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OFFERING A HELPING HAND: LEGAL PROTECTIONS FOR BATTERED IMMIGRANT WOMEN: A HISTORY OF LEGISLATIVE RESPONSES

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A HISTORY OF LEGISLATIVE RESPONSES*

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* While this Article will primarily discuss protections for battered immigrants, some of the legislative reforms that were included in the Violence Against Women Act of 2000 ("VAWA 2000") for the first time also provide protection and immigration relief for immigrant victims of sexual assault, immigrant victims of trafficking, and other immigrant crime victims.

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** The authors have been involved in legislative efforts to improve U.S. immigration and welfare laws protecting battered immigrant women and their children. Leslye E. Orloff, Director of the Immigrant Women Program and Senior Staff Attorney at the NOW Legal Defense and Education Fund, has since 1989 provided technical assistance to members of Congress on each of the pieces of legislation discussed in this article. Janice v. Kaguyutan, Staff Attorney for the Immigrant Women Program of the NOW Legal Defense and Education Fund provided technical assistance to Congress on VAWA 2000. The Immigrant Women Program is the Washington representative of the National Network on Behalf of Battered Immigrant Women, a network of service providers, lawyers, and advocates, and a national organization concerned with furthering legal protections for abused immigrants. The authors, working with the National Network, have also been involved in monitoring implementation of each of the laws discussed in this article. The National Network on Behalf of Battered Immigrant Women is co-chaired by the Immigrant Women Program of the NOW Legal Defense and Education Fund, The Family Violence Prevention Fund, and the National Immigration Project of the National Lawyers Guild. For further information about legal protections for immigrant victims of domestic violence or sexual assault under the laws discussed in this paper, to join the National Network on Behalf of Battered Immigrant Women, or for technical assistance on the legal rights of immigrant women and children in immigration, public benefits, social services, domestic violence or family law matters, contact the Immigrant Women Program of the NOW Legal Defense and Education Fund at (202) 326-0040 or iwp@nowldef.org.

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I. INTRODUCTION

Violence against women is not limited by borders, culture, class, education, socio-economic level or immigration status. A recent survey co-sponsored by the National Institute of Justice and the Centers for Disease Control and Prevention found that approximately 4.8 million intimate partner rapes and physical assaults are perpetrated against women annually.[1] United States Surgeon Generals have warned repeatedly that family violence poses the single largest health threat to adult women[2] and is also detrimental to their children.

For women and their children who have immigrated to the United States, the dangers faced in abusive relationships are often more acute.[3] Historically, these dangers have been aggravated by immigration laws. Immigrant women not only face pressures of cultural assimilation but pressures of maintaining cultural traditions as well. They face language barriers, economic insecurity, and discrimination due to gender, race or ethnicity. Additionally, the problems of domestic violence are "terribly exacerbated in marriages where one spouse is not a citizen and the non-citizen's legal status

1. PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, iii (Nat'l Inst. of Just. & Ctrs. for Disease Control and Prevention, NCJ 181867, 2000).

2. S. REP. NO. 138-138, at 41-42 (1993).

3. LESLYE E. ORLOFF & NANCY KELLY, A Look at the Violence Against Women Act & Gender-Related Political Asylum, Vol. 1, No. 4 VIOLENCE AGAINST WOMEN 380 (1995).

depends on his or her marriage to the abuser."[4] The battered immigrant's ability to obtain or maintain lawful immigration status may depend on her relationship to her United States citizen or lawful permanent resident spouse and his willingness to file an immigrant relative petition on her behalf.[5] The same dynamic occurs any time immigration law gives an abusive spouse total control over the immigration status of his spouse and children. This can occur in cases of persons who have received from the Immigration and Naturalization Service ("INS") legal permission to live and work in the United States through an immigrant or non-immigrant visa; their spouses and children are then awarded derivative immigration status[6] so that they can join him in the United States. Examples of persons whose spouses and children can be awarded derivative visas include: diplomats, persons who work for religious or international organizations, students, and persons who receive visas related to their work.[7] The immigration law gives spouses control over the immigration status of their family members and forces many battered immigrant women to be trapped and isolated in violent homes, afraid to turn to anyone for help. They fear continued abuse if they stay and deportation if they attempt to leave.[8]

A survey among Latina immigrants in the Washington, D.C. area found that 21.7% of the battered immigrant women survey participants listed fear of being reported to immigration as their primary reason for remaining in an abusive relationship.[9] Researchers also found that an immigrant woman who experiences physical and/or sexual abuse was a victim of her abuser's threats of

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4. H.R. REP. NO. 103-395, at 26-27 (1993).

5. In this Article, victims of domestic violence will be referred to as "she" and perpetrators of domestic violence will be referred to as "he." Government and academic studies consistently find that the majority of domestic violence victims are female and that batterers are overwhelmingly male. *See* CALLIE MARIE RENNISON & SARAH WELCHANS, INTIMATE PARTNER VIOLENCE, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT, U.S. DEP'T OF JUSTICE (2000) (reporting that 85% of victimizations by intimate partners in 1998 were committed against women); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE BETWEEN INTIMATES 2-3 (1994); MARY P. KOSSET ET AL., AM. PSYCHOLOGICAL ASS'N, MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK AND IN THE COMMUNITY, xiv-xv (1994); Russel P. Dobash, *The Myth of Sexual Symmetry in Marital Violence*, 39(1) SOC. PROBS. 71, 74-75 (1992).

6. Immigration and Nationality Act of 1952 ("INA"), § 203(d), 8 U.S.C. § 1153(d) (1999) (providing that the status of the spouse and children thus "derives" from the person with the visa).

7. *Id.* at § 1153(b).

8. 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (providing a section-by-section summary of the Battered Immigrant Women Protection Act of 2000).

9. Marry Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 271 (2000).

deportation, threats of refusal to file immigration papers, and threats to call the INS at over ten times the rate experienced by a psychologically abused woman.[10] Abuser's threats of deportation are powerful, ongoing and play upon real, deep-seated fears of deportation. Abusers use constant threats to deport spouses and children as very powerful tools to prevent battered immigrant women from seeking help and to keep them in violent relationships.[11] This is true when the spouse or child is undocumented and when the spouse or child's legal immigration status is based upon a derivative visa tied to the abuser's immigration visa.[12]

This article provides a broad overview of the history of legislative protections for battered immigrant women in the United States. Historically, United States immigration laws placed full and absolute control over the battered immigrant's legal immigration status in the hands of the United States citizen or lawful permanent resident spouse or parent, or the immigrant spouse or parent receiving permission from INS to live, work or study in the United States. When the spouse or parent used domestic violence to control his spouse or children, the structure of United States immigration laws fostered abuse.[13] However, since 1990, Congress has passed a series of amendments to immigration, public benefits, criminal and legal services laws that reflect an evolving understanding of the dangers that domestic violence poses to society as a whole, and to all individual victims — women, children, citizens, and non-citizens alike. This emerging understanding has led to the passage of critical legal protections, including welfare access for a broad array of battered immigrant women and their children who have been or are being abused in the United States.[14]

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10. *Id.* at 292.

11. 146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (statement of the joint managers).

12. Orloff & Kelly, *supra* note 3, at 380.

13. *Id.* at 384.

14. On December 7, 2000, the INS issued proposed regulations that for the first time formally offered an avenue for some battered immigrant women who had fled domestic violence in their home countries and come to the United States to receive gender-based asylum. Asylum and Withholding Definitions: Proposed Rule, Immigration and Naturalization Service, 65 Fed. Reg. 76,588-98 (proposed Dec. 7, 2000).

II. UNITED STATES IMMIGRATION LAWS HISTORICALLY FOSTERED DOMESTIC ABUSE

A. U.S. Immigration Law's Roots in Coverture

Early United States immigration laws incorporated the concept of coverture, which was "a legislative enactment of the common law theory that the husband is the head of the household."[15] Immigration laws in the 1920s gave male citizens and lawful permanent residents control over the immigration status of their immigrant wives and children.[16] The law required a husband to either file a petition for his wife or accompany her when she applied for immigration status.[17] Female citizens or lawful permanent residents could not, however, file petitions for their male immigrant spouses.[18] This approach grew out of the doctrine of "coverture" that was a part of United States common law at that time.[19] Coverture was defined as the legal principle under which "the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything."[20] Coverture was so much a part of United States law that from 1907[21] through 1922,[22] when a United States citizen woman married a man from another country, she lost her United States citizenship.[23] Between 1907 and 1922, all American women acquired their husband's nationality upon marriage.[24] The doctrine of coverture

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15. S. REP. NO. 81-1515, at 414 (1951).

16. Act of May 29, 1921, Pub. L. No. 5, § 2(a), 42 Stat. 5 (1921).

17. Act of May 26, 1924, Pub. L. No. 139, § 4(a), 43 Stat. 155 (1924).

18. Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 583, 596-97 (1991).

19. *See generally id.* at 583.

20. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 432 (1765). Also incorporated into common law was the husband's right of 'chastisement' to restrain his wife from 'misbehavior,' thus creating an environment in which spousal abuse was condoned or even encouraged.

21. The Act of March 2, 1907, Chap. 2534, 34 Stat. 1228 (1907), provided that "any American woman who marries a foreigner shall take the nationality of her husband."

22. Section 7 of the Act of September 22, 1922. 8 U.S.CA. § 9, commonly referred to as the Cable Act, repealed a portion of the law of 1907 through which American women lost citizenship upon marriage and provided that women would not cease to be citizens upon marriage unless they formally renounced citizenship. However, the Cable Act did not automatically restore citizenship already lost by women upon marriage between 1907 and 1922. *In re* Watson's Repatriation, 42 F. Supp. 163 (E.D. Ill. 1941).

23. *In re* Watson's Repatriation, 42 F. Supp. at 164.

24. Marian L. Smith, *"Any Woman Who is Now or May Hereinafter be Married . . . "* –

further gave a husband the right to "chastise" or even kill his wife if he deemed it necessary punishment.[25] Coverture as a state sanctioned legal principle created a social climate that condoned and even encouraged domestic violence.

Although subsequent legislation, particularly the Immigration and Nationality Act of 1952 ("INA"), changed the statutory language to make the immigration laws gender-neutral giving the same women ability to confer legal immigration status on her spouse as men had,[26] the impact of the spousal sponsorship laws is still rooted in the coverture mentality.[27] Since the power of sponsorship and autonomous action lies with the citizen or lawful permanent resident spouse,[28] and because the majority of immigrant spouses and victims of domestic violence are women, the ramifications of spousal sponsorship are most serious for women.[29] "The law gives so much power to the citizen or resident spouse that the immigrant spouse is faced with an impossible choice: either remain in an abusive relationship or leave, become an undocumented immigrant and be potentially deprived of home, livelihood and perhaps child custody."[30]

B. Enhanced Danger to Battered Immigrants: The Immigration Marriage Fraud Amendments of 1986

In 1986, Congress codified a number of immigration law changes that further jeopardized the safety of battered immigrant women and their children. The Immigration Marriage Fraud Amendments of 1986 ("IMFA")[31] significantly enhanced the control a citizen or lawful

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Women and Naturalization, ca. 1802-1940, PROLOGUE: QUARTERLY OF THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, available *at* http://www.nara.gov/publications/prologue/natural1.htm (last modified April 5, 2001).

25. Calvo, *supra* note 18, at 593.

26. INA §§ 101(a)(27), 204, 205 (codified as amended in scattered sections of 8 U.S.C.).

27. Calvo, *supra* note 18, at 598.

28. INA §§ 204(a), 205; 8 U.S.C. § 1154; 8 C.F.R. § 205.1(a)(1).

29. Women and children have constituted approximately two-thirds of the legal immigration into the United States since the 1930s. 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 24 (1997). When both legal and undocumented immigration are combined, more than half of immigrants are women. P. Hondagneu-Sotelo, *Gender and Contemporary U.S. Immigration*, 42 AM. BEHAVIORAL SCIENTIST 565 (1999). According to congressional reports, three to four million women in the United States are abused by their husbands each year, a figure far higher than the number of men abused by their wives. S. REP. NO. 101-545, at 30 (1990); H.R. REP. NO. 103-395, at 26 (1993).

