding issuance and denial of their passports to U.S. citizen minors if they have dual nationality. Thus, if a parent suspects that the child may have another nationality; she should contact that country's embassy or consulate directly to inquire about denial of that country's passport to the child.

B. THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT¹⁷⁶ (ICARA) & THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT¹⁷⁷ (UCCJEA)¹⁷⁸

Under the UCCJEA, there is a procedure to ensure a child's safety and presence in the jurisdiction when notice of an enforcement proceeding might cause the recipient to harm or flee with the child. On a finding that a "child is imminently likely to suffer serious physical harm or be removed from the State," section 311 of the UCCJEA authorizes a court to issue a warrant directing law enforcement officers to take immediate physical custody of the child. Warrants to take physical custody of a child (a "pickup" order) are obtained under the UCCJEA in conjunction with an enforcement action. The remedy may be helpful in preventing international abductions. Patricia Hoff, writing for the U.S. Justice Department, points out that, "ICARA contemplates that courts hearing Hague Convention cases may take measures under the State and Federal law to protect the well-being of the child or prevent a further removal or concealment before the final disposition of the petition. Section 311 of the UCCJEA provides the authority to do so."¹⁷⁹

C. OTHER RESOURCES

In addition to programs such as CPIAP, described above, other resources include the Vanished Children's Alliance (VCA),¹⁸⁰ U.S. State Missing Children Clearinghouses, and various state district attorneys' offices. The VCA is a non-profit organization based in San Jose, California, that has assisted left-behind parents of abducted children for more than two decades. Once a case is registered with the VCA, parents receive certain services free of charge, including a toll-free number that is available to receive reports of sightings of

¹⁷⁵ This may occur in a variety of situations, such as through the child's birth abroad, a parent who was born outside the U.S., or a parent who has acquired a second nationality through naturalization in another country.

¹⁷⁶ Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. 11601-11610 (2000)).

¹⁷⁷ Uniform Child-Custody Jurisdiction and Enforcement Act (1997), 9(1A) U.L.A. 649 (1999 & Supp. 2003), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uccjea97.htm> and www.nccusl.org.

¹⁷⁸ See Breaking Barriers, *Protection Orders* Chapter (discussing how protection orders can be used to deter foreign embassies from issuing visas and passports to children).

¹⁷⁹ PATRICIA HOFF, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN, THE UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (Dec. 2001).

¹⁸⁰ For more information, visit the VCA website at <http://www.vca.org> or email gen_info@vca.org. To report a missing or abducted website, fill out their online form, available at <http://www.vca.org/pages/On-line%20notification.htm>.

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abducted children and requests for help. VCA coordinates closely with law enforcement agencies to help find abducted children.

All fifty U.S. states and the District of Columbia have missing children clearinghouses¹⁸¹, although some states do not have the adequate funding or resources for their offices to be effective. Nevertheless, some state clearinghouses, such as the New York State Missing and Exploited Children Clearinghouse have good track records and assist in many cases of international abduction each year.¹⁸² A number of states have also given their district attorneys and investigators the legal tools to locate and return parentally abducted children. This can include a special unit to deal with international and interstate child abduction, and statewide meetings of criminal justice professionals. California has an innovative approach to custodial interference and abduction cases, and many of their District Attorney's Offices are specially equipped to handle such cases.¹⁸³

Other resources include:

- International Police Organization “INTERPOL”
 - Local law enforcement officials will request that a search by the local police department be conducted for the abducted child in the country where the parent believes the child was taken.
 - Contact them by telephone at (202) 616-9000 or visit the U. S. National Central Bureau of Interpol website at www.usdoj.gov/usncb.
- Department of Homeland Security (DHS)
 - If the abducted child is under the age of 21, unmarried and has been taken to a non-Hague country, the USCIS can deny a visa or admission into the U.S. to the removing parent if that parent is not a U.S. citizen. The U.S. will deny that parent from entering the country until the child is returned.
 - Visit their website at <http://uscis.gov/graphics/>.
- US Embassy
 - The Embassy can supply passports, assist in obtaining exit permits and can help to arrange for loans that will pay for the child's return trip to the U.S.
- Child Find of America, Inc.
 - Child Find America is an organization that helps to negotiate a safe return of the child through mediation.
 - Contact them at 1-800-A-Way-Out.
- National Crime Information Center (NCIC)
 - NCIC is a computerized index of criminal justice information (i.e.- criminal record history information, fugitives, stolen properties, missing persons). The database, which is available to Federal, state, and local law enforcement and other criminal justice agencies, can assist authorized agencies in locating missing persons.
 - National Crime Information Center
Criminal Justice Information Services (CJIS) Division
1000 Custer Hollow Road
Clarksburg, West Virginia 26306
Hours of Service: 9:00 a.m. - 5:00 p.m.
Telephone: (304) 625-2000
 - Their website is <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm>.

¹⁸¹ For contact information of U.S. State Missing Children Clearinghouses, visit <http://www.clamb.org/statecle.htm> or <http://www.klaaskids.org/pg-mc-stmisschildclearing.htm>.

¹⁸² Janet Chiancone, Linda Girdner & Patricia Hoff, U.S. Dept. of Justice, *Issues in Resolving Cases of International Child Abduction by Parents*, JUVENILE JUSTICE BULLETIN (Dec. 2001) at 397, 409.

¹⁸³ *Id.* at 408-09.

D. INTERNATIONAL ABDUCTION TO NON-SIGNATORY COUNTRIES

When a child is abducted to a non-signatory country, the Hague Convention does not apply in any way. It is much more difficult to have a child returned if he or she is abducted to one of these countries, and the number of parental abductions to non-signatory countries has actually increased, in recent years, while the number has decreased to contracting states.¹⁸⁴ Most countries in the Middle East, Africa, and East Asia are not covered by the Convention. These countries often have very different custody laws than those in the United States which makes it difficult to have children returned.

When a child is taken to a country in which the Hague Convention does not apply, the law of that country governs custody determinations. The court will often consider the child's best interests in determining custody, but each country has a different definition of this term. Foreign countries often ignore requests for a child's return, and the country from which the child has been taken has little power to aid the left-behind parent.¹⁸⁵

There are a number of alternatives that the left-behind parent can try. However, none of them has proven particularly successful. One option is to initiate *habeas corpus* proceedings, which can provide relief by compelling return of the child to the legally entitled party.¹⁸⁶ Writs of *habeas corpus* are authorized under the UUCJA as a means of enforcing out-of-state custody decrees¹⁸⁷ and may prove useful in challenging the validity of a custody determination.¹⁸⁸ If successful, a writ of *habeas corpus* may secure an order demanding a child's return, so that the habitual state of residence can make the custody determinations.¹⁸⁹ Nonetheless, even if a *habeas corpus* order is issued, it is difficult to enforce, particularly if the parent is in another country and outside the issuing court's jurisdiction.¹⁹⁰ *Habeas corpus* proceedings are governed in all jurisdictions by statutory provisions, so counsel must conform the writ to the jurisdiction's individual requirements.

Another alternative is to try to enforce a custody decree in the foreign country. Often, U.S. custody orders are not binding in the foreign state. It is possible the foreign country will consider the decree when making its custody decision. Nevertheless, even if the foreign country considers the U.S. custody order, it will apply its own custody laws when making the determination, which often favors its own nationals.¹⁹¹ If a parent does not have a custody order at the time of the abduction, a court in their state may still have jurisdiction to issue an order despite the child's absence. A custody order made after an abduction is sometimes called a "chasing order." Although it may not be enforceable abroad, once a child is returned to the United States, that order governs custody and visitation rights until modified.¹⁹² Parents may also try to criminally prosecute the abductor under U.S. laws or under the laws of the foreign state.

When a child is abducted from a non-signatory nation and is brought to the United States, it is also difficult to predict what will happen when the left behind parent tries to secure a return. U.S. case law is inconsistent and there is no set standard.¹⁹³ It is possible to apply the Uniform Child Custody Jurisdiction Act (UCCJA)¹⁹⁴

¹⁸⁴ Lisa Nakdai, Note, *It's 10PM, Do You Know Where Your Children are: The Hague Convention on the Civil Aspects of International Child Abduction*, 40 FAMILY CT. REV. 251 (2002).

¹⁸⁵ Lara Cardin, *Comment: The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Nonsignatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 158 (1997).

¹⁸⁶ To obtain a writ of habeas corpus, the petitioner must prove: 1) that she is entitled to legal custody of the child; and 2) that the child is being unlawfully detained by the abducting parent in the jurisdiction in which the writ is sought. For example, a writ of habeas corpus would be suitable in a case where the abuser has kidnapped children who are in the victim's legal custody and he remains in the jurisdiction. If the order is granted, then the abducting parent will be ordered to bring the child to the court on a specific date and within specific period of time. ARNOLD H. RUTKIN, ED., 1-6 FAMILY LAW AND PRACTICE § 6.03 (vol. 35 2003).

¹⁸⁷ UCCJA § 15, Comment. See also *Application of Stone*, 481 P.2d 280 (1971).

¹⁸⁸ See, e.g., *Smart v. Cantor*, 574 P.2d 27 (Ariz. 1977).

¹⁸⁹ Lara Cardin, *Comment: The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Nonsignatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 160 (1997).

¹⁹⁰ *Id.* at 161 (citing *Ruppen v. Ruppen*, 614 N.E.2d 577, 580 (Ind. App. 1993)).

¹⁹¹ *Id.*

¹⁹² U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, FAMILY RESOURCE, Chapter 4, 433 (2002).

¹⁹³ Lara Cardin, *Comment: The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Nonsignatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 169 (1997).

¹⁹⁴ 9 Uniform Laws Annotated, Uniform Child Custody Jurisdiction Act.

when a child is wrongfully taken to the United States, but there are questions as to whether it actually applies to the actions of foreign state courts. Section 23 of the UCCJA applies the Act to international disputes¹⁹⁵ but there is conflicting case law as to whether the term “state” includes a foreign nation. Many states have adopted the UCCJA with their own adjustments to various sections. Some states have not adopted Section 23 as part of the state’s UCCJA and have held that the legislature did not intend the word “state” to include a foreign country.¹⁹⁶ States that have adopted Section 23 have taken different approaches as to whether the word “state” includes a foreign country. Some states have found that the foreign country is a “state” under the UCCJA.¹⁹⁷ Other states that have adopted Section 23 but that do not include foreign countries in the definition of “state,” have deferred to the laws of other nations based upon whether the child custody laws in the foreign country are similar to the UCCJA.¹⁹⁸ In many of these decisions, the courts state that they recognize that they could defer to the foreign court, but are not required to under the UCCJA.

What to Do Under Hague If a Child Is Abducted

A parent has three options to start a return action under the Hague Convention. She can: 1) submit an application to the U.S. Central Authority. U.S.CA will forward the application to the foreign central authority; 2) submit a return application directly to the central authority of the foreign country in which the child is located, bypassing the U.S.CA; or 3) file a lawsuit directly with the foreign court in which she can request her child’s return pursuant to the Hague Convention, bypassing both the U.S.CA and the foreign central authority.

A. CENTRAL AUTHORITY¹⁹⁹

Each country that is a party to the Convention has designated its own “central authority” to carry out special duties. Under the Hague Convention, the Central Authority in the requested country has the primary responsibility for processing applications under the Convention. Nevertheless, while a parent can submit their application directly to the central authority or foreign court of the country where the child is believed to be, the State Department advises parents to submit it to the U.S. Central Authority for the best assistance. The Central Authority for the United States (U.S.CA) is the Department of State’s Office of Children’s Issues.²⁰⁰ By contractual agreement, the National Center for Missing and Exploited Children (NCMEC)²⁰¹ acts on behalf of the U.S.CA with regard to incoming Hague cases, by assisting in negotiating the safe and prompt return of children who have been abducted to the United States. NCMEC also provides assistance in outgoing Hague cases (i.e. when the children are abducted and taken outside of the United States), including completing the return application. According to the Department of State, the role of the Central Authority in

¹⁹⁵ “The general policies of this article extend to the international area. The provisions of this article relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.” UCCJA sect 23 at 326.

¹⁹⁶ See *Minton v. Mcmanus*, 458 N.E.2d 1292 (Ohio App. 1983); State ex rel. *Rashid v. Drumm*, 824 S.W.2d 497 (Mo. App. E.D. 1992).

¹⁹⁷ *In Re Marriage of Arnold & Cully*, 222 Cal. App. 3d 499 (Cal. App. 1990) (finding Canada a state because UCCJA has international application); *Ivaldi v. Ivaldi*, 685 A.2d 1319, 1323 (N.J. 1996) (finding that “the term ‘state’ includes foreign countries and...the jurisdiction provisions of the [UCCJA] apply to international custody disputes”).

¹⁹⁸ See *Lotte U. V. Leo U.*, 491 N.Y.S.2d 581 (N.Y. Fam. Ct. 1985) (finding Jurisdiction of Switzerland not recognized because based solely on domicile of father); *Amin v. Bakhaty*, 812 So.2d 12, 39 (La. App. 2001) (stating court’s reluctance “to defer to an Egyptian court, because Egypt’s child custody laws are at the opposite end of the spectrum to Louisiana’s child custody laws”); *McDaniel v. McDaniel*, 262 A.D.2d 1066, 1067 (N.Y.A.D. 1999) (finding “New York should defer only to those foreign nations whose ‘legal institutions [are] similar in nature’ to our own...and whose regard for the rule of law and due process parallels that of American courts”); *Suarez Ortega v. Pujals de Suarez*, 465 So.2d 607, 609 (Fla. App. 1985) (holding Mexico would exercise jurisdiction in accord with principles embodied in UCCJA).

¹⁹⁹ Hague Convention, Oct. 25, 1980, art. 6, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

²⁰⁰ Parents may contact the State Department by calling 1-888-407-4747 or by writing to the Office of Children’s Issues at: SA-29; 2201 C Street, NW; U.S. Department of State; Washington, D.C. 20520.

Information is also available on their website at http://travel.state.gov/children's_issues.html.

²⁰¹ Parents may contact the National Center for Missing and Exploited Children (NCMEC) by calling their 24 hour help-line (1-800-THE-LOST) or by writing to NCMEC at the following address: Charles B. Wang International Children’s Building; 699 Prince Street; Alexandria, Virginia 22314-3175. Information is also available on their website at <http://www.missingkids.org>.

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the United States is that of an “active facilitator.”²⁰² As such, its mission is to promote cooperation among relevant parties and institutions by acting as a source of information about procedures under the Convention, as well as on the status and contents of applications.

The U.S.CA will review an application for the parent, forward it to the foreign central authority, and work with the foreign central authority until the case is resolved. The U.S.CA will facilitate communication, but this does not include translating documents, which is the parent’s responsibility. If the abductor does not voluntarily return the child, the left-behind parent may have to retain an attorney in the foreign country to present the case to the court. Some central authorities do provide or arrange for free or reduced-fee legal representation for applicant-parents. The U.S.CA can inquire on the parent’s behalf about this possibility.²⁰³

The United States Central Authority can also provide information on the central authority in the country in which the child is believed to be located, and assist the parent in understanding the application process. They can also help a parent obtain, either directly or through the NCMEC, information concerning the wrongfulness of the removal or retention under the laws of the country in which the child has resided. At a parent’s request, the U.S.C.A will request a status report six weeks after court action commences in the other country if the court has not yet issued a ruling on the return petition. The Hague process is supposed to be “expeditious,” but there are no penalties for delays or slow decision making.²⁰⁴ The U.S.CA can also provide information about a particular country’s performance under the Hague Convention so that a parent can assess whether the Convention could effectively work in her case. To obtain this information, the parent may have to make a formal request. If the country has a poor track record under the Hague Convention, the parent may want to consider other lawful means to effect the child’s return. When a parent fears international abduction, this information should help the parent consider whether stronger prevention measures are appropriate.²⁰⁵

There are a couple of reasons why it is strongly recommended, particularly in family violence cases, that a parent act quickly in invoking the Hague Convention.²⁰⁶ In addition to the dangers to the child of being in an abusers control, one reason for acting quickly is that the courts are only required to order a return of a child if less than a year has passed since the wrongful removal. The second is that, once a return application is filed (or a court is put on notice of the abduction), courts and other authorities are not allowed to make substantive custody decisions about the child. This may prevent an abductor from getting a custody order in the foreign country.

If the parent who is filing the petition has a custody order, she should attach a certified copy of the custody order to the application. For battered immigrants, the swiftest way to obtain a pre-abduction custody order is as part of a civil protection order. Obtaining protection orders as soon as possible is highly recommended in the case of immigrant victims, particularly when there are concerns about abduction. In circumstances where there is no custody order at the time of the abduction (a pre-decree abduction), the searching parent may strengthen a future Hague Convention case by obtaining an order from a court in this country that states that the taking or retention of the child is wrongful within the meaning of Article 3 of the Hague Convention. This too could be done as part of a protection order, a temporary protection order, or other family court proceeding. The foreign court may, pursuant to Article 15, request that the applicant parent obtain such a determination after an abduction. In the absence of a judicial request, the parent should consider how quickly and at what cost such an order could be obtained.²⁰⁷

If the Hague Convention petition for return is denied, a parent must remember that it is not a decision on the merits of custody. The custody adjudication on the substantive merits of the case will need to take place in

²⁰² International Parental Child Abduction, Department of State Publication 10862, Bureau of Consular Affairs (Revised July 2001), available at <http://travel.state.gov/int'lchildabduction.html> at Part VII.

²⁰³ U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING, Chapter 4, 428 (2002) [hereinafter FAMILY RESOURCE].

²⁰⁴ *Id.* at 430.

²⁰⁵ *Id.* at 427.

²⁰⁶ *Id.* at 428.

²⁰⁷ *Id.* at 425.

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the foreign country. Nevertheless, the Hague Convention petition denial should not be used against her in those and other legal proceedings.²⁰⁸

B. IMMIGRATION

The Convention does not confer any immigration benefits. If persons who are not U.S. citizens are ordered by the court to return to the United States, they must fulfill the appropriate entry requirements. This applies to children and parents involved in any child abduction case, including a Hague Convention case.²⁰⁹ When the abducting parent is ineligible to enter the United States under U.S. immigration laws, the parent may be paroled for a limited time into the United States through the use of a Significant Public Benefit Parole²¹⁰ in order to participate in custody or other related proceedings in a United States court. There is also the possibility of a waiver of visa ineligibility for an undocumented alien pursuant to section 212(d)(3)(A) of the Immigration and Nationality Act. A waiver requires the recommendation of a consular officer or the Department of State (Bureau of Consular Affairs/Visa Office), and the approval of the Department of Homeland Security.²¹¹

C. FOREIGN COUNTRY JURISDICTION

It is possible a parent will have to litigate custody or visitation in the courts of a foreign country. This can happen if: 1) a parent loses her Hague petition for return; 2) a foreign court refuses a parent's request to enforce a U.S. custody or visitation order; 3) a parent does not have a custody order to enforce; or 4) a parent is advised to seek custody in the foreign courts. Parents are often at a disadvantage because many foreign courts favor a parent who has returned home to his or her native country with a child.²¹² Some countries also have a cultural bias in favor of the mother or father, or religious laws that preclude one parent from being awarded custody. It is also possible to be awarded custody, but to have travel restrictions that interfere with the exercise of those custody rights.²¹³

Even if a foreign country grants a parent custody or visitation, there may not be a legal mechanism to enforce the order. If a parent loses custody, a foreign court will not necessarily award the losing parent visitation. If visitation is awarded, the child may not be allowed to come to the United States, and the parent may have to travel to the foreign country to see their child. It is also possible that these visits will be restricted or supervised.

²⁰⁸ *Id.* at 431.

²⁰⁹ <http://travel.state.gov/int'lchildabduction.html> at 12.

²¹⁰ See INA 212(d)(5)(A).

²¹¹ U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, FAMILY RESOURCE, Chapter 4, 430 (2002). 212(d)(3)(A) provides:

an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General.

²¹² U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, FAMILY RESOURCE, Chapter 4, 433 (2002). Family Resource, *supra* note 158,68 at 433

²¹³ One example given is that of a non-Muslim mother who cannot take her children from an Islamic country without the permission of her Muslim husband, despite that she and their children are U.S. citizens. Even if the wife is awarded custody, she may still need the father's permission to leave the country. See U.S. Department of State, Children & Family Issues, International Child Abduction, Country-Specific Abduction Flyers, at http://www.travel.state.gov/family/abduction_country.html. The NCMEC has a publication entitled *Family Guide to Surviving Abduction to the Islamic World* (for information on how to proceeding in a particular country). U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, FAMILY RESOURCE, Chapter 4, 434 (2002). Family Resource, *supra* note 158,68 at 434.

Litigating custody can be difficult and foreign country systems may not offer the same kinds of due process protection available in U.S. courts.²¹⁴ Common law countries will most likely provide a fair custody hearing. Civil law countries do not provide the same kind of due process protections or evidentiary rules that are basic to the U.S. system. Most countries of continental Europe and Central and South America have civil systems. Notice and opportunity to be heard are not necessarily fundamental rights in civil law countries and a parent may not be given adequate notice of custody proceedings or be able to obtain the abductor's foreign address to serve notice of U.S. legal proceedings. Also, because precedent does not bind civil law courts, case outcomes are less predictable than in common law countries.

While litigating in a foreign court can be costly for the U.S. parent, the abductor may be funded fully or in part by the foreign government. If the litigation is lengthy, the amount of time the child lives with the abductor will be prolonged. The longer the child stays with the abductor, the less likely it is that a foreign court will disrupt the relationship by ordering return.²¹⁵ Moreover, a parent in the United States who pursues custody in foreign countries runs the risk that the foreign parent will then argue to a U.S. court that the parent has waived U.S. jurisdiction by participating in the foreign proceedings. To avoid this, a parent can seek an order from her home state court stating that her participation in foreign proceedings is completely without prejudice to her rights under U.S. law, and to the validity of any U.S. custody orders she has obtained.²¹⁶

Conclusion

Obtaining return of children abducted from the United States can be difficult, and expensive. Often this involves prolonged litigation with counsel in both countries and success can be elusive. For this reason, advocates and attorneys working with immigrant victims of domestic violence should carefully review the lists of risk factors for abduction discussed at the beginning of this chapter and take all steps possible to prevent international child abduction. It is particularly helpful to obtain a protection order awarding custody to the battered immigrant victim as soon as possible. It is also important to have the court order an abuser who has the children's passports to turn over the passports to the victim as part of a protection order. If the children are dual nationals the protection order should also include a recommendation that the embassy of the abusive parent's country not issue a passport to the children absent court order. It is recommended that children of all immigrant women be registered in the Children's Passport Alert Program. The following chart summarizes steps that can be taken to prevent international parental kidnapping and to attempt to secure return of children who have been abducted.

Checklist

PREVENTION:

- Be aware of risk factors that may pose a risk for abduction
- Keep a record of important information about the other parent
- Maintain current photos and keep a detailed written description of the child
- Obtain custody decree with specific provisions that attempt to safeguard child against abduction

IF THE CHILD IS ABDUCTED, HOW TO SEARCH FOR A CHILD ABROAD:

²¹⁴ For more information on civil law versus common law jurisdictions, see U.S. Department of State's Bureau of International Information Programs (USIS), Issues of Democracy, September 1999 – US Courts, at <http://usinfo.state.gov/journals/itdhr/0999/ijde/messitte.htm>.

²¹⁵ U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, FAMILY RESOURCE, Chapter 4, 435 (2002).

²¹⁶ Family Resource, *supra* note 1568, *id.* at 435. Parents should consult an attorney in the U.S. and abroad to decide on the best approach to promote their interests.

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- File a missing person's report with local law enforcement officials
- Enter the child's name in the National Crime Information Center [NCIC]
- Attempt negotiating a return of the child through such organizations as NCMEC and Child Find America, Inc.
- Contact the Office of Children's Issues at the Department of State to file an application for the prompt and safe return of the abducted child
- Communicate with the Central Authority of the country to which the child has been abducted (typically the Office of Children's Issues will assist in this communication.)
- Retain legal counsel in the other country to assist in litigating the return of the child
- Consider both Hague and non-Hague remedies

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6.4

Ensuring Economic Relief for Immigrant Victims Through Family Law Proceedings: Child Support and Spousal Support¹²

By Leslye E. Orloff, Joyce Noche, Anne Benson, Laura Martinez and Jennifer Rose

Economic independence is a key factor in whether a domestic violence survivor will successfully leave an abusive relationship. Issues of economic survival particularly impact battered immigrant women, who also face linguistic, cultural, and legal barriers to critical services.³ Research indicates that the lack of access to

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² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) ([United States v. Windsor](http://www.supremecourt.gov/opinions/12-307/wl2013062613.pdf), 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ See Leslye Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. OF WOMEN & L. 597, 614-21 (2001).

financial resources is one of the most significant factors preventing immigrant victims of domestic violence from leaving abusive relationships.⁴

For many low-income abused women, achieving adequate financial assistance usually requires a combination of help from family, friends, public assistance, employment, and child support. Women often must leave everything behind and travel great distances to escape the abuse, leaving them with few resources to start a new life in another community.⁵ In short, violence affects poor women in two critical ways: it makes them poor, and it keeps them poor.⁶

Securing and enforcing child support and spousal support awards for immigrant victims can provide an important resource to enhance an immigrant victim's economic security. Such awards provide critical income for low-income battered immigrants who may not yet be eligible to work, and who are often not eligible to receive a full range of public benefits.⁷ Even when immigrant victims can access public benefits for themselves and their children and can access VOCA crime victim's assistance funds,⁸ child and spousal support are an important additional source of economic support.

This chapter will provide an overview of the child support system and demonstrate some of the problems faced by immigrant victims in accessing this system. This chapter will also provide practical information on how to prepare for a child and spousal support case; what form of support orders are best in domestic violence cases; and tips on child support enforcement. The focus of this chapter will be on the child- and spousal support issues that arise in cases of immigrant victims.

Role of Safety in Seeking Child Support

Financial control and isolation are powerful weapons that abusers use to maintain control over their victims. Many domestic violence victims do not have access to bank accounts or charge accounts. In other instances, their abusers make it difficult for their victims to work outside the home, or completely forbid victims from working outside the home. This financial isolation and control is especially exacerbated where the abuser can control the victim's immigration status, because the abusive spouse is a U.S. citizen, lawful permanent, resident or non-immigrant visa holder and the victim is undocumented.⁹ Abusers of non-citizen victims often use immigration-related abuse to control their victims. Abusers of non-citizen victims threaten to report them to the Department of Homeland Security (DHS), and to not file for immigration status for the victim and/or the children, in order to perpetuate control and instill further fear.¹⁰

The family-based immigration process and laws relating to temporary visas can leave immigrant victims vulnerable to economic abuse. This is because an immigrant spouse generally is dependent on the U.S. citizen/lawful permanent resident/temporary- visa-holder spouse for immigration status. Immigration status determines whether someone can work in the United States legally, and whether he or she is eligible to receive certain public benefits. Immigrant victims may lack work authorization¹¹ under a variety of situations, such as:

⁴ See Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 259, 295-99 (2000).

⁵ Martha F. Davis, "The Economics of Abuse: How Violence Perpetuates Women's Poverty", in *Battered Women, Children, and Welfare Reform: The Ties That Bind* 17, 18 (Ruth Brandwein ed., 1999).

⁶ *Id.* at 19.

⁷ See Chapter 4 of this Manual for a full discussion of Public Benefits that can be accessed by immigrant victims.

⁸ Generally, immigrant victims of domestic violence can qualify to receive victim's compensation from their state from Victims of Crime Compensation Act funds. These funds can provide the victim with reimbursement for costs associated with medical treatment, mental health care, day care, relocation, and loss of income due to the abuser's incarceration. For a more complete discussion of immigrant victim access to VOCA funding, see Chapter 4 of this manual.

⁹ See Dutton, Orloff and Hass, Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000).

¹⁰ *Id.*

¹¹ As an attorney or advocate working with immigrant victims, it is important to warn the client about the immigration consequences of buying or using false papers in order to secure employment, and/or representing herself as a United

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- when their abusive citizen or lawful permanent resident spouse has not filed immigration papers for them;
- when their immigration status is dependent upon the status of their abusive spouse, and they are not authorized to work under the particular immigration status category;
- when they are undocumented;
- when they qualify for the battered spouse relief under the Violence Against Women Act (VAWA) or the crime victim (U visa) but do not know they qualify, or have filed for relief but have not yet been approved.

Further, some immigrant victims of domestic violence have an immigration visa that requires them to work for a particular employer.¹² If they leave that employer, they may violate the terms of their visa and lose their immigration status. Abusers of immigrant women on employment-based visas may harass and abuse them at work.¹³ Harassment at work can cause immigrant victims to lose their jobs, and thus lose their immigration status.

Despite the fact that child support can enhance a victim's ability to achieve self-sufficiency, many abused women forego obtaining child support from their abusers altogether.¹⁴ It is important to weigh the benefits and the risks of pursuing child support orders. Some risks include: an abuser learning the whereabouts of the victim and children; an abuser retaliating in the form of actions for custody or visitation, resulting in increased contact between the abuser and victim; and the escalation of violence.¹⁵ The added threats of retaliation and reporting to immigration authorities can also heighten the risk to an immigrant victim and her children.¹⁶ It is important to always keep in mind the immigrant victim's safety concerns for herself and her children when evaluating her economic options. It is also advisable to become informed on immigration relief under VAWA, and the U visa provisions created by VAWA 2000. Many immigrant victims who qualify for relief under VAWA will be unaware that this relief is available to them.

Duty to Support Children

A statutory duty to support children is imposed on parents in all 50 states and Puerto Rico, the Virgin Islands, Guam, and the District of Columbia.¹⁷ While this chapter focuses on obtaining child support for immigrant custodial parents, it is important to note that immigrant victims may also have a case for child support initiated against them when they are not the custodial parent.

States citizen, or signing a form stating that she is a United States citizen for purposes of employment. Battered immigrants who could potentially qualify to attain legal immigration status under Violence Against Women Act [hereinafter VAWA] could jeopardize their access to VAWA immigration benefits if they do any of these things. 8 U.S.C. §§ 1182(a)(6)(C)(ii), 1227(a)(3)(D)(2003); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 344(c). If you discover that your clients have done any of these things, then they should be referred to an immigration attorney in your area to advise them on how to proceed. For a referral to an immigration attorney familiar with VAWA immigration cases, or for technical assistance to attorneys and victim advocates, please contact the National Immigrant Women's Advocacy Project (NIWAP) at (202) 274-4457 or by email at info@niwap.org.

¹² See INA § 101(a)(15); 8 U.S.C. § 1101 (2003); 8 C.F.R. § 274a.12(b) (2003). For example, persons on H, J, O, and TN visas have specific visas related to their employer, and their spouses and children, as "derivatives" on their visas, may or may not be authorized to work.

¹³ This pattern is typical of abusers in general. See, e.g., Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655, 664-68 (2000); Jody Raphael, *Prisoners of Abuse, Domestic Violence and Welfare Receipt* 6-10 (1996), available at <http://www.ssw.umich.edu/trapped>.

¹⁴ See Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L. J. 47, 54 (2003).

¹⁵ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657 664 (2000). Danger of new violence, injury, and death go up when a victim tries to separate from her abuser. See Caroline W. Harlow, U.S. Dep't of Justice, *Female Victims of Crime* 3 (1991).

¹⁶ See Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000); Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L. J. 47, 54 (2003).

¹⁷ Arnold H. Rutkin, 3-33 FAMILY LAW AND PRACTICE § 33.02 (Arnold H. Rutkin ed., Matthew Bender 2004).

Abusers who are custodial parents may bring child support proceedings against low-income victims of domestic violence in retaliation. When working with a low-income immigrant victim against whom child support is being sought, it is important to review your state's child support statute. Many states have recognized the need for a parent to reserve a portion of income to meet his or her basic subsistence needs before the child support award is calculated.¹⁸ Attorneys and advocates should explore what the immigrant victim's income and resources are, and whether advocacy for a basic subsistence reserve is appropriate.¹⁹ Even victims who have not yet attained legal work authorization can be ordered to pay child support.²⁰

If the immigrant victim and abuser have a shared custody agreement, in many jurisdictions the amount of child support awarded can be adjusted to reflect the percentage of time that each parent actually has physical custody of the children. The child support guidelines (see discussion below) are rebuttable presumptions of an appropriate amount of child support. In other jurisdictions, the child support guidelines reflect the traditional custodial arrangement in which one parent has sole legal and physical custody of the child, and the other parent exercises visitation rights. In these jurisdictions, counsel for the immigrant victim should argue that the amount of support ordered should reflect the custody agreement.²¹ When the immigrant victim incurs costs related to care for the children under a shared-custody arrangement, her child support order should be adjusted accordingly.

Noncompliance with child support payments can have serious legal and immigration consequences. Failure to pay child support can result in civil and criminal penalties. In addition, for non-citizens ordered to pay child support, failure to pay child support can also have immigration consequences. (See discussion below). It is important to adequately advise immigrant victims of their rights and responsibilities, and consequences of failure to pay their child support orders.

Jurisdiction and Establishment of Paternity

There are several ways that immigrant victims can request child support and spousal support. Applicants can usually petition a civil family court for an order of child support and spousal support, or they can obtain orders through a divorce-, separation-, or custody- proceeding. In addition, immigrant victims can request an order for child support and spousal support through a civil protection order.²²

Personal jurisdiction in a family court proceeding for child support can be established when: (1) in a child custody case, the child has substantial connections with the state;²³ (2) in cases of child support and alimony (spousal support), the child, parent, or spouse who is required by law to pay or receive support resides in the state;²⁴ or (3) with respect to domestic violence, child abuse and criminal cases as part of a protection order case when, illegal acts are committed in the state or the victim needs protection in the state.²⁵ When the child or spousal support award will be part of a divorce proceeding,²⁶ the majority of jurisdictions require the party

¹⁸ *Id.*

¹⁹ Attorneys representing immigrant victims with low-wage work need to be aware that the fact that the victim may not have work authorization will not protect her against having to pay child support, whether or not the amount is calculated taking into account a subsistence reserve.

²⁰ *Asal v. Asal*, 960 P.2d 849, 850 – 851 (Okla. 1998) (Although the former husband claimed that he could not work due to his current immigration status, he was ordered to pay support because his testimony indicated that his mother was paying his expenses, and that he could work in the United States, but had not found work)

²¹ Rutkin, Arnold H. Rutkin, 3-33 FAMILY LAW AND PRACTICE § 33.02 (Arnold H. Rutkin ed., Matthew Bender 2004).

²² See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 810 (1993).

²³ Uniform Child Custody Jurisdiction and Enforcement Act [hereinafter UCCJEA] § 201 (a)(2)(A); UCCJA § 75-d (b)(i-ii); 28 U.S.C. § 1738A(c).

²⁴ *Porter v. Porter*, 684 A. 2d 259 (R.I. Sup. Ct. 1996) (court ruled it had exclusive jurisdiction over the non-paying parent because that jurisdiction was the child's state or residence of contestant). North Carolina Gen. Stat. § 50-13.5(f) (child support orders must be made in divorce proceedings and jurisdiction is found where the child resides or is physically present, or where the parent resides). See *Bass v. Bass*, 43 N.C. App. 212 (1979).

²⁵ National Council of Juvenile & Family Court Judges [hereinafter NCJFCJ], *Family Violence: A Model State Code*, § 303 (1994), available at <http://www.ncjfcj.org>.

²⁶ For a full discussion of immigration status and jurisdiction in a range of family court cases, see Chapter 8 of this Manual.

seeking a divorce to satisfy a threshold residency requirement before their courts will adjudicate a divorce action.²⁷ Some states require their courts to have jurisdiction over the party seeking the divorce,²⁸ while other states only require jurisdiction over either one of the parties in the divorce.²⁹

PATERNITY

If a child is born to parents who were married when the child was born or conceived, the law presumes that the husband is the father, no additional action is required to establish the child's paternity.³⁰ To establish legal paternity for a child whose parents are unmarried, formal action must be taken.³¹

The 1996 Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA) required states to adopt and implement a variety of new policies concerning paternity establishment in order to encourage and facilitate voluntary paternity establishment.³² A paternity acknowledgment or order establishes a legal relationship between the father and child. It is the first step in a formal child support process, legally identifies the father for purposes of inheritance and other benefits, and permits nonmarital fathers to seek court-ordered visitation or custody.³³

Generally, states must recognize a signed acknowledgment of paternity as a legal finding of paternity, unless it is rescinded within 60 days. No further legal action may be required to make the voluntary acknowledgment legally binding.³⁴ After 60 days, paternity acknowledgments may be challenged in court only for fraud, duress, or material mistake of fact.³⁵ The law and the implementing regulations require states to make voluntary paternity establishment services broadly available at birth record agencies, as well as at public and private hospitals.³⁶ Additionally, the PRWORA eased the requirements in cases where paternity is contested. Child support agencies are able to order genetic tests without applying for a court order, and the results of properly conducted tests are more readily admitted as evidence.³⁷

²⁷ Without establishing this threshold residency requirement, the state courts do not have subject matter jurisdiction in divorce cases. See *e.g.* Blair v. Blair, 643 N.E.2d 933 (Ind. Ct. App. 1994). Parties cannot agree to confer subject matter jurisdiction on a court that does not have it. Gosa v. Mayden, 413 U.S. 665 (1973). See also, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951); Industrial Addition Ass'n v. Commissioner, 323 U.S. 310, 313 (1945); People's Bank v. Calhoun, 102 U.S. 256 (1880); Cutler v. Rae, 7 How. L.J. 729, 731 (1849).