30. Calvo, *supra* note 18, at 610.

31. The Immigration Marriage Fraud Amendments of 1986 ("IMFA"), Pub. L. No. 99-639, 100 Stat. 3537 (1986).

permanent resident spouse had over his alien spouse's immigration status. The IMFA re-confirmed the original power of the lawful permanent resident or citizen spouse to control the immigration status of his alien spouse by allowing her to become a lawful permanent resident only if he petitions for her. The IMFA created a presumption in immigration law that all marriages were fraudulent until proven to be valid. In an effort to ensure that lawful permanent resident status was granted only to spouses in valid marriages to United States citizens or lawful permanent residents, the IMFA required that immigrant spouses who gained residency based on a marriage to a United States citizen or lawful permanent resident fulfill a two-year conditional residency requirement before being granted full lawful permanent residency.[32]

To prove that the marriage was valid, the law required a joint petition to be filed ninety days before the expiration of two years from when the immigrant spouse first gained her legal status, possibly followed by a scheduled joint interview with an INS official.[33] The law did not require the citizen or lawful permanent resident spouse to file immigration papers for her, or to follow through with the joint petition. Nor did the law oblige him to stay in the marriage for the two-year period during which his wife was dependent on him for her immigration status. This legislative attempt to "curb fraud" and expose "sham marriages" did, however, place battered immigrant women at the mercy of their husbands.[34] It also placed in jeopardy the immigration status of any children whose avenue to attain lawful permanent resident status was based on their mother's marriage to a citizen or lawful permanent resident. If the mother's legal immigration status terminated, so did the children's status terminate.[35]

The IMFA contained two provisions that allowed the Attorney General to change the immigrant spouse's conditional resident status to a permanent resident status without satisfying the requirements of the joint petition and interview if she satisfied the criteria for "extreme hardship" or "good faith/good cause."[36] However, these discretionary waivers proved to be limited and narrow in scope. They

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32. 8 U.S.C. § 1186a.

33. 8 U.S.C. § 1186a(c).

34. William R. Tamayo, *The Evolution of U.S. Immigration Policy, in* DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN 8 (Debbie Lee et al. eds., 1991).

35. 8 U.S.C. § 1186a(a)(1),(b).

36. 8 U.S.C. § 1186a(c)(4).

did little to alleviate the burdensome effect of the IMFA on battered immigrant women.[37] In fact, despite congressional intent, both of the waivers were interpreted by INS not to apply, in most cases, to immigrant women who were abused by their citizen or lawful permanent resident husbands.[38]

In the case of the "extreme hardship waiver," the immigrant spouse had to demonstrate that extreme hardship would result from deportation, considering only those circumstances that arose during the period that the alien spouse was admitted for permanent residence on a conditional basis.[39] Even if successful in demonstrating these facts, the immigrant spouse was not guaranteed a waiver; discretion was left to the INS.[40] Some INS officials interpreted the extreme hardship waiver as not really applying to battered immigrant women because they suffered hardship in the United States and deportation would not likely increase the hardship they may suffer.[41] This misguided view was prevalent among INS officials at the time who had no understanding of the dynamics of domestic violence and who had received no training on the issue. This INS opinion ignored the extreme hardship inherent in being a victim of ongoing and often escalating instances of domestic violence[42] and the additional difficulties deportation posed for battered women.[43] This approach did not recognize the extreme psychological harm that domestic violence causes,[44] the effect that carrying out the abuser's threats of deportation can have on the

37. Calvo, *supra* note 18, at 610.

38. *Id.*

39. 8 U.S.C. § 1186a(c)(4).

40. 8 U.S.C. § 1186a(c)(4) (using the operative language "in the Attorney General's discretion").

41. *See* Calvo, *supra* note 18, at 610 (arguing that deportation adds to the trauma already suffered in the battery).

42. Marry Ann Dutton & Giselle Hass, *Use of Expert Testimony Concerning Battering and Its Effects on Battered Women, in* Domestic VIOLENCE AND IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT: A TRAINING MANUAL FOR ATTORNEYS AND ADVOCATES, app. (Bette Farlow et al., 2000); MARRY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION (1992); TJADEN & THOENNES, *supra* note 1, at 37-38.

43. Affidavit of Dr. Marry Ann Dutton, para. 9-11 (May 10, 1996) [hereinafter Dutton Affidavit] (on file with the authors).

44. TJADEN & THOENNES, *supra* note 1, at iv; Marry Ann Dutton, *Psychological and Sociological Dynamics of Domestic Violence, in* FLORIDA DOMESTIC VIOLENCE LAW, 3-3—3-5, 3-8—3-10 (Susan Swilhart ed., 1995); Angela Browne, *Violence Against Women by Male Partners: Prevalence, Outcomes, and Policy Implications*, AM. PSYCHOLOGIST (1993); Dianne Follingstad et al., *The Role of Emotional Abuse in Physically Abusive Relationships*, 5 J. FAM. VIOLENCE 113-15 (1990).

victim and her children,[45] and the harm to the battered immigrant survivor of domestic violence that can come from severing her from the counseling, support systems and legal protections she needs to overcome the physical and psychological injuries she has suffered as a result of the domestic violence perpetrated against her by her citizen or lawful permanent resident spouse.[46]

Such views were also premised on the erroneous belief that deportation would bring an end to the domestic violence. This perception ran counter to experts' understanding of the dynamics of domestic violence. First, carrying out the deportation of an abused immigrant spouse or child made the government an accomplice in the abuse. Abusers of immigrant women use threats of deportation to prevent their victims from reporting the abuse and cooperating in prosecutions. When the government deports an abused spouse, government officials are in effect carrying out the abuser's threats.

Second, deporting an immigrant domestic violence victim does not keep the victim safe from ongoing abuse. Abusers who are citizens and lawful permanent residents may freely travel abroad at any time to any place. In many instances, these abusers will follow their victims to their home countries and continue the abuse in a place where there are often no laws or law enforcement efforts to stop them. In other cases, the abuser's family members in the home country continue to abuse and terrorize the domestic violence victim and her family members.

Finally, the societal cost of deporting immigrant domestic violence victims is high. Abusers of immigrant spouses and children who cannot be held accountable for their crimes and go on to abuse other intimate partners in the future. Further, if battered immigrant spouses who report abuse are deported, word of these deportations will spread and will have a chilling effect on other immigrant victims of domestic violence, making them reluctant to seek any help from the justice system.

Adopting a similarly restrictive and arbitrary approach, the INS insisted that for an immigrant spouse to obtain lawful permanent residency under the "good faith, good cause" criterion, the immigrant spouse would have had to initiate divorce proceedings herself. This promoted a "race to the courthouse" between the immigrant wife seeking a waiver and the husband trying to block her

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45. Dutton Affidavit, *supra* note 43.

46. Dutton Affidavit, *supra* note 43, ¶ 11; Giselle Aguilar Hass et al., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, *in* DOMESTIC VIOLENCE: GLOBAL PERSPECTIVES 103-13 (2000).

ability to attain the waiver by being the one to initiate divorce proceedings.[47] The immigrant spouse who married in good faith, but who had good cause to divorce because of the domestic violence could not obtain this waiver unless she won the race to the courthouse. This waiver, as implemented by the INS, did not take into consideration the difficulties involved in leaving an abusive marriage, finding a lawyer, and locating the financial resources to finance divorce litigation. If the battered immigrant lost the race to the courthouse, neither the fact that the battered immigrant woman lived in a state with no-fault divorce laws nor the fact that the husband was ultimately found to be at fault played any role in the immigration case if she did not initiate the divorce proceeding.[48] The standard of "goodness" in good cause, good faith waiver cases was itself also questionable. In final evaluation, the good faith, good cause waiver did not afford any meaningful help for battered immigrant women. This was particularly true in light of the fact that none of the INS officials administering these waivers received any training on domestic violence nor were they aware of how the dynamics of domestic violence affected family relationships.

III. RECENT CHANGES IN UNITED STATES IMMIGRATION LAWS THAT ATTEMPT TO DECREASE THE FREQUENCY OF DOMESTIC ABUSE

A. 1990 Battered Spouse Waiver: Congress' First Attempt to Reform Immigration Laws to Offer Protection For Battered Immigrants

In 1990, Congress enacted the "battered spouse waiver," which was the first piece of legislation that recognized domestic violence as a problem experienced by immigrant wives dependent on their spouses for immigration status.[49] The INA was amended to include a new battered spouse waiver that attempted to assist immigrants abused by their citizen or lawful permanent resident spouse and trapped by the IMFA laws in abusive marriages.[50] The battered spouse waiver offered relief to battered immigrant spouses. IMFA was amended to no longer require the immigrant spouse to be the one initiating divorce and to not require marriage termination for a "good cause." The

47. Calvo, *supra* note 18, at 611.

48. *Id.*

49. Immigration Act of 1990, § 701, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended at 8 U.S.C. 1186a(c)(4)). *See also* Conditional Basis of Lawful Permanent Residence for Certain Alien Spouses and Sons and Daughters; Battered and Abused Conditional Residents, 56 Fed. Reg. 22,635 (May 16, 1991) (to be codified at 8 C.F.R. pt. 216) (Interim Rule).

50. 8 U.S.C. § 1186a(c)(4) (1994).

battered spouse waiver further exempted immigrants, who were battered or subjected to extreme cruelty by their citizen or permanent resident spouse and who had already acquired their conditional residency, from the joint petitioning process.[51]

The battered spouse waiver defined domestic violence as "battering or extreme cruelty."[52] This definition of domestic violence was derived from the evolving international law definition of domestic violence, which included some forms of emotional abuse.[53] This definition was more inclusive than the domestic violence definition used in most state protection orders and criminal domestic violence statutes, which only covered actions that violated criminal laws including threats, attempts, and violation of civil protection orders.[54] The battered spouse waiver's definition of domestic violence was based on international rather than United States law. This is similar to the approach United States immigration law has taken in other contexts where protections are being offered for humanitarian reasons.[55]

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51. Tamayo, *supra* note 34, at 8.

52. 8 U.S.C. § 1186a(c)(4); Calvo, *supra* note 18, at 613.

53. "[V]iolence against women in the family and society was pervasive and cut across lines of income, class and culture . . . ." U.N. E.S.C. Res. 15, U.N. ESCOR, 1st Sess., 30th plen. mtg., Annex, ¶ 23, U.N. Doc. E/RES/1990/15 (1990). "'[V]iolence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/RES/48/104 (1994).

54. *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women*, 21 HOFSTRA L. REV. 801, 870-73 (1993) (noting that only thirteen innovative state statutes recognized some form of emotional abuse as a basis to issue a protection order). *See, e.g.*, DEL. CODE ANN. tit. 10, § 945 (Supp. 1992) (insulting, taunting, and other conduct likely to cause humiliation, degradation, or fear); NEV. REV. STAT. ANN. § 33.018(5) (1995) (knowing, purposeful or reckless course or conduct to harass). The Immigration and Naturalization Act's Battered Spouse Waiver provisions recognize that emotional abuse is a form of spousal abuse. *See* 8 U.S.C. § 1886a(c)(4)(C). The INS has defined battering or extreme cruelty in its regulations to include, but not be limited to:

> [B]eing the victim of 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 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 are part of an overall pattern of violence.

Immigrant Petitions, 8 C.F.R. § 204.2(c)(vi) (2001).

55. Historically, refugee and asylum laws have offered discretionary protections to persons who have a "well-founded fear of persecution" if returned to their home countries. Other evidence of discretionary humanitarian protections include parole power which typically arises when someone needs to enter the United States for

While the battered spouse waiver helped battered immigrant women and their children who were locked in abusive marriages for two years by the IMFA, problems remained. The 1990 law allowed the coverture-based control of the earlier immigration legislation to continue. An immigrant spouse still could become only a resident if her citizen or resident spouse sponsored her. If the citizen or resident spouse never initiated the immigration process for his immigrant spouse, or if he began the process and later withdrew the application, the battered immigrant spouse was barred from attaining legal immigration status without her abuser's help.

Additionally, the INS implemented the battered spouse waiver in an extremely narrow way. The INS required battered immigrants applying for battered spouse waivers based on extreme cruelty to submit, along with their application, evidence from a licensed mental health professional.[56] Since the number of mental health professionals with training on domestic violence is very low, and the number who also are bilingual and bicultural are even lower, few battered immigrant spouses were able to obtain the required mental health professional evaluation.[57] Those living in communities where such mental health services existed were often barred access because they could not muster the financial resources to pay for the required mental health evaluation.[58] This mental health expert requirement focused on the victim's injuries rather than abuser's actions[59] and severely limited the number of battered immigrants who had suffered extreme cruelty to be granted the relief.[60]

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medical, humanitarian, or other public interest purposes.

56. Conditional Basis of Lawful Permanent Residence Status, 8 C.F.R. § 216.5(e)(3)(iv)-(vii) (2001).

57. Ignatius Bau & William R. Tamayo, *Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Act) and Other Related Issues, in* DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN 15 (Debbie Lee et al. eds., 1991).

58. *Id.*

59. H.R. Rep. No. 103-395, 38 (1993)

60. For these reasons, the Violence Against Women Act of 1994 ("VAWA 1994") imposed a new credible evidence standard for battered spouse waiver cases that forced the INS to accept any credible evidence of abuse. VAWA 1994 is part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). This immigration provision of VAWA is codified at INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4). The legislative history of VAWA 1994 stated that the INS was to accept "any credible evidence" and explicitly directed the "Attorney General to consider any credible evidence submitted in support of hardship waivers based on battering or extreme cruelty whether or not the evidence is supported by an evaluation by a licensed mental health professional." H.R. Rep. No. 103-395, at 38. This credible evidence standard has since been applied to all immigration cases involving domestic violence and has been extended in VAWA 2000 to apply in immigration cases involving immigrant crime victims. *See, e.g.*,

B. The Violence Against Women Act of 1994

The Violence Against Women Act of 1994 ("VAWA 1994"), included 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. VAWA 1994's overarching goals were to enhance justice system protection for battered women and to expand collaboration and cooperation between battered women's supportive services and the criminal and civil justice systems.[61] VAWA 1994 recognized that battered women's advocates played a key role in assuring successful interventions that stop domestic violence.

The VAWA 1994 provisions provided funding for police, prosecutors, battered women service providers, state domestic violence coalitions, and a national domestic hotline.[62] Funds were made available to improve services to victims, to improve police department and prosecutor's office procedures for handling domestic violence cases, to educate and train community members and professionals about domestic violence, and to foster collaboration and cooperation between battered women's advocates and justice system personnel.[63]

VAWA 1994 provided incentives to jurisdictions seeking funding to abolish practices that were harmful to battered women. Jurisdictions seeking funding were required to certify that they were not using practices in domestic violence cases that were harmful to victims. Each jurisdiction had to certify in their funding application that they do not charge fees in protection order cases, that they have policies and procedures in place prohibiting dual arrest and mutual protection orders, and that they have pro or mandatory arrest policies in place for domestic violence cases.[64] VAWA 1994 included provisions guaranteeing full faith and credit for civil protection orders issued in other states[65] and made interstate domestic violence

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Victims of Trafficking and Violence Protection Act of 2000, § 1504(a), Pub. L. No. 106-386, 114 Stat 1464 (2000) [hereinafter VAWA 2000] (requiring the Attorney General to consider any credible evidence when considering applications to cancel removal orders against a battered spouse or child).

61. *See* VAWA 2000, 146 CONG. REC. S10192 (Oct. 11, 2000) (statement of Joint Managers) (discussing the original purpose of VAWA 1994).

62. VAWA 1994 §§ 40121, 40231, 40295.

63. *Id. See* Grants to Combat Violent Crimes Against Women ("STOP Grants") VAWA 1994 § 40121; Grants to Encourage Arrest Policies ("Arrest Grants"), VAWA 1994 § 40231; Rural Domestic Violence and Child Abuse Enforcement Assistance ("Rural Grants"), VAWA 1994 § 40295.

64. VAWA 1994 § 40231.

65. VAWA 1994 § 40221.

and interstate violation of protection orders a federal crime.[66] Additionally, VAWA 1994 included special protections for battered immigrant women and children abused by United States citizen or lawful permanent resident spouses or parents.[67]

1. Congressional Intent

When VAWA 1994 was enacted, Congress viewed the act as "an essential step in forging a national consensus that our society will not tolerate violence against women"[68] and the terror it spawns.[69] Congress found that domestic violence threatens the lives, safety and welfare of millions of women and children in the United States every year. An estimated 30.4% of all women in the United States are physically abused by a husband or male co-habitant at some point in their lives.[70]

Congress found that abuse of intimate partners is serious, chronic, and national in scope.[71] Congressional reports found that in 1991 at least 21,000 domestic crimes against women were reported to police every week,[72] and that domestic violence crimes are vastly under reported.[73] According to congressional reports, three to four million women in the United States are abused by their husbands each year.[74] Surgeon Generals have repeatedly warned that family violence poses the single largest health threat for adult women.[75] One million women each year seek medical attention for injuries that are the results of crimes committed by male partners.[76] One-fifth of all

66. VAWA 1994 §§ 2261-2262 (codified at 18 U.S.C §§ 2261-2262).

67. VAWA 1994, §§ 40701-40702.

68. S. REP. NO. 103-138, at 41-42 (1993).

69. STAFF OF THE SENATE COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA, 40 (Comm. Print 1992).

70. TJADEN & THOENNES, *supra* note 1, at iv.

71. S. REP. NO. 101-545, at 37 (1990). *See also* Tjaden & Thoennes, *supra* note 1, at NCJ 39 (noting that 65.5% of women physically assaulted by an intimate are victimized multiple times by the same partner and for 69.5% of victims of intimate assault, the victimization lasts for longer than one year).

72. S. REP. NO. 103-138, at 37.

73. *See id.* (claiming that unreported domestic crimes were estimated to be more than three times the level of reported crimes); BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE 7 (2000) (reporting that 53% of domestic violence victims report the abuse to the police); M. L. Coulter & K. Kuehnle, *Police-Reporting Behavior and Victim-Police Interactions as Reported by Women in a Domestic Violence Shelter*, J. INTERPERSONAL VIOLENCE 14 (Dec. 1999) (finding that fifty-eight percent of the victims reported the violence).

74. S. REP. NO. 101-545, at 30; H.R. REP. NO. 103-395, at 26 (1993). *See also* Klein & Orloff, *supra* note 54.

75. S. REP. NO. 103-138, at 41-42.

76. *Id.* at 41; S. REP. NO. 101-545, at 37.

reported aggravated assaults involving bodily injury occur within intimate relationships[77] and fifty percent of the time domestic violence against female victims results in injury.[78] The Department of Justice has reported that more than one in three women who seek care in emergency rooms for violence-related injuries are victims of domestic violence.[79] Finally, family violence accounts for a significant number of murders. One-third of all women who are murdered die at the hands of husbands or boyfriends.[80]

Congress also noted that United States immigration laws were part of a larger failure to confront the domestic violence issue. The House of Representatives Committee on the Judiciary found that domestic abuse problems are "terribly exacerbated in marriages where one spouse is not a citizen and the non-citizens' legal status depends on his or her marriage to the abuser,"[81] because it places full and complete control of the alien spouse's ability to gain legal status in the hands of the citizen or permanent resident.[82] A battered spouse may be deterred from taking action to protect herself and her children including filing for a civil protection order, filing criminal charges or calling the police because of the threat or fear of deportation.[83] As a result, many immigrant women live trapped and isolated in violent homes, afraid to talk to anyone about the violence and afraid to turn for anyone for help. Immigrant battered women fear continued abuse if they stay and deportation if they report the abuse and/or attempt to leave.[84]

Newly published research confirms that an abuser's control over a battered immigrant's immigration status and threats of deportation are very powerful tools that lock battered immigrants in abusive relationships, cut them off from help and enhance the lethality of the

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77. STAFF OF THE SENATE COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 52 (Comm. Print 1992).

78. BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE 1 (2000).

79. *See* A. Ganley, *Introduction* to IMPROVING THE HEALTH CARE RESPONSE TO DOMESTIC VIOLENCE: A TRAINER'S MANUAL FOR HEALTH CARE PROVIDERS 4 (1998).

80. S. REP. NO. 103-138, at 41.

81. H.R. REP. NO. 103-395, at 26.

82. *Id.*

83. *See id.* (conveying that under current U.S. immigration law, a legal permanent resident or U.S. citizen may file a relative visa petition requesting legal status for his spouse based on a valid marriage). *See also* ROBIN L. CAMPO ET AL., UNTOLD STORIES: CASES DOCUMENTING ABUSE BY U.S. CITIZENS AND LAWFUL RESIDENTS ON IMMIGRANT SPOUSES (1993); LESLYE ORLOFF ET AL., NEW DANGERS FOR BATTERED IMMIGRANTS: THE UNTOLD EFFECTS OF THE DEMISE OF 245(i) (2000).

84. *See* H.R. REP. NO. 103-395, at 26-27 (1993) (noting that the legal resident can revoke the petition at any time prior to the issuance of permanent legal status to the immigrant woman).

violence battered immigrant's experience. A survey conducted among Latina immigrants in the D.C. area found that 49.3% reported physical abuse by an intimate partner during their lifetimes, 11.4% reported sexual abuse, and 42.1% reported severe physical or sexual abuse.[85] Among immigrant Latinas who were married or formerly married the lifetime abuse rate raises to 59.5%.[86]Despite the fact that 50.8% of the battered immigrant participants in the survey were married to citizens or permanent residents who could file immigration papers for them, 72.3% of abusive citizen or resident spouses never file immigration papers for their abused spouses and the 27.7% who do file hold their spouses in the marriage for almost fours years before filing immigration papers.[87] Further, this same research found that immigration-related abuse, including threats of deportation against an immigrant spouse or intimate partner usually exists only when physical or sexual abuse is also present.[88] Thus, the existence of immigration-related abuse in a relationship provides corroborating evidence of physical or sexual abuse. Further, when immigration related abuse occurs in relationships that do not yet include physical or sexual abuse, this factor may be a predictor that the lethality of the violence in the relationship is likely to escalate.[89]

In crafting VAWA 1994's immigration provisions, the impact of domestic abuse on children was of significant concern to Congress.[90] When battered immigrant women are locked by immigration laws in abusive marriages to citizen and permanent resident spouses, they are forced to raise their children in an environment where children learn that violence is an appropriate means of addressing anger and frustration.[91] Research suggests that children under the age of twelve

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85. Hass et al., *supra* note 46, at 101-03.

86. Dutton et al., *supra* note 9, at 259.

87. *See* Dutton et al., *supra* note 9, at 259 (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).

88. Hass et al., *supra* note 46, at 106-09. For undocumented Latinas married to citizens or lawful permanent residents the battering rate may even rise as high as 67%.

89. *Id.* at 109.

90. *See* H.R. REP. NO. 103-395, at 38 (noting that the legislation encourages women in abusive households to report the abuse by allowing them to petition the U.S. government for legal status themselves).