²⁸ See Idaho, Idaho Code § 32-701 (2000); Iowa, Iowa Code § 598.6 (2001); Maine, 19-A M.R.S. § 901 (2000); Massachusetts, Mass. Ann. Law ch. 208, § 5 (2001); New Hampshire, R.S.A. 458:5 (2000); North Carolina, N.C. Gen. Stat. § 50-8 (2000); North Dakota, N.D. Cent. Code, 14-05-17 (2001); Ohio, O.R.C. Ann. §3105.03 (2001); South Carolina, S.C. Code Ann. § 20-3-30 (2000); South Dakota, S.D. Codified Laws § 25-4-30 (2001); Virgin Islands, 16 V.I.C. §106 (2001); Wyoming, Wyo. Stat. § 20-2-107 (2001).

²⁹ See Alabama, Code of Ala. §30-2-5 (2001); Arizona, A.R.S. §25-312 (2000); Arkansas, A.C.A. §9-12-307 (2001); California, Cal Fam. Code §2320 (2001); Colorado, C.R.S. §14-10-106 (2001); Connecticut, Conn. Gen. Stat. §466-44 (2001); Delaware, 13 Del. C. §1504; District of Columbia, D.C. Code Ann. §16-902 (2001); Florida, Fla. Stat. §61.021 (2000); Georgia, §19-5-2 (2001); Hawaii, HRS §580-1 (2001); Illinois, §750 ILCS 5/401 (2001); Indiana, Burns Ind. Code Ann. §31-15-6 (2001); Kansas, K.S.A. §60-1603 (2000); Kentucky, K.R.S. §403.140 (2001); Louisiana, La. R.S. §9:308 (2001); Maryland, Fletcher v. Fletcher, 95 App. 114 (1993); Michigan, MCLS §5529(2001); Mississippi, Miss. Code Ann. §93-5-5 (2001); Missouri, §R.S. Mo. (2000); Montana, Mont. Code Ann. §40-4-104 (2001); Nebraska, R.R.S. Neb. §42-349 (2001); Nevada, Nev. Rev. Stat. Ann. §125.020 (2001); New Jersey, N.J. Stat. §2A:34-10 (2001); New Mexico, N.M. Stat. Ann. §40-4-5 (2001); New York, NYCLS Dom Rel §230 (2001); Northern Mariana Islands, 8 C.M.C. §1332; Oklahoma, 43 Okla. St. §102 (2000); Oregon, ORS §107.075 (1999); Pennsylvania, 23 Pa. C.S. §3104 (2001); Puerto Rico, 31 L.P.R.A. §331 (1999); Rhode Island, R.I. Gen. Laws §15-5-12 (2001); Tennessee, Tenn. Code Ann. §36-4-104 (2001); Texas, Tex. Fam. Code §6.301 (2000); Utah Code Ann. §30-3-1 (2001); Vermont, 15 V.S.A. §592 (2001); Virginia, Va. Code Ann. §20-97 (2001); Washington, Rev. Code Wash. (ARCW) §26.09.030 (2001); West Virginia, W. Va. Code §48-5105 (2001); Wisconsin, Wis. Stat §767.05 (2000).

³⁰ Arnold H. Rutkin, 3-33 FAMILY LAW AND PRACTICE § 33.02 (Arnold H. Rutkin ed., Matthew Bender 2004).

³¹ *Id.*

³² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 §331(C) (codified, as amended, in scattered sections of 42 U.S.C.)

³³ National Women's Law Center, *Family Ties: Improving Paternity Establishment Practices and Procedures for Low-Income Mothers, Father, and Children* (2000).

³⁴ *Id.*; See 42 U.S.C. § 666(a)(5)(D)(iii).

³⁵ See 42 U.S.C. § 666(a)(5)(D)(iii) (1999).

³⁶ See 42 U.S.C. § 666(a)(5)(D)(iii)(II)(aa) (1999); 45 C.F.R. § 303.5(g)(1)(ii)(A)(1999).

³⁷ See 42 U.S.C. §§ 666(c)(1)(a), 666(a)(5)(B)(ii)(I), 666(a)(5)(F)(iii)(1999).

In domestic violence cases, these new paternity establishment procedures can raise safety concerns for victims. Establishing paternity when there has been a history of abuse can create increased risks for mothers and children. Parents often do not have sufficient or accurate information about the effect that a voluntary acknowledgment of paternity will have on custody and visitation rights.³⁸ Victims need to know that signing the acknowledgment of paternity could give the abuser the right to take the baby from the hospital without the victim's consent.³⁹ Once paternity is established through acknowledgment, it will be easier for the abusive father to assert custody and visitation rights.⁴⁰ Sometimes abusers will initiate paternity establishment themselves, using the paternity-establishment process and litigation over custody and visitation to continue to abuse and control the victim. When the child's father is abusive, risks to the victim can be exacerbated by issues of language access and the immigrant victim's immigration status. Threats to obtain custody of children and to cut off immigrant victims' access to their children are a common power and control tactics that effectively lock immigrant victims in abusive relationships.⁴¹

Advocates and attorneys working with immigrant victims preparing to give birth need to investigate paternity-establishment procedures at the hospital that the client will be using. They must work with clients in advance to do safety planning, and decide whether the victim will choose voluntary paternity establishment at the hospital. If she will not, advocacy with hospital staff may be needed to avoid endangering the victim by seeking paternity-establishment. Although routine screening for domestic violence is recommended practice for all hospitals and health care settings,⁴² many hospitals do not routinely screen for domestic violence.⁴³ When hospitals screen for domestic violence advocates should encourage hospital staff to review the hospital records of the woman giving birth to determine whether there is an indication that domestic violence is present in the relationship. If so, the hospital should consult with the battered woman's advocate to determine whether paternity establishment at the hospital can be done safely. If the hospital does not do domestic violence screening, advocates need to work with hospital staff to counter assumptions they may have that the father's presence in the hospital means that the relationship is good, and that domestic violence is not present. Hospital staff need to be made aware that encouraging voluntary establishment of paternity can undermine domestic violence victim safety. Further, it may be dangerous for a victim to decline establishing paternity if her abuser is present in the hospital.⁴⁴ Attorneys and advocates need to provide immigrant victims with full information about voluntary establishment of paternity, to help victims consider the pros and cons of paternity establishment, and take steps to help the immigrant victim act on her decision (whether it is to establish paternity or not).

Civil Protection Orders and Spousal and Child Support

After assessing the immigrant victim's safety in pursuing spousal and child support, advocates and attorneys are encouraged to ensure that spousal and child support orders are included in protection orders for immigrant clients and their children. At least thirty-seven jurisdictions authorize the payment of child support as part of their civil protection order remedies.⁴⁵ Including child and spousal support in protection orders can provide crucial income during the victim's first few months away from her abuser. Many state statutes specifically

³⁸ National Women's Law Center, *Family Ties: Improving Paternity Establishment Practices and Procedures for Low-Income Mothers, Father, and Children* (2000).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 302 (2000). See Leslye Orloff, Jessica Cundaria, & Erika Esterbrook, *New Dangers For Battered Immigrants: The Untold Effects of the Demise of 245(i)* (on file with author).

⁴² Ann L. Ganley, *Domestic Violence: Strategies for Screening, Assessment, Intervention and Documentation*, in TRAINERS MANUAL FOR HEALTH CARE PROVIDERS 133 (Family Violence Prevention Fund, 1998).

⁴³ Rodriguez, M., Bauer, H., McLoughlin, E., Grumbach, K., *Screening and Intervention for Intimate Partner Abuse: Practices and Attitudes of Primary Care Physicians*, 282(5) J. OF THE AM. MED. ASSN. (1999). (Only 10% of health care providers routinely screen new patients for abuse and 9% screen patients who come for check ups.)

⁴⁴ National Women's Law Center, *Family Ties: Improving Paternity Establishment Practices and Procedures for Low-Income Mothers, Father, and Children* (2000).

⁴⁵ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 998 (1993)

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allow the trial court to award child support in protection orders,⁴⁶ while other states have catch-all provisions that allow the court to grant relief for the petitioner's well-being and safety in protection orders.⁴⁷ When advocating for clients, attorneys should locate the statutory or case law that allows for the award of monetary relief in civil protection orders. If possible, child support guidelines should be used to calculate the correct amount of child support in advance of the court appearance, as this amount can be useful for the judge, or in settlement. In this way, the attorney representing the immigrant victim will be prepared to provide the court with a proposed child support calculation based upon the state's child support guidelines. Attorneys or advocates should bring a copy of the statute and child support guidelines with them to court.

In addition to spousal and child support, other economic relief may be available for victims, including: rent and mortgage payments, utilities payments, possession of residence or vehicle (for transportation to work), vehicle payments, and child care expenses.⁴⁸ Other creative forms of relief include medical bills, lost earnings, repair and replacement of damaged property, alternative housing costs, meals, out-of-pocket expenses for injuries, relocation and travel expenses, replacement costs for locks, and counseling costs.⁴⁹

Obtaining economic relief through a protection order is helpful. It is important to highlight to clients, however, that this relief is only valid for the duration of the protection order.⁵⁰ Attorneys representing

⁴⁶ The following states have specific provisions for the award of support to the petitioner and/or her minor children. These states also will generally have catch-all provisions in their protection order statutes through which an immigrant victim can obtain other forms of financial relief. ALA. CODE § 30-5-7(d)(5) (2003); ALASKA STAT. § 18.66.100(c)(12) (2003); ARK. CODE ANN. § 9-15-205(a)(4) (Michie 2003); CAL. FAM. CODE § 6341 (West 2003); DEL. CODE ANN. tit. 10, §1045(a)(6); GA. CODE ANN. § 19-13-4(a)(6) & 19-13-4(a)(7) (2002); FLA. STAT. § 741.30(6)(a)4 (2002); 750 ILL. COMP. STAT. § 60/214(b)(12) (2003); IND. CODE § 34-26-5-9(c)(3)(C); IOWA CODE § 236.5 (2003); KAN. STAT. ANN. § 60-3107(a)(6) (2002); KY. REV. STAT. ANN. § 403.750(4) (Michie/Bobbs-Merrill 2002); LA. REV. STAT. ANN. § 46:2136 (A)(2) (West 2003); ME. REV. STAT. ANN. tit. 19A, § 4007(1)(I) & § 4007(1)(J) (West 2003); MD. CODE ANN., FAM. LAW § 4-506(d)(9) (2002); MASS. GEN. L. ANN. ch. 209A, § 3(e) (2003); MINN. STAT. § 518B.01 subd. 6(5) (2003); MISS. CODE ANN. § 93-21-15(1)(e) (2003); MO. REV. STAT. § 455.050 (2003); NEV. REV. STAT. § 33.030 (2003); N.H. REV. STAT. ANN. § 173-B:5 I(b)(7) (2002); N.J. STAT. 2C:25-29b.(8) (2003); N.M. STAT. ANN. § 40-13-5 A.(2) (Michie 2003); N.Y. FAM. CT. ACT § 842 (McKinney 2003); N.C. GEN. STAT. § 50B-3(a)(6) (2003); N.D. CENT. CODE § 14.07.1-02; OHIO REV. CODE ANN. § 3113.31(E)(1)(e) (Anderson 2003); OR. REV. STAT. § 107.718(1)(h) (2001) (allowing emergency monetary assistance); 23 PA. CONS. STAT. § 6108 (a)(5) (2002); R.I. GEN. LAWS § 15-15-3(a)(4) (2002); S.C. CODE ANN. § 20-4-60(c)(2) (2002); S.D. CODIFIED LAWS § 25-10-5(4) (2003); TENN. CODE ANN. § 36-3-606(a)(7) (2003); TEX. FAM. CODE § 85.021(4) (2003); UTAH CODE ANN. § 30-6-4.2(2)(h) (2003); VT. STAT. ANN. Tit. 15, § 1110 (2003); W. VA. CODE § 48-27-503(4) & 48-27-503(5) (2003); WIS. STAT. § 813.12 (2002); WYO. STAT. § 35-21-105(b)(ii) (2003).

⁴⁷ The following states have specific provisions for the award of support to the petitioner and/or her minor children (they may also contain catch-all provisions for other forms of financial relief): ALA. CODE § 30-5-7(d)(5) (2003); ALASKA STAT. § 18.66.100(c)(12) (2003); ARK. CODE ANN. § 9-15-205(a)(4) (Michie 2003); CAL. FAM. CODE § 6341 (West 2003); DEL. CODE ANN. tit. 10, §1045(a)(6); GA. CODE ANN. § 19-13-4(a)(6) & 19-13-4(a)(7) (2002); FLA. STAT. § 741.30(6)(a)4 (2002); 750 ILL. COMP. STAT. § 60/214(b)(12) (2003); IND. CODE § 34-26-5-9(c)(3)(C); IOWA CODE § 236.5 (2003); KAN. STAT. ANN. § 60-3107(a)(6) (2002); KY. REV. STAT. ANN. § 403.750(4) (Michie/Bobbs-Merrill 2002); LA. REV. STAT. ANN. § 46:2136 (A)(2) (West 2003); ME. REV. STAT. ANN. tit. 19A, § 4007(1)(I) & § 4007(1)(J) (West 2003); MD. CODE ANN., FAM. LAW § 4-506(d)(9) (2002); MASS. GEN. L. ANN. ch. 209A, § 3(e) (2003); MINN. STAT. § 518B.01 subd. 6(5) (2003); MISS. CODE ANN. § 93-21-15(1)(e) (2003); MO. REV. STAT. § 455.050 (2003); NEV. REV. STAT. § 33.030 (2003); N.H. REV. STAT. ANN. § 173-B:5 I(b)(7) (2002); N.J. STAT. 2C:25-29b.(8) (2003); N.M. STAT. ANN. § 40-13-5 A.(2) (Michie 2003); N.Y. FAM. CT. ACT § 842 (McKinney 2003); N.C. GEN. STAT. § 50B-3(a)(6) (2003); N.D. CENT. CODE § 14.07.1-02; OHIO REV. CODE ANN. § 3113.31(E)(1)(e) (Anderson 2003); OR. REV. STAT. § 107.718(1)(h) (2001) (allowing emergency monetary assistance); 23 PA. CONS. STAT. § 6108 (a)(5) (2002); R.I. GEN. LAWS § 15-15-3(a)(4) (2002); S.C. CODE ANN. § 20-4-60(c)(2) (2002); S.D. CODIFIED LAWS § 25-10-5(4) (2003); TENN. CODE ANN. § 36-3-606(a)(7) (2003); TEX. FAM. CODE § 85.021(4) (2003); UTAH CODE ANN. § 30-6-4.2(2)(h) (2003); VT. STAT. ANN. Tit. 15, § 1110 (2003); W. VA. CODE § 48-27-503(4) & 48-27-503(5) (2003); WIS. STAT. § 813.12 (2002); WYO. STAT. § 35-21-105(b)(ii) (2003). The following states have catch-all provisions that a court could use to award financial relief: ARIZ. REV. STAT. ANN. § 13-3602(G)(6) (2003); CONN. GEN. STAT. § 46b-15 (2003); D.C. CODE § 16-1005(c)(10) (2003); HAW. REV. STAT. § 586-5.5 (2003); IDAHO CODE § 39-6306(1)(e) (2003); MONT. CODE ANN. § 40-15-201(2)(j) (2002); NEB. REV. STAT. § 42-924(1)(g) (2002); VA. CODE ANN. § 16.1-279.1 (2003); WASH. REV. CODE § 26.50.060 (2003). See also Powell v. Powell, App. D.C. 547 A.2d 973 (1988); Mabry v. Demery, 707 A.2d 49 (D.C. Cir. 1998); Katsenelenbogen v. Katsenelenbogen, 365 Md. 122 (2001); Parrish v. Parrish, 95 Ohio St. 3d 1201 (2002); Brown v. Brown, 2000 Ohio App. LEXIS 949 (March 14, 2000). See also Powell v. Powell, App. D.C. 547 A.2d 973 (1988); Mabry v. Demery, 707 A.2d 49 (D.C. Cir. 1998); Katsenelenbogen v. Katsenelenbogen, 365 Md. 122 (2001); Parrish v. Parrish, 95 Ohio St. 3d 1201 (2002); Brown v. Brown, 2000 Ohio App. LEXIS 949 (March 14, 2000).

⁴⁸ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 996 (1993). For a full discussion of the broad range of economic relief available as part of a protection order see Chapter 5 of this Manual.

⁴⁹ *Id.* at 994-995 (citing creative state statutes that allow for these forms of relief).

⁵⁰ LESLYE E. ORLOFF & CATHERINE F. KLEIN, DOMESTIC VIOLENCE: A MANUAL FOR PRO BONO LAWYERS § Remedies 75 (2d ed. Ayuda, 1992).

immigrant victims should explore and assist clients in seeking permanent spousal and child support orders as part of another family court action before the date on which the protection order ends.⁵¹ Other creative economic remedies that counsel for immigrant victims have been able to attain under protection order catch all provisions include: ordering the abuser to pay for any and all costs associated with the filing and completion of victim's immigration case; ordering the respondent to turn over a certain amount of money to be held in trust for payment of the victim's attorney's fees in a subsequent divorce, custody or other family law matter; and ordering the abuser to pay for any and all costs associated with supervised visitation, including any application fee that may be required.

Child Support Guidelines⁵²

Federal law mandates that states establish child support guidelines, either by "statute, administrative rule, or judicial rule."⁵³ Each state has responded to this federal mandate by creating child support guidelines to meet the needs of children within their state, to reduce litigation over child support award amounts, and to facilitate issuance of consistent child support awards that treat all children in the jurisdiction fairly.⁵⁴ These guidelines are used to set the appropriate amount of child support in paternity-, civil protection order-, divorce-, separation-, custody- and other types of family law cases involving children.

1. Income Shares Models, Percentage of Income Model, and Melson Formula Model

States use different models for calculating child support amounts under state child support guidelines. The Income Shares models are utilized in thirty-four states.⁵⁵ These models seek to provide children of separated households with the same amount of parental financial support they would have received if their parents lived together.⁵⁶ The income of both parents is added together, and the child support obligation is awarded using

⁵¹ Most state protection orders are of between one and three years duration. Some states have protection orders that last indefinitely. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 1085 (1993).

⁵² Many states offer child support guides that can answer specific questions. The Administration for Children and Families offers a listing of the guides available online. See <http://ocse.acf.dhhs.gov/necsrspub/state/topic.cfm?TOPIC=Establishment%20of%20Cases>

⁵³ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03 (2001) (citing 42 U.S.C. § 667(a) providing that "[t]he guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts").

⁵⁴ See Ala. R. Jud. Admin. R. 32 (Effective Oct. 4, 1993); Alaska Civ. R. 90.3 (2003); Ariz. Child Support Guidelines Adopted by the Ariz. Supreme Court (2001); Arkansas Admin. Order of the Supreme Court, Rule 10 (1998); In Re: Administrative Order No. 10 — Arkansas Child Support Guidelines (2002); CAL. FAM. CODE §§4050-4076 (2003); COLO. REV. STAT. ANN. §14-10-115 (2002); Conn. C.S. and Arrearage G. (1999); Del. Fam. Ct. Child Support Evaluation and Update (2002); D.C. CODE ANN. § 16-916. (2003); FLA. STAT. § 61.30 (2002); GA. CODE ANN. §19-6-15 (2002); Hawaii Family Court Child Support Guidelines (1998); Idaho R. Civ. Pro. 6(c)(6) (2003); 750 I.L.C.S. 5/505 – 5/510 (2003); Ind. Child Support Rules and Guidelines (2001); Iowa Child Support Guidelines (2000); Kan. Child Support Guidelines (Sup. Ct. Admin. Order 128) (1998); KY. REV. STAT. ANN. §403.213 (2002); LA. REV. STAT. ANN. §9:315 (2003); ME. REV. STAT. ANN. tit. 19-A § 2001 (2003); MD. CODE FAM. LAW CODE ANN. §12-202 (2002); Mass. Child Support Guidelines (2002); Mich. Child Support Formula Manual (2002); Memorandum on 2003 Child Support Manual, John D. Ferry (March 20, 2003); MINN. STAT. ANN. § 518.551 et. seq. (2002); MISS. CODE ANN. §§ 43-19-101 et. seq. (2003); Mo. Sup. Ct. R. 88.01, Civil Procedure Form 14 (20003); Admin. R. Mont. 37.62.101 et. seq. (2003); Neb. Child Support Guidelines (2003); NEV. REV. STAT. §125B.070-.080 (2003); N.H. REV. STAT. ANN. §§ 458-C:1 et. seq. (2003); N.J. Rules of Court, Appendix IX (2003); N.M. Stat. Ann. §§ 40-4-11 et. seq. (2003); N.Y. DOM. REL. LAW § 240(1-b) (2003); N.C. Child Support Guidelines (2002); N.D. Admin. Code §§ 75-02-04.1-01 et. seq. (2003); OHIO REV. CODE ANN. §3113.215 (2003); OKL. STAT. ANN. tit. 43, §§ 118-120 (2002); Or. Admin. Reg. §§ 137-50-320 et. seq. (2003); Pa. R. Civ. Pro. 1910.16-1 et. seq. (2000); R.I. Fam. Ct. Admin. Order 97-8 (1997); 2; S.C. Soc. Serv. Reg. 114-4710 et. seq. (1999); S.D. COD. LAWS ANN. §§ 25-7-6.1 et. seq. (2003); Tenn. Comp. R. & Regs. Dep't Human Services §§ 1240-2-4-.01 et seq. (1997); TEX. FAM. CODE ANN. §§ 154.001 et. seq. (2003); UTAH CODE ANN. §§ 78-45-7 et. seq. (2003); VT. STAT. ANN. tit.15 §§ 653-660 (2003); VA. CODE ANN. § 20-108.2 (2003); W. VA. CODE §§ 48A-1A-1 et. seq., 48A-1B-1 et. seq. (2003); Wis. Admin. Code DWD 40.01 - 05 (1999); WYO. STAT. ANN. §§ 20-6-301 et. seq. (2003). For more information, see <http://www.supportguidelines.com/links.html>.

⁵⁵ See Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03 (2001); see also The Office of Child Support Enforcement Website at <http://ocse3.acf.hhs.gov/ext/irg/sps/selectastate.cfm>; ME, VT, NH, RI, CT, NJ, NY, MD, DC, WV, VA, NC, SC, KY, AL, FL, MI, IN, OH, NM, OK, LA, NE, IA, KS, MO, SD, UT, CO, WA, OR, ID, CA, AZ.

⁵⁶ See Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03 (2001); (quoting from R. Williams, *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report*, at II-67 (U.S. Dep't of Health and Human Services, Office of Child Support Enforcement, 1987).

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guidelines or tables.⁵⁷ Additional support may be ordered based upon the needs of the child and other expenses.⁵⁸

Other states use either the Melson Formula Model or a Percentage of Income Model.⁵⁹ The Melson Formula Model is similar to the Income Shares Model, but incorporates the Standard of Living Adjustment (SOLA), to allocate “each parent a poverty self-support reserve.”⁶⁰ Of the fourteen states⁶¹ that use the Percentage of Income Model, some states have fixed percentages formulas, while other states have variable percentages formulas.⁶² The Percentage of Income Model calculates child support by awarding a fixed or variable percentage of the non-custodial parent’s income to the child or children.⁶³ The Percentage of Income Model does not consider the income of the custodial parent.⁶⁴

It is important to note that, while states are mandated to develop child support guidelines, the guidelines are only presumptive of the appropriate amount.⁶⁵ The law permits deviation from the guidelines if the amount would produce an unjust or inappropriate result.⁶⁶ Both the custodial and non-custodial parent may seek deviation from the guidelines. A custodial parent may seek a deviation from the child support guidelines because the deviation is in the best interests of the child. Some factors courts consider include: the non-custodial parent’s net resources, costs of the child’s post secondary education, benefits to the non-custodial parent furnished by his employer (e.g. automobile, housing); cash flow from investments, or any other reason consistent with the best interests of the child.⁶⁷ Some examples of where a downward deviation from the guidelines might be appropriate would be if the non-custodial parent has a prior child support obligation from another family, shared-custody arrangements, and agreements between parents to deviate from the child support guidelines.⁶⁸

When examining the issue of income, states either use gross or net income to calculate child support obligations.⁶⁹ Gross income, used by twenty-four states for child support calculations, includes but is not limited to: salaries, wages, tips, commission, overtime, second jobs, bonuses, severance pay, pension income, and military personnel fringe benefits, etc.⁷⁰ Net income, employed by twenty-seven states for child support calculations, includes: gross income minus federal, states, and local taxes and other mandatory deductions.⁷¹

⁵⁷ See Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03[b]. (2001).

⁵⁸ *Id.*

⁵⁹ *Id.* at § 1.03[a]. DE, MT, HI.

⁶⁰ *Id.* at § 1.03[d].

⁶¹ See The Office of Child Support Enforcement Website at <http://ocse3.acf.hhs.gov/ext/irg/sps/selectastate.cfm>; MA, PA, GA, TN, MS, MN, WI, IL, TX, AR, ND, WY, AK, NV.

⁶² See Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03 (2001). See also The Office of Child Support Enforcement Website at <http://ocse3.acf.hhs.gov/ext/irg/sps/selectastate.cfm>

⁶³ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03 (2001); *Id.* at § 1.03[c].

⁶⁴ *Id.*

⁶⁵ Family Support Act of 1988, P.L. 100-485, § 102 Stat. 2343 (1988), codified at 42 U.S.C. § 667(b)(2)(1999).

⁶⁶ Rutkin, Arnold H. Rutkin, 3-33 FAMILY LAW AND PRACTICE §33.08 (Arnold H. Rutkin ed., Matthew Bender 2004).

⁶⁷ State child support guidelines often include factors to be considered by the court in determining whether to deviate from child support guidelines either by awarding more child support because doing so is in the best interests of the child or because the non-custodial parent needs a deviation from an award that might otherwise be unjust. See, TEX. FAM. CODE ANN. §§ 154.123 (2003).

⁶⁸ See June Melvin Mickens, *When Life Dictates Otherwise*, in 23 FAMILY ADVOCATE 12 (American Bar Association, Fall 2000)

⁶⁹ See also The Office of Child Support Enforcement Website at <http://ocse3.acf.hhs.gov/ext/irg/sps/selectastate.cfm>

⁷⁰ See Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[a] (2001); (stating that income can also include: “income from contractual agreements; investment and interest income (including dividends) . . . trust or estate income; annuities; capital gains, unless gain is nonrecurring; Social Security benefits; veteran’s benefits . . . national guard and reserve drill pay; benefits received in place of earned income, including workers’ compensation, unemployment insurance benefits, strike pay, and disability insurance benefits; gifts, prizes, education grants (including fellowships or subsidies that are available for personal living expenses), and lottery and gambling winnings; income of new spouse to the extent that income directly reduces expenses of the parent; alimony received from a person other than the other spouse in the present case; income from self-employment, including rent, royalties, and benefits allocated to an individual for a business or undertaking in the form of a proprietorship, partnership, joint venture, close corporation, agency, or independent contractor, such income comprising gross receipts minus ordinary and necessary expenses required to produce such income. . . Income also includes non-money items such as: employment perquisites, including use of the company car, free housing, and reimbursed expenses where such reduce personal living expenses; in-kind income, such as the forgiveness of a debts and the use of property at less than the customary charge.”); *Id.* 2.03[c].

⁷¹ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[c] (2001);

In many states for purposes of calculating either gross or net income, means-tested benefits, such as Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI),⁷² Food Stamps (FS), Section 8 housing allowances, General Assistance (GA), Pell grants, and benefits received from the Jobs Training Partnership Act may be excluded from the determination of income.⁷³

2. Other Children and Income

In addition to child support guidelines, other issues, such as the number of children and amount of income, can affect the determination of child support. The non-custodial parent may have more than one child. This can affect the amount of the child support award. Also, the non-custodial parent may have previous support orders that he is required to pay that may treat previously born children more favorably.⁷⁴ Accordingly, the majority of child support guidelines allow previous support obligations to be deducted from the non-custodial parent's gross income before the child support calculation is made.⁷⁵ In other states support obligations to other children that are not part of the case before the court are not deducted from the non-custodial parent's income,⁷⁶ instead a deviation from the guidelines is granted lowering the percentage of net income awarded as child support.⁷⁷

3. Seasonal Employment, Self-Employment, and Unreported Income

When a non-custodial parent is employed seasonally or has fluctuating income, child support guidelines generally allow the court to look at the income over a period of time.⁷⁸ Generally, when calculating the child support order, courts will require full financial disclosure and review financial information including, but not limited to, income tax returns and year-to-date income for a lengthy enough period to account for past or anticipated changes in income.⁷⁹ For income that is steadily increasing, use of prior year's income is appropriate.⁸⁰

Determining child support can be difficult if the non-custodial parent owns his or her own business, or earns unreported income. Locating and examining the true worth of the non-custodial parent's business is paramount to obtaining an appropriate child support order. If it is safe for the clients to do so, attorneys and advocates should advise clients to copy any information that would be helpful in a child support and/or spousal support case such as spouse's credit reports, bank statements, canceled checks, deposit slips, monthly credit card statements, loan applications, etc. In addition, if there are specific benefits to the business for the non-custodial spouse, such as a company car, housing, and credit cards, these benefits should be taken into account when determining income and an appropriate child support award.⁸¹ In these cases, the custodial battered immigrant parent may also have to testify as to the non-custodial parent's salary and the lifestyle of the family before they were separated.

If the non-custodial parent is hiding or manipulating his income, courts can consider the earning capacity of the parent when awarding child support.⁸² This issue arises in cases in which the non-custodial parent is claiming less income than he actually earns, or has voluntarily reduced work hours or quit his job to evade his child support obligations. All child support guidelines offer provisions for examining the earning capacity of

⁷² Some states exclude certain forms of benefits from calculations and include others. See e.g. TEX. FAM. CODE § 154.133 (2003) (regarding Social Security Income).

⁷³ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[a], 203.[f] (2001).

⁷⁴ *Id.* at § 3.04[a].

⁷⁵ *Id.*

⁷⁶ This is because in some instances the deduction would result in no available income to pay child support to the child before the court.

⁷⁷ See e.g. TEX. FAM. CODE § 154.129 (2003)

⁷⁸ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[d] (2001).

⁷⁹ See *Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993); *Cleveland v. Cleveland*, 249 N.J. Super. Ct. 96, 592 A.2d 20 (App. Div. 1991).

⁸⁰ See *Schaeffer v. Schaeffer*, 717 N.E.2d 915 (Ind. Ct. App. 1999); *Mahoney v. Mahoney*, 567 N.W. 2d 206 (N.D. 1997).

⁸¹ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[e] (2001). See Bruce L. Richman, *Eye on the Business*, Family Advocate, Vol. 23, No. 2 American Bar Association Fall 2000.

⁸² See Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 CONN. L. REV. 647 (1997). For a discussion of the child support obligations of incarcerated parents, see Karen Cavanaugh & Daniel Pollack, Child Support Obligations of Incarcerated Parents, 7 CORNELL J. L. & PUB. POL'Y 531 (1998).

a non-custodial parent.⁸³ Past employment records of the non-custodial parent can be introduced to show that he is voluntarily reducing his income.⁸⁴ The custodial parent's testimony about the non-custodial parent's work schedule, earnings and extravagant spending patterns when the parties resided together can also provide evidence of the non-custodial parent's earning capacity.⁸⁵ In cases in which the abuser has voluntarily left a well-paying job to avoid child support payments, the courts can impute former income to the non-custodial parent.⁸⁶ It is important to note that immigration status of the non-custodial parent is not a valid defense in a child support case. For example, an Oklahoma appeals court ruled that a trial court did not abuse its discretion in ordering a former husband to pay child support based on attribution of minimum wage.⁸⁷ Although the former husband claimed that he could not work due to his current immigration status, he was ordered to pay support because his testimony indicated that his mother was paying his expenses, and that he could work in the United States, but had not found work.⁸⁸

4. Retroactive Child Support Awards and Prior Child Support Orders

In awarding child support, the court can award retroactive child support back to the date of birth of the minor child.⁸⁹ Some states may have a presumption for limiting retroactive child support to a lesser period of time, but attorneys for battered women have been successful in overcoming this presumption and winning retroactive support awards for longer periods of time by arguing that the non-custodial parent knew or should have known about the minor child.⁹⁰ In making determinations about retroactive child support, courts will consider not only the support that the non-custodial parent would have provided the child, but also the fact that the custodial parent who has been supporting the child in the meantime and is entitled to reimbursement.⁹¹

⁸³ See Ala. R. Jud. Admin. R. 32(B)(1); Alaska Civ. R. 90.3 (2003); Ariz. Child Support Guidelines Adopted by the Ariz. Supreme Court (2001); Arkansas Admin. Order of the Supreme Court, Rule 10 (1998); In Re: Administrative Order No. 10 — Arkansas Child Support Guidelines (2002); CAL. FAM. CODE § 4057(g)(2) (2003); COLO. REV. STAT. ANN. §14-10-115 (A)(4) (2002); Conn. C.S. and Arrearage G. (1999); Del. Fam. Ct. Child Support Evaluation and Update (2002); D.C. CODE ANN. § 16-916. (2003); FLA. STAT. § 61.30 (2002); GA. CODE ANN. §19-6-15 (2002); Hawaii Family Court Child Support Guidelines (1998); Idaho R. Civ. Pro. 6(c)(6) (2003); 750 I.L.C.S. 5/505 – 5/510 (2003); Ind. Child Support Rules and Guidelines (2001); Iowa Child Support Guidelines (2000); Kan. Child Support Guidelines (Sup. Ct. Admin. Order 128) (1998); KY. REV. STAT. ANN. §403.213 (2002); LA. REV. STAT. ANN. §9:315(6)(b) (2003); ME. REV. STAT. ANN. tit. 19-A § 2001 (2003); MD. CODE FAM. LAW CODE ANN. §12-202(b)(2) (2002); Mass. Child Support Guidelines (2002); Mich. Child Support Formula Manual (2002); Memorandum on 2003 Child Support Manual, John D. Ferry (March 20, 2003); MINN. STAT. ANN. §§ 518.551 et. seq. (2002); MISS. CODE ANN. §§ 43-19-101 et. seq. (2003); Mo. Sup. Ct. R. 88.01, Civil Procedure Form 14 (20003); Admin. R. Mont. 37.62.101 et. seq. (2003); Neb. Child Support Guidelines (2003); NEV. REV. STAT. §125B.070-.080 (2003); N.H. REV. STAT. ANN. §§ 458-C:1 et. seq. (2003); N.J. Rules of Court, Appendix IX (2003); N.M. Stat. Ann. §§ 40-4-11 et. seq. (2003); N.Y. DOM. REL. LAW § 240(1-b) (2003); N.C. Child Support Guidelines (2002); N.D. Admin. Code §§ 75-02-04.1-01 et. seq. (2003); OHIO REV. CODE ANN. §3113.215(A)(1)(b) (2003); OKL. STAT. ANN. tit. 43, §§ 118-120 (2002); Or. Admin. Reg. §§ 137-50-320 et. seq. (2003); Pa. R. Civ. Pro. 1910.16-1(c)(1) (2000); R.I. Fam. Ct. Admin. Order 97-8 (1997); 2; S.C. Soc. Serv. Reg. 114-4710 et. seq. (1999); S.D. COD. LAWS ANN. §§ 25-7-6.1 et. seq. (2003); Tenn. Comp. R. & Regs. Dep't Human Services §§ 1240-2-4-.01 et seq. (1997); TEX. FAM. CODE ANN. §§ 154.001 et. seq. (2003); UTAH CODE ANN. § 78-45-7 et. seq. (2003); VT. STAT. ANN. tit.15 §§ 653-660 (2003); VA. CODE ANN. § 20-108.1(B)(3) (2003); W. VA. CODE §§ 48A-1A-1 et. seq., 48A-1B-1 et. seq. (2003); Wis. Admin. Code DWD 40.01 - 05 (1999); WYO. STAT. ANN. §§ 20-6-301 et. seq. (2003).