91. In over 50% of domestic violence homes where women are abused so are the children. Children were involved or present during 43% of all domestic violence offenses in 1996. It is estimated that almost ten million children in America are at risk of being exposed to domestic violence each year. As violence against the mother becomes more severe and more frequent, children experienced 300% increase in physical violence by the male batterer. ADVISORY COUNCIL ON DOMESTIC VIOLENCE, CHILDREN AND DOMESTIC VIOLENCE REPORT 1-3, 5 (1998).

are present in 43% of abusive households.[92] Children are the victims of both direct and indirect violence.[93] A child may be the direct victim of violence as in cases of sexual assault of a child by a parent.[94] A child may also suffer harm from being an indirect victim of violence between parents, including when a child is present and witnesses one parent abusing the other parent,[95] or when the child views a rape or beating of their mother by their father.[96] Children who witness and experience violence in their home exhibit a greater likelihood of aggressive and antisocial behavior, more traumatic stress, depression, anxiety and slower cognitive development than children who grow up in non-violent homes.[97]

The VAWA 1994 immigration provisions involve the federal government in the struggle to counter domestic violence. Through the immigration laws an area of exclusive federal governmental control. VAWA 1994 contained two provisions designed to help immigrant children living in abusive homes. First, Congress recognized that an abuser's control of the immigration status of the parent of the abused child would inhibit the reporting of child abuse and the removal of the child from the home of the abuser.[98] To address this issue, VAWA offered immigration protection to abused immigrant children and extended immigration protection to the immigrant parents of child abuse victims.[99] Second, battered

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92. *See* RENNISON & WELCHANS, *supra* note 5, at 6.

93. *See* STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 5 (Comm. Print 1992) (stating that while many children are victims of rape or incest, children are more commonly victims of indirect violence, such as those children who see a parent raped).

94. *Id.*

95. *Id.*

96. *Id.*

97. SUSAN SCHECHTER & JEFFERY L. EDELSON, DOMESTIC VIOLENCE AND CHILDREN: CREATING A PUBLIC RESPONSE 4 (Open Society Institute, Center on Crime, Communities and Culture: 2000).

98. *See* H.R. REP. NO. 103-395, at 38 (stating that an abused alien can "self-petition" the government for legal status for herself and her child).

99. INA § 204(a)(1)(A)(iii)(bb), 204(a)(1)(B)(ii)(bb); 8 U.S.C. § 1154(a)(1)(A)(iii)(bb) & 1154(a)(1)(B)(ii)(bb) allow immigrant spouses to file a self-petition if their child is being abused by the immigrant spouse's citizen or lawful permanent resident spouse. The immigrant spouse can file this self-petition, whether or not the immigrant spouse is also being abused. Secondly, VAWA offered suspension of deportation to these same battered immigrant spouses who needed access to legal immigration status to be able to protect their children from ongoing child abuse. However, VAWA suspension of deportation also offered immigration protection to the immigrant parent of an abused child when the abuser is the child's other citizen or lawful permanent resident parent. VAWA suspension of deportation is available even when that immigrant parent of the abused child is not married to the citizen or lawful permanent resident parent who had committed the child abuse. INA § 244(a)(3) as in effect before the Title IIIA effective date in § 309 of the Illegal

immigrant mothers were explicitly authorized to assist their minor children in obtaining immigration benefits by including any of their children who were undocumented as derivative applicants in the mothers' VAWA self-petitions.[100]

By enacting the VAWA 1994 immigration provisions, Congress intended to provide battered immigrant women and children abused by their United States citizen and lawful permanent resident spouses or parents with a way to secure lawful immigrant status without their abuser's cooperation or knowledge.[101] Congress amended immigration laws to provide battered women and children with a means of escape. VAWA 1994 was also designed to enhance the ability of battered immigrants to help in the prosecution of their abusers by providing them the protection of legal immigration status.[102] Prior to VAWA 1994, abusers of immigrant women could use control over immigration status and threats of deportation to make themselves immune from any risk of prosecution or punishment. Abusers had the unfettered power to assure that their victims remain forever undocumented and could have their victims deported if they cooperated with authorities.[103]

VAWA's battered immigrant provisions allowed for immigrant women and abused immigrant children, whose abusive citizen and permanent resident spouses or parents attempted to use their immigration status as a means of inflicting physical, emotional, and economic abuse, to file for lawful immigration status without the approval, assistance, or cooperation of their abusive spouses or parents.[104] They could either self-petition for lawful permanent

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Immigration Reform and Immigrant Responsibility Act of 1996; INA § 240A(a)(2)(A); 8 U.S.C. § 1229(b).

100. *See* VAWA 1994 § 40701(a) (codified at 8 U.S.C. § 1154(a)(1)) (amending INA § 204(a)(1)) (allowing unclassified aliens to petition on behalf of their children and themselves).

101. As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRAIRA"), Congress added to VAWA immigration protections confidentiality provisions that barred the INS or Justice Department officials from releasing any information about the existence of a VAWA immigration case to any persons including the abuser. This guaranteed that battered immigrants could file for relief under VAWA without their abuser's knowledge. IIRAIRA § 384 (codified as amended at 8 U.S.C. § 1367).

102. VAWA 1994 § 40703(a) (codified at 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).

103. Orloff & Kelly, *supra* note 3, at 383.

104. *See* VAWA 1994 § 40701(a) (codified at 8 U.S.C. § 1154(a)(1) (amending INA § 204(a)(1))).

resident status[105] or apply for VAWA suspension of deportation.[106]

2. Self-Petitions Under VAWA

Through VAWA 1994, the ability to self-petition for one's own immigration status was made available to an immigrant woman married to a citizen or lawful permanent resident[107] (she had to be married to him at the time the application was filed; divorce was a bar),[108] whose husband had not filed or was not expected to follow through with the immigration case he filed with the INS on his immigrant spouse's or child's behalf. She had to prove, in addition to the immigration status of her abuser, that she had suffered battering or extreme cruelty, that she had entered the marriage in good faith, that she resided with the abuser for a period of time (no specific time period required), that she was of good moral character, and that she or her children would suffer extreme hardship if deported.[109] Abused children of citizen or permanent resident parents were also eligible for this remedy, as were the unabused spouses who were parents of children abused by the undocumented immigrant parent's citizen or permanent resident spouse.[110] Both undocumented battered immigrants and documented battered immigrants with non-permanent visitor, student or work-based visas could file self-petitions if they had been battered or subjected to extreme cruelty by their citizen or lawful permanent resident spouse or parent. Since the VAWA 1994 immigration protections were gender neutral, self-petitions could be filed by abused wives, husbands, or children and could be used to help any immigrant who qualified.[111]

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105. *See* VAWA 1994 § 40701(a) (codified at 8 U.S.C. § 1154(a)(1)) (amending INA § 204(a)(1)).

106. *See* VAWA 1994 § 40703(a) (codified at 8 U.S.C. § 1254(a) (amending INA § 244(a)) (establishing conditions under which unclassified aliens may petition for a stay of deportation) (repealed 1997).

107. *See* VAWA 1994 § 40701(a) (codified at 8 U.S.C. § 1154(a)(1) (amending INA § 204(a)(1))).

108. *See* 8 C.F.R. § 204.2(c)(ii) (2001) (setting forth the petition process for a widow or widower of a United States citizen). *See also* Petition to Classify Alien as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children [hereinafter Petition to Classify Alien], 61 Fed. Reg. 13,061, 16062 (Mar. 26, 1996) (noting that VAWA's revisions to INA 204(a)(1) requires a self-petitioning spouse to be married to the abuser at the time the petition is filed).

109. 8 C.F.R. § 204.2(c)(i) (2001); *see also* Petition to Classify Alien, *supra* note 108, at 13062-63, 13065-68 (discussing basic self-petitioning eligibility requirements and standards for establishing United States residence with the abuser, battery, good moral character, and extreme hardship).

110. 8 C.F.R. § 204.2(e)-(f) (2001).

111. 8 C.F.R. § 204.2 (2001) (noting that immigrant petitions are for widows and

3. Suspension of Deportation[112] *and Cancellation of Removal Under VAWA*[113]

VAWA 1994 also provided immigration relief and protection for battered immigrants who were placed in deportation proceedings.[114] Battered immigrants could file for a special VAWA form of suspension of deportation that, if granted, would afford them lawful permanent resident status without the assistance of their abusive spouse or parent. In order to obtain this remedy, the battered immigrant woman had to show three years of continuous physical presence in the United States; prove that she would suffer extreme hardship if she were deported; demonstrate that she is, or was, married to a citizen or lawful permanent resident (divorce is not a bar to filing for VAWA suspension); prove that she resided with the abuser and married him in good faith; and prove good moral character.[115] The elements required to prove VAWA suspension of deportation were very similar to self-petitioning with the additional requirements of three years of physical presence in the United States and undocumented status at the time of filing.[116]

Additionally, VAWA suspension of deportation was an important remedy for some battered immigrants who were not statutorily eligible to self-petition – those who were divorced; whose spouses or parents lost lawful permanent resident status due to criminal activity (including domestic violence crimes); whose spouses or parents died before they could file or obtain their permanent resident status under a VAWA self-petition; those victims of child abuse who turned twenty-one before they could file for or obtain lawful permanent residency under VAWA; and those immigrant parents of child abuse victims whose mothers are not married to the abusive citizen or lawful

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widowers, abused spouses and children).

112. *See* VAWA 1994 § 40703(a) (codified at 8 U.S.C. § 1254(a) (repealed 1997) (amending INA § 244(a)) (enumerating conditions that unclassified aliens were required to meet in order to petition for a stay of deportation).

113. *See* IIRAIRA § 384 (codified at 8 U.S.C. § 1367) (noting that § 304 of IIRAIRA created a new § 204A of the INA which replaced the former deportation and exclusion proceedings with removal proceedings). In making this change, IIRAIRA preserved the VAWA immigration protections for battered immigrants and converted VAWA suspension of deportation to VAWA cancellation of removal. Proceedings to remove an immigrant from the United States initiated by the INS after April 1, 1997, are removal actions in which applicants may file for cancellation of removal instead of suspension of deportation. 8 U.S.C. § 1367(a)(2).

114. VAWA 1994 § 40703(a) (codified at 8 U.S.C. § 1254(a)) (repealed 1997); INA § 244(a)(3) as in effect before April 1, 1997, the effective date of IIRAIRA.

115. *Id.*

116. *Compare* 8 C.F.R. § 204.2(c)(i), *with* VAWA 1994 § 40703 (codified at 8 U.S.C. § 1254(a)).

permanent resident.[117] If successful in the VAWA suspension of deportation case, the battered immigrant would obtain lawful permanent residency. If unsuccessful, she would ultimately be forced to leave the United States

4. Credible Evidence Standard

VAWA also created a special evidentiary standard that INS and immigration judges were required to use when adjudicating cases of battered immigrants in VAWA self-petitioning, VAWA suspension of deportation and battered spouse waiver cases. In implementing the 1990 battered spouse waiver amendments, the INS adopted a regulatory approach that was unworkable, insensitive and contrary to congressional intent.[118] In doing so, the INS of that time demonstrated a lack of understanding and a lack of willingness to learn about the dynamics of domestic violence experienced by immigrant women. By regulation, the INS created a requirement that battered immigrant women submit an affidavit of a licensed mental health professional in order to prove extreme cruelty and qualify for the battered spouse provisions.[119]

This approach was unfeasible for most battered immigrants. First, because of their abuser's control over all family funds, most had no access to the economic resources needed to pay for a mental health evaluation.[120] Second, few mental health professionals had the requisite domestic violence training, cultural competency and language abilities to conduct evaluations the INS required for proof of extreme cruelty in these cases.[121] Third, this approach mistakenly focused the extreme cruelty inquiry on the effect the psychological abuse had on the victim instead of on the perpetrator and his abusive conduct. To correct this misinterpretation and ensure that similar regulatory errors did not happen with VAWA 1994, Congress mandated that the INS was required to accept "any credible evidence" in all VAWA and battered spouse waiver cases.[122]

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117. VAWA 1994 § 40703(a) (codified at 8 U.S.C. § 1254(a) (repealed 1997) (amending INA § 244(a).

118. This provision in the regulations was criticized in comments on the interim regulations. *See* Martha Davis & Janet Calvo, *INS Interim Rule Diminishes Protection for Abused Spouses and Children*, 68 INTERPRETER RELEASES 665, 665-68 (1991) (citing excessive burden of proof for establishing extreme cruelty; restrictive and unclear definition of abuse; inadequate confidentiality protections; and a lack of due process protections for self-petitioners).

119. 8 C.F.R. § 216.5(e)(3)(iv)-(vii) (2001).

120. Tamayo, *supra* note 34, at 15.

121. *Id.*

122. *See* VAWA 1994 § 40702 (codified at, 8 U.S.C. § 1186a(c)(4)) (amending INA

5. VAWA Implementation

VAWA 1994 has been critical in removing the reins of power from the hands of many abusive United States citizen and lawful permanent resident spouses and granting control over the immigration process to the battered immigrant women and their children whose lives and well-being depend on the process. From the publication of the interim regulation in March of 1996 through July of 2000, the INS has received more than 11,000 VAWA self-petitions, and has approved over 6,500.[123] Many of the cases that were denied were filed by unqualified persons who filed VAWA self-petitions before VAWA regulations were issued, and many others were cases of battered immigrants who could prove the abuse and a valid marriage but who did not have legal representation or the assistance of a trained advocate and could not prove extreme hardship on their own.[124] This number of approved cases does not include the number of children of VAWA self-petitioners who derived immigration status through an abused parent's self-petition.[125]

Although the passage of VAWA 1994 represented a great stride forward in providing legal protection for battered immigrant women, it was a compromise with a number of significant shortcomings. The legislation helped many very needy battered immigrant women and children abused by their citizen or lawful permanent resident spouses or parents, but many other battered immigrants still remained locked in abusive homes without any real remedy. The shortcomings of VAWA 1994, its implementation problems and additional problems caused by immigration reforms occurring subsequent to 1994 became the focus for battered women's advocates in the drafting of new legislation that, after much delay, became law on October 28, 2000, as part of the Violence Against Women Act of 2000 ("VAWA 2000"). VAWA 2000's immigration provisions were the most recent of several amendments affecting VAWA-eligible battered immigrants. The next section of this Article will discuss immigration laws after 1994 and

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§ 216(c)(4)) (establishing the "any credible evidence" standard in spousal waiver applications); *see also* VAWA 1994 § 40703(b) (codified at 8 U.S.C. § 1254) (repealed 1997) (amending INA § 244) (adding the "any credible evidence" standard to the Attorney General's requirements in considering petitions to suspend deportation).

123. *See Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 91 (2000) (statement of Barbara Strack, Acting Executive Associate Commissioner, INS) [hereinafter *Hearings*].

124. Deletion of this extreme hardship requirement was one of the central objectives of VAWA 2000. *See* discussion of VAWA 2000, *infra* notes 176 - 179 and accompanying text.

125. *See Hearings*, *supra* note 123, at 91.

other legislation that affected battered immigrants and will highlight several of the problems that battered immigrants who needed the protection of VAWA encountered. The final section of this Article will discuss the solutions to these problems that were included in VAWA 2000, as well as the outstanding issues that will make up the battered immigrant women's advocacy agenda for the future.

IV. POST-1994 CHANGES TO UNITED STATES IMMIGRATION LAWS

A. Immigration Laws and Welfare Reforms of 1996

In 1996 and 1997, sweeping changes were made to immigration laws. The passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[126] ("IIRAIRA") and the Antiterrorism and Effective Death Penalty Act of 1996[127] ("AEDPA") drastically limited legal immigration and heavily penalized those who violated immigration laws. The immigration law changes made by these two pieces of legislation included: bars to entry and to legal immigration, summary rejection of arriving asylum seekers, reduction of due process protections in deportation cases, and restriction of federal court review of agency decisions and practices.[128] In addition, the Personal Responsibility and Work Opportunity Reconciliation Act[129] ("PRWORA") that passed the same year cut off many immigrant non-citizens from access to federally and state-funded public benefits.

Despite these restrictive legislative amendments, the advocacy community effectively managed to obtain statutory language in IIRAIRA that preserved access to VAWA's immigration protections, extended and expanded access to public benefits for battered immigrant spouses and children of United States citizens and lawful permanent residents, and secured other enhancements to legal protections for battered immigrants. Three of these enhancements are described below.

1. Exemption from the Three-Year and Ten-Year Bars

IIRAIRA barred immigrants who are in the United States unlawfully from re-entering the United States for either three or ten

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126. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

127. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.).

128. Carol Wolchok, *Demands and Anxiety: The Effects of the New Immigration Law*, A.B.A., HUMAN RIGHTS 12 (1997).

129. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

years depending on the length of their unlawful residence.[130] The 1994 VAWA immigration protections were designed to offer immigration relief and protection to battered immigrant women and children who were in the country illegally, due at least in part to the actions or inactions of their abusive citizen or lawful permanent resident spouses or parents. Since application of the bars to VAWA immigration cases would defeat the purpose of the VAWA 1994 protections, IIRAIRA exempted battered immigrant VAWA recipients from the three- and ten-year bars to re-entry.

One problem with this battered immigrant exception to the three- and ten-year bars was that battered immigrants who illegally entered the United States after April 1, 1997 were required to show a substantial connection between their unlawful entry and the abuse to qualify for an exemption from these bars.[131] This connection could be established any time the abusive relationship predated the unlawful entry. However, in practice few if any battered immigrant women who sought to obtain lawful permanent residency based on an approved self-petition were required to show this substantial connection. Most were able to adjust their status under the provisions of section 245(i) of the Immigration and Nationality Act ("INA"), which allowed them to pay a $1,000 fine to adjust their status to that of a lawful permanent resident without leaving the United States.[132]

2. *Confidentiality Rules*

IIRAIRA also extended to battered immigrants the protection of special, new confidentiality rules that prohibit the INS or other Justice Department officials from releasing information about a battered immigrant's case to any person.[133] These confidentiality provisions were modeled after confidentiality rules that were part of the 1986 amnesty program under the Immigration Reform and Control Act.[134] The confidentiality provisions further barred the INS

130. IIRAIRA § 301(b)(1) (codified at 8 U.S.C. § 1182(a)(9)(B).

131. IIRAIRA §§ 301(b)(3), 309(a).

132. 8 U.S.C. § 1255(i) (1999 & Supp. 2001). However, since access to § 245(i) for adjustment of status in the U.S. ended in January 1998, VAWA 2000 created a separate avenue to adjustment of status that guaranteed that battered immigrants could obtain their lawful permanent residency in the U.S. without risking the dangers to themselves and their children that could arise if battered immigrants with approved self-petitions were required to leave the country to obtain lawful permanent residency. *See* discussion of section 245(i), *infra* notes 142-152 and accompanying text.

133. IIRAIRA § 384 (codified at 8 U.S.C. § 1367).

134. Immigration Reform and Control Act of 1986 Pub. L. No. 99-603, 100 Stat.

from using information provided by an abuser or an abuser's family member against a battered immigrant to deny her application for immigration benefits or harm her in any way.[135]

3. Public Benefits Access for Battered Spouses and Children of Citizens and Lawful Permanent Residents

In the aftermath of VAWA 1994, it became evident that opening an avenue to legal immigration status was not enough to end domestic violence for battered immigrant women. Battered immigrant spouses and children also desperately needed access to the welfare safety net. Escaping a violent relationship is an extremely difficult accomplishment for any victim of domestic violence — citizen or immigrant. On the one hand, battered women often face the danger of violent retaliation from the abuser when they attempt to flee. Women trying to leave violent spouses are twice as likely to become victims of homicide than are abused women who continue to live with their abusers.[136] On the other hand, for their efforts to leave to be successful, they also must struggle to find a means to survive economically apart from the batterer.

One of the most significant improvements IIRAIRA added to the protections for battered immigrants was the restoration of some public benefits to battered immigrants who were denied benefits by the PRWORA.[137] Further, IIRAIRA expanded public benefits access to a group of battered immigrants many of whom were undocumented and prior to IIRAIRA, had no access to the public benefits safety net. Three groups of battered immigrants benefited from this expanded public benefits access include:

1. VAWA self-petitioners and VAWA cancellation and suspension applicants and their derivative children;
2. Battered immigrants who were the beneficiaries of family-based I-130 visa applications filed by abusive United States citizen or lawful permanent resident spouses or parents; and
3. Battered immigrant conditional or lawful permanent residents who had previously been barred from access to public benefits because of deeming.[138]

3359 ("IRCA"), (codified at 8 U.S.C. § 1255(c)(5)(A), (B)).

135. IIRAIRA § 384 (codified at 8 U.S.C. § 1367).

136. Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE & VICTIMS (1993).

137. IIRAIRA § 501 (codified at 8 U.S.C. § 1641).

138. *See* IIRAIRA § 501 (detailing categories of aliens eligible for public benefits); *see also* IIRAIRA § 552 (providing exceptions regarding previously obtained monetary support for battered aliens).

IIRAIRA enacted three provisions designed to facilitate battered immigrant access to public benefits. First, IIRAIRA section 501[139] added a new subsection (c) to section 431 of PRWORA which expanded PRWORA's definition of "qualified alien"[140] to include battered immigrants who were VAWA self-petitioners, VAWA suspension and VAWA cancellation applicants and battered immigrant spouses and children who were beneficiaries of I-130 family-based visa applications among the limited groups of immigrants eligible to access some public benefits.[141] These specified groups of battered immigrants were granted access to welfare benefits despite the fact that they would be undocumented at the time they filed for and received benefits. New section 431(c) allowed this limited group of battered immigrant women and children to become "qualified aliens" eligible for public benefits after they filed for self-petitioning, cancellation or suspension of deportation under VAWA or a family-based visa application, so long as their application contained *prima facie* evidence of eligibility or their application had been approved by the INS.[142]

Second, section 551 (a) of IIRAIRA exempted battered immigrants with VAWA self-petition cases from the affidavit of support requirement.[143] In order to immigrate to the United States based on a family petition, the sponsoring relative (often a spouse or parent) must sign a legally enforceable affidavit promising to support the immigrating family member at an income that is 125% of the federal poverty level.[144] Battered immigrants whose sponsors are their abusers could file a VAWA self-petition and would be exempted from the affidavit of support requirement.

Third, section 552 of IIRAIRA provided an exemption from deeming rules for all battered immigrants who were "qualified

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139. IIRAIRA § 501.

140. Qualified aliens are immigrants who were made statutorily eligible by PRWORA to receive some public benefits. Which benefits they could receive and how long they might have to be in the United States before they could receive them depended in large part on when they first entered the United States, whether they were living in the United States on August 22, 1996, and whether they could meet the heightened eligibility requirements of certain benefits programs (e.g., food stamps and supplemental security income ("SSI")). *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).

141. 8 U.S.C. § 1641(c) (1999 & Supp. 2001).

142. The factors battered immigrants must prove to qualify to receive public benefits under IIRAIRA § 501 will be discussed below. *See infra* notes 161-68 and accompanying text.

143. IIRAIRA § 551(a) (codified at 8 U.S.C. § 1183a(a)(1)(a)).

144. INA § 213A(f)(5).

aliens."[145] Previously, battered immigrants who had received lawful permanent residency through a family-based visa application filed by their citizen or lawful permanent resident spouses or parents were required to have their sponsoring spouse or parent file an affidavit of support. All immigrants, including battered immigrants who received their permanent residency though a family-based visa petition and were required to file affidavits of support had been subjected to deeming rules that effectively barred them from accessing public benefits. Under deeming rules, immigrants applying for benefits are deemed to have full access to all of the assets and income of their sponsoring spouse or parent whose income is counted for the purpose of determining whether the immigrant is income eligible to receive public benefits. The exemption from deeming for battered immigrants was designed to help both battered immigrants with pending or approved VAWA cases or family-based visa petitions and battered immigrants who attained their lawful permanent residency through a spouse-based visa petition in which their abusive spouses had filed an affidavit of support. IIRAIRA removed deeming as a barrier to benefits access for these particular groups of battered immigrant women and children.