⁸⁴ Some courts impute income to the non-custodial parent regardless of the reason of voluntarily being unemployed or underemployed. Others use a "good faith test" to determine if the reason for under- or unemployment is valid. Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.04[b], [c] (2001).

⁸⁵ Testimony on earning capacity need not be limited to testimony provided by the custodial parent. In cases of self-employed abusers, attorneys representing battered immigrants have successfully presented testimony on income generated through employment from investigators and from witnesses employed in a similar line of work (e.g. street vendor, waiter, construction worker).

⁸⁶ See *Lascaibar v. Lascaibar*, 658 So.2d 170, 171 (Fla. Dist. Ct. App. 1995); *Hutto v. Kneipp*, 627 So. 2d 802, 805-806 (La. Ct. App. 1993); In re *Marriage of Gable*, 750 P. 2d 534, 535-36 (Or. Ct. App. 1988); see also Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 Conn. L. Rev. 647 (1997). Some courts will also order a non-custodial parent to undertake a job search and report to the court every two weeks on the progress of that job search until the non-custodial parent has secured employment.

⁸⁷ *Asal v. Asal*, 960 P.2d 849, 850 – 851 (Okla. 1998).

⁸⁸ *Id.* Some states may have a poverty reserve for child and/or spousal support. For example, if the liable party earns less than 125% of the poverty line, the court may award \$25.00 or \$50.00 per child per month.

⁸⁹ See sample Retroactive Child Support Order in the Appendix to this chapter.

⁹⁰ See e.g. TEX. FAM. CODE ANN. § 154.131(d) (presumption that retroactive child support awards are limited to 4 years can be overcome by proof that the obligor knew or should have known that he was the father of the child or that he sought to avoid establishment of child support.)

⁹¹ See e.g. In Re *Valdez*, 980 S.W.2d 910, 913 (Tex.App. – Corpus Christi 1998).

It is important to determine whether prior child support orders have been entered for the client's child by other courts or through State Child Support IV-D agencies. When these cases exist it is important for counsel to give proper notice to both the non-custodial parent and the IV agency of any child support case being filed. Counsel may need to file motions to intervene in the prior child support case and motions to consolidate the prior case or cases with the current case and ask that the court reduce the prior orders to judgments. Important to include also in the any new child support order received arrearage language from prior court orders and retroactive judgments. In seeking a retroactive judgment, it is important that the client provide you with a detailed timeline of when they were living with the abuser and when they were not. Many times there will have been previous separations and nonsupport periods that qualify for retroactive support. It is also important that all initial pleadings include requests for both retroactive and arrearage amounts so that the court can address these issues if they come up at trial. Some judges will not award arrearages amounts or retroactive support if requests for these forms of relief were not included in the pleadings.

Spousal Support

Spousal support orders can be an important component of an immigrant victim's ability to achieve self-sufficiency and stability for herself and her children.⁹² For immigrant victims who qualify to attain legal immigration status either through a VAWA or a U visa case, spousal support orders provide victims with an important source of income during the time they are waiting for their immigration case to be processed to the point that they can receive work authorization. Spousal support orders can also provide critical support that allows immigrant victims to obtain skills, training, and education needed in order to become self-supporting. The terminology for court ordered payments to a spouse can vary from state to state. There can also be a distinction under state laws between temporary spousal support awarded as part of a temporary order in divorce proceedings⁹³ and support awarded as part of the final divorce decree.⁹⁴ Spousal support can also be awarded as part of relief granted a victim in a civil protection order case.⁹⁵

Spousal support orders are different from child support orders in that there are no set guidelines governing what an appropriate spousal support order should be. Courts are given broad discretion to determine whether a spousal support order is appropriate in a particular case, and the amount, and duration of the spousal support order.⁹⁶ Some states have statutes that list the general factors that courts may consider in determining a spousal support order.⁹⁷ Many states approach spousal support as 'rehabilitative'; they direct that the amount of support should be enough to allow a spouse to obtain the necessary job skills, education, or training to enable him or her to become fully self-supporting.⁹⁸ Typically, spousal support (maintenance/alimony) orders awarded as part of the divorce decree do not last for a duration of longer than a few years from the date of divorce.⁹⁹ Absent any extraordinary circumstances, such as advanced age or poor health, most spousal

⁹² As in child support, an assessment on the risks in pursuing spousal support should be evaluated carefully with the immigrant victim.

⁹³ Some attorneys representing battered immigrants have been successful in securing temporary injunctions against third parties (e.g. banks, savings and 401K administrators) to keep these institutions from releasing funds to the abuser. This is a very important step to take, because abusers with assets will often withdraw funds and spend them before the initial hearing in the divorce case or before the protection order hearing. These injunctions can be obtained at the time of filing the divorce action or as part of the ex parte temporary protection order. Once the temporary injunction is obtained to be effective it must be served on the institution.

⁹⁴ See *eg.*, In re Marriage of Vaughn, Iowa App. Lexis 663 (2003) (Discussing wife's need for temporary spousal support during the pendency of dissolution of dissolution hearing because she experienced an adverse change of circumstances and was unable to meet expenses of living.); See *also*, DeWitt v DeWitt, WL 490928 (Ohio App. 3 Dist., Feb. 26, 2003), (Granting wife's petition for temporary spousal support on November 7, 2001, where divorce hearing was not complete until May of 2002).; See *also*, In Re Marriage of Askmo, 102 Cal.Rptr.2d 66 (2003) (discussing wife's right to "a pendente lite order" for spousal support during pendency of dissolution); This form of more permanent spousal support can be called spousal maintenance, alimony or spousal support depending on the jurisdiction.

⁹⁵ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 997 (1993).

⁹⁶ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004). See, *eg.*, In re Marriage of Cheriton, 92 Cal. App. 4th 269 (2001)

⁹⁷ *Id.* See California/Florida.

⁹⁸ *Id.*

⁹⁹ *Id.*; See, *eg.*, Gaines v. Gaines, No. 2000CA00020, 2000 Ohio App. LEXIS 3696 (Aug. 14, 2000);

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support orders are not permanent or lifetime awards.¹⁰⁰ Temporary spousal support awards entered as part of temporary orders in a divorce proceeding generally last for the duration of the litigation.

Attorneys and advocates for immigrant victims should think creatively about presenting arguments to support a spousal-support claim. Some things to consider include:

- Contributions of the immigrant victim to the marriage, including, but not limited to, providing childcare, homemaking, any contributions to the support of spouse in a business, or pursuit of education and any opportunities the immigrant victim sacrificed for the marriage—e.g. any career or educational opportunities, family ties, in home country and/or the United States;¹⁰¹
- the immigrant victim's eligibility for VAWA immigration relief, or other possible routes to immigration status;¹⁰²
- any of the abuser's actions that kept the victim from attaining legal immigration status and controlled her ability to learn English;
- any evidence of physical, emotional, economic, and immigration-related abuse; and
- any plans that the survivor has to further her educational or career development to enhance the immigrant victim's ability to become self-supporting.
- amounts necessary to avoid loss of community assets pending finalization of the divorce (i.e. marital home, insurance, vehicles, etc.).¹⁰³

FACTORS IN DETERMINING SPOUSAL SUPPORT

The following are the factors most courts consider in determining spousal support awards. Generally, the courts will look at all the factors and then apply the factors to the facts of a particular case.

1. Standard of Living Established During Marriage

The court will look at the parties' standard of living during the marriage and, to the extent possible, fashion an award that would maintain this standard. Marriages of long duration are generally given a lot of weight in the duration and amount of a spousal support award.¹⁰⁴ The court may also look at whether one spouse has foregone career development in order to care for the home in considering the amount and duration of a spousal support order. Courts may also attempt to allow both parties to retain the lifestyle they enjoyed during their marriage.¹⁰⁵ However, in relationships in which only one party was working and/or in cases

¹⁰⁰ See *Moorhead v. Moorehead*, 745 So.2d 549 (Fla. Dist. Ct. App. 1999); *Hartog v. Hartog*, 605 N.Y.S.2d 749 (N.Y. App. Div. 1993); *Delozier v. Delozier*, 640 A.2d 55 (Vt. 1994); *Kaprelian v. Kaprelian*, 653 N.Y.S.2d 634 (N.Y. App. Div. 1997).

¹⁰¹ See *In Re the Marriage of: Vikram Gangahar v. Preeti Gangahar*, 2000 Minn. App. LEXIS 405 (2000)(court noted that respondent-wife gave up everything when she left India and was completely dependent on petitioner when she arrived in the United States); *In Re the Marriage of: Howard Hanson v. Evonne Chou Hanson*, 378 N.W.2d 28; 1985 Minn. App. LEXIS 4908 (1985) (court held that trial court award of temporary maintenance was proper as respondent left Taiwan to marry petitioner and is now unable to speak English or to support herself, further, respondent would be unable to return to her native country without personal disgrace).

¹⁰² There may be other routes to immigration status besides VAWA relief, e.g. family-based sponsorship, employment-based petition, and education-related visas. Attorneys and advocates should consult with an experienced immigration attorney for assistance in pursuing these other routes.

¹⁰³ Counsel for immigrant victims should explore with clients the possibility of being awarded the marital home as part of a divorce decree. Home ownership is very important to people and many immigrant victims would not be able to qualify for a home loan after the divorce on their own. There are pros and cons to homeownership that need to be explored with clients. Home ownership is not always financially feasible. The abuser can be ordered to pay or help pay the mortgage pending the finalization of the divorce in community property states. The client may also explore the possibility of identifying persons with whom she can share the residence whose rent payment can be used to help pay the costs of a mortgage that is higher than the amount the court orders the abuser to pay. If the home is awarded to the client, the abuser will be required to sign a Special Warranty Deed and client will sign the Deed of Trust to Secure Assumption.

¹⁰⁴ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004); See, eg., *In re Hasabnis*, 322 Ill. App. 3d 582 (2001) (Outlining the factors courts consider, including duration of marriage, in deciding support amount.)

¹⁰⁵ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.04 (Arnold H. Rutkin ed., Matthew Bender 2004); See, eg., *Roden v. Roden*, 949 P.2d 67 (Ariz. Ct. App. 1997) (Reasoning that because she worked outside the home during the parties' two-year marriage, being paid \$130,000, where she had received \$ 100,000 in temporary support during parties' separation, and where, given her education and experience, she was capable of maintaining the middle-class lifestyle which

involving low- to middle-income families, it may be difficult to fashion an award to allow for both parties to enjoy the lifestyle they had when they were married. In those instances, courts will attempt to distribute the income and property as fairly as possible.¹⁰⁶

2. Income and Financial Resources of Each Party

The spouse seeking spousal support must prove that he or she needs the support. For immigrant victims, if the U.S. citizen or lawful permanent resident spouse did not file petition asking immigration authorities to grant legal immigration status to the immigrant victim, counsel can argue that this choice by the abuser is the reason the immigrant spouse does not have work authorization. In such cases, spousal support is needed until she is able to receive work authorization and becomes self-supporting.¹⁰⁷ Any evidence of immigration-related abuse can be helpful to this argument, because, in many cases, had the abuser filed for immigration status for the victim, she would have had work authorization.¹⁰⁸

3. Duration of the Marriage

Although court practice in some jurisdictions is to award spousal support as part of the temporary orders in divorce cases, with regard to final orders of maintenance, alimony or spousal support, it can be difficult to obtain spousal support awards in marriages of less than five years' duration absent extraordinary circumstances.¹⁰⁹ In seeking spousal support awards for immigrant victims with shorter marriages, since immigration status and the ability to obtain legal work authorization are linked, it can be relevant to present evidence demonstrating how the abuser used immigration-related abuse, including failure to file papers, threats to withdraw the immigration case and threats to have the victim deported, to keep the victim in the abusive relationship and to maintain economic control over her. Depending on the circumstances of the case, emphasizing the need for a rehabilitative alimony or temporary order of support to allow the immigrant victim to become self-supporting can be persuasive.¹¹⁰

4. Age and Physical and Emotional Health of Parties

The courts will examine the age and physical and emotional health of the parties. If either spouse suffers from a medical or emotional condition which will affect the present or future need for treatment, this may be a factor in the amount and duration of support.¹¹¹ The courts will be looking at the parties' relative employability. If a party's physical or mental condition is an issue in the case, attorneys and advocates should be aware that the immigrant victim may be required to submit to a physical or psychological examination by a professional of the contesting party's choosing.¹¹²

the couple enjoyed during their marriage, the court Decided not to award the wife spousal maintenance, which essentially left intact both parties' lifestyles during marriage).

¹⁰⁶ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.04 (Arnold H. Rutkin ed., Matthew Bender 2004). See, eg. In re Marriage of Mathews, 70 Wn. App. 116 (1993) (Reversing the ordered maintenance fees awarded to the wife because it left the husband without the ability to meet needs and financial obligations and would force him to pay maintenance fees out of his disability and retirement income, whereas with the remaining spousal support, wife would still be able to maintain standards of living enjoyed during the marriage.)

¹⁰⁷ See Ben C. Stone v. Larisa P. Stone, 2004 Ohio 671; Ohio App. LEXIS 644 (2004); Watson v. Watson, 724 So.2d 350; 1998 Miss. LEXIS 595 (1998); Korn v. Korn, 867 So.2d 338, 2003 Ala. Civ. App. LEXIS 42 (2003).

¹⁰⁸ Leslye E. Orloff & Janice V. Kaguyatan, *Offering a Helping Hand: Legal Protections for battered Immigrant Women: a History of Legislative Responses*, 10 Am. U. J. Gender & Soc. Pol'y. 95 (2001).

¹⁰⁹ Rutkin, ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004); See eg., Harrelson v. Harrelson, 932 P.2d 247 (Alaska 1997); Hann v. Hann, 629 So.2d 918 (Fla. Dist. Ct. App.)

¹¹⁰ See In Re Marriage of Steven John Shirilla and Natalia N. Shirilla, 2004 MT 28; 319 Mont. 385; 89 P.3d 1 (2004)(court found that rehabilitative maintenance award was necessary to allow the immigrant spouse to work on her English proficiency). In some cases an abuser may have helped the immigration victim attain legal immigration status. If he filed an immigration case for her, he may have completed an affidavit of support. For a full discussion of how the affidavit of support might be useful as evidence of ability to pay in spousal support proceedings, see discussion below.

¹¹¹ See Cal. Fam. Code § 4325, which creates a rebuttable presumption where there is a criminal conviction for an act of domestic violence entered by the court within five years of the filing of the dissolution proceeding, or at any time thereafter for any award of temporary or permanent spousal support to the abusive spouse otherwise awardable.

¹¹² Rutkin, ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004); See., eg., Coons v. Coons, 765 So. 2d 175 (Fla. Dist. Ct. App. 2000) (Discussing the issue of a wife's medical condition in regards to potentially long-term, or possibly increasing alimony payments by the husband in the event that wife's condition worsened and treatment costs increased).

5. Time Necessary for Either Party to Acquire Sufficient Education or Training in Order to Find Appropriate Employment

Since the approach taken by most courts and state statutes is to achieve financial self-sufficiency for both parties, courts will consider the amount of time it would take a party to become trained and employable. Courts will then fashion an order of support of limited duration in order for the party to achieve this. Attorneys and advocates should work with their battered immigrant clients and examine how long it would take her to become self-supporting. Factors to consider include: how long it will take for her to attain legal immigration status and receive lawful permanent residency under any immigration applications she might have pending, and any education or training she would need or has had in the past which was delayed because of domestic violence and/or family obligations. A specific and realistic plan will enhance a party's chances of obtaining a spousal support order.

6. Needs of Recipient Spouse and Financial Resources of Payor Spouse

The needs and resources of the recipient spouse will be balanced against the financial resources of the payor spouse.¹¹³ The award of support must not be disproportionate to the payor's ability to pay, nor should it be in excess of the payee spouse's financial needs.¹¹⁴

7. Contributions of Each Spouse During Marriage

Virtually all states recognize the nonmonetary contributions of each spouse during the marriage, which usually takes the form of homemaking or child-care services.¹¹⁵ Other examples can include contributions to the success of a family business, spouse's contributions to the other spouse's pursuit of a graduate, or professional degree and any sacrifices to career, family, education and home-country ties that she might have made for the marriage.¹¹⁶

8. Retroactive Nature of the Spousal Support Award

In most jurisdictions, the final support award of the court will be retroactive to the date of the commencement of the action, or the date upon which the request for support was filed.¹¹⁷

Proving Your Case

1. Discovery

Discovery devices are useful to gather all of the relevant facts in preparation for a child and/or spousal support proceeding. "Discovery" refers to the exchange of information between the parties. Discovery procedures that are available in civil court proceedings are generally available in divorce and custody

¹¹³ Rutkin, ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004). See, eg. In re Marriage of Mathews, 70 Wn. App. 116 (1993) (Reversing the order for maintenance fees awarded to the wife because it did not leave the husband with the ability to meet needs and financial obligations, as statutorily required, and would force him to pay maintenance fees out of his disability and retirement income).

¹¹⁴ *Id.*

¹¹⁵ Rutkin, ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004). See, eg., Hammer v. Hammer, 991 P.2d 195 (Alaska 1999) (Factoring in wife's homemaking for nearly 19 years out of the 23 year marriage, to conclude that more monetary support is necessary from husband when considering that wife is not likely to obtain employment that will adequately satiate basic needs.)

¹¹⁶ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004); See, eg., Watson v. Watson, 724 So.2d 350 (1998)(court noted the wife's contributions as a spouse and that her age and lack of work experience warranted a periodic alimony payment in the amount of \$1,000.00 per month); Ahmad v. Ahmad, 2001 Ohio App. LEXIS 5303 (2001); In Re the Marriage of: Vikram Gangahar v. Preeti Ganghar, 2000 Minn. App. LEXIS 405 (2000)

¹¹⁷ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004); See, eg., Gotten v. Gotten, 748 S.W.2d 430 (1987) (Stating that the court's support decision was retroactive, and therefore the wife was entitled to reimbursement for mortgage payments made prior to the entering of the court's decision.)

cases.¹¹⁸ In civil protection order cases, discovery may be more limited, given the need to avoid delays and promote victim safety in the issuance of protection orders.¹¹⁹

Examples of discovery devices include:

- Interrogatories – Written requests/questions used to elicit any relevant information for a hearing.
- Requests for Production of Documents– Useful for requiring a party to turn over documents.
- Depositions – Requires a party to answer questions asked orally by the other side's attorney regarding the facts of the case. Depositions are under oath and generally take place in an attorney's office. Generally, a court reporter is present, or the deposition is taped and everything that is said is recorded.
- Physical and Mental Examinations – Appropriate if the party's or the children's physical or mental condition is at issue.

Subpoenas

Many times it is necessary to obtain documents and information from persons or entities who are not parties to the proceedings. Some examples of this include the party's employer, business associates, bank institutions, accountants, and vocational experts. The procedures governing discovery from nonparties usually are specified by statutes or rules of practice.¹²⁰ Some jurisdictions may also require that permission be obtained from the court prior to the issuance of a discovery request on a nonparty.¹²¹ In most jurisdictions a non-party's attendance and/or documents that are ordered produced at a hearing or deposition will require a subpoena (for a nonparty) or a subpoena *duces tecum* (for documents). Check your statutes and local practice rules for procedures for issuance of subpoenas and subpoena *duces tecum*.

2. Proving the abuser's income and ability to pay

If the non-custodial parent/spouse is working, W-2 forms and any other proof of salary can be used at the hearing. Also, any type of financial documents that the client possesses regarding the household's finances should be gathered before the hearing. The search for evidence that can document income and ability to pay should not be limited to financial information. For example, police reports may contain useful information. The abuser may have told the police that he is willing to pay for repairs of damages he incurred, hospital bills, or support for the child or spouse. This information may be recorded in the police report and can be used as evidence of his willingness and ability to pay or for impeachment purposes. Evidence that the battered immigrant should try to obtain in advance of a hearing to show the spouse/non-custodial parent's income and ability to pay includes:¹²²

- Financial statements
- Income tax returns
- Pay stubs
- Employer's Statements¹²³
- Employer's Affidavits
- Tax returns
- Bank statements
- Mortgage documents
- Rental lease
- Copies of credit card statements
- Affidavit of Support (see discussion below)
- Car payments or leases (showing lifestyle of opposing party)

¹¹⁸ ARNOLD H. RUTKIN, 2-12 FAMILY LAW AND PRACTICE § 12.01 (Arnold H. Rutkin ed., Matthew Bender 2004).

¹¹⁹ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 823 (1993).

¹²⁰ 2-12 ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 12.05 (Arnold H. Rutkin ed., Matthew Bender 2004)

¹²¹ *Id.*

¹²² Lisae C. Jordan, et. al, *The Domestic Violence Civil Law Manual Protection Orders and Family Law Cases*, 2001 A.B.A. COMM. ON DOMESTIC VIOLENCE 28 (2001).

¹²³ Attached to this chapter is a copy of an employer's statement from the Superior Court of the District of Columbia.

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- Self-employment records, records of employee bonuses
- Any records of past employment
- Any proof of the non-custodial parent's assets (401K plans including the ability to borrow funds from such a plan).

If a battered immigrant seeks assistance before leaving her abuser, she should be advised to copy these documents if she can do so safely. In addition to obtaining documents from the battered immigrant, her attorney may be able to subpoena the records in advance of the hearing from the respondent's employer, banking institution, or from the respondent if he is self-employed.¹²⁴ Additionally, in many states, limited discovery may be possible in a civil protection order case if the victim will be requesting a child support and/or spousal support award as part of her protection order.¹²⁵ In such cases, the court may require that each party complete and exchange financial affidavits.

Attorneys representing immigrant victims have been successful in using Employer's Statements to prove income in a child support case in lieu of the employer's testimony. Counsel subpoenas the employer using a subpoena duces tecum which requires that the employer appear and bring with them the Employer's statement and affidavit for inspection and copying. The employer (actually it is the person in charge of payroll) is usually given the option of providing the documents prior to the hearing so that the battered immigrant's counsel can share this information with the opposing party and to secure an agreement to admit the Employers Statement at the hearing without requiring the testimony from the Employer. It is important to not quash the subpoena and keep the employer on call in case their testimony is required.

The Employer's Statement and Employer's affidavit¹²⁶ can be admitted into evidence under court rules which deem these documents prima facie evidence of income.¹²⁷ In other jurisdictions Employer's Statements and Employer's affidavits are generally admitted under the State's equivalent to the Federal Rule of Evidence Rule 902 Self-Authentication.¹²⁸ Under these circumstances these statements are obtained through a subpoena duces tecum, but the Employer is not "excused" from having to testify. If the opposing counsel objects to the admission of the Employer's Statement the person who signed the Employer's Statement and Employer's affidavit would need to be available to testify to the fact that the Employer's Statement contains information that is kept in regular course of business. In practice by keeping the employer on call and providing opposing counsel copies of the Employer's Statement and Employer's Affidavit, opposing counsel usually agrees to stipulate that the figures contained in the Employer's Statement shall be used by the court in calculating the child support amounts.

Some employers may refuse to comply with the subpoena duces tecum. When this occurs the subpoena can be enforced against the employer. Recalcitrant employers may collaborate with the non-custodial parent to help him avoid child support awards or enforcement of child support orders. This may occur but is not limited to instances in which the non-custodial parent is related to the employer. If the employer fails to comply with a subpoena, the subpoena can be enforced against him. When an employer fails to comply with a wage withholding order the employer may be sanctioned under state law for non-compliance. Employers can be fined for not withholding court ordered child support. Attorneys for immigrant victims have won damage awards from employers for failure to comply with court wage withholding orders.¹²⁹

¹²⁴ Check your statutes and local rules for the procedures governing the issuance of a subpoena.

¹²⁵ Leslye E. Orloff, Deeana Jang, & Catherine F. Klein, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 314, 324 (1995). See also the attached financial statement from the Superior Court of the District of Columbia.

¹²⁶ See sample Employer's Statement and Employer's Affidavit included in the appendix to this chapter.

¹²⁷ See e.g. District of Columbia SCR General Family Rule J.; Alabama, ARJA Rule 32(F); Louisiana, LSA-R..S. 9:315.2 (A); Maryland, MD Code Fam. Law §12-203; Maine, 19-A.M.R.S.A. §2004 1A.

¹²⁸ See e.g. Texas Rule of Evidence, 902 Self Authentication. The Texas rule requires that the Employer's State be on file for 14 days prior to the hearing, the federal rule does not have this requirement. Attorneys should check State rules in the appropriate jurisdiction.

¹²⁹ TEX. FAM. CODE ANN. § 158.210; See, eg., *Belcher v Terry*, 420 S.E.2d 909 (1992) (Holding that W.Va. Code Sections 48A-5-3(n) and 48 A5-3(f)(b) (Supp. 1991) clearly provides a right of action against employers who failed to withhold child support payments from salary in accordance with a receipt of notice to do so from the state's Child Advocacy Office. The court also said that punitive damages could be obtained after a showing that the failure to withhold was willful on the part of

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Generally, before making financial awards, courts require evidence of the income and expenses of the battered immigrant and her children. In many jurisdictions, completing a financial statement is the simplest means for the battered immigrant and her children to provide expense information the court.¹³⁰ This financial statement outlines the client's income and expenses, separating out expenses for the client and for her children. Whether or not the financial statement is required to be signed under oath in the jurisdiction, it is important to inform the client that she can be cross-examined on the financial statement. She needs to understand what the financial statement is and that it is being prepared to demonstrate her need for support. It is especially important to point out to clients the importance of being forthright in including all of the amounts they actually spend and to work with clients to help ensure they are not underestimating the true costs of supporting their children and themselves.¹³¹

Even when a financial statement is used, it is advisable to gather and bring to any child support hearing additional evidence of the client's expenses. Evidence of client's expenses might include:¹³²

- Mortgage payments
- Rent payments
- Food and clothing costs
- Utilities
- Telephone
- Medical and dental expenses (for client and child)
- Counseling expenses
- Child care expenses
- Car payments
- Gas or transportation costs
- Insurance payments (car, home, health)
- School tuition
- Extracurricular activities
- Payments on debts (credit cards, hospital bills, student loans)
- Attorney's Fees
- Diapers and formula
- Laundry
- Meals away from home
- School lunches
- Children's activities
- Entertainment
- Haircuts
- Cable TV and newspapers

the employer.); *Child Support Recovery Srvs., Inc. ex rel S.C. v. Inn at the Waterfront, Inc.*, 7 P3d 63 (Alas. 2000) (Affirming summary judgment against an employer for failure to withhold income from an employee who had child support obligations...the court's finding relied on Alaska Stat. Section 25.27.260(a) and (b).)

Casino Magic Corp. v. King, 43 S.W.3d 14 (Tex. App. 2001) (Awarding mother \$36,951.85 in delinquent child support plus attorney fees and court costs after mother filed motion to enforce child support wage withholding order against father's employer where employer purportedly failed to comply with previous order.); See also, *State v Filipino*, Conn. Super. LEXIS 266 (2000) (Suing on behalf of respondent's former wife, the Connecticut Support Enforcement Division prevailed when the court held employer to be in contempt for willfully violating a valid withholding order, and found employer liable to mother in the sum of \$29,259 for the full amount of income not withheld since receipt of the notice to withhold.)

¹³⁰ See sample financial statement in the Appendix to this chapter.

¹³¹ Often immigrant victims will underestimate their actual expenses. Sometimes this will occur because they are multiplying their weekly costs by 4 instead of 4.3 weeks to attain a monthly expense amount. In other instances they may be very proud of how their ability to be frugal, because it has helped them be able to survive and support their children on their own. One way attorneys can help clients check to see if they have included all expenses on the financial statement is to ask whether they are saving money or spending all of the money they receive. In most instances low income immigrant women will not be saving any money and the total amount of expenses reported on the financial statement should equal or be more than their income. Counsel will need to work with clients to be prepared to explain how they pay for expenses that exceed their income (e.g. help from family, credit card debt, etc.)

¹³² See Leslye E. Orloff, Deeanana Jang, & Catherine F. Klein, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 314, 324 (1995).

When the victim has incurred expenses related to having suffered abuse, it is important to introduce evidence of those expenses at the civil protection order, child support-, spousal support-, and divorce hearing. Documentation of expenses related to the abuse and evidence of lost employment opportunities might include:¹³³

- Medical bills
- Hospital bills
- Bills related to repairing property damaged by abuse
- Costs associated with changing locks on the family residence
- Transportation costs associated with seeking medical treatment for injuries
- Counseling costs for the victim and the children
- Evidence of reduced pay from an employer related to having suffered abuse, including days missed at work when recuperating from injuries, and days missed when involved in court proceedings.

Immigration Affidavits of Support as evidence of the ability to pay child support and/or spousal support

An Affidavit of Support is a document that a U.S. citizen or lawful permanent resident is required to submit to immigration authorities when a family member whom he or she has sponsored applies for lawful permanent residence (a “green card”).¹³⁴ In the affidavit of support, the U.S. citizen or lawful permanent resident family member signs a sworn statement promising to financially support the immigrant family member. Affidavits of Support can be helpful in family court cases in obtaining child and spousal support awards. The affidavit can be used as evidence of income and the ability to pay child and/or spousal support and as evidence of the abusive spouse’s or parent’s obligation to support his family.¹³⁵ For immigrants who applied for permanent residence before December 19, 1997, affidavits were filed on Form I-134. Applicants filing on or after that date were required to submit the new enforceable Affidavit of Support on Form I-864.¹³⁶

If the immigrant victim attained lawful permanent or conditional resident status (i.e. greencard) through her spouse, he will have had to file an affidavit of support in her immigration case. The existence of an affidavit of support provides critical information that can help in obtaining child and spousal support, including evidence of the sponsoring spouse’s income. When filing the affidavit of support, the sponsor is required to submit to immigration authorities, together with the affidavit, the following documents:

- A copy of the sponsor’s income tax returns for the last three years if he or she had a legal duty to file;¹³⁷
- evidence of current employment or self-employment (normally recent pay stubs and a statement from the sponsor’s employer on business stationery);¹³⁸

¹³³ *Id.* at 28.

¹³⁴ An Affidavit of Support is required in all family-based immigration cases, whether the sponsored immigrant is applying for permanent residence through adjustment of status in the U.S. or an immigrant visa at a United States consulate abroad. INA 212(a)(4)(C); 8 U.S.C 1182(a)(4)(C). In employment-based immigration cases an affidavit of support is also required if the immigrant will be employed by in a business owned by a relative. INA § 212(a)(4)(D); 8 U.S.C. 1182(a)(4)(D).

¹³⁵ See *Sinojia v. Sinojia*, No. 113953, 1994 Conn. Super. LEXIS 2485 (Conn. Super. Ct. Sept. 27, 1994)(spousal support); *Stein v. Stein*, 831 S.W.2d 684 (Mo. Ct. App. 1992)(affidavit of support admitted as evidence); *K.S. v. I.G.S.*, Index No. 313910/00 (N.Y. Sup. Ct. July 16, 2001)(spousal support); *Walsh v. Walsh*, 764 N.E.2d 1103 (Ohio Ct. App. 2001)(as evidence); *Dao v. Nguyen*, No. 2071-95-4, 1995 WL 653322 (Va. Cir. Ct. Nov. 7, 1995)(spousal support).

¹³⁶ A sponsor who signs a new affidavit of support may be required to repay any “means-tested public benefits” received by the sponsored immigrant if requested by the government agency that provided the benefits. See INA Sec. 213A(b). As of April 2003, the National Immigration Law Center reported that no government agency had been known to request repayment from an I-864 sponsor. See *Sponsored Immigrants and Benefits*, http://www.nilc.org/ciwc/ciwc_ce/AOS_and_Bs_CA.htm; see generally, Charles Wheeler, *The New Affidavit of Support and Sponsorship Requirements*, 74 Interpreter Releases 1581 (Oct. 20, 1997); Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 Creighton L. Rev. 741, 753-54 (1998).

¹³⁷ 8 CFR § 213a.2(c)(2)(i)

¹³⁸ 8 CFR § 213a.2(c)(2)(ii)

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- If the income is below 125% of the poverty level for the family size,¹³⁹ the sponsor may also submit other proof of his ability to support his immigrant spouse and/or child, including evidence of the sponsor's assets.

Obtaining information that was submitted in conjunction with the Affidavit of Support can be useful in cases where proving the abuser's income and ability to pay would otherwise be difficult. Examples include when the abusive sponsor is self-employed or works for a family member, or is hiding or manipulating income. To determine that the affidavit of support has been filed, counsel for an immigrant victim in a protection order-, child support-, divorce- or other family court proceeding should:

- Submit a Freedom of Information Act (FOIA) request to obtain copies of the battered immigrant's immigration file if she does not have a copy of the Affidavit of Support or underlying documents;
- If necessary, use discovery in the family court case to obtain copies of the affidavit of support and tax returns that the abusive spouse filed with his affidavit of support and pay stubs attesting to current income;
- If necessary, creatively use protection order remedies to order that the abuser provide a copy of the Affidavit of Support and/or copies of his tax returns. If he cannot provide copies of these documents, the abuser can be ordered to obtain an IRS transcript of tax returns filed for the past three years.¹⁴⁰

While the strategies discussed above for child support cases should also be explored in spousal support cases,¹⁴¹ obtaining spousal support awards can be significantly more difficult than child support awards. For this reason, counsel for an immigrant victim may want to consider introducing the Affidavit of Support as evidence in a divorce or protection order case in which the battered immigrant is seeking spousal support. The affidavit, in which the sponsor promised to financially support the immigrant spouse, can be introduced along with the other evidence (see discussion above on types of evidence) to support a spousal support award of sufficient duration for the battered immigrant to gain economic self-sufficiency.¹⁴²

3. Form of Relief – Wage Withholding

Wage withholding requires the non-custodial parent's employer to withhold child support from the non-custodial parent's paycheck before he or she is paid. For victims of domestic violence, this form of relief is preferable because it minimizes any contact between the abuser and victim, and provides an objective method to prove whether child support has been paid. This can be accomplished by obtaining a wage-withholding order in conjunction with the protection order, child support order, or divorce order.¹⁴³ Payment through a child support collection agency is also possible. A child support collection agency will distribute the payment to the victim and record the payments. The child support collection agency can also assist in enforcement if the abuser fails to pay the court-ordered child support.

¹³⁹ See 8 CFR § 213a.1. In determining whether the household income is sufficient, household size is calculated to include the sponsor, all persons related to the sponsor by birth, marriage, or adoption living in the sponsor's residence, the sponsor's dependents, the sponsored immigrant(s), and any immigrants the sponsor has previously sponsored for immigration status when that support obligation has not terminated.

¹⁴⁰ To obtain a transcript of tax returns, an individual can submit IRS Form 4506-T by mail, fax, or in person at a local IRS office or order by calling 1-800-829-1040. If an attorney or individual other than the taxpayer is requesting the transcript or other document, IRS Form 2848, Power of Attorney and Declaration of Representative, must be signed by the taxpayer and submitted with the request. For more information and to obtain these forms, see the IRS official website: <http://www.irs.gov/formspubs/>.

¹⁴¹ Even when counsel plans on introducing the affidavit of support in a family court case, counsel should also use the strategies described above to obtain the financial documentation submitted with the affidavit. Any information on assets submitted could be useful both for spousal support and property division awards.

¹⁴² Under the affidavit of support the responsibility to support a family member under an affidavit of support lasts until the immigrant family member becomes a U.S. citizen or is credited with forty quarters of work (usually ten years). 8 U.S.C. § 1183a(a)(3)(A), B) (2003).

¹⁴³ Depending on your jurisdiction's rules, a wage withholding order may be issued automatically with a court order that includes spousal and/or child support. If wage withholding orders are not automatically issued, you must request that the court issue the order. See also Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, §453(g)(1) (codified, as amended, in scattered sections of 42 U.S.C.)

Child Support and Visitation

Another important area of which battered immigrant women should be aware involves visitation and child support. Many non-custodial parents argue that they should not be required to pay child support if they are not allowed visitation with their children. Safety concerns for the children and the battered immigrant client, particularly in very violent cases, may lead a court to not order visitation with an abusive father. Immigrant victims should be informed by counsel that the court may not demand that she allow visitation in order that child support be provided.¹⁴⁴ Rather, the non-custodial parent is required to pay child support regardless of his visitation rights with his children.¹⁴⁵ Many domestic violence victims, including battered immigrant victims, are unaware that, as a matter of law child support and visitation are independent issues in a family court proceeding. It is important for attorneys and advocates working with immigrant victims to explain that a non-custodial parent is required to pay child support regardless of his visitation rights with his children.¹⁴⁶

When a non-custodial parent who is an abuser has not been exercising visitation rights, attorneys need to be aware that seeking a child support order may spur the abuser to seek visitation with the child. An abuser's payment of child support does not guarantee him the right to visitation with the children. In domestic violence cases, if a victim seeks and receives a court order that limits or denies an abuser visitation with the parties children, those restrictions on visitation do not cut off the rights of the children to receive child support payments.¹⁴⁷

Enforcement of Support Orders

It is quite possible that, even after the successful attainment of a child support and/or spousal support order, the abuser or non-custodial parent will not pay. It is estimated that over eighty-four billion dollars of child

¹⁴⁴ See, e.g., *Hagstrom v. Smith*, 251 S.E.2d 27 (Ga. Ct. App. 1978) (finding that the withholding of visitation constitutes no defense in an action seeking payment of child support under a valid court order); *In re Marriage of Hoksbergen*, 587 N.W.2d 490 (Iowa App. 1998) (holding that the withholding of visitation did not stop the father's obligation to support the minor children); *Vanburen County Dep't of Social Servs. by Curtis v. Swearingin*, 455 S.E.2d 161, 163 (N.C. Ct. App. 1995) (voiding an order that conditioned child support on visitation for jurisdictional reasons in a URESA action). *Cf. Brancoveanu v. Brancoveanu*, 548 N.Y.S.2d 694 (N.Y. App. Div. 1989) (holding that pursuant to Domestic Relations Law § 241, interference with, or withholding of, visitation rights is not a ground for terminating child support or canceling child support arrears. However Domestic Relations Law § 241 (2003) does allow the suspension of alimony or maintenance support payments (including alimony/maintenance arrears during the time that visitation was withheld) when the custodial parent wrongfully interfered or withheld visitation).

¹⁴⁵ Generally, visitation rights cannot be terminated because of non-payment of child support. See, e.g., *Peterson v. Jason*, 513 So. 2d 1351, 1352 (Fla. Dist. Ct. App. 1987) (holding that a court can only terminate visitation rights for nonpayment of support when the nonpayment has been willful, intentional and detrimental to the welfare of the child, so that termination would be in the child's best interest); *Ledsome v. Ledsome*, 301 S.E.2d 475, 479 (W. Va. 1983) (holding that the trial court incorrectly denied visitation rights because the record did not show that he continuously, willfully, or intentionally failed to support his children).

¹⁴⁶ Generally, visitation rights cannot be terminated because of non-payment of child support. See, e.g., *Peterson v. Jason*, 513 So. 2d 1351, 1352 (Fla. Dist. Ct. App. 1987) (holding that a court can only terminate visitation rights for nonpayment of support when the nonpayment has been willful, intentional and detrimental to the welfare of the child so that termination would be in the child's best interest.); *Ledsome v. Ledsome*, 301 S.E.2d 475, 479 (W. Va. 1983) (holding that the trial court incorrectly denied visitation rights because the record did not show that he contumaciously, willfully, or intentionally failed to support his children).

¹⁴⁷ See, e.g., *Hagstrom v. Smith*, 251 S.E.2d 27 (Ga. Ct. App. 1978) (finding that the withholding of visitation constitutes no defense in an action seeking payment of child support under a valid court order); *In re Marriage of Hoksbergen*, 587 N.W.2d 490 (Iowa App. 1998) (holding that the withholding of visitation did not stop the father's obligation to support the minor children); *Vanburen County Dep't of Social Servs. by Curtis v. Swearingin*, 455 S.E.2d 161, 163 (N.C. Ct. App. 1995) (voiding an order that conditioned child support on visitation for jurisdictional reasons in a URESA action). *Cf. Brancoveanu v. Brancoveanu*, 548 N.Y.S.2d 694 (N.Y. App. Div. 1989) (holding that pursuant to Domestic Relations Law § 241, interference with or withholding of visitation rights is not a ground for terminating child support or canceling child support arrears, yet Domestic Relations Law § 241 (2003) does allow the suspension of alimony or maintenance support payments (including alimony/maintenance arrears during the time that visitation was withheld) when the custodial parent wrongfully interfered or withheld visitation).

support arrears are owed in the United States.¹⁴⁸ The state and federal government have implemented several strategies to address this problem. In addition, civil and criminal contempt actions in courts are also possible. The following section will discuss child support enforcement and will emphasize particular issues that can arise in cases of immigrant victims.

1. Child Support Enforcement Under Personal Responsibility And Work Opportunities Reconciliation Act (PRWORA) -- TANF Requirements and Other Available Enforcement

PRWORA¹⁴⁹ made significant changes to child support enforcement. PRWORA required the creation of new databases, strengthened child support enforcement mechanisms, and pushed states to achieve a ninety percent paternity-establishment rate, or face financial penalties in the form of cuts to the State's federal TANF block-grant funds.¹⁵⁰ PRWORA tightened the cooperation requirements for child support and added a new requirement that states flag cases of individuals in the state's child support automated system when there is reasonable evidence of domestic violence, or when a protection order has been issued.¹⁵¹

Custodial parents seeking TANF are required under federal law to make a "good-faith effort" to provide the state with information about the non-custodial parent, and are required to agree to appear at interviews, hearings, and legal proceedings. If necessary, to establish paternity, and to subject themselves and their child to genetic tests to establish paternity.¹⁵² If a custodial parent does not cooperate with the state on paternity-establishment or child support proceedings, the custodial parent may be sanctioned by partial or full loss of TANF benefits for herself and her children.¹⁵³

When a parent applies for cash-assistance benefits, she will be required to disclose the identity of the children's father.¹⁵⁴ The state child support enforcement agency will then attempt to collect child support from the father. Generally, if an immigrant victim is receiving cash assistance, the amount of cash assistance she is receiving may be deducted from her child support payment, or her cash-assistance payment may be reduced.¹⁵⁵ Some battered women and battered immigrant women may not wish to collect child support out of fear of retaliation from the abuser. The child support enforcement agency may not attempt collection in certain instances where a battered immigrant shows fear of violence from the father.¹⁵⁶

Federal law provides two exceptions to the child support cooperation requirement: (1) a waiver for "good cause," and (2) the Family Violence Option (FVO), which permits the state to waive child support cooperation requirements, as well as other TANF requirements, such as work and time limits, if the state finds "good cause."¹⁵⁷ The first exception is broader, encompassing not only domestic violence, but other circumstances, including conception of the child through forcible rape or incest, pending adoption proceedings, and reasonably anticipated physical or emotional harm to the mother or child.¹⁵⁸ The FVO exception urges states to screen TANF cases for domestic violence, safeguard battered applicants'

¹⁴⁸ See Office of Child Support Enforcement, FY 2000 Preliminary Data Preview Report, Ch. 1: Child Support Enforcement (CSE) Background and Program Results, at <http://www.acf.dhhs.gov/programs/cse/pubs/2000/datareport/ch01.html>.

¹⁴⁹ Pub. L. No. 104-193 §§, 110 Stat. 2105 (1996).

¹⁵⁰ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657 660 (2000).

¹⁵¹ *Id.* at 695. See also 42 U.S.C. §654(26)(D) (Supp. III 1997).

¹⁵² Please refer to previous section on paternity and risks to victims of domestic violence. See Stern, Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L. J. 47, 52 (2003). See also 42 U.S.C. §654 (Supp. III 1997).

¹⁵³ See Stern, Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L. J. 47, 56 (2003); See also 42 U.S.C. §654 (Supp. III 1997).

¹⁵⁴ See Office of Child Support Enforcement : Handbook on Child Support Enforcement, available at <http://acf.dhhs.gov/programs/cse/fct/cshdbk.htm> (last modified September, 1997).

¹⁵⁵ ARNOLD H. RUTKIN, 5-48 FAMILY LAW AND PRACTICE § 48.03 (Arnold H. Rutkin ed., Matthew Bender 2004).

¹⁵⁶ For more strategies on how to argue for greater safety and security for domestic violence victims when they seek child support See Susan Notar & Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U.J. GENDER SOC. POL'Y & L. 657 (2000).

¹⁵⁷ See Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L. J. 47, 56 (2003).

¹⁵⁸ *Id.*

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confidentiality, and refer battered individuals to counseling and supportive services.¹⁵⁹ States may also use the FVO to waive other TANF requirements such as residency requirements, child support cooperation, time limits, work requirements, and family-cap provisions, if they make ‘good cause’ determinations to do so.¹⁶⁰ Most states have chosen to adopt the Family Violence Option.¹⁶¹

Family Violence Option waivers can be particularly useful in cases of battered immigrants who receive a prima facie determination that grants them access to public benefits usually within two months of filing a VAWA self-petition.¹⁶² However, battered immigrant self-petitioners cannot receive legal work authorization until their VAWA self-petition has been approved.¹⁶³ The delay between the prima facie determination granting them permission to access public benefits and receipt of work authorization following approval of their VAWA self-petition can take over a year. FVO’s waiver of work requirements are needed to carry the battered immigrant self-petitioner through this waiting period.

Further, battered immigrants who are eligible for benefits based on an approved family based visa petition filed by their spouse who is an abusive lawful permanent resident cannot receive work authorization until they become eligible to adjust their status to that of a lawful permanent resident.¹⁶⁴ The wait between approval of their family based visa petition and adjustment can be up to 7 years, depending on the immigrant’s country of origin.¹⁶⁵ During this waiting period, IIRAIRA explicitly granted access to benefits to battered immigrants with approved family-based visa petitions to help them address survival needs while they wait for their immigration case to work its way through the system.¹⁶⁶

PRWORA not only created child support enforcement procedures for families on TANF, it also created programs for parents not receiving TANF.¹⁶⁷ Child support enforcement programs are open to anyone seeking assistance with child support enforcement.¹⁶⁸ PRWORA created new and expanded federal and state databases that will match information on child support orders with information on newly hired employees.¹⁶⁹ In addition, the database matching also allows for automated enforcement of child support orders, such as seeking and attaching assets of delinquent obligors.¹⁷⁰ States are required to have general safeguards against unauthorized use or disclosure of information relating to paternity, child support, and custody proceedings, however.¹⁷¹ Most importantly, when a protection order has been issued the law specifically prohibits states from releasing information on the whereabouts of a spouse or child to the abuser.¹⁷²

¹⁵⁹ In implementing FVO, it is important that immigrant battered women be provided interpreters, and that they be provided access to culturally competent and language-accessible counseling with support services. Leslye Orloff, Leandra Zarnow and Yiris Cornwall, FACILITATING ACCESS TO TANF FOR BATTERED IMMIGRANTS: A PILOT TRAINING MANUAL FOR TANF ELIGIBILITY WORKERS, Ch. 9 (2000).

¹⁶⁰ See Stern, Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims’ Access to Child Support and TANF*, 14 HASTINGS WOMEN’S L. J. 47, 57 (2003).

¹⁶¹ See the appendix of this chapter for a state-by-state analysis of which states have implemented the Family Violence Option and an overview of each state’s approach to FVO.

¹⁶² See chapter 5 on public benefits for a full discussion of public benefits access for immigrant victims.

¹⁶³ See Leslye Orloff, Leandra Zarnow and Yiris Cornwall, FACILITATING ACCESS TO TANF FOR BATTERED IMMIGRANTS: A PILOT TRAINING MANUAL FOR TANF ELIGIBILITY WORKERS, Ch. 9 (2000).

¹⁶⁴ *Id.*

¹⁶⁵ The current visa bulletin can be found at http://travel.state.gov/visa/frvi_bulletincurrent.html.

¹⁶⁶ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C. and 18 U.S.C.) 8 U.S.C. 1641(c).

¹⁶⁷ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL’Y & L. 657 671 (2000).

¹⁶⁸ See Office of Child Support Enforcement : Handbook on Child Support Enforcement, available at <http://acf.dhhs.gov/programs/cse/fct/cshdbk.htm> (last modified September, 1997).

¹⁶⁹ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL’Y & L. 657 667 (2000).

¹⁷⁰ *Id.* at 695. The law also provides other mechanisms of enforcement including the ability of states to revoke drivers-, professional-, recreational-, and occupational licenses, the ability to attach tax refunds and turn them over to the custodial parent, and the creation of centralized collection and disbursement units. See Office of Child Support Enforcement : Handbook on Child Support Enforcement, available at <http://acf.dhhs.gov/programs/cse/fct/cshdbk.htm> (last modified September, 1997).

¹⁷¹ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL’Y & L. 657 696 (2000).

¹⁷² *Id.*; See also 42 U.S.C §654(26)(B) (Supp. II 196).

When applying for child support collection assistance from the state, the battered immigrant should have as much information about the non-custodial parent as possible. It would thus be very useful to collect this information during discovery in the family court case, or as part of the protection order case that led to the issuance of the child support order. The information that should be collected includes the name, address and social security number of the parent, the name and address of the parent's employer, any proof of income or assets (pay stubs, tax returns, bank accounts, investments or property holdings), children's birth certificates, any proof of paternity, the divorce decree or separation agreement, and past child support records.¹⁷³

2. Civil Contempt And Criminal Sanctions

If the non-custodial parent is unable to make the support payments due to financial reasons, then he may file for a modification of the previous award. Courts can examine whether the reduction in financial resources was bona fide, or voluntarily undertaken to reduce his child support obligation. When deciding such motions, courts regularly determine whether the child support payor voluntarily reduced his income or incurred debt (e.g. by buying a new car) in order to reduce or avoid child support payments.¹⁷⁴ If the payor incurred debt, the court may not reduce child support payments. In cases in which the abuser quit his job, the court could order the abuser to seek employment, and impute income to him thereby continuing child support.¹⁷⁵

Civil or criminal contempt proceedings are used to enforce support orders when the payor reduces or ceases payment without a modification being granted. Civil contempt proceedings generally are filed in the court that issued the original order. The majority of states have civil contempt statutes for nonsupport¹⁷⁶, while a minority of states have criminal contempt statutes for nonsupport.¹⁷⁷

When filing for contempt, a simple petition is usually drafted which enumerates the violations of the order and attaches a copy of the original order. During the proceedings, the non-custodial parent may seek to introduce evidence of support, such as the purchase of clothes or diapers, or paying the rent or mortgage. However, if the non-custodial parent or obligor of spousal support is not paying support as ordered in the original order, he is still in contempt. Civil contempt proceedings usually have to be personally served on the non-custodial parent.

A battered immigrant may pursue civil contempt proceedings and still not receive child support payments. In such cases, the client may be advised to pursue criminal charges against the non-custodial parent for nonpayment of support.¹⁷⁸ Criminal charges for failure to pay child support are usually brought only against persons who refused to comply with child support orders after other options for civil enforcement have been

¹⁷³ U.S. Department of Health and Human Services, Handbook on Child Support Enforcement [available online at www.pueblo.gsa.gov/cgi-bin/pf.cgi].

¹⁷⁴ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 n 9.5 (Arnold H. Rutkin ed., Matthew Bender 2004).

¹⁷⁵ *Id.*

¹⁷⁶ See ALA. CODE § 12-15-11 (2001); ALASKA STAT. § 09.50.020 (2001) (referring to both civil and criminal contempt); ARIZ. REV. STAT. ANN. 12-864.01 (2002); ARK. CODE ANN. § 9-14-235 (2001); CAL. FAM. CODE § 4571 (2002); COLO. REV. STAT. § 14-14-110 (2002); CONN. GEN. STAT. § 17b-745 (2002); DEL. CODE ANN. tit. 13 § 516 (2001); D.C. CODE ANN. § 16-2325 (2002); FLA. STAT.ch. 61.14 (2001); 7 GUAM CODE ANN. § 34102 (2001); GA. CODE ANN. § 15-15-4.1 (2001); 305 ILL. COMP. STAT. ANN. 5/10-16 (West 2002); IND. CODE ANN. § 31-16-12-6 (Michie 2002); KY. REV. STAT. ANN. § 403-240 (2002); LA. CHILD. CODE tit. 1353 (2002); MD. CODE ANN., CTS & JUD. PROC. § 5-111 (2001); MICH. COMP. LAWS § 552.631 (2002); MINN. STAT. § 518.617 (2002); MISS. CODE ANN. § 43-19-39 (2002); MO. REV. STAT. § 210.843 (2002); MONT. CODE ANN. § 40-5-601 (2001); NEB. REV. STAT. § 43-512.04 (2001); NEV. REV. STAT. 425.3836 (2001); N.H. REV. STAT. ANN. § 126-A:41 (2001); N.M. STAT. ANN. § 40-4A-11 (2001); N.C. GEN. STAT. § 50-13.4 (2002); N.D. CENT. CODE § 14-17-16 (2002); OHIO REV. CODE § 3119.57 (2002); OKLA. STAT. TIT. 10 § 78 (2002); 23 PA. CONS. STAT. ANN. § 4345 (West 2002); R.I. GEN. LAWS § 15-21-1 (2001); S.C. CODE ANN. § 20-7-1350 (Law Co-op 2002) (referring to both civil and criminal contempt); S.D. CODIFIED LAWS § 26-7A-98 (2002); TENN. CODE ANN. § 36-5-101 (2001); TEX. FAM. CODE ANN. § 157.001 (2001); UTAH CODE ANN. § 78-32-17 (2001); VT. STAT. ANN. TIT. 15 § 603 (2001); TERRITORIAL COURT RULE 108 (Virgin Islands 2001); WASH. REV. CODE § 26.09.160 (2002); W. VA. CODE § 48-14-501 (2002) (referring to both civil and criminal contempt); WIS. STAT. § 767.08 (2002); WYO. STAT. ANN. § 20-2-310 (Michie 2001). This and the following statute lists may not be inclusive. Please confirm information with an attorney in your state.

¹⁷⁷ See ALASKA STAT. § 09.50.020 (2001) (referring to both civil and criminal contempt); IDAHO CODE § 7-610 (2002); IOWA CODE § 598-23A (2002); ME. REV. STAT. ANN. tit. 19-A § 2601 (West 2002); MASS. GEN. LAWS ANN. ch. 215 § 34 (2002); N.J. STAT. ANN. § 2A:34-23e (2001); N.Y. FAM. LAW § 454 (McKinney 2002); S.C. CODE ANN. § 20-7-1350 (Law Co-op 2002) (referring to both civil and criminal contempt); W. VA. CODE § 48-14-501 (2002) (referring to both civil and criminal contempt).

¹⁷⁸ See discussion in Section a. below for more information on criminal remedies.

exhausted. The abuser may have sought to reduce child support payments through the court. The court may have denied his request, after which he has refused to pay. On the other hand, he may simply have refused to pay without any explanation or attempt to change the order. Other abusers may continue to refuse to pay court ordered child support after having been brought before the court on civil contempt charges.

a. Immigration Consequences of Criminal Convictions for Failure to Pay Child Support

Many states criminalize failure to support or abandonment. The statutes vary in their language, with some states mandating that there must be a willful failure to pay in order for nonsupport to be a crime, and other states holding that nonsupport is simply a strict-liability offense. When the non-paying non-custodial parent is a non-citizen, convictions under statutes with certain mens rea (intent) elements, such as willfulness requirements, could lead to a non-citizen's deportation. The fact that criminal prosecution for nonpayment of child support could potentially result in deportation of the non-paying parent means that attorneys working with immigrant victims need to carefully examine the ramifications of criminal child support enforcement. Victim safety and economic security need to be carefully considered. If the abuser is deported, the victim will likely be cut off from receiving any future child support payments. On the other hand, the fact that criminal conviction for non-payment of child support could lead to the non-paying parent's deportation could help convince batterers to make court-ordered child support payments.

Under immigration law state statutes that criminalize non-payment of support and include willfulness or other mens rea (intent) elements may be more likely than other support-enforcement laws to trigger deportation of nonpaying non-citizens, because such crimes could qualify as "crimes of moral turpitude." Most states' criminal non-support statutes require that a child support case meet civil contempt's prima facie case for nonsupport.¹⁷⁹ The failure to support must be "willful,"¹⁸⁰ and the failure to support would leave the child or spouse destitute.

Crimes of moral turpitude are not defined in the Immigration and Nationality Act, but are generally viewed by case law as crimes involving conduct that is inherently base, vile, or depraved, and contrary to accepted moral standards.¹⁸¹ Moral turpitude crimes include crimes involving an intent to steal or defraud, crimes in which bodily harm or property harm is caused or threatened by an intentional act, or crimes in which serious bodily harm or harm to property is caused or threatened by a reckless act, felonies, some misdemeanors in which malice is an element, and most sex offenses.¹⁸² Moral turpitude is determined by the fact-finder in relation to the elements of the crime, and is not determined by the state or federal criminal law's classification of a particular crime as a felony or misdemeanor.¹⁸³ Therefore, if intent to defraud is an element of the crime of which the individual was convicted, the crime is one of moral turpitude.¹⁸⁴

In particular, willful failure to pay child or spousal support can be characterized as a crime of moral turpitude, because by failing to pay court-ordered child support, the abuser demonstrates his intent to steal or defraud the person to whom court ordered support was to be paid.

Whether or not being criminally convicted of nonsupport would constitute a crime of moral turpitude in any given state depends both upon whether there is language in the statute regarding "willful," "intentional" or "knowing" nonsupport, and on whether the failure to support would make the spouse or child destitute.¹⁸⁵

¹⁷⁹ Generally, a "prima facie showing" means that support must have been ordered, notice of the order was given or there was knowledge of it, and there was noncompliance with the order. See, e.g., Cal. Civ. Proc. Code § 1209.5 (2002), from Deborah K. Bell, *Child Support Orders: The Common Law Framework -- Part II*, 69 Miss. L.J. 1120, 1120 (2000).

¹⁸⁰ 23-FALL Fam. Advocate 49, 50 (2000).

¹⁸¹ Nat'l Ass'n of Women Judges, *Removing Obstacles to Justice for Immigrants, Education Curriculum for Judges* 20 (April 5, 2002).

¹⁸² *Id.* at 20.; See also ANN BENSON, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, Appendix C (2001).

¹⁸³ Goldesthstein v. BCIS, 8 F.3d 645 (9th Cir. 1993).

¹⁸⁴ Jordan v. De George, 341 U.S. 223, 227 (1951).

¹⁸⁵ See, e.g., In Matter of R., 4 I. & N. Dec. 192 (BIA 1950); Annotation, *What constitutes "crime involving moral turpitude" within meaning of secs. 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. secs. 1182(a)(9), 1251(a)(4)), and similar predecessor statutes providing for exclusion or deportation of aliens convicted of such crime*, 23 A.L.R. Fed. 480 § 12j (1975).

Battered Immigrants and Family Law Issues: Custody, Support, Divorce

Forty-two states include “willfulness” language in their criminal nonsupport¹⁸⁶ or criminal contempt¹⁸⁷ statutes. Seven states do not include such language.¹⁸⁸ One state, Arizona, has no statute relating to nonsupport; its only enforcement mechanisms are contempt proceedings¹⁸⁹ and suspension of drivers’ licenses.¹⁹⁰ When examining a particular state’s statute, you must make sure that it contains “willfulness” language, and a requirement that the failure to pay support would make the spouse or child destitute. Many of the statutes with a “willfulness” requirement also contain language regarding the requirement that nonsupport leave the spouse or child destitute, but you need to check your state statute to make sure.

Other states with nonsupport statutes also impose other penalties for nonpayment of court-ordered support, such as suspension of drivers’ licenses, and orders to obtain work.¹⁹¹ However, even if a state statute includes the required language, whether criminal convictions for non-payment of support will have immigration consequences also depends upon the sentence that may be imposed,¹⁹² unless the person has been convicted of crimes of moral turpitude.¹⁹³

The immigration consequences of criminal convictions for nonpayment of support vary depending upon several factors.¹⁹⁴ A non-citizen may be found deportable after conviction for one crime of moral turpitude if that crime was committed within five years of admission into the United States **and** if the sentence that could **potentially** be imposed was for one year or more.¹⁹⁵ Note that the maximum potential sentence listed in the statute, and not the sentence actually received, determines whether someone can be deported for committing the crime. If the potential sentence in the statute is one year or more, a person committing that crime can be deported even if the person actually receives a sentence of less than one year, or if s/he receives probation. A non-citizen can also be deported for any two convictions for crimes of moral turpitude committed at any time,¹⁹⁶ regardless of sentence.¹⁹⁷ This means that although non-paying parents or spouses may have their

¹⁸⁶ See ALA. CODE § 13A-13-4 (2002); CAL. PENAL CODE § 270 (2002); COLO. REV. STAT. § 14-16-101 (2002); DEL. CODE ANN. tit. 11, § 1113 (2001); FLA. STAT. ch. 856.04 (2001); GA. CODE ANN. § 19-10-1 (2002); HAW. REV. STAT. § 709-903 (2002); IDAHO CODE § 18-401 (2002); 750 ILL. COMP. STAT. ANN. 16/15 (West 2002); IND. CODE ANN. § 35-46-1-5 (Michie 2002) (referring to children); IND. CODE ANN. § 35-46-1-6 (Michie 2002) (referring to spouses); IOWA CODE § 726.5 (2002); IOWA CODE § 598-23A (2002); KY. REV. STAT. ANN. § 530.050 (2001); LA. REV. STAT. ANN. § 14:74 (West 2002); ME. REV. STAT. ANN. tit. 17-A, § 552 (West 2002); MD. CODE ANN., FAM. LAW § 10-201 (2002); MASS. GEN. LAWS ANN. CH. 273, § 1 (2002); MASS. GEN. LAWS ANN. CH. 273, § 15A (2002); Michigan, MICH. COMP. LAWS § 750.165 (2002); Minnesota, MINN. STAT. § 609.375 (2001); MISS. CODE ANN. § 97-5-3 (2001); MO. REV. STAT. § 568.040 (2002); MONT. CODE ANN. § 45-5-621 (1999); NEB. REV. STAT. § 28-706 (2001); NEV. REV. STAT. 201.020 (2001); N.H. REV. STAT. ANN. § 639:4 (2001); N.J. STAT. ANN. § 2C:24-5 (2002); N.M. STAT. ANN. § 40-4A-11 (2001); N.Y. FAM. LAW § 454 (McKinney 2002); N.C. GEN. STAT. § 49-2 (2001);, N.D. CENT. CODE § 14-07-15 (2001) (referring to children); N.D. CENT. CODE § 14-07-16 (2001) (referring to spouses); Oklahoma, OKLA. STAT. TIT. 21 § 85 (2002) (referring language to “willful” only pertains child support, not spousal support); 18 PA. CONS. STAT. ANN. § 4731 (West 2002); R.I. GEN. LAWS § 11-2-1.1 (2001); S.D. CODIFIED LAWS § 25-7-16 (2002); TENN. CODE ANN. § 39-15-101 (2001); TEX. PENAL CODE ANN. § 25.05 (Vernon 2001); UTAH CODE ANN. § 76-7-201 (2001); VT. STAT. ANN. TIT. 15, § 202 (2001); VA. CODE ANN. § 20-61 (Michie 2002); WASH. REV. CODE § 26.20.035 (2002); W. VA. CODE § 48-14-502 (2002); WIS. STAT. § 948.22 (2002); and WYO. STAT. ANN. § 20-2-310 (Michie 2001).

¹⁸⁷ See IOWA CODE § 598-23A (2002); S.C. CODE ANN. § 20-7-1350 (Law Co-op 2002); W. VA. CODE § 48-14-501 (2002).

¹⁸⁸ See ALASKA STAT. § 12.55.135 (Michie 2002); ARK. CODE ANN. § 5-26-401 (Michie 2001); CONN. GEN. STAT. § 53-304 (2002); KAN. STAT. ANN. § 21-3605 (2001); OHIO REV. CODE § 2919.21 (2002); OR. REV. STAT. § 163.555 (2001); S.C. CODE ANN. § 20-7-90 (Law. Co-op 2002).

¹⁸⁹ See ARIZ. REV. STAT. § 12-864.01 (2002).

¹⁹⁰ See, e.g., ARIZ. REV. STAT. § 25-518 (2002); See also, ME. REV. STAT. ANN. TIT. 19A, § 2202 (2001); MONT. CODE ANN. § 40-5-291 (2001). In practice, even without statutory requirements, many state courts regularly order non-paying parents who are not working to obtain employment. Such orders are issued as part of civil contempt proceedings and often in response to the non-paying parent’s voluntarily leaving employment to avoid child support payments. See, e.g., IOWA CODE § 252B.21 (2002); MINN. STAT. § 518.616 (2001).

¹⁹¹ See, e.g., *Id.*

¹⁹² INA § 237 (a)(2)(A)(i)(II), 8 U.S.C. § 1227 (a)(2)(A)(i)(II) (2002). See further discussion in Chapter 9 of this manual on what is considered a conviction under immigration laws. The federal immigration law defining convictions is different than state criminal laws, and many determinations not considered convictions under state law are convictions for immigration law purposes.

¹⁹³ INA § 237 (a)(2)(A)(ii), 8 U.S.C. § 1227 (a)(2)(A)(ii).

¹⁹⁴ Manual Vargas, Immigration Consequences of Conviction and Sentencing, Address at National Judicial College (April 5, 2002) (power point presentation on file with the author).

¹⁹⁵ INA § 237 (a)(2)(A)(i), 8 U.S.C. § 1227 (a)(2)(A)(i) (2002).

¹⁹⁶ INA § 237 (a)(2)(A)(ii), 8 U.S.C. § 1227 (a)(2)(A)(ii) (2002) (stating “Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.”) It is not likely that a pattern of domestic violence occurring over a period of time would be considered a single scheme of criminal misconduct.

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first criminal sentence structured so as not to trigger characterization as a crime of moral turpitude, a second conviction for non-payment of support, or for any other moral turpitude crime, may invoke deportation consequences, regardless of sentence length.

Non-citizens applying for lawful permanent residence are deemed inadmissible and denied permanent residency if they are convicted of or admit committing any crime of moral turpitude, regardless of the length of potential sentence.¹⁹⁸ However, crimes of moral turpitude are not grounds for denial of lawful permanent residency for inadmissibility in two instances.¹⁹⁹ First, the applicant may be admissible if the offense was committed more than five years before the request for admission as a lawful permanent resident, and if the offense was committed when the applicant was under eighteen (18) years of age.²⁰⁰ Second, if the applicant has no prior criminal history, the maximum possible sentence is less than one year, and the actual sentence imposed is less than six months, then the applicant may be admissible.²⁰¹

Every state has laws that criminalize failure to support a spouse or child. The penalties range in severity. In Idaho, desertion and nonsupport of children or spouse is a felony punishable by up to fourteen years in prison.²⁰² However, Alabama simply codifies nonsupport as a Class A misdemeanor.²⁰³ Many state statutes provide that a sentence of greater than one year may be imposed for nonsupport, and these statutes also have the requisite mens rea of “willful” to qualify as a crime of moral turpitude.²⁰⁴ If a batterer is convicted under such a statute, the sentence may mean that the batterer has committed a crime of moral turpitude and may face deportation in addition to being denied lawful permanent residency, **even if** he or she does not actually receive a sentence of greater than one year.²⁰⁵ The key language under federal immigration law is that a crime of moral turpitude is a crime “for which a sentence of one year or longer may be imposed.”²⁰⁶

FEDERAL LAW AND CHILD SUPPORT ENFORCEMENT

In addition to state court enforcement actions, there is also a federal remedy for non-payment of child support under the Child Support Recovery Act when implemented in combination with the Deadbeat Parents Punishment Act of 1998. These federal statutes work together to penalize criminally parents who willfully avoid child support payments for a child in another state, and who owe more than a year’s worth of child support or five thousand dollars (\$5000). This makes nonsupport a federal crime punishable by up to two years in prison for certain deadbeat parents.²⁰⁷ As with state crimes, a federal criminal conviction for non-payment of child support under these federal statutes could also constitute a crime of moral turpitude, since the length of sentence that could be imposed under the statute is up to two years in prison. Federal child support enforcement actions could lead to the non-paying non-citizen parent’s deportation.

Attorneys working with immigrant victims trying to collect court-ordered child support or spousal support from their abusers need to understand that certain child support enforcement mechanisms may have immigration consequences for non-citizen non-custodial parents. It is important for attorneys working to enforce child support orders to do safety planning with victims to ensure that actions taken to enforce child support will actually be effective. Understanding the potential immigration consequences of criminal

¹⁹⁷ Sejal Zota, *Immigration Consequences of Convictions Checklist*, Criminal Defense Immigration Project, New York State Defenders Association (2001) in NAT’L ASS’N OF WOMEN JUDGES, REMOVING OBSTACLES TO JUSTICE FOR IMMIGRANTS, EDUCATION CURRICULUM FOR JUDGES 20 (April 5, 2002).

¹⁹⁸ *Id.*

¹⁹⁹ INA § 212(a)(2)(i), 8 U.S.C. § 1182(a)(2)(i) (2002).

²⁰⁰ INA § 212(a)(2)(ii)(I), 8 U.S.C. § 1182(a)(2)(ii)(I) (2002). See also Memorandum of Law, Katherine Brady and Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility related to Crimes 12* (April 2001). This is unlikely to be the case in child support convictions as it is highly unlikely that someone under the age of 18 would be convicted for non-payment of child support.

²⁰¹ INA § 212(a)(2)(ii)(II), 8 U.S.C. § 1182(a)(2)(ii)(II) (2002). See also Memorandum of Law, Katherine Brady and Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility related to Crimes 12* (April 2001).

²⁰² IDAHO CODE § 18-401 (2002).

²⁰³ ALA. CODE § 13A-13-4 (2002).

²⁰⁴ Check your state nonsupport statutes, found in footnotes above, and accompanying statutes (if any) for the actual length of sentence.

²⁰⁵ INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227 (a)(2)(A)(i) (2002).

²⁰⁶ *Id.*

²⁰⁷ 18 U.S.C. § 228 (2002).

convictions for failure to pay court-ordered support obligations can be useful information for settlement discussions with opposing counsel when non-citizens are delinquent in support payments,²⁰⁸ since batterers who owe spousal support or child support and fail to pay it face a range of consequences, from contempt proceedings to criminal charges for nonsupport.

a. Nonpayment of child support and good moral character in immigration cases

Immigration consequences for failure to pay child support may occur even when there is no court order to pay child support, and even when the immigrant non-custodial parent has never had a child support enforcement action filed against him. Failure to pay child support can lead to a finding of lack of “good moral character” and denial of certain immigration benefits such as naturalization²⁰⁹ and, in some cases, relief under VAWA. Establishing good moral character is a requirement for several types of immigration relief, including cancellation of removal for non-permanent residents,²¹⁰ self-petitions for battered spouses and children under VAWA, voluntary departure,²¹¹ citizenship, and registry. There is generally no waiver available for this requirement, and, if an individual is found to lack good moral character, the form of immigration relief the immigrant has requested must be denied.²¹²

Nonpayment of child support, although not listed as a statutory bar to establishing good moral character in INA § 101(f), is an important factor in determining good moral character. The INS (now U.S.CIS) has long taken the position that “the duty of . . . a parent to support his child, is not only a moral . . . obligation, but also a duty imposed by law. A finding of good moral character is precluded where there is a willful failure or refusal to provide support.”²¹³ The regulations governing the naturalization process also address the issue of child support. According to 8 C.F.R. 316.10(b)(3)(i):

[u]nless the applicant establishes extenuating circumstances, the applicant shall be found to lack good moral character if, during the statutory period, the applicant . . . [w]illfully failed or refused to support dependents (emphasis added).

This rule is implemented during the naturalization process and routinely enforced by the U.S.CIS. The naturalization application itself contains a question about child support, and all applicants must state whether they have EVER failed to support their dependents.²¹⁴ There is some variation in how the different U.S.CIS citizenship offices implement the regulation governing child support, but attorneys and advocates from different cities throughout the country report that evidence of an applicant’s payment of children support is routinely required.²¹⁵

The Board of Immigration Appeals and federal courts have long recognized the moral and legal obligation of a parent to support his or her dependents, and failure to pay child support has long been a factor in assessing

²⁰⁸ This information’s usefulness is not limited to domestic violence cases. It could be equally helpful to un-abused immigrant victims who are not receiving court-ordered support. However, counsel need to ethically approach this issue remembering generally that under the Rules of Professional Responsibility counsel cannot threaten criminal prosecution to gain advantage in a civil case.

²⁰⁹ INA § 316(d) – (e), 8 U.S.C. § 1427(d) – (e) (2002).