Congress included these public benefits provisions in IIRAIRA because it recognized that immigrants battered by their United States citizen or lawful permanent resident spouses or parents would not be able to leave their abusers, cooperate in their abuser's prosecution or seek protection from the courts if they could not sever the economic control their abusers held over them. Without battered immigrant access to the public benefits safety net, the congressional purposes of VAWA 1994 were being thwarted. Battered immigrants who qualified for the stable immigration status offered to them by VAWA 1994 were not applying because they continued to be locked by economic circumstances in the very abusive relationships from which Congress hoped to offer them freedom.

In IIRAIRA, Congress granted access to the welfare safety net to battered immigrants based on its understanding of the key role economic survival plays in battered women's successful escape from abusive relationships. For both citizens and immigrant victims of domestic violence, escaping a violent relationship is not easy. Battered women in the United States typically make 2.4 to 5 attempts to leave their abusers before they ultimately succeed.[146] Absent

145. 8 U.S.C. § 1631(f) (1999 & Supp. 2001).

146. Lewis Okun, *Termination or Resumption of Cohabitation of Women in Battering Relationships: A Statistical Study*, *in* COPING WITH FAMILY VIOLENCE: RESEARCH AND

intervention from the legal system or other sources pressuring the abuser to change his behavior, it is almost guaranteed that the same woman will be assaulted again and again by the same man.[147] Battered women face the danger of escalating violent recrimination from the batterer when they attempt to flee.[148] Women attempting to leave violent spouses are twice as likely to be killed by their abusers as are abused women who continue to cohabit with their abuser.[149]

Additionally, economic dependence of women upon their abusive partners is one of the primary reasons victims of family violence remain in violent relationships.[150] Research has found that more than half of battered women report that they stay with their abusers because they did not feel they could support themselves and their children if they left.[151] Among battered immigrants, this economic factor is an even more significant barrier. Like all battered women, abused immigrants report lack of access to money as the single largest barrier to leaving an abusive relationship.[152] Battered immigrants still living with their abusers report a much higher incidence of economic barriers as compared to the general population of battered immigrant women - lack of money (67.1% vs. 40%), lack of employment (31.8% vs. 20%), and lack of a place to go if they leave (35.3% vs. 18.3%).[153] The level of economic resources available to an abused woman is the best indicator of whether she will be able to separate permanently from the abuser.[154] Women with greater economic dependence on their batterers experience a greater severity of abuse compared to employed women who are abused.[155]

POLICY PERSPECTIVES 107, 113 (1988).

147. S. REP. NO. 101-545, at 36 (1990).

148. CAROLINE HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 5 (1991); Anne Ganley, *Domestic Violence: The What, Why, and Who, as Relevant to Civil Court Cases, in* DOMESTIC VIOLENCE IN CIVIL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION 24 (1992).

149. WILSON & DALY, *supra* note 136.

150. *See generally* MURRAY STRAUSS & RICHARD GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8145 FAMILIES (1990); CATHERINE T. KENNEDY & KAREN R. BROWN, NOW LEGAL DEF. & EDUC. FUND, REPORT FROM THE FRONT LINES: THE IMPACT OF VIOLENCE ON POOR WOMEN 10, 11 (1996).

151. Cris Sullivan et al., *After the Crisis: A Needs Assessment of Women Leaving a Domestic Violence Shelter*, 7 VIOLENCE & VICTIMS 271 (1992).

152. Dutton et al., *supra* note 9, at 295-96.

153. *Id.* at 276-79, 295.

154. Patricia Horn, *Beating Back the Revolution: Domestic Violence's Economic Toll*, 182 DOLLARS & SENSE 12, 21 (1992).

155. Michael J. Strube & Linda S. Barbour, *The Decision to Leave an Abusive Relationship: Economic Dependence and Psychological Commitment*, 45 J. MARRIAGE & FAM. 785, 790-92 (1983).

For battered immigrant self-petitioners, the inability to work legally further exacerbates these problems. Self-petitioners are granted work authorization only after their VAWA self-petition has been approved and they have received deferred action. From the time their VAWA self-petition has been filed, through its approval, receipt of deferred action status, application for and receipt of work authorization can take anywhere from four months to significantly longer.[156] During that time period, many self-petitioners' only option for economic survival may be reliance on the public benefits safety net. For some, government services provide a critical bridge to abused women and children as they attempt to escape abuse and prepare to move on with their lives.

Battered immigrant women and children need to access social services and public benefits as a means to support themselves and their children during difficult periods of transition— away from their abusers and toward self-sufficiency. These public benefits are part of a package of relief that includes: safe shelter, transitional and permanent housing, food and clothes, medical care, court protection, custody of their children, work authorization, and the ability to obtain lawful immigration status. Some battered immigrants who work may only be able to obtain part-time or low-wage employment and may need to rely partially on public benefits to support their children, who are often United States citizens, particularly in cases where the abuser is not paying court-ordered child support.

Congress went out of its way in IIRAIRA to grant access to public benefits for VAWA-eligible battered immigrants and for battered immigrant spouses and children of United States citizens with approved I-130 family-based visa petitions. The PRWORA severely restricted immigrant access to public benefits, but at the same time explicitly granted a limited number of specified immigrant groups access to programs defined as federal public benefits.[157] Although the PRWORA did not include battered immigrants on the original list of immigrants granted benefits, when IIRAIRA passed later in 1996, IIRAIRA added certain battered immigrants to the list of immigrants who could receive benefits.[158] Congress clearly wanted immigrant

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156. Leslye Orloff, *Lifesaving Welfare Safety Net Access For Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 620 (2001).

157. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") §§ 400-451, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C).

158. IIRAIRA § 501, 8 U.S.C. § 1641(c) (adding § 431 to the PRWORA) .

spouses and children abused by United States citizen and lawful permanent resident spouses and parents to gain access to the public benefits safety net.

This approach was consistent with other steps Congress took in 1996 to offer protection for battered women and children. When Congress passed the PRWORA and the IIRAIRA, it included provisions that preserved some access for battered women and battered immigrant women to public benefits, thus providing them with some of the transitional economic support needed to leave an abusive relationship.

The PRWORA included a Family Violence Option ("FVO") which sought to encourage states to screen Temporary Assistance to Needy Families ("TANF") applicants for domestic abuse while maintaining confidentiality, to make referrals to counseling and supportive services, and to grant good-cause waivers of certain welfare program requirements.[159] The FVO would be helpful to many battered women who could qualify for TANF benefits. Further, the waivers could be used to help battered immigrants get credit for English as a Second Language classes as part of a job readiness program and ensure that all battered immigrants are exempt from deeming rules if they have affidavits of support filed with the INS by their abusers. Without this exemption from deeming, states may opt to consider all of the abuser's assets and income as available to the battered immigrants for purposes of determining the battered immigrant's income eligibility for benefits.

The IIRAIRA expanded PRWORA's list of qualified aliens by specifically authorizing that certain groups of undocumented immigrant battered women and children could access public benefits on their own behalf.[160] To qualify for benefits, in addition to having a pending or approved self-petition or family-based visa petition, the battered immigrant must also prove that she has separated from her abuser and that there is a substantial connection between the abuse and the need for the benefit. In cases of battered immigrant applicants who are not self-petitioners but who instead have a pending or approved family-based visa petition case (I-130), these battered immigrants must also prove to the benefits-granting agency that they have been battered or subjected to extreme cruelty.[161] The U.S. Attorney General was delegated the legal responsibility of

159. PRWORA § 103 (codified as amended in scattered sections of 42 U.S.C.).

160. IIRAIRA, Pub. L. No. 104-208, § 501, 110 Stat. 3009, 670 (1996) (codified as amended at 8 U.S.C. § 1641(c) (2000)).

161. *Id.*

determining under which circumstances there would be a substantial connection between the need for benefits and the abuse.[162]

As with VAWA 1994, the battered immigrant access to benefits included in IIRAIRA was a political compromise that only partially achieved its goals.[163] There remained several problems such as adverse public charge determinations, battered immigrants who were newer arrivals were subject to a five-year bar to benefits, and few battered immigrants could access Supplemental Security Income ("SSI") or Food Stamps.[164] After IIRAIRA, battered immigrant eligibility for certain benefits depends in part on the immigrant's date of entry into the United States. With the exception of Food Stamps and SSI, 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

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162. *Id.* For a list of circumstances that demonstrate "substantial connection" between battery and the need for public benefits, see Guidance on Standards and Methods for Determining Whether a Substantial Connection Exists Between Battery or Extreme Cruelty and Need for Specific Benefits, 62 Fed. Reg. 65,285, 65,285-87 Dep't of Justice (Dec. 11, 1997) [hereinafter Guidance Order]. The Attorney General issued an order providing examples of the types of circumstances that demonstrate a "substantial connection" between the need for benefits and battering or extreme cruelty. *Id.* That order includes examples of substantial connection circumstances including when benefits are needed: to enable the applicant to become self-sufficient following separation from the abuser; to enable the applicant to escape the abuser and/or the community in which the abuser lives, or to ensure the safety of the applicant; to counteract a loss of financial support resulting from the applicant's separation from the abuser; because the battery or cruelty, separation from the abuser, work absences or lower job performance resulting from the battery or extreme cruelty cause the applicant to lose her job for safety reasons; because the applicant requires medical attention or mental health counseling, or has become disabled, as a result of the battery or extreme cruelty; because the loss of a dwelling or source of income or fear of the abuser following separation from the abuser jeopardizes the applicant's ability to care for her children; to alleviate nutritional risk or need resulting from the abuse or following separation from the abuser; to provide medical care during a pregnancy resulting from the abuser's sexual assault or abuse; or where medical coverage and/or health care services are needed to replace medical coverage or health care services the applicant had when living with the abuser. *Id.*

Prior to the Justice Department's issuance of the Guidance Order, the Attorney General had published an interim order, which gave notice of the proposed Guidance. 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. 61,344 Dep't of Justice (Nov. 17, 1997) [hereinafter Interim Guidance Order]. This Interim Guidance Order also recognized that battered immigrant women need access to public benefits to be able to survive economically apart from their abuser. *Id.* at 61,370.

163. *See* H.R. CONF. REP. NO. 104-828, at 1 (1996) (acknowledging the disagreeing votes of the two Houses and withdrawing House of Representatives' objections to proposed Senate amendments to IIRAIRA).

164. *Id.* at 137-38, 148.

available to United States citizens.[165] Battered 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 qualified status.[166] These federal means-tested public benefits with restricted access for entrants after August 22, 1996, include: TANF, non-emergency Medicaid, the State Children's Health Insurance Plan ("SCHIP"), Food Stamps and SSI.[167]

B. Access to Legal Services Corporation Services For Battered Immigrants

Unfortunately, cutbacks on immigrant access to public benefits and legal immigration status were not the only 1996 reforms that harmed 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.[168] This law originally even prohibited an LSC-funded organization from using non-LSC funds to provide legal assistance to ineligible non-citizens. Since most legal services offices rely 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.[169]

The following year, Congress amended this law to ameliorate its harsh effect on battered women and abused children. 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.[170] LSC-funded legal services offices can now represent battered immigrant women, regardless of their immigration status, on matters directly related to domestic abuse, as long as they raise non-LSC funds to do so. Which issues are

165. 8 U.S.C. § 1631(d) (2000).

166. 8 U.S.C. § 1613 (2000).

167. 8 U.S.C. § 1611(c) (2000).

168. For the restrictions imposed by Congress on the Legal Services Corporation, see the Omnibus Consolidated Revisions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1321-54 (1996).