²¹⁰ Good moral character is a requirement for cancellation under INA 240A(b)(1) as well as for special rule cancellation for battered spouses and children under VAWA, and for certain nationals of Guatemala, El Salvador, and former Eastern bloc countries under NACARA § 203. Immigration courts can properly exercise their discretion to deport, rather than grant relief to, fathers who paid only limited amounts of child support. *Satoot v. I.N.S.*, 24 F.3d 249, 1994 WL 192120 (9th Cir. 1994) (unpublished opinion); *In re Halas*, 274 F. Supp. 604 (D.C. Pa. 1967). It is important to note that the parent not paying child support in the *Satoot* case was also abusive.

²¹¹ INA § 244(a), 8 U.S.C. § 1254a(a) (2002).

²¹² See *Miller v. INS*, 762 F.2d 21 (3d Cir. 1985). There is an exception under INA § 204(a)(1)(C) for self-petitioners under VAWA with criminal convictions that would otherwise preclude good moral character, if the conviction is connected to the abuse and waiveable when determining admissibility under INA § 212(h).

²¹³ INS Interpretation 316.1(f)(5).

²¹⁴ Part 10.D, Question 22g of Form N-400 asks: “Have you **EVER** failed to support your dependents or to pay alimony?” A written explanation and copies of any relevant documentation is requested if the answer is yes.

²¹⁵ Immigration practitioners from California, Florida, Minnesota, Texas, New York, Arizona, Louisiana, Oregon, Wisconsin, Missouri, Utah, Washington, and Maryland provided information on local U.S.CIS practices for this section. All reported that requests for evidence of child support are routine in citizenship cases.

good moral character in immigration cases, particularly in applications for naturalization.²¹⁶ Courts have upheld decisions of the immigration authorities to deny naturalization where the non-payment was willful and not excusable due to extenuating circumstances.²¹⁷

Though an applicant's willful failure to support his dependants is presumed to be inconsistent with good moral character, an applicant for naturalization may not be barred from a positive good moral character determination if he can demonstrate extenuating circumstances for nonpayment. Because there are no per se statutory disqualifications to a positive good moral character determination, an applicant's nonpayment of support to his dependants is considered in the context of the applicant's total pattern of behavior and overall character.²¹⁸

Conclusion

Without adequate economic support, many victims of domestic violence find themselves in the impossible situation of choosing between a life of certain poverty or continued abuse.²¹⁹ Child support and spousal support can be important tools for a battered woman to achieve self-sufficiency and stability for herself and her children. For immigrant victims, these tools can prove to be essential, as they may not have employment authorization nor access to public benefits. Creative strategies and remedies in child support and spousal support proceedings can further assist immigrant victims and their children in building a new life free from abuse.

²¹⁶ For decisions related to suspension of deportation and other types of immigration relief, see *Matter of S*, 3 I & N Dec. 393 (BIA 1998); *Matter of Pires da Silva*, 10 I&N Dec. 191 (BIA 1983).

²¹⁷ *In re Naturalization of Halas*, 274 F. Supp. 604 (E.D. Pa. 1967). See also *Matter of Dobric*, 189 F. Supp. 638 (D. Minn. 1960); *in re Petition for Naturalization of Spak*, 164 F. Supp. 257 (E.D. Pa. 1958).

²¹⁸ *Torres-Guzman v. INS*, 804 F.2d 531, 533-34 (9th Cir. 1986) ("[i]n the absence of a congressionally imposed *per se* rule, a statutory discretion to determine the presence or absence of good moral character requires the fact finder to weigh and balance the favorable and unfavorable facts or factors, reasonably bearing on character, that are presented in evidence. To preclude consideration of favorable factors is to abuse discretion").

²¹⁹ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657 659 (2000).

Suggested Immigrant Client Child Support Interview Questions

1. Does your client have children?
2. Does your client have or has your client ever had a child support order?
3. Is your client seeking a spousal support order?
4. What other types of financial relief are available in your jurisdiction (protective orders that allow attorney's fees, housing, utilities, medical and counseling bills)?
5. What are your jurisdiction's child support guidelines?
6. What is the abuser's income?
7. What amount of support would he legally be required to pay under your state child support guidelines?
8. What are your client's expenses per month?
9. Is the abuser able to pay?
10. Is your immigrant client eligible for any immigration relief under VAWA?
11. Will he claim that he is not able to pay, and what basis will he use for that claim (e.g. supporting other children, debt from an expensive car he purchased, quit his job, his immigration status or lack thereof)?
12. Who is the abuser's employer, and how is the abuser paid (check, cash, monthly, every other month)?
13. Does the statute in your state call nonsupport a willful failure to pay, and does it mandate a sentence of longer than one year?
14. If the abuser is self-employed, do you know approximately how much he earns a month? What aspects of his lifestyle can be used to show income? What are other businesses earning that are similar to the abuser's business?
15. If the abuser is a U.S. citizen or lawful permanent resident, did he ever file an Affidavit of Support on behalf of the immigrant victim?
16. Where are the assets of the abuser held? Are immediate injunctions necessary? Has he threatened or begun acting to take all of the parties' money out of the bank?
17. If a prior court order exists, where can copies of the order be obtained? Will there be jurisdictional issues in the current case? Are there payment problems, retroactive support issues or arrearage judgments that counsel should be aware of?
18. If the abuser has not paid his child support, how had this affected the child and the client?
19. Has the client suffered emotional distress from the abuser's failure to pay child support?
20. What kinds of difficulties has the client had because of the abuser's failure to pay child support?
 - Late fees for non-payment of rent, mortgage, credit card bills?
 - Telephone being disconnected, reconnection fees?
 - Electricity being turned off, difficulty having it turned on again?
 - Items that perished due to electricity being turned off?
 - Children not having necessary items that they needed for school?
 - Children not being able to participate in extracurricular activities?
 - Day care being cancelled for non-payment? Client not being able to continue working or loses employment due to lack of child care

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6.5

Immigration Status and Family Court Jurisdiction¹²

By Leslye Orloff, Jennifer Rose, Laura Martinez, and Joyce Noche

Public policy favors granting all persons who live in the United States access to family courts that can resolve contentious and emotionally charged family matters in order to ensure the best interests of children, and to protect victims of domestic violence and child abuse from ongoing abuse. Immigrants and immigrant victims of domestic violence thus must be granted full access to family court in all matters involving protection orders, divorce, legal separation, child support, custody, domestic violence, and child abuse.³ Despite the various public policy reasons to ensure the courthouse doors remain open, many immigrant victims either do not attempt to access family court relief, or are turned away. Advocates and attorneys need to be prepared to

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² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants>.

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counter abusers' attempts to inflict further abuse through the family court process, and to educate the courts on access to programs for all victims, including immigrants.

After making a finding of abuse, courts should presume by law that an abusive partner is unfit to be a custodial parent.⁴ State statutes,⁵ court rulings,⁶ research findings,⁷ and policy recommendations by experts⁸ charge state family courts with the obligation to intervene in emotionally charged, family court cases in order to resolve these disputes in a manner that justly determines custody disputes, so as to protect children and victims of abuse. In order to keep children safe, domestic violence must be taken into account for purposes of custody, visitation, and child support determinations. Family courts are the primary forum able to address child security and stability during custody, civil protection orders, and divorce or separation proceedings. Therefore, it is imperative that these courts take advantage of custody proceedings to shield those who are vulnerable from further violence or harmful contact.

Serious consequences can arise from the failure to consider domestic violence issues when making a custody determination. Despite the fact that placing a child in the custody of an abuser could ultimately result in the death of that child,⁹ states such as Connecticut, Mississippi and Utah do not even consider domestic violence a factor when determining custody.¹⁰ It is undisputed that children raised in abusive households can suffer a range of serious emotional and physical harms. Given the nature of the risks involved, there is no justification for treating custody cases involving non-citizens parties and children differently from all other custody cases.¹¹

For these reasons, courts must not base family court jurisdiction on the immigration status of the parties. This notion is clearest in domestic violence and child abuse cases. If domestic violence victims seeking court protection or their non-abusive custodial parents in child abuse cases were asked about immigration status in these family court proceedings, it would have the effect of ensuring abusers of immigrant spouses, girlfriends, and children that they would not be held accountable by the justice system for their criminal acts. Victims would not seek protection and, as a result, abusers would not be prosecuted since victims could not secure the safety needed to be cooperative witnesses in criminal prosecutions and/or obtain the protection orders and custody awards needed to keep themselves and their children safe from their abusers. Similarly, in child abuse cases, non-abusive immigrant parents would not be able to come forward and cooperate with state authorities in child abuse investigations for fear that the perpetrators of the child abuse would reveal their immigration status to the courts and have them deported.

⁴ Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* 13 (ABA 1994).

⁵ See The Child Safety Act; Uniform Child Custody Jurisdiction Act; Family Violence Prevention and Services Act U.S.C. §§ 10401-10410 (1994).

⁶ See e.g., *In re James R.*, 663 N.Y.S.2d 760, 763 (1997); *In re Charise B.*, 533 N.Y.S.2d 595, 598-99 (1990); *In re Maria F.*, 428 N.Y.S.2d 425, 427 (1980); *In re Fred S.*, 322 N.Y.S. 2d 170, 173 (1971); *In re Violet Walsh*, 315 N.Y.S.2d 59, 61 (1970). See also, *Smith v. Org. of Foster Families for Equal, & Reform*, 431 U.S. 816, 828 (1977) (granting family court authority to intervene in situations of child abuse and neglect); *Marks v. Marks*, 315 S.E.2d 158, 162 (S.C. 1984) (denying intervention by a family court unless the welfare of the child is at stake).

⁷ Judith S. Wallerstein & Sandra Blakeslee, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* 272 (1989) ("A study of court-ordered joint custody arrangements found that children present during fighting parents is detrimental to the well being of the child, because they "seem to fare much worse than children raised in traditional sole custody families also torn in bitter fighting" and they "look more depressed, more withdrawn or aggressive, and more depressed, more withdrawn or aggressive, and disturbed."). See Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994).

⁸ Mary A. Duryee, *Guidelines for Family Court Services Intervention When There Are Allegations of Domestic Violence*, 33 FAM. & CONCILIATION CTS. REV. 79, 82 (1995); James Herbie DiFonzo, *Parental Responsibility for Juvenile Crimes*, 80 OR. L. REV. 1, 94 (2001); Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 357 (1982); Gender Equality Advisory Board, Trial Court of Massachusetts, *Achieving Equity-Recommendations for Dispute Intervention Practice in the Probate & Family Court* 29 (1995) (declaring it the business of family courts to determine responsibility and not put domestic violence behind closed doors).

⁹ See Leslye E. Orloff & Catherine F. Klein, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 900 n.601, 924-25, 943, 1129, 1142 (1993).

¹⁰ See CONN. GEN. STAT. §§ 46b, -56a; MISS. CODE ANN. §§ 93-5-23, -24; UTAH CODE ANN. §§§ 30-3-10, -10.2, -34.

¹¹ See 42 USC § 1981(a) (2002). (mandating equal rights under the law: all persons within the jurisdiction of the U.S. have the same right in every state and territory to sue and be a party to a suit).

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If questions regarding immigration status of parents are wrongly allowed to become part of child abuse proceedings, immigrant parents of child abuse victims will risk being separated from their children, despite being fully capable of caring for their children and protecting their children's safety. Immigration status remains a factor in the level of abuse in domestic violence situations. In a report issued by the American Bar Association (ABA) in 1994, the ABA found that immigration status exacerbates the level of violence in abusive relationships when batterers control information about legal status and the legal system and use the threat of deportation to lock their spouses and children in violent relationships.¹² Further findings note that batterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution, and to shift the focus of family court proceedings away from their violent acts.¹³ In addition, undocumented immigrants frequently remain undocumented because their abusers refuse to file immigration papers on their behalf.¹⁴ Thus, inquiring about immigration status in family court proceedings effectively closes the doors of the courthouse to a significant proportion of families in any jurisdiction, greatly increasing the danger towards immigrant victims of domestic violence and child abuse, and jeopardizing the economic security of unabused immigrant spouses and children.¹⁵

Eighty-five percent of all immigrant families contain within the nuclear at least one non-citizen and one child that is a citizen.¹⁶ In March of 2000, 28.4 million persons in the United States population were foreign-born.¹⁷ The national average of foreign-born persons is 10.4 percent of the U.S. population. Nine states in the United States had a foreign-born population above the national average of 10.4 percent.¹⁸ In 2000, one in six children (11.5 million) lived in a household with at least one foreign-born parent,¹⁹ and 2.6 million of these children were foreign-born.²⁰ Over the next 40 years, approximately 27 percent of the U.S. population will either be immigrants themselves, or the second-generation children of immigrants.²¹ Thus, at least 10.4 to 15 percent of families who could turn to family courts to resolve important matters, potentially having a material impact on the safety and economic security of family members, have at least one party who is an immigrant.

Across the country, trial courts are correctly ruling that immigration status is irrelevant to family court jurisdiction and are assuring that family courts remain open to all families without regard to the immigration status of any family members.²² Such rulings ensure that all children and immigrant victims of domestic violence and child abuse can receive the family court protection essential to their safety without regard to immigration status.

¹² Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994)

¹³ *Id.*

¹⁴ In a survey of 279 Latina immigrants, 72.3% of their abusers never filed legal immigration papers for them, and if the papers were filed, the delay was approximately 3.97 years. NOW Legal Defense and Education Fund, Domestic Violence Needs and Assessment Survey Among Immigrant Women (unpublished data collected between 1992 and 1995) (on file with Legal Momentum).

¹⁵ MICHAEL E. FIX, WENDY ZIMMERMANN, & JEFFREY S. PASSEL, IMMIGRATION STUDIES: THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES (The Urban Institute 2001), available at <http://www.urban.org/url.cfm?ID=410227>. In March of 2000, 28.4 million persons in the United States population were foreign-born. Lisa Lollock, *The Foreign-Born Population in the United States: March 2000*, CURRENT POPULATION REPORTS (U.S. Census Bureau), Jan. 2001, at 1 available at <http://www.census.gov/population/www/socdemo/foreign/cps2000.html>.

¹⁶ FIX, ZIMMERMANN, & PASSEL, *supra* note 13, at 15.

¹⁷ Lollock, *supra* note 13, at 1.

¹⁸ CA (25.9 percent), NY (19.6 percent), FL (18.4 percent), HI (16.1 percent), NV (15.2 percent), NJ (14.9 percent), AZ (12.9 percent), MA (12.4 percent), TX (12.2 percent) *Id.* at

¹⁹ This includes only children under the age of 18.

²⁰ *Id.* at 2.

²¹ MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 40 (The Urban Institute 1994), available at <http://www.urban.org/url.cfm?ID=305184>.

²² This is particularly important because lack of legal immigration status does not mean that a person does not intend to reside permanently in the United States. In fact, fully one third of all legal permanent residents at one point lived illegally in the United States. Fix & Passel *supra* note 19. Since many immigrants gain legal immigration status through family based immigration, and victims of domestic violence and child abuse have access to special form of immigration benefits, there is a significant likelihood that a family member who may not be documented when they first encounter the family courts will gain legal immigration status at some point in the future. Thus, courts should be encouraged to keep inquiries into immigration status of parties out of family court proceedings, except when relevant to demonstrate that an abuser has used threats of deportation to keep his spouse, intimate partner, or child from seeking help in domestic violence and child abuse cases.

This chapter will provide an overview of statutory and case law that support access to family courts for divorce, custody, child support, protection order, and child abuse cases for all persons, without regard to their immigration status.

I. Divorce and Jurisdiction

Prior to the commencement of the court action, jurisdiction over family matters can be established when: (1) the child has substantial connections with the state with respect to custody cases;²³ (2) the child, parent, or spouse required by law to pay or receive support reside in the state in cases of child support and alimony;²⁴ (3) the commission of illegal acts in the state when the victim or perpetrator of the illegal acts resides in the state with respect to domestic violence, child abuse and criminal cases; or physical residence of one or more parties in the state.²⁵

In divorce cases, the majority of jurisdictions require the party seeking a divorce to satisfy a threshold residency requirement before their courts will adjudicate a divorce action.²⁶ Some states require their courts to have jurisdiction over the party seeking the divorce,²⁷ while other states only require jurisdiction over either one of the parties in the divorce.²⁸ At least one jurisdiction does not have a residency requirement at all.²⁹

With respect to divorces, threshold residency requirements do not serve as barriers for immigrants. The immigration status of a legal or undocumented immigrant does not preclude that individual from formulating the intent necessary to establish domicile or residency for purposes of divorce actions.³⁰

A. DOMICILE VERSUS RESIDENCE

Court jurisdiction over a party in a divorce action principally depends upon whether the party is domiciled in, or is a resident of, a particular jurisdiction. The meaning of the terms “domicile” and “residence” may differ from one jurisdiction to the next. A review of case law demonstrates that these terms essentially have the

²³ UCCJEA § 201(a)(2)(A); UCCJA § 75-d(b)(i-ii); 28 U.S.C. § 1738A(c).

²⁴ *Porter v. Porter*, 684 A.2d 259, 261-62 (R.I. 1996) (holding the court had exclusive jurisdiction over the non-paying parent because that jurisdiction was the child's state or residence of contestant); N.C. GEN. STAT. § 50-13.5(f) (child support orders must be made in divorce proceedings and jurisdiction is found where the child resides or is physically present or where the parent resides.). See also *Bass v. Bass*, 258 S.E.2d 391 (N.C. Ct. App. 1979).

²⁵ NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES [hereinafter NCJFCJ], FAMILY VIOLENCE: A MODEL STATE CODE, § 303 (1994), available at <http://www.ncjfcj.org>.

²⁶ Without establishing this threshold residency requirement, the state courts do not have subject matter jurisdiction in divorce cases. See, e.g., *Blair v. Blair*, 643 N.E.2d 933, 935 (Ind. Ct. App. 1994). Parties cannot agree to confer subject matter jurisdiction on a court that does not have it. *Gosa v. Mayden*, 413 U.S. 665, 707 (1973). See also, *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951); *Indus. Addition Ass'n v. Comm'r*, 323 U.S. 310, 313 (1945); *People's Bank v. Calhoun*, 102 U.S. 256, 260-61 (1880); *Cutler v. Rae*, 7 How. L.J. 729, 731 (1849).

²⁷ See IDAHO CODE § 32-701 (2004); IOWA CODE § 598.6 (2004); MASS. GEN. LAWS ch. 208, § 5 (2004); N.H. REV. STAT. ANN. § 458:5 (2003); N.C. GEN. STAT. § 50-8 (2004); N.D. CENT. CODE § 14-05-17 (2003); OHIO REV. CODE ANN. § 3105.03 (2004); S.C. CODE ANN. § 20-3-30 (2003); S.D. CODIFIED LAWS § 25-4-30 (2004); 16 V.I.C. § 106 (2004); WYO. STAT. ANN. § 20-2-107 (2003).

²⁸ See ALA. CODE § 30-2-5 (2003); ARIZ. REV. STAT. § 25-312 (2004); ARK. CODE ANN. §9-12-307 (2004); CAL FAM. CODE § 2320 (2004); COLO. REV. STAT. ANN. § 14-10-106 (2004); CONN. GEN. STAT. § 46b-44 (2004); DEL. CODE ANN.tit. 13, § 1504 (2003); D.C. CODE ANN. § 16-902 (2004); FLA. STAT. ANN. § 61.021 (2004); GA. CODE ANN. § 19-5-2 (2004); HAW. REV. STAT. § 580-1 (2003); 750 ILL. COMP. STAT. 5/401 (2004); KAN. STAT. ANN. § 60-1603 (2003); KAN. STAT. ANN. § 403.140 (West 2004); LA. REV. STAT. ANN. § 9:308 (West 2004); *Fletcher v. Fletcher*, 619 A.2d 561 (Md. Ct. Spec. App. 1993); MICH. COMP. LAWS § 552.9 (2004); MISS. CODE ANN. § 93-5-5 (2004); Mo. Rev. Stat. § 452.450 (2004); MONT. CODE ANN. § 40-4-104 (2003); NEB. REV. STAT. § 42-349 (2003); NEV. REV. STAT. ANN. § 125.020 (2004); N.J. STAT. ANN. § 2A:34-10 (2004); N.M. STAT. ANN. § 40-4-5 (2004); N.Y. DOM. REL. LAW § 230 (McKinney 2004); 8 N. MAR. I. CODE § 1332; OKLA. STAT. ANN. tit. 43, § 102 (West 2004); OR. REV. STAT. § 107.075 (2004); 23 PA. CON. STAT. ANN. § 3104 (West 2004); 31 P.R. LAWS ANN. § 331 (2004); R.I. GEN. LAWS § 15-5-12 (2003); TENN. CODE ANN. § 36-4-104 (2004); TEX. FAM. CODE ANN. § 6.301 (Vernon 2004); UTAH CODE ANN. § 30-3-1 (2004); VT. STAT. ANN. TIT. 15, § 592 (2003); VA. CODE ANN. § 20-97 (2004); WASH. REV. CODE § 26.09.030 (2004); W. VA. CODE ANN. § 48-5-105 (Michie 2004); WIS. STAT § 767.05 (2004).

²⁹ *Alaska. State v. Adams*, 522 P.2d 1125, 1132 (Alaska 1974).

³⁰ *Hanano v. Alassar*, No. 169004, 2001 Va. Cir. LEXIS 169, at *10 (Va. Cir. Jan. 23, 2001).

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same meaning. In fact, in many jurisdictions the terms “domicile” and “residence” are interchangeable.³¹ Nevertheless, at least one jurisdiction holds that these terms are not interchangeable.³²

1. Domicile

Generally, in order for a party to establish his or her domicile for maintaining a divorce action in a particular jurisdiction, he or she must be *physically present* in that jurisdiction and must also *intend to remain indefinitely*, or permanently, in that jurisdiction.³³ However, in some jurisdictions, a party may still establish domicile without physical presence in the jurisdiction, as long as that party has the intent to return to that particular jurisdiction to live.³⁴

2. Residency

Likewise, in order for a party of a divorce to demonstrate his or her residence in a particular jurisdiction, he or she must be actually present or must establish an abode in that particular jurisdiction,³⁵ as well as intend to remain in or return to that particular jurisdiction.³⁶ However, some jurisdictions do not require the party to actually be present in order to establish residency. Specifically, some jurisdictions allow a party to leave his or her abode for a period of time and still maintain residency status as long as the intent exists to return to that abode.³⁷

3. Immigration Status and Residency

In determining whether a party intends to establish residency or domicile in a particular state, the court will examine the intent of the party seeking the divorce, rather than any potential adverse action by a third party, such as the U.S. Citizenship and Immigration Services (USCIS).³⁸ Both documented and undocumented immigrants can establish residency for family court purposes.

Many immigrants live and work in the United States and intend to make the United States their permanent home, despite the fact that they may not currently have a legal immigration status and USCIS permission to live and work permanently in the United States.³⁹ This can be especially true for immigrant victims of domestic violence, who have been dependent on their abusers for status and may not have known about the immigrant remedies under VAWA.

³¹ See *Caheen v. Caheen*, 172 So. 618 (Ala. 1937); *Lake v. Bonham*, 716 P.2d 56 (Ariz. Ct. App. 1986); *Ungemach v. Ungemach*, 142 P.2d 99 (Cal. 1943); *McMillion v. McMillion*, 497 P.2d. 331 (Colo. Ct. App. 1972); *Worrell v. Worrell*, 247 S.E.2d 847 (Ga. 1978); *Hampshire v. Hampshire*, 223 P.2d 950 (Idaho 1950); *Kleinrock v. Nantex Mfg. Co.*, 201 A.D. 236 (N.Y. App. Div. 1999); *Andris v. Andris*, 309 S.E.2d 570 (N.C. Ct. App. 1983); *Smith v. Smith*, 75 N.W. 783 (N.D. 1898); *Zimmerman v. Zimmerman*, 155 P.2d 293 (Or. 1945); *Brown v. Brown*, 261 S.W. 959 (Tenn. 1923); *Duval v. Duval*, 546 A.2d 1357 (Vt. 1988); *Howe v. Howe*, 18 S.E.2d 294 (Va. 1942); *Marcus v. Marcus*, 475 P.2d 571 (Wash. Ct. App. 1970); *State ex rel. Lynn v. Eddy*, 163 S.E.2d 472 (W. Va. 1968).

³² *Garrison v. Garrison*, 246 N.E.2d 9, 11 (Ill. App. Ct. 1946) (holding that “residence” does not mean “domicile” but instead denotes permanent abode).

³³ See *Perito v. Perito*, 756 P.2d 895 (Alaska 1988); *J.F.V. v. O.W.V.*, 402 A.2d 1202 (Del. 1979); *Abou-Issa v. Abou-Issa*, 189 S.E.2d 443 (Ga. 1972); *Blackburn v. Blackburn*, 41 Haw. 37 (Haw. 1955); *Hampshire v. Hampshire*, 223 P.2d 950 (Idaho 1959); *Andris v. Andris*, 309 S.E.2d 570 (N.C. Ct. App. 1983); *Marcus v. Marcus*, 475 P.2d 571 (Wash. Ct. App. 1970).

³⁴ *Abou-Issa v. Abou-Issa*, 189 S.E.2d 443 (Ga. 1972); *Gasque v. Gasque*, 143 S.E.2d 811 (S.C. 1965).

³⁵ *Williams v. Williams*, 328 F. Supp. 1380, 1383 (V.I. 1971). See also *Hanano v. Alassar*, No. 169004, 2001 Va. Cir. LEXIS 169, at *10 (Va. Cir. Jan. 23, 2001) (quoting *Williams v. Williams*, 328 F. Supp. 1380, 1383 (V.I. 1971)).

³⁶ See ARK. CODE ANN. § 9-12-307(b) (2004). See also *Ungemach v. Ungemach*, 142 P.2d 99 (Cal. 1943); *Hampshire v. Hampshire*, 223 P.2d 950 (Idaho 1950); *Garrison v. Garrison*, 246 N.E.2d 9 (Ill. App. Ct. 1946); *Leader v. Leader*, 251 N.W.2d 288 (Mich. Ct. App. 1977); *Smith v. Smith*, 12 So. 2d 428 (Miss. 1943).

³⁷ *Abou-Issa v. Abou-Issa*, 189 S.E.2d 443 (Ga. 1972); *Means v. Means*, 17 N.W.2d 1 (Neb. 1945); *Gasque v. Gasque*, 143 S.E.2d 811 (S.C. 1965); *Duval v. Duval*, 546 A.2d 1357 (Vt. 1988).

³⁸ The agency formerly known as Immigration and Naturalization Services (INS) and later as the Bureau of Citizenship and Immigration Services (BCIS) under the administration of the Department of Homeland Security was recently renamed the U.S. Citizenship and Immigration Services (USCIS). See *Hanano v. Alassar*, No. 169004, 2001 Va. Cir. LEXIS 169, at *10 (Va. Cir. Jan. 23, 2001) (holding that domicile depends upon the intent of the party rather than the potential action of a third party such as the Immigration and Naturalization Service).

³⁹ Almost one-third of the 8.8 million U.S. legal permanent residents currently residing in the U.S. (approximately 2.8 million persons) were formerly undocumented immigrants in the United States. Fix & Passel, *supra* note 19.

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Courts consistently have held that immigration status or lack thereof does not preclude an individual from establishing domicile or residency for purposes of maintaining an action in family court.⁴⁰ In *Hanano v. Alassar*, the Court found that, despite the plaintiff's current immigration status as a non-immigrant authorized to live and work in the United States in an international organization, she was not precluded from establishing that she was an actual *bona fide* resident and domiciliary in order to establish a divorce action.⁴¹ The court held that, in determining whether a party intends to establish residency, courts must look to the intent of the party, rather than any potential adverse action by a third party, such as USCIS.⁴²

Similarly, in *Williams v. Williams*, the court held that non-residents are not precluded from obtaining domicile, noting that individuals "need not intend to remain in a place unto death to acquire domicile."⁴³ This court found that the fact that non-residents admitted temporarily to the United States had declared their intent to return to their home country as part of their immigration visas did not preclude a finding of domicile. Instead, even an individual who contemplates staying for only a brief period of time may acquire domicile.⁴⁴ The only necessary element to finding domicile is the intent to make a home somewhere until some reason unrelated to the divorce makes it desirable or necessary to leave.⁴⁵

The fact that an immigrant requesting family court assistance may not be in the United States legally or does not have permanent legal immigration status in the United States is not indicative of whether he or she qualifies for legal immigration status, will qualify in the future, or is likely to be deported now or any time in the future. This is an important point to note, especially if the immigrant victim is eligible for relief under VAWA. Immigration status or non-citizen status does not preclude an immigrant from gaining access to divorce courts because the court's focus of inquiry is on his or her intent to establish residence in that state, not immigration status.⁴⁶

Immigration laws are interpreted separately from divorce laws and jurisdiction requirements.⁴⁷ Therefore, a court determination of jurisdiction for divorce purposes has no effect on decisions of the USCIS in any immigration case.⁴⁸ Family court judges should be assured that finding residence, domicile, or any other jurisdictional finding in a family court case will not help an immigrant attain any form or immigration status for which they would not otherwise qualify.

B. DUE PROCESS & EQUAL PROTECTION

All permanent legal⁴⁹ or undocumented immigrants⁵⁰ within the jurisdiction of the United States have the same rights in every state and territory to sue, be parties, give evidence, and have the full and equal benefit of all state federal laws.⁵¹ To deny these rights is to deny the fundamental right to due process and equal protection, under the Constitution of the United States.

⁴⁰ Dick v. Dick, 18 Cal. Rptr. 2d 743 (Cal. Ct. App. 1993); Rzeszotarski v. Rzeszotarski, 296 A.2d 431 (D.C. 1972); Nicholas v. Nicholas, 444 So. 2d 1118 (Fla. Dist. Ct. App. 1984); Gosschalk v. Gosschalk, 138 A.2d 774 (N.J. Super. Ct. App. Div. 1958); Das v. Das, 603 A.2d 139 (N.J. Super. Ct. Ch. Div. 1992); Cocron v. Cocron, 373 N.Y.S.2d 797 (N.Y. Sup. Ct. 1975); *In re Marriage of Pirouzkhar*, 626 P.2d 380, (Or. Ct. App. 1981); Sinha v. Sinha, 491 A.2d 899 (Pa. Super. Ct. 1985); Bustamante v. Bustamante, 645 P.2d 40 (Utah 1982); *Hanano*, 2001 Va. Cir. LEXIS 169, at *10.; *Williams*, 328 F. Supp. 1380.

⁴¹ *Hanano*, 2001 Va. Cir. LEXIS 169, at *10.

⁴² *Id.*

⁴³ *Williams*, 328 F. Supp. 1380 at 1384.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ However, non-citizens residing in the United States on special non-immigrant visas for foreign nationals (G-4 visa) and working for international organizations must take additional steps to establish residency. Under the special non-immigrant visas for foreign nationals, non-citizens deny residency in order to avail themselves the special financial benefits offered to World Bank employees who are non-resident foreign nationals on temporary visas. Therefore, these individuals cannot claim residency for family court purposes. *See id.*

⁴⁷ Rajapaksha v. Jayaweera, 5 N. Mar. I. 87, 89 (N. Mar. I. 1997).

⁴⁸ *See id.*

⁴⁹ Graham v. Richardson, 403 U.S. 365 (1971).

⁵⁰ Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (N.D. Ill. 1936).

⁵¹ 42 USCS § 1981(a) (2002).

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In *Plyer v. Doe*, the Supreme Court reaffirmed that, regardless of immigration status, individuals are entitled to the protections of the Due Process and Equal Protection Clauses.⁵² The Court examined the constitutionality of a Texas statute that withheld state education funds from children who were not “legally admitted” in the United States, and authorized local school districts to deny enrollment to these children. The Court held that this statute violated the Equal Protection Clause of the Fourteenth Amendment.⁵³ The Court rejected the argument that undocumented immigrants did not qualify as “persons within the jurisdiction” of the State of Texas, and thus did not have the right to equal protection of the law.⁵⁴ Under this precedent, immigrants whose presence in this country is unlawful are still recognized as “persons” in the ordinary sense of the term, thus, guaranteeing them the Fifth and Fourteenth Amendment rights to due process of the law.⁵⁵

In *Williams v. Williams*, the court held that a denial of access to divorce courts based solely upon the possibility of an immigration violation was a denial of due process and equal protection.⁵⁶ Denial of these fundamental rights would attach civil disability to some aliens without granting them the benefit of the procedures used to enforce immigration laws. The court further stated that exclusion from courts for violation of immigration laws, and not for violations of any other types of laws, was unduly discriminatory without a “compelling” reason or justification.⁵⁷ Yet again, the court found immigration status was not only entirely irrelevant to divorce proceedings, but that the use of immigration status would be a violation of due process and equal protection.

II. Child Custody and Jurisdiction

As in divorce cases, immigrants and their children should be granted full access to the courts to secure child custody determinations without consideration of the parent’s or child’s immigration or citizenship status. Without full, unfettered access to family courts, 10.4 to 15 percent of families in the United States would be unable to utilize the family courts for child custody determinations, due to their immigration status.⁵⁸

Full access to family courts is essential to immigrant women and their children, who face numerous distinct barriers in breaking out of the cycle of domestic violence, many relating to child custody.⁵⁹ Batterers use threats that limit the likelihood that their partners will fight them in custody disputes,⁶⁰ as well as to keep battered immigrants and their children in abusive relationships under their control.⁶¹ These threats are even more effective against immigrant victims forced to stay in abusive relationships out of fear that separation will-by-law leave the children in the hands of the abuser, or will lead the abuser to sequester the children and have her deported so that she will never see her children again.⁶² Denying immigrant victims’ access to family law courts due to a party or a child’s immigration status undermines the courts’ obligation under state

⁵² *Plyer v. Doe*, 457 U.S. 202 (1982).

⁵³ U.S. Const., Amend XIV. The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or protection, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

⁵⁴ *Id.* at 210.

⁵⁵ *Id.* (stating “aliens, whose presence is unlawful, have long been recognized as persons guaranteed due process of law by the Fifth and Fourteenth Amendment.”)

⁵⁶ *Williams v. Williams*, 328 F. Supp. 1380, 1383 V.I. (1971); See also *Rzeszotarski v. Rzeszotarski*, (D.C. App. 1972); *Alves v. Alves* 262 A.(D.C. App. 1970); *Nicholas v. Nicola*,s 444 So. 2d 1118 (Fla. Dist. Ct. App. 1984); *Abou-Issa v. Abou-Issa*, 229 Ga. 77 (1972); *Cocron v. Cocron*, 84 Misc.2d 335 (1975); *Pirouzkhar v. Pirouzkhar* 51 Ore. App. 519 (1981); *Bustamante v. Bustamante* 645 P.2d 40 (Utah 1982); *In Re the Marriage of Elisabeth L. and John W. Dick*, 15 Cal. App. 4th 144 (1993).

⁵⁷ *Id.*

⁵⁸ Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994), available at <http://www.abanet.org/domviol/pubs.html>.

⁵⁹ Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994).

⁶⁰ See *Id.* at 270; Leti Volpp, *Working with Battered Immigrant Women: A Handbook to Make Services Accessible*, 33 (Leni Marin ed., 1995) published by the Family Violence Prevention Fund, 415-252-8089; Leslye Orloff, Remarks at the National Conference on Family Violence: Health and Justice (March 11-13, 1994).

⁶¹ Leti Volpp, *Working with Battered Immigrant Women: A Handbook to Make Services Accessible* 4 (Leni Marin ed., 1995) (cited from the Power and Control wheel developed by the Domestic Abuse Intervention Project in Duluth, Minnesota).

⁶² See *Countering Abuser’s Attempts To Raise Immigration Status of the Victim in Custody Cases in NEW OPTIONS FROM IMMIGRANT CRIME SURVIVORS: AN INTERDISCIPLINARY TRAINING*, National Network to End Violence Against Women (May 6, 2003) available at <http://www.nationalimmigrationproject.org>.

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family laws to resolve custody disputes in the best interests of children⁶³ and to consider domestic violence as part of that determination.⁶⁴ Courts make custody decisions based upon the “the best interest of the child” standard, taking into account any history of abuse against an adult and/or child as a key factor in determining the “best interest of the child.”⁶⁵

With respect to child custody determinations, most states either follow the model of the Uniform Child Custody Jurisdiction and Enforcement Act [hereinafter UCCJEA]⁶⁶ or the Uniform Child Custody Jurisdiction Act [hereinafter UCCJA].⁶⁷ In 1997, the UCCJA was revised by a new act called the UCCJEA, which updated the UCCJA and added enforcement provisions for custody orders.⁶⁸ While most states follow the UCCJEA, a few states have developed their own adaptations of either the UCCJA or UCCJEA, which govern those states’ child custody determinations.⁶⁹

All state statutes follow the same basic scheme for determining which court has subject matter jurisdiction in a child custody case. Additionally, all state custody jurisdiction statutes must be read in conjunction with the Federal Parental Kidnapping Prevention Act (PKPA),⁷⁰ which establishes a federal preference for home-state jurisdiction,⁷¹ if there are competing jurisdictions.⁷² Neither the home state definition in the PKPA, nor any state’s UCCJA or UCCJEA requires an analysis of residency or domicile as in the divorce context. Furthermore, neither the PKPA, state statutes, nor case law make the immigration status of any party a relevant factor to any jurisdictional decision of child custody cases.⁷³

⁶³ Nancy K. D. Lemon, *The Legal System’s Response to Children Exposed to Domestic Violence*, in *THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN* 69 (Richard E. Behram ed., 1999).

⁶⁴ Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994), available at <http://www.abanet.org/domviol/pubs.html>. See AL 30-3-131, 30-3-132, 30-3-152; AK 25.24.150, 25.20.090; AZ 25-403; AR 9-13-101; CA Fam. Code 3011, 3044; CO 14-10-124; DE 13 § 722, § 705A, § 706A; DC 16-911, 16-914; FL 61.13; GA 19-9-1, 19-9-3; HI 571-46; ID 32-717, 32-717B; IL 750 § 5/602; IA 598.41; IN 31-17-2-8, 31-1-11.5-21 (added 5-22-02, BL); KS 60-1610; KY 403.270; LA 9:364; ME 19-A § 1653; MD Family Law § 9-101.1; MA 208 § 31, 208 § 31A, 209 § 38, 209C § 10; MI 722.23, 722.27a; MN 257.025, 518.17; MO 452.375, 452.400; MT 40-4-212; NE 42-364; NV 125.480, 125C.220, 125C. 230, 125A.050 (added 5-22-02, BL); NH 458:17; NJ 9:2-4; NM 40-4-9.1; NY DRL 240; NC 50-13.2; ND 14-09-06.2; OH 3109.04, 3109.051; OK 10 § 21.1, 43 § 112.2; OR 107.137; PA 23 C.S.A. § 5303; RI 15-5-16; SC 20-7-1530, 20-7-1557; SD 25-4-45.5, 25-4-45.6; TN 36-6-106, 36-6-411, 36-3-106 (added 5-22-05, BL); TX Family Code 153.004, 153.131; VT 15 § 665; VA 20-124.3; WA 26.09.191, 26.10.160; W.VA 48-11-207, 48-11-209; WI 767.24; WY 20-2-112, 20-2-113, 20-2-201

⁶⁵ Howard Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (ABA 1994) at 13, available at <http://www.abanet.org/domviol/pubs.html>. See also, Leslye E. Orloff & Catherine F. Klein, *Providing Legal Protection for Battered Women: An Analysis of state Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).*supra*

⁶⁶ See Alabama, CODE OF ALA. §30-3B-201 (2001); Alaska, ALASKA STAT. §25.30.300 (2001); Arizona, A.R.S. §25-1031 (2001); Arkansas, A.C.A. §9-19-201 (2001); California, CAL. FAM. CODE §3421 (2001); Colorado, C.R.S. §14-13-201 (2001); Connecticut, Conn. Gen. Stat. §466-115k (2001); Delaware, 13 DEL. C. §1903 (2001); D.C. CODE ANN. §16-4602.1 (2001); Florida, FLA. STAT. §16.1308 (2001); Georgia, O.C.G.A. §19-9-61 (2001); Hawaii, HRS § 583-3 (2001); Idaho, IDAHO CODE §32-11-201 (2001); Illinois, 754 ILCS 35/4 (2001); Indiana, BURNS IND. CODE ANN. §31-17-3-3 (2001); Iowa, IOWA CODE §598B.201 (2002); Kansas, K.S.A. §38-1348 (2001); Louisiana, LA. R.S. §13:1702 (2002); Maine, 19-A M.R.S. §1745 (2001); Massachusetts, MASS. ANN. LAWS CH. 209B, §2 (2001); Michigan, MCLS §722.1201 (2001); Minnesota, MINN. STAT. §518D.201 (2001); Montana, MONT. CODE ANN. §40-7-201(2001); New York, NY CLS DOM. REL. §76 (2002); North Carolina, N.C. GEN. STAT. §50A-201 (2000); North Dakota, N.D. CENT. CODE, §14-14.1-12 (2001); Oklahoma, 43 OKLA. ST. §551-201 (2000); Oregon, OR. REV. STAT. §109.741 (2001); Rhode Island, R.I. GEN. LAWS §15-14-4 (2001); Tennessee, TENN. CODE ANN. §36-6-216 (2001); Texas, TEX. FAM. CODE §152.201 (2002); Utah, UTAH CODE ANN. §79-45c-201 (2001); Virginia, VA. CODE ANN. §20-146.12 (2001); Washington, WASH. REV. CODE §26.27.201 (2002); West Virginia, W. Va. Code §48-20-201 (2001).

⁶⁷ See Kentucky, KRS §403.420 (2001); Mississippi, MISS. CODE ANN. §93-23-5 (2001); Missouri, §452.450 R.S. Mo. (2001); Nevada, NEV. REV. STAT. ANN. §125A.050 (2001); New Hampshire, RSA 458-A:3 (2000); New Jersey, N.J. STAT. §2A:34-31 (2001); South Carolina, S.C. CODE ANN. §20-7-788 (2001); South Dakota, S.D. CODIFIED LAWS §26-5A-3 (2001); Vermont, 15 V.S.A. §1032 (2001); Virgin Islands, 16 V.I.C. §117 (2001); Wisconsin, WIS. STAT. §822.03 (2001).

⁶⁸ Uniform Law Commissioners, *The National Conference of Commissioners on Uniform State Laws: Why Should States Adopt the UCCJA* (2001), at http://www.nccusl.org/nccusl/uniformact_why/uniformacts-why-uccjea.asp

⁶⁹ See Maryland, MD. FAMILY LAW CODE ANN. §9-204 (2001); Nebraska, NEB. REV. STAT. §43-1203 (2001); New Mexico, N.M. STAT. ANN. §40-10A-201 (2001); Ohio, OHIO REV. CODE ANN. §3109.22 (Anderson 2001), Pennsylvania, 23 PA. CONS. STAT. §5344 (2001); Wyoming, WYO. STAT. §20-5-104 (2001).

⁷⁰ Parental Kidnapping Prevention Act [hereinafter PKPA], 28 U.S.C. § 1738A (2001).

⁷¹ *Id.* at 28 U.S.C. § 1738A (c)(2)(A).

⁷² *Id.* at 28 U.S.C. § 1738A (c)(2)(B).

⁷³ Additionally, under Article 26 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parent Responsibility and Measures for the Protection of Children, a State which ratifies or accedes to the Convention is required to enforce registered child support orders from other State parties according to the procedures of the latter State.⁷³ Furthermore, a resident immigrant of that jurisdiction can request a domestic, interstate, or international child

A. THE UCCJA

States following the UCCJA model have initial jurisdiction over a child custody proceeding if one of four situations arises: (1) the state is the home state of the child;⁷⁴ (2) the state has a significant connection with the child;⁷⁵ (3) an emergency situation arises which effects the child's welfare while the child is residing in the state;⁷⁶ or (4) no other state has jurisdiction over the child or a state having jurisdiction over the child declines to exercise jurisdiction because another jurisdiction would be a more appropriate forum for determining the custody of the child.⁷⁷ All of these jurisdictional options focus on the physical location of the child, the child's contact and connections in the state, and the child's welfare. Immigration status of the child or parents is not a factor in this determination. No state statute or court case has found that the immigration status of the child or either parent is relevant to establishing jurisdiction in child custody cases.

1. Home State

Under the UCCJA model, a state can exercise initial jurisdiction over a child in order to make a child custody determination if that state is the home state of that child. The UCCJA declares that a state is the home state of a child (1) if the child resides in the state at the time the custody proceeding is initiated⁷⁸ or (2) if the child resided in that state six consecutive months prior to the commencement of the custody proceeding, the child is absent due to his removal or retention from that state by a person claiming custody or for other reasons, and a parent or person acting as a parent continues to live in that state.⁷⁹ However, for a child that is less than six months old, a state is presumed the home state of the child if, for a majority of time since birth the child lived with his or her parents, a parent, or a person acting as a parent in that state.⁸⁰ This form of home state jurisdiction is favored in interstate custody disputes under the federal PKPA.⁸¹

As in the divorce context, child custody cases typically focus on where the child is living, has lived or is residing, and where the parents of the child continue to reside. The purpose of the home state preference is to deter parental kidnapping.⁸² Preventing families with non-citizen members from accessing family courts denies children in mixed-status families the important parental kidnapping prevention protections of the UCCJA and the PKPA. This lack of access to family courts in custody cases undermines the safety and security of children living in families with mixed forms of immigration status, as non-citizens would be inhibited from accessing the family courts in custody cases. In order to avoid these consequences, the immigration status of any party or child must not be a factor in custody cases.

2. Significant Connection

A state can exercise initial jurisdiction for child custody proceedings if it is in the best interest of the child for the state to assume jurisdiction because the child, and one or both of the child's parents have significant connection with the state, and the state court has access to considerable evidence regarding the child's present or future case, protection, training, and personal relationships.⁸³ Ideally, states exercising jurisdiction under the significant connections prong of the UCCJA communicate with the home state and request that the home

custody order. The immigration status of either party involved is unrelated to court jurisdiction over child support or custody orders.

⁷⁴ UCCJA §75-d (a).

⁷⁵ UCCJA §75-d (b).

⁷⁶ UCCJA §75-d (c).

⁷⁷ UCCJA §75-d (d).

⁷⁸ UCCJA § 75-d (a)(i).

⁷⁹ UCCJA § 75-d (a)(ii).

⁸⁰ UCCJA § 75-c (5).

⁸¹ 28 U.S.C. § 1738A.

⁸² Jennifer Marston, *Yesterday, Today, & Tomorrow's Approaches to Resolving Child Custody Jurisdiction in Oregon*, 80 OR. L. REV. 301, 301 (2001); Jerry A. Behnke, *Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 699, 723 (1995); Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 818 (1995).

⁸³ UCCJA § 75-d (b)(i-ii); 28 U.S.C. § 1738A(c).

state decline jurisdiction.⁸⁴ In this sense, the custody jurisdiction assumed or based on significant connections would be enforceable under the PKPA.⁸⁵ Immigration status does not affect the establishment of significant connections.

3. Emergency

A state can exercise initial jurisdiction to determine a child custody proceeding if the child is physically present in the state and (1) the child has been abandoned or (2) it is necessary for the state to protect the child.⁸⁶ The emphasis of the statute is on physical presence and the need for protection.

4. Default

Under the UCCJA, a state can exercise initial jurisdiction for child custody determinations if no other state would have jurisdiction over the child, or if another state declined to assert jurisdiction based on the belief that the former state is a more appropriate forum for custody determination.⁸⁷ Additionally, the UCCJA requires that it be in the best interest of the child for that state to assume jurisdiction.⁸⁸ However, many individuals have lived outside of the United States for significant periods of time, particularly those in immigrant or military-based families. As a result, there are many cases in which there may be no readily ascertainable U.S. court to exercise jurisdiction because a child may not have a “home state,” and there may not be a state that has significant connections with the child. In such situations, jurisdiction can be founded upon the default ground, or in domestic violence cases upon emergency jurisdiction ground.⁸⁹ However, if courts of other countries issue child custody determinations, the Hague Convention may control where jurisdiction can be asserted.⁹⁰

B. UCCJEA

The UCCJEA has been adopted by 34 states,⁹¹ updating the UCCJA’s approach to child custody jurisdiction. The act was drafted in 1997 to “revise the law on child custody jurisdiction in light of federal [legislation] and approximately thirty years of inconsistent case law.”⁹² Unlike the UCCJA, the UCCJEA model provides a remedial process to enforce interstate child custody and visitation determinations.⁹³ Another significant

⁸⁴ Marcia McIvor, *Jurisdiction Counts in Custody Matters*, 37 FALL ARK. LAW. 14, 15 (2002); Richard E. Crouch, *An Intricate Maze of Child-Snatching Statutes*, 23 SPG FAM. ADVOC. 29, 32 (2001); Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 FAM. L.Q. 239, 256 (2000); Richard Friedling, *Navigating the Murky Waters of Interstate Child Custody Disputes*, 18 NO. 2 MATRIM. STRATEGIST 1 (2001). See also, Juliet A. Cox, *Judicial Wandering Through a Legislative Maze: Application of the Uniform Child Custody Jurisdiction Act & the Parental Kidnapping Prevention Act to Child Custody Determinations*, 58 MO. L. REV. 427, 447 (1993) (remarking on the Missouri court’s implied home state preference when the home state does not decline jurisdiction).

⁸⁵ 28 U.S.C. § 1738A

⁸⁶ UCCJA § 75-d (c)(i-ii).

⁸⁷ UCCJA § 75-d (d)(i-ii).

⁸⁸ UCCJA § 75-d (d)(i-ii).

⁸⁹ UCCJA § 3(a)(3), (4); PKPA, 28 U.S.C.A. § 1738A(c)(2)(D). See also, David Carl Minneman, *Default Jurisdiction of Court under § 3(a)(4) of the Uniform Child Custody Jurisdiction Act or the Parental Kidnapping Prevention Act*, 28 U.S.C.A. 1738A(c)(2)(D), 6 A.L.R. 5th 69, (1992).

⁹⁰ For a full discussion of the Hague Convention, see BREAKING BARRIERS, Implications of the Hague International Child Abduction Convention: Cases and Practice Chapter 8.

⁹¹ See Alabama, CODE OF ALA. §30-3B-201 (2001); Alaska, ALASKA STAT. §25.30.300 (2001); Arizona, A.R.S. §25-1031 (2001); Arkansas, A.C.A. §9-19-201 (2001); California, CAL. FAM. CODE §3421 (2001); Colorado, C.R.S. §14-13-201 (2001); Connecticut, Conn. Gen. Stat. §466-115k (2001); Delaware, 13 DEL. C. §1903 (2001); D.C. CODE ANN. §16-4602.1 (2001); Florida, FLA. STAT. §16.1308 (2001); Georgia, O.C.G.A. §19-9-61 (2001); Hawaii, HRS § 583-3 (2001); Idaho, IDAHO CODE §32-11-201 (2001); Illinois, 754 ILCS 35/4 (2001); Indiana, BURNS IND. CODE ANN. §31-17-3-3 (2001); Iowa, IOWA CODE §598B.201 (2002); Kansas, K.S.A. §38-1348 (2001); Louisiana, LA. R.S. §13:1702 (2002); Maine, 19-A M.R.S. §1745 (2001); Massachusetts, MASS. ANN. LAWS CH. 209B, §2 (2001); Michigan, MCLS §722.1201 (2001); Minnesota, MINN. STAT. §518D.201 (2001); Montana, MONT. CODE ANN, §40-7-201(2001); New York, NY CLS DOM. REL. §76 (2002); North Carolina, N.C. GEN. STAT. §50A-201 (2000); North Dakota, N.D. CENT. CODE, §14-14.1-12 (2001); Oklahoma, 43 OKLA. ST. §551-201 (2000); Oregon, OR. REV. STAT. §109.741 (2001); Rhode Island, R.I. GEN. LAWS §15-14-4 (2001); Tennessee, TENN. CODE ANN. §36-6-216 (2001); Texas, TEX. FAM. CODE §152.201 (2002); Utah, UTAH CODE ANN. §79-45c-201 (2001); Virginia, VA. CODE ANN. §20-146.12 (2001); Washington, WASH. REV. CODE §26.27.201 (2002); West Virginia, W. Va. Code §48-20-201 (2001).

⁹² See Prefatory Note of the UCCJEA.

⁹³ See Prefatory Note of the UCCJEA.

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difference between the two acts is that the UCCJEA gives priority to home state jurisdiction over jurisdiction based on significant connections.

States following the UCCJEA model will have initial jurisdiction to make child custody determinations if one of the following situations arises: 1) the state is home state of the child; 2) the state has significant connection with the child; 3) the state is the most appropriate forum; 4) necessity.⁹⁴ Thus, like the UCCJA, the UCCJEA determines jurisdiction based on the child's needs, residence, and connections to the jurisdiction.⁹⁵ The immigration status of the child or either of the child's parents is not relevant to the jurisdictional determination under the UCCJEA.

1. Home State

As with the UCCJA, a state can exercise initial jurisdiction to make a child custody determination if that state is the "home state" of the child. For purposes of the UCCJEA, the term home state has two definitions. First, a child's home state may be the state where the child resides at the commencement of the child custody proceeding.⁹⁶ Second, a child's home state may be the state where the child resided with a parent or a person acting as a parent for six consecutive months prior to the commencement of the custody proceeding.⁹⁷ Finally, if the child is less than six months old, a child's home state may be the state where the child resided with a parent or a person acting as a parent from the child's date of birth.⁹⁸ This form of jurisdiction is also favored by the PKPA for interstate enforcement purposes.⁹⁹ Furthermore, the immigration status of the child and/or the parents is irrelevant to this determination.

2. Significant Connection

A state can also exercise initial jurisdiction to determine child custody if the child or one of his or her parents has a "significant connection" with the jurisdiction.¹⁰⁰ This significant connection must consist of more than mere physical presence in the state.¹⁰¹ The state must also have considerable evidence with respect to the child's care, protection, training, and personal relationships.¹⁰²

3. More Appropriate Forum

If all courts having home state jurisdiction or significant connections decline to exercise that jurisdiction because another state is a more appropriate forum, that other state may exercise initial jurisdiction to determine a child custody proceeding.¹⁰³

4. Necessity

A state can exercise initial jurisdiction to determine a child custody proceeding by necessity when no other state would have jurisdiction over the child.¹⁰⁴

C. UCCJA & UCCJEA SUMMARY

Under both the UCCJA and the UCCJEA models, a state can exercise jurisdiction over a child custody proceeding if the child is residing in the state,¹⁰⁵ if the state has significant connections with the child,¹⁰⁶ or if

⁹⁴ See UCCJEA §201. See also Jennifer Marston, Comment, *Yesterday, Today, and Tomorrow's Approaches to Resolving Child Custody Jurisdiction in Oregon*, 80 OR. L. REV. 301, 314-318 (2001).

⁹⁵ UCCJEA § 201.

⁹⁶ UCCJEA § 201 (a)(1).

⁹⁷ UCCJEA § 201 (a)(2).

⁹⁸ UCCJEA § 102 (7). See also, *Lemley v. Miller*, 932 S.W.2d 284 (Tex. App. Austin 1996) (holding that an 11 month absence outside that jurisdiction counted as a part of the "home state" period).

⁹⁹ PKPA, 28 U.S.C. § 1738A (2001).

¹⁰⁰ UCCJEA § 201 (a)(2)(A).

¹⁰¹ *Id.*

¹⁰² UCCJEA § 201 (a)(2)(B).

¹⁰³ UCCJEA § 201 (a)(3).

¹⁰⁴ UCCJEA § 201 (a)(4).

the child's welfare is at stake, making jurisdiction appropriate under necessity or an emergency.¹⁰⁷ This priority is also consistent with the PKPA, which only allows initial jurisdiction based on significant connections for child custody determinations when there is no home state.¹⁰⁸

Furthermore, the UCCJEA updates the UCCJA by providing a remedial process to enforce interstate child custody.¹⁰⁹

D. DUE PROCESS & EQUAL PROTECTION

In child custody disputes, using the status of either parent as the sole factor in determining custody has also been held to violate due process and equal protection. In the case of *In re Parentage of Antonio Florentino v. Melissa Woods*, the mother argued that the trial court erred in awarding custody of the child to the father based on the fact that he was undocumented.¹¹⁰ The Washington Court of Appeals held that, although immigration status may be considered with respect to the best interest of the child standard, immigration status is not a dispositive factor in determining custody.¹¹¹ Denying custody solely based on the father's immigration status would be a violation of due process and equal protection.¹¹²

Additionally, in *Plyer v. Doe*, the Supreme Court reaffirmed that undocumented immigrants are entitled to the protections of the federal constitution's Due Process and Equal Protection clauses.¹¹³ Therefore, denying an undocumented immigrant custody of his or her child based on immigration status would be a violation of these rights. Thus, immigration status cannot be used as the sole factor in determining custody matters and should not be held so by the courts.

III. Civil Protection Orders and Jurisdiction

Full access to family law courts and civil protection orders (CPO) can be crucial to protect battered immigrants from their abusers.¹¹⁴ A CPO is a court order prohibiting or restricting a person from harassing, threatening, and sometimes even contacting or approaching another specified person.¹¹⁵ CPOs grant immediate relief to victims of domestic violence by enjoining batterers from further violence against a family or household member.¹¹⁶ State statutes allow such orders to include, among others, restraining orders, "no contact" orders, eviction orders, and orders to stay away from a residence.¹¹⁷ Currently, all fifty states, the District of Columbia, Puerto Rico, and U.S. territories make CPOs available to victims of domestic violence.¹¹⁸ These orders are designed to deter batterers from committing further violence and to hold them accountable through both civil and criminal remedies.¹¹⁹ Courts cannot and should not base family court jurisdiction for protection orders on the immigration status of the parties involved. Courts must treat domestic violence as a serious violation of criminal law, independent of the victims' immigration status.¹²⁰

¹⁰⁵ UCCJA §75-d (a); UCCJEA § 201 (a)(1).

¹⁰⁶ UCCJA §75-d (b); UCCJEA § 201 (a)(2)(1)(A).

¹⁰⁷ UCCJA §75-d (c); UCCJEA § 201 (a).

¹⁰⁸ Honorable Jon D. Levy, *Transcending Borders in Child Custody Jurisdiction and Enforcement Act in Maine*, 15 ME. B.J. 78, 79 (2000).

¹⁰⁹ See Prefatory Note regarding the UCCJEA.

¹¹⁰ *In re. Parentage of Antonio; Simon Santos Florentino v. Melissa Woods*, No. 25966-4-II, 2002 Wash. App. LEXIS 1896 (Wash. Ct. App. 2002).

¹¹¹ *Id.* at 18

¹¹² *Id.*

¹¹³ *Plyer v. Doe*, 457 U.S. 202, 210-13 (1982).

¹¹⁴ NCJFCJ, *supra* note 25 (discussing that courts should not issue mutual protection orders).

¹¹⁵ BLACK'S LAW DICTIONARY (7th ed. 1999).

¹¹⁶ Judge Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 425-426 (1990).

¹¹⁷ For a full discussion of civil protection orders, see BREAKING BARRIERS, Civil Protection Orders and Their Practical Application chapter.

¹¹⁸ Klein & Orloff, *supra* note, at 810.

¹¹⁹ Lisae C. Jordan & Bette Garlow, ABA Comm'n on Domestic Violence, *The Domestic Violence Civil Law Manual, Protection Orders and Family Law Cases*, §3 (2001).

¹²⁰ See The Violence Against Women Act, 42 U.S.C.S. § 3796hh (2002) (stating that the federal government should "encourage States, Indian tribal governments, State and local courts [including juvenile courts], tribal courts, and units of

The battered immigrant women provisions of the Violence Against Women Act provides protection to women previously forced to remain in violent relationships due to immigration status issues.¹²¹ Congress specifically intended these provisions to ensure that U.S. citizens and lawful permanent resident batterers could no longer use immigration status to perpetuate physical, mental, emotional, and economic violence against their spouses and children.¹²² The intent of Congress was to provide battered immigrants legal relief without risking deportation.¹²³ Civil courts must follow this intent with respect to civil protection orders by allowing battered immigrant women to access protections of the court system, without fear of deportation.

Any victim of domestic violence can file a petition for a protection order, regardless of immigration status.¹²⁴ A wide range of criminal acts can form the basis for civil protection orders, including physical abuse of the petitioner or child, criminal trespass, kidnapping, burglary, malicious mischief, interference with child custody, and reckless endangerment, as well as many others.¹²⁵ Thus, civil protection statutes provide a civil remedy based on a criminal act, allowing the victim to avoid the criminal prosecution of her batterer and potentially prevent additional violence.

The importance of legal access to battered immigrants is immeasurable. Protection order hearings can provide battered immigrants with the tools necessary to protect themselves and their children from further abuse. Women with legal representation are much more likely to receive civil protection orders than women who appear *pro se*.¹²⁶ Furthermore, CPOs granted to women with legal representation are more likely to include more effective and complete remedies.¹²⁷ Despite the fact that many batterers violate the protection order in some way, most orders deter repeated incidents of physical and psychological abuse.¹²⁸ Previous studies show that civil protection orders can be effective in eliminating or reducing domestic violence when properly drafted and enforced.¹²⁹

A. JURISDICTION AND VENUE

Generally, courts have jurisdiction to provide orders of protection in the state where the acts of abuse or threats occurred or in the state where the victim or perpetrator is currently present.¹³⁰ Thus, jurisdiction may exist regardless of the residency of the battered victim within that judicial jurisdiction.¹³¹ Victims of domestic violence and their children may need to file for an order of protection in a jurisdiction different than the jurisdiction where the abuse occurred, in order to better achieve safety for those abused. The purpose of protection order cases is to respond to, and deter future violence.¹³² For this reason domestic violence victims can file for protection orders in a variety of locations. No state statute or case law includes or supports the consideration of immigration status in protection order cases since these considerations would deny victims the protections of the court. Victims applying for protection orders must, however, establish jurisdiction and venue so that the appropriate court can hear their case.

local government to treat domestic violence as a serious violation of criminal law;" it also should, "strengthen legal advocacy service programs for victims of domestic violence and dating violence, including strengthening assistance to such victims in immigration matters.")

¹²¹ *Id.*

¹²² *Id.* at § 21:6.

¹²³ *Id.* at § 21:11. See also, Orloff & Klein, *supra* note, at 1023.

¹²⁴ Leslye E. Orloff et al., *With No Place To Turn: Improving Legal Advocacy for Battered Women*, 29 FAM. L. Q. 313, 314-315 (1995) (discussing the unique problems domestic violence victims face as immigrants and also discussed is the importance of how a protection order can be the most important remedy for domestic violence victims); NCJFCJ, *supra* note 25.

¹²⁵ Orloff & Klein, *supra* note, at 849 (citing statutes from Delaware, New Jersey, New Mexico, and Washington as examples).

¹²⁶ *Id.* at 812.

¹²⁷ *Id.*

¹²⁸ Susan Keilitz, *Effectiveness of Civil Protection Orders*, National Center for State Courts (1996), available at <http://www.ojp.usdoj.gov/nij/vawprog/comp18.htm>.

¹²⁹ *Id.* at 813.

¹³⁰ NCJFCJ, *supra* note 25. See also Orloff & Klein, *supra* note, at 876-77.

¹³¹ NCJFCJ, *supra* note 25. See also Orloff & Klein, *supra* note, at 877.

¹³² Lisae C. Jordan & Bette Garlow, ABA Comm'n on Domestic Violence, *The Domestic Violence Civil Law Manual, Protection Orders and Family Law Cases*, §3 (2001) available at <http://www.abanet.org/domviol/pubs.html>.

1. *Subject Matter and Personal Jurisdiction*

Domestic violence victims may file a petition for an order of protection in one of three places: (1) where they are currently or temporarily residing, (2) where the acts of domestic violence took place, or (3) where the abuser resides.¹³³ Battered immigrants are not required to have been residing in the state where the petition for the order of protection was filed.¹³⁴

When domestic violence victims raise claims in the state where the abuse occurred, that state's courts have subject matter jurisdiction over the tortious acts and may issue a protection order.¹³⁵ Family courts are given subject matter jurisdiction over petitions for protection orders so that these specialized courts can address the safety of victims, even if they remain with their abusers. Furthermore, family courts are best able to address important child custody issues in situations of domestic violence.¹³⁶ Across the country, jurisdiction and venue in protection order cases are generally established in one of several alternate locations: the petitioner's residence,¹³⁷ the petitioner's temporarily location¹³⁸ or shelter,¹³⁹ the respondent's residence,¹⁴⁰ either party's residence,¹⁴¹ or the location where the abuse occurred.¹⁴²

Some jurisdictions explicitly do not have specific residency requirements.¹⁴³ Thirty-one jurisdictions authorize the petitioner to file for a civil protection order in any general jurisdiction district court;¹⁴⁴ nine authorize filing in circuit court;¹⁴⁵ nine authorize filing in family court;¹⁴⁶ and one authorizes filing in juvenile or district court.¹⁴⁷

As with divorce, immigration status is irrelevant to whether an immigrant can obtain a protection order in a given jurisdiction. If the order is filed where the abuse occurred, residence is not relevant to the court's jurisdiction.¹⁴⁸ Likewise, when the victim is filing for a protection order in the jurisdiction where the abuser

¹³³ NCJFCJ, *supra* note 25. See also Orloff & Klein, *supra* note at 876-77.

¹³⁴ Orloff & Klein, *supra* note, at 876-77.

¹³⁵ *Id.*

¹³⁶ See *id.* at 24.

¹³⁷ Al. St. § 30-5-3, Al. St. § 9-15-201; DE ST TI 10 § 1042; DC CODE § 16-1001; GA St 19-13-2; HI ST § 585-2; ID ST § 39-6304; IL ST CH 750 § 60/209; IN ST § 12-10-328; KS LEGIS 142 (2002); KY ST § 403.725; LA. REV. STAT. ANN. § 46:2133 (West1993); MA ST 209A § 2; MI ST 600.2950; MO ST §455.503; MT ST § 40-15-301; NV ST § 3.223; N.J. STAT. ANN § 2C:25-28; NY FAM CT § 154; OK ST T.22 § 60.2; TX FAMILY § 83.003; VT ST T. 15 § 1002; WA ST 26.50.020; WI ST § 801.50 (1993).

¹³⁸ Al. St. § 30-5-3, Al. St. § 9-15-201; DE ST TI 10 § 1042; ID ST § 39-6304; IL ST CH 750 § 60/209; KY ST § 403.725; MT ST § 40-15-301; N.J. STAT. ANN § 2C:25-28; VT ST T. 15 § 1002; WA ST 26.50.020.

¹³⁹ Residence also includes the domestic violence victim's temporary residence in shelters. Orloff & Klein, *supra* note, 893.

¹⁴⁰ DE ST TI 10 § 1042; GA St 19-13-2; ID ST § 39-6304; LA. REV. STAT. ANN. § 46:2133 (West 1993); ME ST T. § 211; MO ST §455.503; MT ST § 40-15-301; N.J. STAT. ANN § 2C:25-28; OK ST T.22 § 60.2; SC. ST § 20-4-40; TN ST § 36-3-602; TX FAMILY § 83.003; WI ST § 801.50 (1993).

¹⁴¹ AZ ST § 13-3602, IA ST § 236.6; MN ST § 518B.01; NH ST § 17-b:3; N.J. STAT. ANN § 2C:25-28; SD ST § 25-10-2; UT ST § 30-6-3.

¹⁴² DE ST TI 10 § 1042; DC CODE § 16-1001; GA St 19-13-2; LA. REV. STAT. ANN. § 46:2133 (West 1993); MN ST § 518B.01; MO ST §455.503; MT ST § 40-15-301; NY FAM CT § 154; OK ST T.22 § 60.2; TN ST § 36-3-602; UT ST § 30-6-3.

¹⁴³ Ak. St. § 18.66.100; FL ST § 741.30; MD FAMILY § 4-501-6; MS ST § 97-3-107; NE ST §25-2740; NM 45-5-402; NC ST § 50B-2; ND ST 14-07.1-02.1; OH ST § 3133.31; OR ST § 107-710; PA ST 18 Pa. C.S.A. § 4954; RI ST § 15-15-3; VA ST §16.1-253.1; WV ST § 48-27-301; WY ST 35-21-103.

¹⁴⁴ Al. St. § 30-5-3, Al St. § 9-15-201; Ak. St. § 18.66.100; CA FAM App. § 547; CO ST § 15-14-402; DE ST TI 10 § 1042; ID ST § 39-6304; IN ST § 12-10-328; KS LEGIS 142 (2002); KY ST § 403.725; MD FAMILY § 4-501-6; MN ST § 518B.01; MS ST § 97-3-107; MO ST §455.503; MT ST § 40-15-301; NE ST §25-2740; NH ST § 17-b:3; NM 45-5-405; NY FAM CT § 154; NC ST § 50B-2; ND ST 14-07.1-02.1; OH ST § 3133.31; OK ST T.22 § 60.2; PA ST 18 Pa. C.S.A. § 4954; SC. ST § 20-4-40; TN ST § 36-3-602; TX FAMILY § 83.003; UT ST § 30-6-3; VA ST § 16.1-253.1; WA ST 26.50.020; WI ST § 801.50 (1993).

¹⁴⁵ AR ST § 9-15-201; FL ST § 741.30; GA St 19-13-2; ME ST T. § 211; MA ST 209A § 2; OR ST § 107-710; SD ST § 25-10-2 WV ST § 48-27-301; WY ST 35-21-103.

¹⁴⁶ CT ST § 46B-15 amended by 2002 Conn. Legis Serv. P.A. 02-127; DC CODE § 16-1001; HI ST § 585-2; LA. REV. STAT. ANN. § 46:2133 (West1993); MI ST 600.2950; NV ST § 3.223; N.J. STAT. ANN § 2C:25-28; RI ST § 15-15-3; VT ST T. 15 § 1102.

¹⁴⁷ UT ST § 30-6-3

¹⁴⁸ NCJFCJ, *supra* note 25 See also, Orloff & Klein, *supra* note, at 876-77.

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resides, the residence of the victim is irrelevant for jurisdictional purposes.¹⁴⁹ Additionally, the residence of the victim has been interpreted to include temporary locations in order to accommodate victims living at shelters or other locations. This definition allows victims to obtain the protection they need without the risk of traveling back to a location where the abuser may be more likely to harm them. Since the victim is physically present in the temporary jurisdiction, she now requires protection in that jurisdiction and thus has been held eligible to access local courts. Victims should also not be compelled to list their present address on the forms served on the abuser.

Although subject matter jurisdiction can be found where the abuse occurred, where the victim is physically present, or where the abuser resides, securing personal jurisdiction over the abuser is easiest when protection orders are initiated either where the violence occurred or where the abuser resides.

Personal jurisdiction is jurisdiction over the person who commits acts of domestic abuse and can be established in the state where the acts of violence were committed.¹⁵⁰ Personal jurisdiction can also be found where the violence occurred, regardless of whether the victim or the batterer resides in that jurisdiction.¹⁵¹ Most importantly, civil protection orders can be issued in jurisdictions where no actual violence occurred.¹⁵² However, obtaining personal jurisdiction through service of process in a jurisdiction to which a domestic violence victim has fled can be difficult. Additionally, serving an abuser with notice of the victim's new residence may increase the risk of violence to the victim. Otherwise, the victim would be required to travel to the jurisdiction where the violence occurred or where the defendant lives. Finally, once the victim obtains a protection order from one jurisdiction, that order will be granted full faith and credit in other jurisdictions and can be enforced wherever the victim moves in the United States.¹⁵³ Full faith and credit is granted as long as it complies with VAWA's due process requirement. This enforceability grants the victim access to family courts in the jurisdiction providing the most protection for the victim.¹⁵⁴

2. Venue

If jurisdiction can be established in a particular state, "venue" determines the location of the court within that state that is most convenient for deciding a protection order matter.¹⁵⁵ The correct court is usually the court located where the victim currently resides or the "home state."¹⁵⁶ Nevertheless, venue can also be established where the victim permanently or temporarily resides, where the batterer resides, where either the victim or batterer resides at the time of the protection order petition or violation, or where the abuse occurred.¹⁵⁷ Most importantly, victims cannot be denied the legal safeguards of protection orders simply because the abuse did not occur in the jurisdiction where the victim is filing the protection order petition.¹⁵⁸ Courts in the home state can decline jurisdiction in domestic violence cases where the victim has fled across state lines and sought refuge in another state.¹⁵⁹ By applying an inconvenient forum analysis, any court with the power to exercise jurisdiction may choose to decline their jurisdiction over the case.¹⁶⁰ This would allow the victim to

¹⁴⁹ National Council of Juvenile & Family Court Judges, *Family Violence: A Model State Code*, § 303 (1994). See also, Orloff & Klein, *supra* note, at 876-77.

¹⁵⁰ Orloff & Klein, *supra* note, at 876-77.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994). See also, Violence Against Women Online Resources, *Increasing Your Safety: Full Faith and Credit for Protection Orders*, Developed and Distributed by National Center on Full Faith and Credit, Pennsylvania Coalition Against Domestic Violence, available at <http://www.vaw.umn.edu/FinalDocuments/survivorbrochure.asp>.