169. Restrictions on Legal Assistance to Aliens, 45 C.F.R. §§ 1626.3, .6(a) (2001).

170. OCRAA of 1997, Pub. L. No. 104-208, § 502, 110 Stat. 3009, 3009-59 (1996) (also known as the Kennedy Amendment).

directly related to the abuse has been broadly defined to include representation in a protection order, family court, housing, employment, immigration and other matters where there is a connection between the legal action and the abuse or the victim's ability to overcome the detrimental effects that the domestic violence has had on the life of the victim and the victim's children.[171] It is important to note that victims of domestic violence are the only exception to the 1996 ban on LSC-funded programs providing legal assistance to most non-citizen immigrants. The only other groups of immigrants that LSC-funded programs can represent are immigrant family members of United States citizens or lawful permanent residents who have filed applications for adjustment of status to that of a lawful permanent resident.[172]

There is one caveat, however, that restricts access to LSC-funded legal services for many needy battered immigrants. LSC-funded organizations may only use funds derived from a non-LSC source to represent battered immigrant women who have been battered by a spouse or 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 to the battery.[173] Immigrant women who are not married but who are battered by their boyfriends, the fathers of their children, or by another person in a relationship with the abuse victim that would be covered by the protection order and criminal laws of the state in which the legal services program is operating may not be served by an LSC-funded organization.

A victim of domestic violence may receive services if the legal assistance is directly related to the prevention of, or obtaining relief from the battery or cruelty and if 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;[174] or 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

171. Bilingual Education: Field-Initiated Research Program, 64 Fed. Reg. 19,410-11 (Apr. 20, 1999); Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 45,755-56 (Aug. 29, 1997) (to be codified at 45 C.F.R. pt. 1626).

172. OCRAA of 1996, § 504(a)(11).

173. OCRAA of 1997, § 502.

174. *Id.*

consented, or acquiesced to such battery, and the immigrant did not actively participate in such battery.[175]

While the amendment to the LSC's immigrant restrictions allowed LSC-funded legal services programs to raise funds from non-LSC sources so that they can represent some battered immigrants, this amendment did not go far enough. In many communities, the lawyers who work for LSC-funded organizations are the only experts in the community with significant experience representing battered women in protection order and family court cases. Restricting access to LSC-funded lawyers effectively cuts off access to the justice system for many immigrant victims of domestic violence. There is no logical reason why LSC-funded organizations should not be able to raise funds from non-LSC sources to assist any battered immigrant without regard to who her abuser was and what immigration status she has. Further legislative reforms are needed to correct this problem.

C. A Catch-22 for Battered Immigrants: VAWA's Unfulfilled Promises

Implementation of VAWA posed a special challenge to the Immigration and Naturalization Service. INS typically construes immigration statutes as narrowly possible so as to offer immigration benefits to as few people as possible. In VAWA Congress directed the INS to implement the law in a manner that will assist and offer protection to immigrant victims.[176] Over time to a large extent by concentrating on the handling of VAWA self-petitions at the Vermont Regional Service Center, and creating a team of expert VAWA adjudicators, INS adopted an approach to those cases that was sensitive to victim needs and circumstances.

When VAWA 1994 and battered immigrants began to access public benefits in 1996, advocates and attorneys working with battered immigrants began to identify several significant legal impediments and problems with INS implementation of VAWA that resulted in battered immigrants having less access to legal immigration status than had originally been contemplated. From 1997 though 2000, advocates for battered immigrants collected stories, monitored implementation of legal protections, documented problems and advocated for improvements and legal protections for battered immigrants. Some of the problems were identified as battered

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175. *Id.*

176. *See* Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313, 325 (1995) (discussing how specific provisions of VAWA were designed to assist battered immigrant women under the protection of the INS).

immigrants began applying for relief under VAWA's self-petitioning provisions.

Three of the foremost obstacles were: extreme hardship, public charge and the expiration of section 245(i). Battered immigrants who applied for VAWA self-petitions pro se without the assistance of a trained attorney or advocate were having their self-petitions denied because they had not adequately proven extreme hardship.[177] Battered immigrants also encountered unanticipated obstacles, like public charge issues that arose as untrained immigration officers in district offices across the country were being called upon to adjudicate adjustment applications for battered immigrant self-petitioners. Another major obstacle was placed in the path of battered immigrant self-petitioners under VAWA when Congress allowed section 245(i) of the INA to expire, forcing some battered immigrants to leave the country as their only avenue to obtain lawful permanent residency based on an approved VAWA self-petition.[178]

Although Congress enacted provisions that sought to facilitate a battered immigrant woman's or child's ability to report and escape the abuse by granting access to legal immigration status, public benefits and legal services, certain existing and subsequent immigration laws made it difficult for immigrant victims to actually take full advantage of VAWA 1994. The very group of battered immigrants VAWA sought to protect was caught in a dangerous predicament. Those without legal representation could not obtain VAWA protection because they could not prove extreme hardship. Others could obtain an approved VAWA self-petition that included deferred action status and work authorization, but there were two significant obstacles that could prevent them from ever being able to obtain the lawful permanent residency VAWA sought to promise them. These obstacles were the sunset of INA section 245(i), adverse public charge determinations for receipt of public benefits authorized under IIRAIRA and extreme hardship. Resolving each of these problems required further legislative action.

1. The Sunset of INA Section 245(i)

At the time that VAWA was passed in 1994, there existed a provision in the INA that any immigrant who entered the United

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177. *New Dangers for Battered Immigrants: The Untold Effects of the Demise of 245(i): Hearing on H.R. 3083 Before the House Comm. on the Judiciary*, 106th Cong., n. 26 (2000) (statement of Leslye E. Orloff, Esq., NOW Legal and Education Defense Fund), *available at* http://www.house.gov/judiciary.orlo0720.htm.

178. *Id.* at n. 24.

States illegally, or — in the case of relatives of lawful permanent residents — entered lawfully but worked without permission, overstayed or otherwise violated the terms of their visa, could opt to pay a fine which rose as high as $1,000 to adjust to permanent resident status while remaining in the United States.[179] The INA provision that allowed for this adjustment of status was commonly known as Section 245(i) of the INA. This provision provided significant revenue to the INS[180] and allowed those with approved immigrant visa petitions to remain in the United States while adjusting to lawful permanent residency status.[181] For battered immigrant VAWA self-petitioners who were granted special access to work authorization and deferred action status,[182] this meant the ability to live and work in the United States and to continue to support their children while they waited in what can be a seven-year line to receive their lawful permanent residency status.

Section 245(i) was scheduled to sunset on September 30, 1997.[183] On November 13, 1997, Congress voted to allow section 245(i) of the INA to sunset on January 14, 1998.[184] On November 26, 1997, President Clinton signed legislation containing the provision that eliminated the benefits of section 245(i) for all immigrants seeking permanent residency status.[185] Deletion of section 245(i) from the INA meant that immigrants[186] with approved immigrant visas who either entered the United States illegally or overstayed an earlier visa could no longer adjust status within the continental United States. Instead, these immigrants would be forced to return to their

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179. Congress set the fine at $1000 in 1996; before then, the amount of the fine had fluctuated at much lower amounts. *See generally* H.R. CONF. REP. NO. 104-863, at 608-58 (1996) (outlining the penalty for violators of the immigration laws who seek permanent residency in the United States).

180. Revenues were used, in large part, to fund detention centers for illegal and criminal aliens. S. REP. NO. 105-48, at 32 (1997).

181. Gabrielle M. Buckley, *Immigration and Nationality*, 32 INT'L LAW. 471, 474 (1998).

182. Deferred action status is an agreement from the INS not to take action to deport the battered immigrant while she waited until she could apply for and receive lawful permanent residency.

183. H.R. REP. NO. 105-845, at 191-92 (1999).

184. *Id.*

185. *Id.* at 192; Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2458 (codified as amended at 8 U.S.C. § 1255 (2000)) (amending the INA to limit immigrants' eligibility for status adjustment).

186. Immigrants who entered lawfully and were spouses or children of United States citizens who violated the terms of their visas were allowed to continue to adjust their status within the United States. 8 U.S.C. § 1255.

countries of origin and obtain their green cards[187] through visa processing at United States embassies or consulates abroad. Allowing section 245(i) to sunset was designed to essentially bar immigrants who had been living in the United States unlawfully from obtaining lawful permanent residence. With a few exceptions, any immigrant who had been living in the United States unlawfully for more than six months or more than one year, and left the United States for any period of time, was barred from reentry for either three or ten years respectively.[188] Many battered immigrants were exempt from the three to ten year bar to reentry but were still placed in the dangerous position of having to leave the United States to obtain their lawful permanent residence status through VAWA.

Included among the immigrants who would have to leave the country as their only avenue to obtain lawful permanent residency status were battered immigrant women with approved VAWA self-petitions or immigrants otherwise qualified for VAWA protection. Battered immigrants would be forced to leave the country to obtain their green cards despite the fact that they had been generally exempted from the three-and ten-year bars.[189] Section 245(i) had offered battered immigrants the security of being able to obtain green cards while remaining safely within United States borders. Without section 245(i), many battered immigrants with approved VAWA self-petitions filed after January 14, 1998, were placed in a difficult and dangerous catch-22 situation. Battered immigrants would have to choose between risking the dangers of leaving the protections that United States law offered to stop the violence or remaining with an immigration status in permanent limbo. Hundreds of battered immigrants who could not safely travel abroad were forced to remain in the United States with approved VAWA self-petitions[190] without formal legal immigration status and no safe means to obtain lawful permanent residency status. For some, the expiration of this provision made battered immigrants more vulnerable to abuse and deterred them from leaving their abusers and from bringing criminal charges against their abusers.

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187. The term "green card" is the common term used by non-lawyers to refer to the immigrant visa awarding lawful permanent residency status. The terms green card and lawful permanent residency will be used interchangeably in this article.

188. INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B).

189. INA, 8 U.S.C. § 1182(a)(6)(A)(ii); INA, 8 U.S.C. § 1182(a)(9)(B)(iii)(IV) (discussing the eligibility status of battered women and children).

190. Self-petitioners are granted work authorization and deferred action status which offered some protection, but no permanent legal immigration status. Control of Employment of Aliens, 8 C.F.R. § 274a.12(c)(14) (2001).

2. Devastating Effects for VAWA Self-Petitioners

Battered immigrants who had successfully self-petitioned under VAWA would suffer many hardships and dangers if they were forced to return to their countries of origin to obtain their green cards. Some of these hardships and dangers can be summarized as follows:

a. Risk of Abuse Abroad

Leaving the United States deprives battered immigrants of the protection provided by United States laws, court orders, and law enforcement.[191] Restraining orders are not valid outside the territory of the United States, which makes battered immigrants vulnerable to abuse the moment they leave the jurisdiction of the United States courts.[192] VAWA made restraining orders enforceable across state lines in every United States jurisdiction, however, it contains no provisions regarding enforcement of these orders outside of the United States.[193] Batterers who are United States citizens or lawful permanent residents can readily travel abroad and can take advantage of abused immigrants' lack of legal protection. Since the IIRAIRA of 1996 made the crime of domestic violence a deportable offense,[194] a batterer who is a non-citizen and has been convicted of a domestic violence crime may be deported to the same country where the battered immigrant would be forced to return to obtain her green card.[195]

b. Loss of Custody of the Children

There are no procedures in place at United States embassies and consulates abroad for processing cases of battered immigrants with VAWA self-petitions approved by the INS. Although most battered immigrants are exempt from the three- and ten-year-bars to re-entry that apply to other immigrants who have been unlawfully present in the United States, there are no regulations implementing these exemptions for VAWA self-petitioners.[196] Thus, it is not possible to

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191. Klein & Orloff, *supra* note 54, at 1019-30 (discussing the legal protection available for battered immigrants).

192. *See* Shawn Foster, *Law's Demise Puts Immigrant Wives at Risk*, SALT LAKE TRIB., Jan. 25, 1999, at B1.