¹⁵⁴ NCJFCJ, *supra* note 25.

¹⁵⁵ BLACK'S LAW DICTIONARY (7th ed. 1999).

¹⁵⁶ Orloff & Klein, *supra* note, at 893-894.

¹⁵⁷ This includes permanent and temporary protection orders NCJFCJ, *supra* note 25; Orloff & Klein, *supra* note, at 893-894.

¹⁵⁸ National Council of Juvenile & Family Court Judges [hereinafter NCJFCJ], *Family Violence: A Model State Code*, § 303 (1994), available at <http://www.ncjfcj.org>.

¹⁵⁹ Several jurisdictional statutes provide for the inconvenient forum analysis, including the Uniform Child Custody Jurisdiction Act (UCCJA) (drafted by NCCUSL in 1968) and the Uniform Child Custody Jurisdiction and Enforcement Act (UUCJEA) (drafted by NCCUSL in 1997). For a fuller discussion of these and other jurisdictional statutes, see Deborah Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence after the Violence Against Women Act of 2000*, 13 Colum. J. Gender & L. 101, 115-16, 123-25, 134-35 (2004).

¹⁶⁰ See UCCJA § 7(c) (1968); UUCJEA § 207(b) (1997). For example, courts have considered safety issues when declining jurisdiction. See *Swain v. Vogt*, 206 A.D.2d 703 (N.Y. App. Div. 1994) (finding that where a mother left the child's home

remain in the refuge state, instead of forcing her to return to her home state, which could potentially protect her and her children from further abuse. Just as with subject matter jurisdiction, immigration status is not relevant to establishing venue in a protection order cases.

B. DUE PROCESS & EQUAL PROTECTION

Like divorce and child custody issues, civil protection order hearings also entitle all permanent legal¹⁶¹ or undocumented immigrants¹⁶² to the right to sue, be parties, give evidence, and have the full and equal benefit of all state and federal laws.¹⁶³ These rights encompass the fundamental right to Due Process and Equal Protection provided by the Constitution. Civil protection orders satisfy the state action requirement of the Due Process clause and therefore implicate these fundamental constitutional rights.¹⁶⁴ Thus, denying individuals due process and equal protection of the courts based on their immigration status is a violation of their constitutional rights.¹⁶⁵

IV. Child Support and Jurisdiction

Isolation, intimidation, fear of losing custody of their children, and economic abuse are all contributing factors to the inability of domestic violence victims to leave their batterers. Furthermore, when an immigrant victim and her batterer have children, issues of child support, custody, and alimony also come into play.¹⁶⁶ According to the U.S. Census Bureau, children living with a single mother have a one-in-three chance of living in poverty.¹⁶⁷ Many victims of domestic violence do not pursue such claims out of fear that the violence will escalate.¹⁶⁸

A. ECONOMIC ABUSE

Aside from fear, economic dependence is possibly the single most common reason why abuse victims remain with or return to their batterers.¹⁶⁹ For immigrant victims, economic abuse is a common form of power and control exerted by abusers.¹⁷⁰ Without legal authorization to work, many immigrant victims are prevented from gaining stable employment. Rather, in order to make a living, many are forced to accept employment through informal employment arrangements.¹⁷¹ Working at these jobs, usually for cash, immigrant women

state and relocated with her son to escape abuse that the court was entitled to decline jurisdiction upon finding that the refuge state was a more appropriate forum); *Van Norman v. Upperman*, 436 N.W.2d 834, 835 (Neb. 1989) (declining jurisdiction on inconvenient forum grounds, based on the fact that the children were receiving counseling in Kansas and had relatives in Kansas, and that the mother's limited income would make coming to the home state for court appearances an extreme hardship); *Cronin v. Camilleri* (declining jurisdiction based on inconvenient forum because the children had relatives in the refuge state, and the mother could earn a living there).

¹⁶¹ *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁶² *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D. Ill. 1936).

¹⁶³ 42 USCS § 1981(a) (2002).

¹⁶⁴ *Clouterbuck v. Clouterbuck*, 556 A.2d 1082, 1085 n.3 (D.C. 1989).

¹⁶⁵ Similarly, immigration status has even less relevance in child abuse situations. While civil protection orders create a civil remedy based on a criminal act, child abuse cases constitute a criminal charge brought by the state against the perpetrator. As the state is the initiator of this criminal case, immigration status of the parties involved plays no role in the prosecution of the defendant. Refer to Part I (B) and Part II (D) for a discussion of these rights in case law.

¹⁶⁶ Leila Rothwell, *VAWA 2000's Retention of the "Extreme Hardship" Standard for Battered Women in Cancellation of Removal Cases: Not your Typical Deportation Case*, 23 U. HAW. L. REV. 555, 607-8 (2001).

¹⁶⁷ U.S. Comm'n on Interstate Child Support, *Supporting Our Children: A Blueprint for Reform*, 2 Washington, D.C.: U.S. Government Printing Office (1992).

¹⁶⁸ Symposium, *Women, Children, & Domestic Violence: Current Tensions & Emerging Issues*, 27 FORDHAM URB. L.J. 567, 743 (2000).

¹⁶⁹ Orloff & Klein, *supra* note, at 990.

¹⁷⁰ See Leila Rothwell, *VAWA 2000's Retention of the "Extreme Hardship Standard" for Battered Women in Cancellation of Removal Cases: Not Your Typical Deportation Case*, 23 U. HAW. L. REV. 555, 567 (2001).

¹⁷¹ It is important to note that when advocates and attorneys discover that undocumented immigrant battered women are working they should advise these clients that there are two things related to work that immigrant clients without work authorization from USCIS must not do. First, they must not hold themselves out as a U.S. citizen for purposes of obtaining employment. If they do this, even if they qualify for immigration benefits under VAWA, they will not be able to attain lawful permanent residency under VAWA. Second, they should be advised not to buy or use false papers (work permits, green card, social security numbers) Although, if they have done this they might be able with the assistance of a trained

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have little job security, are often underpaid, have no health insurance, and are at increased risk for abuse and exploitation by employers.¹⁷² The inability to work legally often is manipulated as a source of power and control by abusers. Immigrant victims married to citizen or lawful permanent resident abusers may not file immigration papers for their immigrant spouses, thus preventing them from seeking legal employment.¹⁷³ All of these factors make it more difficult for many immigrant victims of domestic violence to support themselves and their children if they separate from their abusers.

These circumstances leave many battered immigrants in a position where they lack the means to independently support themselves and their children. This inability to sufficiently support themselves separately from their abusive spouse or partners leaves them economically dependent on the very individual that abuses them.¹⁷⁴ Generally, the severity of the abuse increases by the degree of economic dependence.¹⁷⁵ In light of these economic limitations, the basic legal right to seek court-ordered child support is essential to a victim's ability to provide for her child and live independently from her abuser. Immigration status plays no role in determining court jurisdiction over child support proceedings. By the same token, regardless of immigration status, all parents have a duty to support their children. There are no state statutes that require the individual seeking child support to be a citizen or lawful permanent resident of the United States.

B. PERSONAL JURISDICTION

Child support payments can be addressed during divorce, civil protection orders, custody, or independent child support proceedings without inquiring into the immigration status of the parents or child. In child support proceedings, jurisdiction is established where the child resides, or where the court can obtain jurisdiction over the non-paying parent.¹⁷⁶ Essentially, the court has valid jurisdiction over child support proceedings involving an immigrant custodial parent and his or her child wherever the child or non-paying parent resides.

The Due Process clause of the U.S. Constitution limits the ability of state courts to assert personal jurisdiction over a defendant who does not reside in the state.¹⁷⁷ In *International Shoe Co. v. Washington*, the Supreme Court ruled that in order for personal jurisdiction to be established over a non-resident defendant, the defendant must have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" ¹⁷⁸ In *Kulko v. Superior Court*, the Supreme Court held that the parent-child relationship was insufficient to establish the minimum contacts required between a nonresident parent and the state in which the child resides for purposes of child support benefits.¹⁷⁹

After the parent-child relationship was held to be insufficient to assert personal jurisdiction, state legislatures have enacted new "long-arm" statutes incorporating acts of purposeful availment relevant to child support actions.¹⁸⁰ Many state long arm statutes allow personal jurisdiction over non-resident defendants under any basis that is constitutionally permissible; other states allow jurisdiction to be asserted based on specific acts or

immigration attorney to overcome bars from attaining lawful permanent residence under VAWA, there is not guarantee and it is difficult. Thus clients should be advised not to do these things. Clients who have used or are using false papers should be advised to stop doing so. *Id.*

¹⁷² *Id.*
¹⁷³ Mary Ann Dutton, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latina: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 250-51 (2000).

¹⁷⁴ Leslye Orloff, *Lifesaving Welfare Safety Net Access For Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM & MARY J. WOMEN & L. 597, 656-657 (2001).

¹⁷⁵ Michael J. Strube & Linda S. Barbour, *The Decision to Leave an Abusive Relationship: Economic Dependence and Psychological Commitment*, 45 J. MARRIAGE & FAM. 789, 790-92 (1983).

¹⁷⁶ *Porter v. Porter*, 684 A.2d 259 (Supreme Court of Rhode Island 1996) (court ruled it had exclusive jurisdiction over the non-paying parent because that jurisdiction was the child's state or residence of contestant). North Carolina Gen Stat. § 50-13.5(f) (child support orders must be made in divorce proceedings and jurisdiction is found where the child resides or is physically present or where the parent resides.) See *Bass v. Bass*, 43 N.C. App.212.

¹⁷⁷ *Kulko v. Superior Court of California in and for City and County of San Francisco*, 436 U.S. 84, 91 (1978)

¹⁷⁸ *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

¹⁷⁹ *Kulko*, 436 U.S. 84, at 101.

¹⁸⁰ Susan Weinstein, *Reaching Nonresident Defendants in Child Support Actions: A Survey of State Long Arm Statutes*, 9 PROB. L.J. 81, 103-114 (1989).

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circumstances, such as tortious conduct by non-resident defendants causing injury within the state.¹⁸¹ Though the statutes based on specific acts or tortious circumstances generally apply to a non-resident's business transactions or tortious conduct, many courts extended these circumstances to apply to child support orders.¹⁸² This form of jurisdiction is based on a separation or divorce agreement with a "substantial connection" to the forum state.¹⁸³

The Uniform Interstate Family Support Act [UIFSA] was established to create uniformity amongst child support guidelines and enforcement throughout the nation.¹⁸⁴ All states have enacted the UIFSA¹⁸⁵ to ensure that there is one controlling child support order to be enforced in courts around the country.¹⁸⁶ Under Section 201 of the UIFSA, a petitioner for child support has three options. The first option is the use the state long arm statute to obtain personal jurisdiction over the respondent.¹⁸⁷ As a second option, the petitioner can initiate a two-state action under the UIFSA, to establish a support under in the respondent's state of residence applying the law of the respondent's state.¹⁸⁸ Finally, the petitioner may file a suit in the respondent's state of residence in order to settle support issues within a single proceeding.¹⁸⁹

Under the UIFSA, personal jurisdiction can be established over a nonresident if the individual: (1) is personally served with a citation, summons, or notice within the forum state, (2) submits to the jurisdiction of the forum state by consent, by entering a general appearance, or filing a responsive document which has the effect of waiving consent to the jurisdiction, (3) resided with the child in the forum state, (4) resided in the forum state and provided pre-natal expenses or support to the child, (5) engaged in sexual intercourse in the state during which the child may have been conceived, or (6) asserted parentage in the putative father registry maintained in the state by the appropriate agency.¹⁹⁰ Additionally, personal jurisdiction can be established if the child resides in the state as a result of the acts or directives of the individual over which jurisdiction is being asserted, or if there is any other basis consistent with the constitutions of the state and the United States for the assertion of personal jurisdiction.¹⁹¹

This section of the UIFSA creates a long-arm jurisdiction that is as broad as constitutionally permitted.¹⁹² It must be noted that a child support order sought under the UIFSA submits to the jurisdiction only for child support issues and not for issues of child custody or visitation.¹⁹³ However, if the non-custodial parent moves outside the state where the custody order was issued, that parent is still subject to the state's jurisdiction for enforcement of child support if the child or an individual obligee continues to reside there.¹⁹⁴ Finally, jurisdiction granted under the UIFSA or other state law continues as long as the state with jurisdiction has continuing exclusive jurisdiction to modify and enforce its order under Sections 205, 106, and 211 of UIFSA.¹⁹⁵

¹⁸¹ Rosemarie T. Ring, *Personal Jurisdiction and Child Support: Establishing the Parent-Child Relationship as Minimum Contacts*, 89 CAL. L. REV. 1125, 1139 (2001).

¹⁸² *Id.* at 1140. See, e.g. *In re Custody of Miller*, 548 P.2d 542, 718 (Wash. 1976) (holding that "the failure of a parent to support his or her children constitutes a tort" within the meaning of the long-arm statute); see also *Poindexter v. Willis*, 231 N.E.2d 1, 3 (Ill. App. Ct. 1967) (stating that "the word 'tortious' ...is not restricted to the technical definition of a tort, but includes any act committed in this state which involves a breach of duty to another and makes the one committing the act liable to respondent in damages"). Nevertheless, most courts require an existing support order before finding that the nonresident defendant is in violation of a duty or has engaged in tortious conduct.

¹⁸³ Ring at 1140.

¹⁸⁴ Uniform Interstate Family Support Act [hereinafter UIFSA], 42 U.S.C. 666 Prefatory Note (1996).

¹⁸⁵ Personal Responsibility & Work Opportunity Reconciliation Act [hereinafter PRWORA], 42 U.S.C. § 666(f) (2000).

¹⁸⁶ Stacy L. Brustin, *The Intersection Between Welfare Reform & Child Support Enforcement: D.C.'s Weak Link*, 52 CATH. U. L. REV. 621, 630 (2003).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ UIFSA at § 201 (1996).

¹⁹¹ *Id.*

¹⁹² *Id.* at § 201, Comment.

¹⁹³ Barry J. Brooks & John J. Sampson, *Uniform Interstate Family Support Act (2001) with Prefatory Notes & Comments*, 36 FAM. L.Q. 329, 356 (2002).

¹⁹⁴ UIFSA at § 205.

¹⁹⁵ UIFSA at § 202.

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Furthermore, under the Uniform Reciprocal Enforcement of Support Act, child support orders are enforceable, even if issued through a divorce proceeding in another state.¹⁹⁶ Thus, when a parent is delinquent on child support payments, a state court may seek child support payments from a non-paying parent, even if he resides outside that state. In other words, the non-paying parent is still subject to the issuing state's jurisdiction for enforcement of child support, until such time that the court's jurisdiction is terminated through a specific long arm jurisdiction provision.¹⁹⁷ Under Uniform Reciprocal Enforcement of Support Act, all states must recommend and give full faith and credit to child custody orders from foreign states.¹⁹⁸

However, once a child support order has been issued, neither party can attempt to receive a new child support order in a new jurisdiction.¹⁹⁹ Instead, the provisions of the UIFSA must be applied in order to enforce and modify the existing child support order, to enforce and modify previous orders. For example, where neither party lives in the original state issuing the child support order, the long arm provision of the UIFSA can be invoked to assert personal jurisdiction in order to modify the order. Under Section 611, personal jurisdiction cannot be asserted in the new state where the petitioner resides, even if a basis for long-arm jurisdiction exists.²⁰⁰ However, jurisdiction may be asserted in the state issuing the controlling child support order, or in the respondent's new state of residence if other U.S. jurisdictions do not have a connection to the respondent.²⁰¹ None of these provisions or restrictions considers immigration status relevant to child support determinations, thus, making such inquiries irrelevant.

C. DUE PROCESS & EQUAL PROTECTION

Like divorce, child custody, and civil protection orders, child support issues also entitle all permanent legal²⁰² or undocumented immigrants²⁰³ to the right to sue, be parties, give evidence, and have the full and equal benefit of all state and federal laws.²⁰⁴ These rights encompass the fundamental right to due process and equal protection of the courts, and denial of these rights based on immigration status is a violation of those constitutional rights.

¹⁹⁶ Uniform Reciprocal Enforcement of Support Act [hereinafter URESA], § 2(m) (1968) ("State" includes a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect").

¹⁹⁷ Shannon Braden, *Battling Deadbeat Parents: The Constitutionality of the Child Support Recovery Act in Light of the United States v. Lopez*, 7 SPG KAN. J.L. & PUB. POL'Y 161, 166 (1998).

¹⁹⁸ Uniform Reciprocal Enforcement of Support Act.

¹⁹⁹ Brooks & Sampson, *supra* note 193, at 355.

²⁰⁰ UIFSA at § 611. This restriction holds true even if the non-resident appears in the state to enforce visitation of the custody order. See *Kulko v. Superior Court*, 436 U.S. 84 (1978).

²⁰¹ *Phillips v. Phillips*, 826 S.W.2d 747 (Tex. App. 1992). However, the jurisdiction of the original issuing state must be used with extreme restraint in order to comply with Section 611. UIFSA at §611.

²⁰² *Graham v. Richardson*, 403 U.S. 365 (1971).

²⁰³ *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D. Ill. 1936).

²⁰⁴ 42 USCS § 1981(a) (2002).

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Battered Immigrants and the Criminal Justice System¹²

By Anna Pohl, Moira Fisher-Preda, Ann Benson, and Leslye Orloff

****DISCLAIMER****

The information provided in this chapter is intended to serve as an introduction and provide a basic overview of how criminal matters can affect battered immigrant women. It is essential to contact an expert on immigration law and crimes before proceeding with a criminal case involving immigrants.³

Chapter 19 “The Criminal Justice System and Immigrant Victims” in “Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault” provides additional information about issues that arise when immigrant victims of sexual assault interact with the criminal justice system. This publication can be accessed and downloaded at <http://niwaplibrary.wcl.american.edu/reference/manuals/sexual-assault>.

¹ “This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.” The authors would like to gratefully acknowledge the contributions of Maunica Sthanki, Louisiana State University, Jessica Levie, University of Wisconsin Law School, and Eric Bobila, Boston College Law School in the preparation of this chapter. For further information See Chapter 19 *The Criminal Justice System And Immigrant Victims* in *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* (Legal Momentum, 2011)

² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ A list of references is provided at the end of this chapter.

Introduction⁴

This chapter is designed to help advocates and attorneys with two main issues: how to work with victims who have criminal convictions or criminal charges pending against them, and how to work with victims whose abusers have charges pending against them. For battered immigrant women, criminal issues can have serious immigration consequences, including the following:

- A battered immigrant can be deported if she commits any of a wide variety of crimes;
- Her VAWA self-petition or application for VAWA cancellation of removal or naturalization can be denied if she cannot show good moral character because of a criminal history;
- Even if she has an approved VAWA self-petition, she may be barred from obtaining lawful permanent residence (a green card) if she falls within one of the criminal grounds of inadmissibility;
- Her application for adjustment of status (permanent residence) or VAWA cancellation of removal can be denied if immigration authorities decide not to exercise discretion in her favor because of her criminal history.

For battered immigrants whose abusers have criminal charges pending against them, the potential immigration consequences for the abuser could affect her safety and ultimately her ability or willingness to cooperate in her abuser's prosecution.

This chapter presents an overview of the immigration consequences of criminal conduct. It also presents guidelines for advocates on assisting battered immigrants within the justice system, both when they themselves have criminal histories or face charges, and when their abusers are facing criminal charges. Criminal laws are not uniform and vary in each jurisdiction, making each criminal case unique. This chapter is therefore *not* intended to be an exhaustive or comprehensive guide for assisting battered immigrant women involved in criminal cases. Instead, it provides advocates with basic information and tools to understand and address the immigrant victim's situation.

Criminal Convictions and Immigration Status

Criminal conduct can jeopardize the immigration status of all non-citizens living in the United States. Even lawful permanent residents who have lived in the U.S. for years and have close family ties, such as U.S. citizen spouses and children, can be affected. Such consequences include deportation, permanent bars to returning to the U.S., and mandatory detention by immigration authorities, as well as difficulties in obtaining permanent residence or becoming citizens through naturalization.⁵

Battered immigrants, even if otherwise eligible for permanent residence through the Violence Against Women Act (VAWA), can be rendered ineligible because of a criminal conviction and subject to deportation. Advising non-citizens to plead guilty to seemingly low-level misdemeanor offenses without considering potential immigration consequences to such a criminal conviction can have disastrous consequences. To avoid these consequences, advocates and attorneys should work with defense attorneys and prosecutors to inform them of the potential immigration consequences and get criminal charges dismissed or reduced when possible.

It is not unusual for battered immigrant women themselves to be arrested on domestic violence charges. This often occurs because of language barriers. The police may speak to an abuser or his family members but not to the victim, because she does not speak English. An abuser may assault the victim, causing her to fight back in self-defense, and then call the police and claim that she assaulted him. If the victim speaks little or no

⁴ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/immigration/enforcement-detention-and-criminal-justice>.

⁵ ANN BENSON ET AL., WASHINGTON DEFENDER ASS'N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS IN WASHINGTON STATE, 1 (2001), at http://www.defensenet.org/immigration/immig_main.htm (last visited Aug. 13, 2004).

English, she will not be able to explain what really happened and could be arrested herself. A conviction for domestic violence is a ground of deportability and can render a battered immigrant ineligible for certain relief under VAWA.⁶

It is important to understand that the relationship between criminal and immigration law is complex, and that immigration laws are constantly changing. A misunderstanding of these legal complexities can render an immigrant ineligible for permanent resident status and can possibly result in deportation. **It is therefore essential to consult an immigration attorney with knowledge of the consequences of criminal convictions before proceeding with the defense of a survivor of domestic violence who is facing criminal charges. This will enable the victim and her defense attorney to assess the potential effects of the criminal case on her immigration status when deciding how to proceed.**⁷

Effects of Criminal Convictions On Immigration Status – An Overview For Battered Immigrants

There are numerous ways in which a criminal history can negatively affect a battered immigrant's immigration case:

- Regardless of her immigration status, criminal convictions and conduct can make an immigrant survivor subject to “removal proceedings” (formerly known as deportation proceedings) by triggering one of the crime-related legal grounds of inadmissibility or deportation.⁸
- Criminal convictions can trigger legal barriers that will prevent immigrant survivors from getting lawful immigration status and benefits that they would otherwise be entitled to receive. VAWA self-petitions, VAWA cancellation, U and T visa provisions, asylum and citizenship all contain legal bars relating to criminal convictions and conduct.⁹
- Even where a criminal conviction does not trigger a legal bar preventing the immigrant survivor from filing for immigration status or citizenship, it will constitute a negative discretionary factor in deciding her case. Immigration authorities can deny an otherwise eligible applicant if they determine that she does not deserve a “favorable exercise of discretion”.
- If the immigrant survivor has been deported and returns illegally to the U.S., she is at risk of federal criminal prosecution for illegal reentry after deportation. If she has a criminal conviction, it will increase her sentence by possibly years.¹⁰

Advocates should be aware of common issues of criminal law that affect battered immigrants. The following sections describe some possible scenarios that battered immigrants may face in the criminal justice system and the effects on their immigration cases. **This chapter is not intended to be a comprehensive guide to the immigration consequences of criminal convictions. Instead, it is meant to address some of the more common situations in which criminal matters affect the immigration status of immigrant victims of domestic violence.**

DEFINITIONS – CONVICTIONS AND SENTENCES UNDER IMMIGRATION LAW

Convictions under immigration law

⁶ INA §237(a)(2)(E); 8 U.S.C. 1227 (1996); INA §240A(b)(2); 8 U.S.C. 1229b (1996).

⁷ For information on how to obtain a client's criminal records, see Appendix 2.

⁸ See INA §101(a)(43); §212(a)(2); §237(a)(2); 8 USC 1101(a)(43); §1181(a)(2); §1227(a)(2).

⁹ Some of these provisions contain special “waivers” of certain criminal convictions. See INA §212(a)(2)(A)(ii)(I); INA §212(h); INA §204(c). However, many convictions cannot be “waived” and having to apply for crime-related waivers makes these cases much more difficult and susceptible to denial.

¹⁰ See 8 USC 1326. The maximum possible sentence in these cases is either 10 or 20 years. Illegal reentry after deportation is now one of the most prosecuted federal crimes and accounts for over 25% of all cases in some jurisdictions.

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It is important for advocates to understand that the definition of a “conviction” in the criminal justice system differs from the legal definition of “conviction” in the immigration context. The term “criminal conviction” for immigration purposes, is defined by the Immigration and Nationality Act.¹¹ A judgment that might not be considered a conviction under the criminal law of the relevant jurisdiction may be one for immigration purposes.

The immigration law defines a conviction as follows:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where

- (i) a judge or jury has found the alien [noncitizen] guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.¹²

Many states have a variety of “deferred adjudication procedures” that allow for the criminal case to be continued at some stage of the proceedings in order to give the defendant an opportunity to comply with certain conditions. The specifics of each procedure vary, but they are generally designed to result in the dismissal of charges if the defendant complies with these conditions.¹³ Often, the defendant agrees to the admissibility of the police report or certain facts, with the understanding that, if she violates the conditions, the judge will rely on the police report or those facts to determine the defendant’s guilt. Even if these admissions do not constitute a conviction, the admissions, particularly when they include a stipulation as to the sufficiency of the facts, can still have serious consequences for non-citizen defendants. Immigration officials may still find there is an admission to facts “sufficient to warrant a finding of guilt,” and find the non-citizen inadmissible for having admitted to committing a crime, whether or not there is a conviction.¹⁴

A conviction with a pending appeal is not final and therefore not considered a conviction under immigration law,¹⁵ and juvenile dispositions are not considered convictions for immigration purposes (unless the juvenile was transferred to and convicted as an adult in adult criminal court).¹⁶ Some other dispositions that are not considered convictions under criminal law, such as pretrial diversion, withholding of adjudication, or probation before judgment, may be considered convictions for immigration purposes.¹⁷

An advocate working with a battered immigrant who has been accused of a crime should consult with the victim’s defense attorney and prosecutors when possible and inform them of potential immigration consequences of a conviction. If a battered immigrant is charged with domestic violence, the advocate should assist the defense attorney in determining the circumstances of the arrest. Questions that should be asked include the following: did the police arrive and only speak with her abuser or his family members? Who speaks English? Was this a case of dual arrest? Is the abuser the predominant perpetrator of abuse in the relationship? Was the victim acting in self-defense?

If the victim was wrongly arrested, the advocate should work with the police and prosecutors to have the case dismissed. If efforts to have the case dismissed are unsuccessful, the advocate must educate the prosecutor and defense attorney about the immigration consequences of a guilty plea and deferred adjudication agreements that contain admissions that could warrant a finding of guilt. Immigrant victims should be

¹¹ INA §101(a)(48)(A); 8 U.S.C. 1101(a)(48)(A) (1996).

¹² *Id.*

¹³ See e.g. ANN BENSON, WASHINGTON DEFENDER ASS’N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, 14 (2002).

¹⁴ See INA §212(a)(2)(A)(i); 8 U.S.C. 1182(a)(2)(A)(i) (1990), which states that “any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of – (I) a crime involving moral turpitude..., or (II) a violation of... any law or regulation of a State... is inadmissible.”

¹⁵ See *Pino v. Landon*, 349 U.S. 901 (1955).

¹⁶ *Matter of Devison*, Int. Dec. 3435 (BIA 2000); See also Daniel Levy, Under the Auspices of the National Immigration Project of the National Lawyer’s Guild, *U.S. Citizenship and Naturalization Handbook*, §7:28.

¹⁷ *Id.*

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advised not to enter into any plea agreement until the victim and her defense attorney have consulted an immigration attorney for advice.

Criminal Sentences

The sentence a non-citizen receives is often a critical factor in determining the immigration consequences that will result. A sentence for immigration purposes includes not only time served in jail, but any period of incarceration ordered by a court regardless of whether some or the entire sentence is suspended.¹⁸ Many crimes, such as misdemeanor assault and misdemeanor theft, can have drastic immigration consequences if the non-citizen is sentenced to one year or more in prison, even if that sentence is suspended. If a battered immigrant woman is convicted of one of these crimes and receives a 365-day sentence with 364 days of it suspended, she will be considered to have a 365 day sentence for immigration purposes.

DOMESTIC VIOLENCE CRIMES

An immigrant convicted of domestic violence, stalking, child abuse, child neglect, or child abandonment can be deported.¹⁹ An immigrant can also be deported for violating a protection order.²⁰ These provisions are grounds of deportability and will apply to immigrants who have been lawfully admitted to the U.S. or who have obtained lawful permanent resident status or conditional permanent resident status.²¹

Domestic violence is defined as any crime of violence (as defined in 18 U.S.C. § 16) that is directed against a person by:

- A current or former spouse of the person;
- An individual with whom the person shares a child in common;
- An individual who is cohabitating with or has cohabitated with the person as a spouse;
- An individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or
- Anyone protected from the perpetrator by state domestic violence laws.²²

The definition of “crime of violence” under 18 U.S.C. § 16 includes:

- An offense that has as an element of use, attempted use, or threatened use of physical force against the person or property of another; or
- Any felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

An immigrant can become deportable for violating a protection order if the court has determined that the immigrant’s conduct violated the part of the protection order that involves protection against:

- credible threats of violence;
- repeated harassment; or
- bodily injury to the person or persons protected under the order.²³

Since violating a protection order is a deportable offense, immigrant victims should not agree to, and should contest the issuance of, any civil protection order against them. Abusers sometimes claim at protection order

¹⁸ INA § 101 (a)(48)(B); 8 U.S.C. 1101(a)(48)(B) (1996).

¹⁹ INA § 237(a)(2)(E)(i); 8 U.S.C. 1227(a)(2)(E)(i) (1996).

²⁰ INA § 237(a)(2)(E)(ii); 8 U.S.C. 1227(a)(2)(E)(ii) (1996).

²¹ Undocumented immigrants who entered illegally and have never received any lawful immigration status are not subject to the grounds of deportation. They will face removal under the grounds of inadmissibility at INA §212. The grounds of inadmissibility relating to crimes do NOT contain domestic violence and protection order provisions. Thus, these immigrants will only face removal for their DV and protection order convictions if they constitute crimes of moral turpitude under INA §212(a)(2)(A)(i).

²² INA § 237(a)(2)(E)(i); 8 U.S.C. 1227(a)(2)(E)(i) (1996).

²³ INA § 237(a)(2)(E)(ii); 8 U.S.C. 1227(a)(2)(E)(ii) (1996).

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hearings that they had been abused as well, and judges may issue mutual protection orders against both parties in such cases. Such mutual protection orders violate Due Process and are unenforceable under the Full Faith and Credit Provisions of the Violence Against Women Act.²⁴ In other cases, after the victim has filed for a protection order, the abuser may file his own civil protection order against the victim to retaliate. An immigrant victim who has not committed a domestic violence offense, or who acted in self-defense, should not agree to the issuance of a protection order against her.

Aside from the protection order context, battered victims are sometimes arrested if police officers see that the abuser has a visible wound that may have been inflicted while the battered immigrant was defending herself. When this happens, a battered immigrant may be charged with domestic violence or various forms of assault.²⁵ A conviction for domestic violence or even simple assault may trigger deportation if the record demonstrates a relationship listed in the Immigration and Nationality Act.²⁶

In the Violence Against Women Act of 2000, Congress recognized that there are instances where a battered immigrant may end up with a criminal conviction in connection to her being a victim of abuse. A battered immigrant who is not the predominant perpetrator may be eligible for a waiver of deportation for domestic violence or stalking crimes, if:

- the alien was acting [in] self-defense;
- the alien was found to have violated a protection order²⁷ intended to protect the alien; or
- the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime –
 - that did not result in serious bodily injury; and
 - where there was a connection between the crime and the alien's having been barred of subject to extreme cruelty²⁸

It is often confusing for the police to determine which person is the predominant perpetrator and which is the victim. This confusion is heightened when a battered immigrant woman does not speak English and her abuser does. Advocates should work with the prosecutor to provide evidence of a history of abuse and explain that prosecuting a battered immigrant woman may lead to her deportation or removal, and is not in the interests of justice. If possible, advocates should demonstrate that the victim was acting in self-defense and should not be charged with any crime.

CRIMES OF MORAL TURPITUDE

A non-citizen who is convicted of a crime of moral turpitude committed within five years of admission for which a sentence of one year or longer may be imposed, or who has two or more convictions of crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, is deportable.²⁹ Crimes of moral turpitude are also a ground of inadmissibility and, thus, can render an immigrant survivor ineligible to reenter the U.S. or to obtain immigration benefits such as self-petitioning, adjustment of status, VAWA cancellation of removal, and citizenship.³⁰

Definition and Examples of Crimes Involving Moral Turpitude

It is not always easy to determine if a conviction amounts to a crime involving moral turpitude. Courts have found that a number of different crimes involve moral turpitude, and an attorney will often have to compare

²⁴ 18 U.S.C.A. §2265(c) (2000).

²⁵ For more information, please contact the National Clearinghouse for the Defense of Battered Women, 125 South Ninth Street, Suite 302, Philadelphia, PA 19107, T: (215) 351-0010, F: (215) 351-0779.

²⁶ INA §237(a)(2)(E)(i) (1996).

²⁷ Statutes and case law in virtually every jurisdiction that has addressed the issue, state that the protection order is between the court and the abuser. Victims cannot be convicted of violating a protection order issued to protect them. See e.g. *Ohio v. Lucas* 795 N.E.2d 642, 647 (OH 2003); *Cole v. Cole*, 556 N.Y.S.2d 217, 219 (Fam. Ct. 1990); See also Catherine E. Klein and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1114-17 (1993).

²⁸ INA § 237(a)(7)(A); 8 U.S.C. 1227(a)(7)(A) (2000).

²⁹ INA § 237(a)(2)(A); 8 U.S.C. 1227(a)(2)(A) (1996).

³⁰ INA § 212(a)(2)(A)(i)(I); 8 U.S.C. 1182(a)(2)(A)(i)(I); INA §101(f); 8 U.S.C. 1101(f).

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the exact criminal statute to the case law. Crimes such as murder, rape, voluntary manslaughter, robbery, burglary, theft, arson, aggravated assault, forgery, prostitution, and shoplifting have consistently been held to involve moral turpitude. In general, the following types of crimes have also been held to involve moral turpitude:

- Crimes that involve an intent to defraud or intent to steal;
- Crimes which have as an element an intentional or reckless infliction of harm to persons or property;
- Felonies and some misdemeanors that involve malice; and
- Sex offenses that involve some “lewd” intent.³¹

Crimes that do not involve the above elements have generally been held not to involve moral turpitude. These include involuntary manslaughter, simple assault, breaking and entering, criminal trespass, malicious mischief, and various weapons possession offenses.³² Violations of statutes that merely license or regulate and impose criminal liability without regard to evil intent, such as parking violations, do not constitute crimes of moral turpitude.³³ Advocates and attorneys should be aware that the determination of whether a crime constitutes an act of moral turpitude is determined by closely examining the statute under which your client is accused and relevant court decisions, and requires expert analysis by an attorney with experience in immigration and crimes.³⁴

There are certain crimes that are encountered more frequently in cases involving battered immigrants, and are often a result of the abuse. Advocates should work with the prosecutor to provide evidence of a history of abuse in these cases, and urge dismissal of cases where the immigrant victim acted in self-defense.

Examples of crimes that are often connected to abusive relationships include:

- **Theft:** An abused woman is often left without economic means if she has left her husband or if he has refused to give her money. Desperate immigrant women may attempt to shoplift food or other supplies for themselves and their children without realizing that a criminal conviction could lead to deportation. Theft crimes are usually considered crimes of moral turpitude.
- **Fraud:** An abused woman may have been forced to be involved in fraudulent activities by her abuser. Further, an abused woman trying to support herself and her children may engage in fraud or fraud for economic reasons, such as forgery, passing bad checks, or using fraudulent documents to work if she does not have legal employment authorization.
- **Prostitution:** An abused woman may have been forced into prostitution by her abuser.

Battered immigrants who qualify for relief under VAWA may be eligible for waivers in these cases if they can establish hardship to themselves, or a U.S. citizen or permanent resident parent or child, or if they can show the crime was connected to the abuse.

Exceptions and Waivers

The crime of moral turpitude ground of inadmissibility – that applies to most immigrants seeking lawful status (such as VAWA self-petitions, U and T visas and adjustment of status applicants) – provides two exceptions and a waiver. These convictions can remove a crime of moral turpitude as a legal bar to getting lawful status.

The Petty Offense Exception

³¹ Ann BENSON, WASHINGTON DEFENDER ASS'N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, 51 (2002).

³² *Id.*

³³ See Brian Bates, *Guerilla Lawyers II: Lessons in Basic Strategy and the Art of War*, in AM. IMMIGR. LAW. ASS'N., 2000-2001 IMMIGRATION AND NATIONALITY HANDBOOK, 284, 287 (2001-02) (citing Matter of Short, 20 I&N Dec. 136 (BIA 1989)).

³⁴ *Id.* at 287.

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The petty offense exception applies to a battered immigrant who committed only one crime, as long as the maximum penalty for the crime does not exceed one year, and the battered immigrant was not sentenced to a term of imprisonment of more than six months (including time suspended).³⁵

The Juvenile Exception

The juvenile exception applies if the battered immigrant committed the crime when she was under 18 years old and was released from confinement more than five years before filing for an immigration benefit or admission to the United States.³⁶

Immigrants with convictions for crimes involving moral turpitude, prostitution, or one conviction of simple possession of 30 grams or less of marijuana (but not other drug crimes) may qualify for a waiver of inadmissibility under INA § 212(h). Normally the applicant must establish extreme hardship to a U.S. citizen or permanent resident spouse, parent, or child to qualify. Battered immigrant VAWA self-petitioners are eligible for the waiver if they can establish extreme hardship to themselves.³⁷

When assisting battered immigrants with a criminal record, advocates and attorneys should always consult with an expert in immigration law and crimes to determine whether one of the exceptions or waivers applies to the facts of a battered immigrant client's case.

DRUG OFFENSES

Drug convictions, as well as certain drug-related conduct, can trigger some of the most drastic consequences and legal bars under immigration law. Many of the drug-related provisions create absolute bars to obtaining immigration benefits. Advocates must give extra caution to analyzing any case where the client has a history of involvement with – or convictions for – drugs.

A battered immigrant who is found to be a drug abuser or addict, or who has a conviction or admits to violating any controlled substance law, is inadmissible and generally ineligible for immigration relief, such as permanent residence and VAWA cancellation of removal.³⁸ A conviction or admission of a controlled substance offense will also prevent an immigrant victim from demonstrating that she is a person of good moral character. The only type of drug offense for which a waiver is available is for a single offense of simple possession of 30 grams or less of marijuana for one's own use.³⁹

A related ground of inadmissibility is where the immigration officer “knows or has reason to believe” that a battered immigrant is a drug trafficker, or the spouse or child of a drug trafficker who has received any financial or other benefit from the illicit activity and knew the benefit was the product of such illicit activity.⁴⁰ Similarly, involvement with drug trafficking prevents a showing of good moral character.⁴¹ Advocates should determine whether a battered immigrant client actually benefited from drug trafficking activity her abuser might be involved in, or if she was forced to engage in such activity or receive benefits from such activity as part of the pattern of abuse.

Drug convictions can also trigger deportation as both a controlled substance violation and as an aggravated felony.⁴²

AGGRAVATED FELONIES

³⁵ INA § 212(a)(2)(A)(ii)(II); 8 U.S.C. 1182(a)(2)(A)(ii)(II) (1990).

³⁶ INA § 212(a)(2)(A)(ii)(I); 8 U.S.C. 1182(a)(2)(A)(ii)(I) (1990).

³⁷ No waivers are available for the crimes of murder or torture, INA §212(h); 8 U.S.C. 1182(h) (2000).

³⁸ INA § 212(a)(1)(A)(iv); 8 U.S.C. 1182(a)(1)(A)(iv) (1990) (stating drug abuser or addict is inadmissible); INA §212(a)(2)(A)(i)(II); 8 U.S.C. 1182(a)(2)(A)(i)(II) (1990) (stating alien convicted for controlled substance offense is inadmissible).

³⁹ INA §101(f)(3); 8 U.S.C. 1101(f)(3) (1990), INA § 212(h); 8 U.S.C. 1182(h) (2000).

⁴⁰ INA § 212(a)(2)(C); 8 USC § 1182(a)(2)(C) (2000).

⁴¹ INA § 101(f)(3); 8 USC § 1101(f)(3) (1990).

⁴² INA §237(a)(B)(i) and §237(a)(2)(A)(iii); 8 USC 1227(a)(2)(B)(i) and 1227(a)(2)(A)(iii) (1996).

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A battered immigrant woman convicted of an aggravated felony at any time is deportable.⁴³ The aggravated felony provision is defined by immigration law, not state criminal law, and includes 21 provisions that encompass hundreds of offenses.⁴⁴ Some examples include: murder, rape, child sexual abuse, trafficking in controlled substances, firearms offenses, child pornography, obstruction of justice or perjury with a sentence of one year or more, fraud or deceit if the loss exceeds \$10,000, crimes of violence with a sentence of one year or more, and theft or burglary offenses (including receipt of stolen property) with a sentence of one year or more.⁴⁵

Any offense that falls within the aggravated felony definition triggers drastic immigration consequences. A battered immigrant woman convicted of an aggravated felony will not be eligible for VAWA self-petition or cancellation of removal because she will be barred from establishing good moral character. She will generally be subject to deportation, despite many years' residence in the U.S. or what family ties she might have here.⁴⁶ She also will be ineligible for most forms of relief from deportation.⁴⁷ If she returns to the U.S. unlawfully and is prosecuted for illegal reentry after deportation, she faces severely enhanced penalties - up to 20 years in prison.⁴⁸

Examples of Aggravated Felonies

- **Drug offenses:** In addition to rendering an immigrant inadmissible generally without a waiver, many drug offenses are also considered drug trafficking offenses and thus aggravated felonies.⁴⁹ Battered immigrant women may be implicated and arrested for drug offenses because their abusers are involved with drugs.
- **Crimes of violence:** A conviction for a crime of violence with a sentence of one year or more is an aggravated felony.⁵⁰ If a battered immigrant is convicted of domestic violence or any crime where the use, attempted use, or threatened use of force is an element and if she is sentenced to one year or more, even if all or part of her sentence is suspended, her conviction will be treated as an aggravated felony under immigration law.
- **Theft offenses:** A conviction for theft, including possession or receipt of stolen property, with a sentence of one year or more, even if all or part of her sentence is suspended, will be considered an aggravated felony.⁵¹

Law Enforcement Response: What is the Likelihood That Battered Immigrants Who Call the Police for Help Will Be Reported to Immigration Authorities?

Battered immigrants face multiple barriers when trying to access services to aid their escape from violent relationships, or to stop the abuse.⁵² A battered immigrant's experience with the police, either in their

⁴³ INA § 237(a)(2)(A)(iii); 8 U.S.C. 1227(a)(2)(A)(iii) (1996).

⁴⁴ INA § 101(a)(43); 8 U.S.C. 1101(a)(43) (1996).

⁴⁵ *Id.*

⁴⁶ If she is a lawful permanent resident, or was admitted as a refugee, she will be entitled to a hearing before an immigration judge, but otherwise, she can be subject to an administrative order of removal with virtually no right to appeal.

⁴⁷ Katherine Brady & Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility Related to Crimes*, (2003), at http://www.fd.org/pdf_lib/GroundsofDeport_Inadmiss.pdf.

⁴⁸ ANN BENSON, WASHINGTON DEFENDER ASS'N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, 51 (2002).

⁴⁹ Katherine Brady & Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility Related to Crimes*, 95 (2003), at http://www.fd.org/pdf_lib/GroundsofDeport_Inadmiss.pdf.

⁵⁰ A crime of violence includes any offense that has the use, attempted use, or threatened use of force as an element of the offense, as well as any felony that by its nature presents a substantial risk that force will be used against a person or property in the commission of the offense. 18 U.S.C. § 16.

⁵¹ INA § 101(a)(43)(G); 8 U.S.C. 1101(a)(43)(G) (1996); Katherine Brady & Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility Related to Crimes*, 97 (2003), at http://www.fd.org/pdf_lib/GroundsofDeport_Inadmiss.pdf.

⁵² See generally Sandra D. Pressman, *The Legal Issues Confronting Conditional Resident Aliens Who are Victims of Domestic Violence: Past, Present, and Future Perspectives*, 6 MD. J. CONTEMP. LEGAL ISSUES 129 (1995); Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 249-253 (2000); Leslye E. Orloff and Dave Nomi, *Identifying*

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homeland or in the U.S., could influence her trust in calling the authorities for help. Battered immigrants are often afraid to call the police due to many reasons: fear of deportation, fear of retribution from their abusers, fear of themselves being arrested, fear of being separated from their children, and fear of future economic, social, or employment-related repercussions, and negative experiences with the police back in her homeland.⁵³ These barriers preclude many battered immigrants from requesting the help they need to escape the domestic violence. The barriers become even more pronounced when the batterer is a U.S. citizen or resident, and the victim does not have permanent immigration status.⁵⁴

In many cases, the most difficult hurdle for battered immigrants is the fear of being reported to immigration officials by police.⁵⁵ According to a survey of 230 battered immigrant Latinas in Washington, D.C., battered immigrants with stable permanent immigration status were significantly more likely to call the police for help in a domestic violence incident than any other battered immigrant women (43.1%).⁵⁶ This reporting rate dropped to 20.8% for battered immigrants who were in the United States legally but whose status was temporary, and fell to 18.8% for battered immigrants who were undocumented.⁵⁷ These reporting rates are significantly lower than reporting rates of battered women generally in the U.S., which range between 53% and 58%.⁵⁸

Addressing immigrants' fears about calling the police is essential to the safety of victims, their children and our communities. Battered immigrants and advocates may be concerned that if the police is called, the victim's immigration status will be asked, thus taking the focus away from prosecuting the abuser. Ultimately, an abuser who is not held accountable is likely to continue abusing the victim, as well as harm family members and future intimate partners. Furthermore, when an immigrant who calls the police for help is turned in to the immigration authorities, word spreads quickly in that immigrant community.⁵⁹ As a result, immigrant victims of crimes are silenced and will be afraid to call the police and report crimes.

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Police officers are not required to inquire into or report the immigration status of crime victims who call for help. However, IIRAIRA does allow the Attorney General to enter into agreements with state or local law enforcement to delegate police officers the authority to enforce federal immigration laws.⁶⁰ As of the date of publication of this chapter, only a limited number of police officers in Florida and Alabama are authorized to enforce immigration law through such agreements.⁶¹ Additionally, the Anti-Terrorism and Effective Death Penalty

Barriers: Survey of Immigrant Women and Domestic Violence in the DC Metropolitan Area, POVERTY AND RACE 9-10 (Jul/Aug 1997); Mary Ann Dutton and Giselle Aguilar Hass, *Use of Expert Testimony Concerning Battering and Its Effects on Immigrant Women*, in DOMESTIC VIOLENCE AND IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT: A TRAINING MANUAL FOR ATTORNEYS AND ADVOCATES, Appendix C (2000); Leslye E. Orloff and Rachel Little, *SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN*, A 'HOW TO' MANUAL FOR BATTERED WOMEN'S ADVOCATES AND SERVICE PROVIDERS 279 (May 1999); Leti Volp, *WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE 16-20* (1995); Catherine Klein and Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1019 (1993).

⁵³ Leslye E. Orloff, et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 55 (2003).

⁵⁴ *Id.*

⁵⁵ *Id.*; See also, Mary Ann Dutton, et al., *Characteristics of Help-Seeking Behaviors, Resources, and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 251-56 (2000).

⁵⁶ Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 60 (2003) (citing the Ayuda Inc. research project).

⁵⁷ *Id.*

⁵⁸ Martha L. Coulter & Kathryn Kuehnle, *Police Reporting Behavior and Victim-Police Interactions as Reported by Women in a Domestic Violence Shelter*, 14 J. INTERPERSONAL VIOLENCE 1290 (1999) (reporting rates for the general population of battered women in the U.S. at 53%); CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, *INTIMATE PARTNER VIOLENCE 7* (2000) (reporting rates for battered women at 58%).

⁵⁹ Mary Ann Dutton, et al., *Characteristics of Help- Seeking Behaviors, Resources, and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 251-6 (2000).

⁶⁰ INA § 287(g), 8 U.S.C. § 1357(g) (1996). Section 287(g)(10) further states that this section does not require states or municipalities to seek a similar agreement to allow their employees to report undocumented immigrants or otherwise cooperate with the immigration authorities.

⁶¹ Florida Memorandum of Understanding, at

http://www.fdle.state.fl.us/osi/domesticsecurity/domestic_security_orig/ds_5/INS_FDLE_MOU.pdf; April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Law since 9/11*, 55 ALA. L. REV. 1149, 1158-9 (2004).

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Act of 1996 provides state and local police, if authorized by state law, with limited authority to arrest non-citizens in the U.S. when the non-citizen is present illegally and has previously been convicted of a felony and was deported or left the U.S. after such a conviction.⁶²

Some police officers, prosecutors, and judges have misinterpreted these sections to justify their decisions to inquire into the immigration status of crime victims and have reported victims to immigration authorities.⁶³ When this occurs, it can become very difficult to bring criminals to justice, because victims of crime will be afraid to come forward out of fear of deportation. Furthermore, when police officers inquire into the immigration status of crime victims, the police may also inadvertently affect the community relations between police departments and immigrant communities.

To properly address the fears of battered immigrants, advocates and attorneys should develop good working relationships with the police, prosecutors, and judges in their communities. They should work with the justice system personnel on protections established for immigrant victims. Furthermore, advocates and attorneys should work with the police, prosecutors and judges to hold perpetrators accountable for their criminal conduct without considering the immigration status of the victim.

Assisting Battered Immigrants with Pending Criminal Cases

Advocates should work with the battered immigrant and her defense attorney to ensure that the defense attorney consults with an immigration expert on immigration law and crimes. A list of references is provided at the end of this chapter. Advocates should also work with the local prosecutor's office to try to convince the prosecutor to drop or reduce charges where appropriate. **The advocate should provide the following type of information and evidence:**

- **For assault or domestic violence cases:** Provide the prosecutor with information about the relationship, including documented evidence of abuse (medical records, witness statements, protection orders) to establish the history of domestic violence in the relationship. This will help demonstrate that the victim did not commit any domestic violence offense, was acting in self-defense, or is not the predominate perpetrator and should not be charged.
- **For other crimes:** Advocates should provide evidence of a history of abuse demonstrating that a battered immigrant's crimes were at the behest of the abuser, related to efforts to escape abuse, or otherwise connected to the abuse. Such evidence may convince a prosecutor that prosecuting a battered immigrant for crimes connected to the abuse she has suffered may not be in the interests of justice.

If the prosecutor does not agree to drop the charges, the defense attorney and advocate should try to convince him/her to continue the criminal case for a specific period of time without any finding or admission. If there are no new criminal acts by your client after that time period has passed, request the prosecutor dismiss the case.

If none of the above suggestions are effective, work with the battered immigrant client to convince her defense attorney to take the case to trial rather than enter a plea.⁶⁴ **A defense attorney who is not aware of the immigration consequences of entering a plea may advise the client that this is the best option for her because she may avoid going to jail by doing so. In many cases, however a guilty or no-contest plea may make the battered immigrant deportable or otherwise have negative ramifications in her VAWA**

⁶² The police officer must obtain confirmation from immigration officials of the status of such an individual and may keep the individual in custody only as long as necessary for immigration officials to take the person into federal custody for removal. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 § 439 8 U.S.C. § 1252(c) (1996).

⁶³ Leslye E. Orloff, et al., *Battered Immigrant Women's Willingness to call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 88 (2003).

⁶⁴ However, it is important to note that for some undocumented immigrants, staying out of jail may be the most paramount concern, as this is where they are most likely to risk apprehension by immigration authorities. Thus, this factor should be taken into account if trial is likely to result in jail time.

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case. It is important that the defense attorney understand the immigration consequences before advising a battered immigrant to enter a plea.

The defense attorney may still decide that going to trial is not a good option due to the circumstances of the case and that the immigrant should enter a plea. If a plea agreement is the best option the defense attorney should consult an attorney with expertise in immigration law and crimes for assistance in deciding on a plea to a charge that will not have immigration consequences, or to a charge for which an immigration waiver is available, if these alternatives are possible.

Advocates who are assisting battered immigrants with VAWA self-petitions should refer victims with previous criminal convictions to an attorney with expertise in immigration law and crimes.

An advocate should recognize that they are the battered immigrant's most important allies during any criminal prosecution. It is important for the immigrant victim to stay in close contact with her defense attorney, victim-witness advocate, and the prosecutor handling her case. Provide her with support by accompanying her to all hearings if possible. It is not easy to protect a battered immigrant from the immigration consequences of a criminal charge, but the likelihood of deportation is minimized when knowledgeable and sympathetic advocates and attorneys become involved.

Assisting Battered Immigrants Whose Abusers Have Pending Criminal Cases

In most states, prosecutors have adopted "no-drop" policies for domestic violence in criminal cases. This allows prosecutors to proceed with a criminal case regardless of the wishes of the victim. The no-drop policy is intended to prevent perpetrators from bullying women out of pressing charges. Some prosecutors may even subpoena the battered immigrant to testify as a witness for the prosecution, although the practice of subpoenaing domestic violence victims in criminal cases is not favored. While the "no-drop" policy is intended to protect battered women, it poses difficult safety planning problems for battered immigrants whose abusers are non-citizens, since criminal convictions for domestic violence and other crimes can lead to an abuser's deportation.

For some battered immigrants, deporting her abuser may enhance her safety. For others, however, the deportation may increase the danger to her or her family members. Many battered immigrants are afraid to cooperate in the criminal prosecution of their abusers because of concerns about their own immigration status and economic survival, cultural or religious factors, or the potential increase in danger to themselves or their family members in the U.S. and/or abroad. It is important for advocates, domestic violence civil attorneys, prosecutors and defenders to understand how each of these factors affect the safety of an immigrant victim when considering asking them to cooperate in the criminal prosecution of the abuser.

Victims should be provided with assistance from advocates with training in safety planning and knowledge about the legal rights of immigrant victims. Knowledgeable advocates can work with the victim to answer questions, to dispel misperceptions the victim may have about her legal rights and to provide the victim with the critical support she will need as the criminal prosecution moves forward.

Advocates should carefully interview the immigrant victim to determine what her needs, fears, and concerns are with respect to participating in the prosecution. They should also assess whether her abuser's prosecution and subsequent deportation will enhance her safety or increase the danger to her. This information should also be discussed with prosecutors to help them decide how to proceed in a manner that will hold the abuser accountable and protect the victim's safety. The role of advocates is especially important in this process, as defense attorneys for abusive spouses may try to convince your client not to cooperate. An advocate may be the only independent source of support and information for an immigrant victim in determining how best to protect herself and her children.

When immigrant victims are provided full information about their legal options and when they obtain the support and representation they need, many choose to cooperate in the abuser's prosecution. In the limited number of cases in which the abuser's deportation poses a real danger to the victim, advocates should urge

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prosecutors to enhance victim safety by pursuing measures such as pretrial diversion that will hold the perpetrator accountable without leading to his deportation.

ASSESSING THE SAFETY OF IMMIGRANT VICTIM COOPERATION IN THE CRIMINAL PROSECUTIONS OF THEIR ABUSERS:

General safety planning tips for battered immigrants whose abusers have pending criminal cases:

- Encourage her to obtain a civil protection order and ensure that it at least has the following provisions. (See Chapter 7 for more information on protection orders)
 - ❑ Stay away
 - ❑ No contact or communication either directly or through third parties
 - ❑ Abuser's eviction for any shared home
 - ❑ Custody of children
 - ❑ Child support

If the victim continues residing with her abuser, she should obtain a protection order that prohibits future abuse, orders the abuser into treatment, and orders him not to communicate with her about the criminal case.

- Help the battered immigrant client develop a safety plan to protect her and her children. If she is still living with her batterer, make sure that she has a safe place to flee during the prosecution if necessary. If she is in immediate danger, encourage her to go to a shelter or safe home.
- If necessary, try to have the police patrol the neighborhood where she lives and make sure that the batterer is ordered to turn over any weapons in his possession. Inform her that the police will be watching over her if you feel that it will enhance her sense of safety.

ADDRESSING CONCERNS ABOUT THE VICTIM'S IMMIGRATION STATUS

The immigration status of a battered immigrant may be tied to her abuser's citizenship or immigration status. Advocates should work with the battered immigrant to explore options she may have for attaining legal immigration status independent of her abuser. Many battered immigrants are terrified of any involvement in the criminal justice system because they believe their immigration status is fully dependent on the abuser's status and that she will be deported along with him if he is convicted of a crime. When an immigrant woman learns that she may be able to obtain legal immigration status and work authorization without the abuser's cooperation or knowledge, a significant barrier to her involvement in the prosecution is removed. Key safety planning steps advocates should take to enable victims to obtain immigration status include:

- She should be referred to an immigration attorney to assess her eligibility for immigration relief, including relief under VAWA. If she does not qualify for immigration status under VAWA, she may qualify for a U visa as a victim of violent crime if she is willing to cooperate in the abuser's investigation or prosecution. If she qualifies for immigration relief, start preparing her immigration case immediately.⁶⁵
- Make sure that she knows what information she needs for her immigration case. Consider using the protection order as a tool to require the abuser to provide the battered immigrant with the information she needs for her immigration case, such as proof of his U.S. citizenship or permanent resident status.
- Even when your battered immigrant client is undocumented and cannot at this time attain lawful immigration status, she should still be able to cooperate in the criminal prosecution of her abuser. Advocates should work closely with law enforcement, prosecutors, and judges to ensure that they

⁶⁵ See Chapter 3 for more information.

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will not inquire into the immigration status of crime victims or report them to immigration authorities.

- If an immigrant victim fears that the abuser will try to report her to immigration authorities in retaliation for her testimony, ask the prosecutor to include in the abuser's pretrial release order an instruction prohibiting the defendant, or any of his agents from contacting immigration authorities. If his attorney contacts immigration authorities on the abuser's behalf, urge the prosecutor to file a case against the defense attorney for witness-tampering and consider filing an ethical complaint against the attorney with the appropriate bar authorities.

ECONOMIC CONCERNS

Some battered immigrants are hesitant to cooperate in their abuser's prosecution out of economic concerns. Advocates should discuss options available to battered immigrants so they can support themselves and their children and safely cooperate in the prosecution. The following issues should be addressed:

- Does she currently receive financial help from the abuser, or is there a realistic possibility of such help in the future? Help her determine the extent to which she really depends on her abuser for financial support. Has she actually received child support from her abuser or is she only hoping to receive it in the future? Does she receive child support payments directly from the abuser through a court order, or through the abuser's wages being garnished? Has her receipt of support been regular or sporadic? How would her ability to work legally mitigate her need for support from her abuser? If the abuser has not actually provided child support, childcare, or other financial support, and there is little realistic expectation that he will do so in the future, the economic costs of his deportation may be negligible.
- Help her assess her resources and think about how she can survive without the abuser's support. A battered immigrant who files a VAWA self-petition and receives a prima facie determination of VAWA eligibility may be eligible for public benefits. Any U.S. citizen children she has are eligible to receive public benefits. Once her case is approved, she can obtain work authorization. U visa applicants who receive interim relief receive work authorization. Advocates should brainstorm with a battered immigrant client about other options for supporting herself and her children without the abuser's assistance. These might include:
 - Full or part time employment
 - Self-employment that builds upon her existing skills and contacts
 - Public benefits for her children
 - Public benefits for herself
 - Court-ordered child support paid through wage withholding
 - Temporary support from friends or family members
 - Finding a roommate to share household expenses
 - Seeking first and last month rent on a new apartment from the Red Cross or a faith based program

CULTURAL AND RELIGIOUS FACTORS

For some immigrant victims, cultural or religious factors may affect her willingness to cooperate in her abuser's prosecution. She may be blamed for her abuser's deportation; stigmatized or ostracized by her family, friends, or community; blamed for breaking up the family or bringing shame upon her family; or held responsible for any reduction in financial support that was being sent to family members residing in her home country. Advocates should help immigrant victim's access culturally competent services and support that may help to counter the effects of cultural or religious disapproval.

There are growing numbers of immigrant women's community based groups. These organizations provide woman-to-woman, culturally competent support and build the immigrant victim's self-esteem. Immigrant women groups can play a key role in connecting immigrant victims to service providers who help battered

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women. They can also help victims involved in cases before the justice system by providing support that respects the victim's culture rather than pressuring her to abandon it.

DANGER TO THE VICTIM AND HER FAMILY IF HER ABUSER IS DEPORTED

For some immigrant victims, the abuser's deportation may increase danger to the victim, her children, or her family or friends in the United States or her home country. Advocates should conduct a lethality assessment to help an immigrant victim determine whether cooperating in the prosecution is safe for her and her family. Factors to consider include:

- Whether the abuser has a history of stalking, or is likely to stalk the victim or her children;
- Whether the victim has children or other family members in her home country whom the abuser has threatened to or is likely to harm if he is deported;
- The likelihood that the abuser will lie in wait for the victim abroad, so that she can never safely return to see family members;
- The likelihood that the abuser will kidnap her children in the U.S. or take them abroad;
- The likelihood that the abuser will return to the U.S. after deportation and retaliate against the victim.

The victim's safety needs should be paramount in any decision made by advocates and prosecutors about how to proceed in a criminal case to hold abusers accountable. If it is determined that the abuser's deportation would increase the danger to the victim or her family members, prosecutors need not dismiss the criminal case against the abuser. In these cases, the justice system can employ measures to hold the abuser accountable while monitoring his behavior with the goal of curbing future abuse. Prosecutors can request continuances and charge abusers with non-deportable crimes. Judges can place abusers on probation and compel them to enter a treatment program. First time offenders are generally treated more leniently than repeat offenders. If an abuser continues to perpetuate acts of domestic violence after being treated more leniently, he should be prosecuted and sentenced without regard to the immigration consequences.

Prosecutors should not turn the abuser over to immigration authorities. If the abuser is convicted, immigration authorities can deport the abuser after he serves his full criminal sentence. Individuals who reenter the U.S. after being deported can be criminally prosecuted, and the penalties are enhanced for reentry after deportation for a criminal offense.⁶⁶ When abusers are removed by immigration authorities instead of standing trial for their crimes, they are very likely to return to the U.S. emboldened by their success at having avoided prosecution.⁶⁷

⁶⁶ INA § 276(b); 8 U.S.C. 1326 (1994).

⁶⁷ Karen Saunders, Department of Homeland Security, Domestic Violence Immigration and Law Enforcement, power point presentation at Seven State Capacity Building Summit, Miami Florida, May, 2004 (Deportations provide false sense of security for victims of domestic violence; Most removals are administrative procedures; Perpetrators are likely to return illegally).

Resources

PUBLICATIONS

Maria Baldini-Potermin, Defending Non-Citizens in Minnesota Courts: A Summary of Immigration Law and Client Scenarios. (Distributed by the Minnesota Bar Association (612) 333-1183)

Ann Benson, Immigration Consequences of Criminal Convictions: An Overview for Criminal Defenders, Judges and Prosecutors in Washington State, Washington Defender Association's Immigration Project, (2002). Available at www.defensenet.org or by calling 206-726-3332.

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Kesselbrenner & Rosenberg, Immigration Law and Crimes (West Group, 1999). Call (800) 221-9428.

Maynard, W. "Deportation: An Immigration Law Primer for the Criminal Defense Lawyer", The Champion, June 1999 (National Association of Criminal Defense Lawyers). Websites: www.criminaljustice.org or www.nacdl.org

Norton Tooby and Katherine Brady, Criminal Defense of Immigrant. (Distributed by The Law Offices of Norton Tooby, 516 52nd Street, Oakland, CA 94604/ (510) 601-1300) or www.criminalandimmigrationlaw.com .

Manuel Vargas, Representing the Noncitizen Criminal Defendant (NY State Defender's Association, Criminal Defense Immigration Project, 1998). Call (212) 998-6476.

INTERNET RESOURCES

Board of Immigration Appeals Precedent decisions <http://www.usdoj.gov/roit/efoia/bia/biaindx.htm>

Immigrant Legal Resource Center <http://www.ilrc.org>

Law Offices of Norton Tooby. <http://www.criminalimmigrationlaw.com>

NACDL Immigration Articles
<http://www.criminaljustice.org/public.nsf/freeform/Immigration?OpenDocument>

National Lawyers Guild/ National Immigration Project <http://www.nationalimmigrationproject.org>

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MORE RESOURCES

For immigration questions regarding criminal convictions, contact Dan Kesselbrenner, National Immigration Project/ NLG- (617) 227-9727.

For immigration questions relating to battered immigrants and referrals to experts on immigration and crimes, contact:

- The National Immigrant Women's Advocacy Project (NIWAP); 202-274-4457; info@niwap.org; <http://wcl.american.edu/niwap>
- Advances Special Immigrant Survivors Technical Assistance (ASISTA); 515-244-2469; questions@asistahelp.org; www.asistahelp.org
- Futures Without Violence; 415-679-5500; info@futureswithoutviolence.org; www.futureswithoutviolence.org

To get a directory of nonprofit agencies that assist persons in immigration matters, contact the National Immigration Law Center at (213) 938-6452.

To get a list of local immigration attorneys, contact the American Immigration Lawyer's Association, National Office, 1400 Eye Street, N.W., Suite 1200, Washington, D.C. 20005 (202) 216-2400.

In California, contact the Immigrant Legal Resource Center (415) 255-9499

In Florida, contact the Florida Immigrant Advocacy Center (305) 573-1106

In Washington State, Ann Benson, Directing Attorney for the Washington Defender Association's Immigration Project at 206-726-3332 or email: defendimmigrants@aol.com .

APPENDIX 1

Intake Questionnaire: Important Questions for Battered Immigrants Involved in a Criminal Case

Immigration cases are most successful when advocates develop a trusting relationship with a victim that allows them to collect full and complete information about sensitive issues as early in the case as possible. It is essential, when an immigrant victim has a criminal history, to obtain information about that criminal history as soon as possible. In order to personalize an immigration and criminal strategy for an individual battered immigrant, advocates and attorneys must be aware of the victim's history. Obtaining this information may not be easy, as the victim may be afraid to divulge her immigration status and possible criminal history. Advocates should develop a trusting relationship with the victim by explaining that factual information is necessary to protect her. Advocates should demonstrate that they are there to help the victim, not harm her.

Domestic violence advocates can play a critical role in highlighting problem areas and quickly introducing battered immigrants to qualified criminal defenders and immigration attorneys. In order to coordinate these relationships, it is essential that advocates obtain basic information regarding the victim's immigration status. The next section will present a number of questions that should become routine in any consultation. They are specifically designed to red-flag and highlight areas of concern for an immigration attorney and present a basic blueprint for further consultation. These questions can also help immigration practitioners to focus in on the nature of criminal conduct in the immigrant's history.

Advocates should always ask the following information, which will be helpful when they speak with an immigration attorney.⁶⁸

1. What is the criminal charge that the client has received? What are any possible offenses that she might plea-bargain to?
2. What is the client's criminal history?
3. When did the client first enter the U.S.?
4. What is her visa type? Is her status still valid?
5. Any significant departures from the U.S.?
6. Is the client a lawful permanent resident?
 - a. If so, when did she obtain her green card?
7. If not an LPR, what other special immigration status might the client have?
8. Did anyone ever file a visa petition for the client; if so, get the details of name and visa number; what kind of visa; date filed; and whether it was granted.
9. Has the client ever been deported or gone before an Immigration Judge?
10. Does the client have an Immigration Court date pending? If so, why, and what is the date?
11. Has the client ever before received a waiver of deportability [§ 212(c) relief or cancellation of removal] or suspension of deportation?
12. Where were the client born? Does the client have any relatives who are U.S. citizens? Does the client have a lawful permanent resident spouse or parent?
13. Would the client's employer help her immigrate?
14. For purposes of possible unknown U.S. citizenship, was the client or the client's parent or grandparent born in the U.S. or granted U.S. citizenship? Or, was the client a permanent resident under the age of 18 when a parent naturalized to U.S. citizenship?
15. Has the client been abused by her spouse or parents?
16. Where was the client born? Would the client have any fear about returning, and if so, why?

Following are some explanations of why some of these questions are important.

1) WHAT IS YOUR IMMIGRATION STATUS IN THE UNITED STATES?

⁶⁸ List adapted from ANN BENSON, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS, PROSECUTORS AND JUDGES IN WASHINGTON STATE 39 - 40 (2001).

Battered Immigrants and The Criminal Justice System

This question is **important** because there are different rules for different categories of immigrants and waivers for criminal conduct and convictions may be available to one category of immigrants and not to others. For example, a naturalized U.S citizen has greater legal protections and is not subject to deportation or removal for crimes. The exception for naturalized citizens is that their citizenship can be revoked for conduct or crimes which occurred prior to their naturalization and which should have legally barred them from being naturalized. This occurs because the crime was either not revealed to the INS, or it managed to escape their scrutiny. Crimes that a citizen commits after naturalization will not affect their status.

Advocates may not be able to directly ask this question, as battered immigrants may be afraid to admit their immigration status. While this question needs to be asked, advocates need to phrase their questions carefully so that victims are not weary of utilizing services. In addition, many battered immigrants may not have accurate information on their status, as abusers may have given them incorrect information regarding their immigration status.

This question should not be asked of any person unless they are considering applying for immigration benefits for which they might qualify. However, a battered immigrant obtaining benefits for her citizen children should not be asked of her own immigration status. It is generally safe to ask this question of a woman who is married to and abused by her U.S. citizen or lawful permanent resident spouse.

This question is particularly important for battered immigrants accused of crimes. The remedy they will need may be dependent on their specific immigration status. There are different rules for different categories of immigrants and waivers of criminal conduct or convictions may be available to one category of immigrants and not to others.

2) IF YOU HAVE LAWFUL PERMANENT RESIDENT STATUS, WHEN AND HOW DID YOU GET IT?

It is important to know how an immigrant obtained their status because some lawful permanent residents are subject to different rules for crimes committed within five years of being granted lawful permanent residence. In addition, the length of time that a person has been a lawful permanent resident may be considered by immigration judges when using their discretion to rule in favor of a battered immigrant despite the existence of criminal convictions (e.g., through a waiver). Many immigrants with lawful permanent residence status obtained that status through family members or employers who got them visas. In the case of a battered immigrant, it is important to understand how her abusive relationship affected her immigration process as well as find out if she obtained lawful permanent residency through VAWA or a political asylum case.

3) WHEN DID YOU FIRST ARRIVE IN THE UNITED STATES AND HOW MANY TIMES HAVE YOU LEFT AND RETURNED SINCE THEN?

New immigration laws are being applied retroactively. Therefore immigrants who may have committed crimes in the past that were not then disqualifying crimes may now face immigration restrictions and possible deportation. Leaving and reentering the United States may trigger bars to reentry and may trigger the application of new and more severe definitions of disqualifying crimes. In addition, the number of illegal entries made by an immigrant may be a factor in the type of charges brought by immigration authorities, and, depending on the circumstances, may itself constitute a crime. It is also important for immigration attorneys to know the length of absences because it may affect those immigrants attempting to claim relief by way of cancellation of removal, in which case they must demonstrate a continuous physical presence for 10 years, (or 7 years for those still eligible for suspension of deportation), and 3 years for battered immigrants claiming VAWA suspension of deportation. The length of absences can also affect a legal resident's application of naturalization.

4) CRIMINAL HISTORY: INCLUDING CURRENT CHARGES, ALL ARRESTS, AND DISPOSITIONS (Include Dates or at Least the Year for Each Category)

This is VERY important for advocates assisting battered immigrants with a criminal convictions, and essential for any immigrant filing for immigration relief. A complete criminal history can assist an immigration attorney in deciding if a particular crime will have harmful immigration ramifications, if the rule against multiple convictions will have any bearing, and if waivers exist. (For more information on waivers, refer to ‘waiver’ section in this chapter) In a wide range of cases, immigration authorities require that applicants submit fingerprints (e.g. attaining lawful permanent residence, filing a VAWA self petition). Attorneys should learn about the criminal history of VAWA-qualified battered immigrants as soon as possible. This allows the immigration attorney assisting in the victim’s VAWA case to address criminal history and seek waivers as early as possible in the application process, as well as develop case strategy that takes any criminal history into account. If the battered immigrant fails to provide the advocate or attorney accurate information about her criminal history, the INS could discover it by scanning her fingerprints. This could be detrimental for the immigrant who may have had an opportunity to get a waiver, or could have possibly convinced the INS to use its discretion in her favor.

5) LIST FAMILY MEMBERS (Spouse, Parent or Child) WHO ARE U.S. CITIZENS OR PERMANENT RESIDENTS.

This background is important for advocates and attorneys attempting to get a complete picture of the battered immigrant’s history. In addition, in the context of suspension or cancellation proceedings, the applicant will be required to establish hardship of legal resident or U.S. citizen family members.

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