193. VAWA 1994 § 40221(a) (1994) (codified at 18 U.S.C. § 2265).

194. IIRAIRA § 350, 8 U.S.C. § 1251.

195. Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 307-08 (1997) (considering the effects of deportation on the battered immigrant's interests).

196. Leslye E. Orloff, Comments on Public Notice 2556, Interim Rule 22 C.F.R. § 240 submitted to Edward Odom. Bureau of Consular Affairs, Department of

predict how long a battered immigrant would have to remain abroad to obtain her green card under VAWA.

If battered immigrants were forced to travel abroad to obtain lawful permanent residency status, they would be separated from their children for an indeterminate period of time. Often, a battered immigrant woman is the sole caretaker of her children and has a court order awarding her custody of the children. Knowing that she would have to leave the United States and potentially remain abroad for several months to obtain her green card creates significant problems for a battered immigrant. For example, a battered immigrant may have to take her children with her so that she can protect them from her abuser. However, taking the children with her may be economically impossible, since she cannot predict how long she will have to remain abroad. Taking the children with her also may result in the violation of a court order awarding her abuser visitation with the children. As a result, the abuser may succeed in having parental kidnapping charges filed against her.[197]

If a battered immigrant decides not to take her children with her when she travels abroad to get her green card, she must then locate a temporary place for the children to stay that is safe from her abuser. This is often a very difficult, if not impossible, task. Whether or not the battered immigrant succeeds in finding a place for her children to stay, once she leaves the United States, her abuser may use her absence from the United States as an excuse to file for permanent custody of the children, claiming that she has abandoned them.[198]

Furthermore, many battered immigrants may not be able to leave the United States because custody matters are still pending in the courts. Neither parent may remove the children from the country without court permission once a custody case has been initiated. To obtain such court permission, a battered immigrant must be able to guarantee to the court that she will return to the United States by a fixed date. Providing such a date is impossible, however, since the battered immigrant will not be able to predict how long it will take to obtain her green card abroad. If she misses a United States court date for a pending custody matter, she may risk losing custody of her children permanently or being held in contempt.

State on behalf of Ayuda and the National Network on Behalf of Battered Immigrant Women 6 (Feb. 26, 1998) [on file with author].

197. *Id.* at 5.

198. *Id.* at 5-6.

c. Abuser Kidnapping the Children

Battered immigrants who contemplated leaving the United States to attain their green cards have been concerned that if they leave their children in the United States with a trusted relative, their abusers will either petition the courts for custody of the children or attempt to kidnap the children. Conversely, battered immigrants have also been concerned that if they bring their children with them to their countries of origin, their batterers will follow them there, kidnap the children, and take the children back to the United States or to another country.

d. Shame and Loss of Familial Support

Many battered immigrants would face severe social stigma if they were forced to return to their countries of origin after divorcing or separating from their husbands.[199] Women are often deterred from reporting domestic violence in the United States or leaving their abusers because they fear that their families and communities in their countries of origin will condemn or ostracize them for publicly exposing their husbands' abuse and breaking up the traditional family unit.[200] Religious norms and social constructions of gender roles in the immigrants' home countries also penalize the returning immigrant who has dared to leave her abusive husband.[201] Thus, VAWA self-petitioners forced to return to their home countries to obtain their green cards may not be able to access help and support from their families and communities during the time they must remain abroad.

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199. *See* Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 681-82 (1998) (describing cultural challenges that prevent women from reporting abuse). *See also* Uma Narayan, *Male-Order Brides: Immigrant Women, Domestic Violence and Immigration Law*, 10 HYPATIA 104, 108 (1995) (describing the ostracism of Indian women who return home after having left their abusive husbands). In some countries, shelters and services for survivors of domestic violence may not exist. In other countries, laws against domestic violence may be greatly under-enforced, either because the laws have only recently been passed or because law enforcement fails to respond to domestic violence reports. *Id.*

200. Narayan, *supra* note 199, at 106 (citing Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1311-26 (1991), and giving the example of Asian women at a Los Angeles battered women's shelter who refrained from reporting domestic violence due to a need to preserve the family honor).

201. *See* Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1420-21 (1993) (explaining that poverty, lack of access to services, lack of privacy, and fears for their own safety impede women from repeating abuse).

e. Lack of Physical and Mental Health Care Abroad

Victims of domestic violence and their children often suffer from physical and mental health problems as a result of the abuse.[202] These problems include depression, low self-esteem, post-traumatic stress disorder, and long-term physical injuries caused by the abuse.[203] If a battered immigrant or her children receive treatment from mental health professionals in the United States, discontinuing treatment for the weeks or months needed to obtain a green card abroad could cause tremendous emotional damage for women and children struggling to rebuild their lives.[204] Additionally, for some battered immigrants or their children, travel abroad for any period of time would disrupt treatments they are receiving in the United States for physical ailments. Often, these immigrants would be unable to find an adequate level of affordable health care treatment in their home countries. The issue becomes even more complicated when a battered immigrant's child has a physical ailment that requires treatment in the United States. If the battered immigrant is the sole caretaker of the child, and the immigrant would be forced to take the child with her when seeking her green card, discontinuing the child's medical treatment could result in life-threatening consequences for the child.

f. Poor Socio-political Conditions Abroad

Returning to the battered immigrant's country of origin could also, in some cases, subject her to political persecution, war, torture, jail, extreme poverty, disease, entrenched gender discrimination, or death.[205]

3. Infeasibility of Consular Processing for VAWA Self-Petitions

Consular officers abroad have not received the training they need to enter proper decisions regarding VAWA self-petitioners' qualifications for lawful permanent residency. Untrained consular

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202. *See* Deborah Weissman, *Protecting the Battered Immigrant Woman*, 68 FLA. B.J. 81, 82 (1994) (stating that the consequences of reporting domestic violence for immigrants can be harsh).

203. *See id.* (stating that an immigrant woman is likely to suffer from the same symptoms as a non-immigrant woman being abused).

204. *See* Anderson, *supra* note 201, at 1414 (pointing out that "immigrant women usually do not turn to the mental health professionals or to the counselors needed to prove mental cruelty.").

205. *See* Weissman, *supra* note 202, at 82 (reporting evidence that conditions in women's home country may endanger and jeopardize a woman's ability to gain permanent residence from a U.S. consulate abroad).

officials may choose to re-open and re-evaluate approved VAWA self-petitions. Allowing consular officials who do not appreciate the particular problems battered immigrants face to overturn decisions made by INS adjudicators with expertise in domestic violence poses grave dangers to battered immigrants.

The problem and danger to battered immigrants lies in allowing consular officers abroad to determine whether or not battered immigrants will receive legal permanent residency. First, the domestic violence that the approved VAWA self-petition was based upon must usually have occurred in the United States.[206] Any additional evidence to support the self-petition is also usually in the United States. Thus, a battered immigrant would be unable to gather whatever additional evidence might be needed to convince the consular official to grant her lawful permanent residency status based on her self-petition.

Second, within the United States, both administrative agency and judicial review are afforded to all immigrants whose self-petitions or adjustment applications are denied approval by the INS. By contrast, no judicial review is available to immigrants for decisions made by consular officers at embassies and consulates abroad.[207] The consular officer could deny the battered immigrant a green card and trap her in her country of origin without a way to legally re-enter the United States. No review of the consular officer's decision would be available.[208]

Even though a battered immigrant has left the United States with an approved VAWA petition in hand, a consular officer abroad could determine that the battered immigrant's personal affidavit was not believable, or that she did not suffer enough violence, although no specific quantity of violence is required by the statute. These problems are common when untrained judges and adjudicators issue rulings in domestic violence cases in the state courts in the United States. They rise from a lack of understanding of the psychological

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206. *See* VAWA 2000 § 1502 (codified at 8 U.S.C. § 1101) (including amendments that allow spouses of U.S. government employees and military members who were abused abroad to file self-petitions).

207. *See* Pena v. Kissinger, 409 F. Supp. 1182, 1185 (S.D.N.Y. 1976) (quoting United States ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928): "whether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to vise a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against, ... It is beyond the jurisdiction of the court.").

208. *Id.* (noting that there is substantial support in the cases for the government's position that consular decisions in regard to the issuance of visas are unreviewable).

dynamics of abusive relationships.[209]

Once trained, most adjudicators come to understand that facts which, to an untrained decision-maker would raise questions as to the abuse victim's credibility, so closely fit patterns of domestic violence that these same facts actually enhance the petitioner's credibility. For example, untrained adjudicators may fail to credit a battered woman's testimony because they cannot believe she would have stayed in the relationship if such abuse were occurring.[210] A trained adjudicator would understand that she stayed because of her abuser's power and control over her.[211]

The INS has followed the lead of other justice system professionals who work on issues of domestic violence. Many courts, police departments, and prosecutors' offices have created specialized units with trained staff to handle domestic violence cases.[212] The INS has adopted this integrated approach. A team of adjudicators who work only on VAWA cases has been formed, allowing for the centralized

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209. *See* Rimonte, *supra* note 200, at 1319 (stating that a woman abused by her husband often hesitates a very long time before attempting to do anything about the violence).

210. *See id.* (stating that to some people, a woman's inaction appears to suggest collusion).

211. *See* Anderson, *supra* note 201, at 1402 (quoting Beckie Masaki, the Executive Director of San Francisco's Asian Women's Shelter, saying, "[T]he batterer uses his citizenship to control and humiliate his wife," and Pat Eng, founder of the New York Asian Women's Center, saying, "Batterers invariably use the threat of deportation as a weapon in the abuse of their alien wives.").

212. Memorandum from Grace Carswell, VAWA Unit Supervisor, Vermont Regional Service Center, Immigration and Naturalization Service on the VAWA Unit, from the Immigrant Women Program of NOW Legal Defense and Education Fund [on file with author]. *See* SUSAN KEILITZ, SPECIALIZATION OF DOMESTIC VIOLENCE CASE MANAGEMENT IN THE COURTS: A NATIONAL SURVEY (2000); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System* 11 YALE J.L. & FEMINISM 3 (1999); MARTHA WADE STEKETEE & SUSAN KEILITZ, IMPLEMENTING AN INTEGRATED DOMESTIC VIOLENCE COURT: SYSTEMIC CHANGE IN THE DISTRICT OF COLUMBIA 5. Examples of specialized criminal misdemeanor domestic violence dockets can be found in Winnipeg, Ontario. E. Jane Ursel, *The Family Violence Court of Winnipeg*, MANITOBA L.J. 100, 100-02 (1994). More examples of specialized domestic violence dockets can be found in Denver County, Colorado; Philadelphia County, Pennsylvania; and Marion County, Indiana. *See also* MIRTHA MERRYMAN, SPECIALIZED DOMESTIC VIOLENCE COURTS: A NEW MEANS TO ADDRESS AN AGE OLD PROBLEM 33, 51, 62 (1994) (unpublished manuscript on file with author). Another example of specialized domestic violence dockets for criminal misdemeanor and felony cases can be found in San Francisco. *See The San Francisco District Attorney's Office Domestic Violence Felony and Misdemeanor Prosecution Protocol*, District Attorney's Office, San Francisco, California, 13, 22, 26, Jan. 1997; Cook County State's Attorney Office, Domestic Violence Division (TAC) Informational Booklet (1998); Susan Lictman, *UM ALUMS Help Stop the Violence*, BARRISTER, Feb. 1993, at 10; Linda Dakis, *Dade County's Domestic Violence Plan: An Integrated Approach*, TRIAL, Feb. 1995, at 48; Klein & Orloff, *supra* note 54, at 846 (noting that the effective provision of legal assistance and services to battered immigrant women requires that advocates, attorneys, police, and courts receive training and education on domestic violence issues).

collection and adjudication of VAWA self-petitions. All VAWA cases are handled by a group of specially trained immigration adjudicators at the INS Vermont Service Center.[213] This group of officers has been made aware of the particular evidentiary burdens that victims of domestic violence face and have developed expertise in adjudicating these cases.

Decisions about whether to grant a battered immigrant with an approved VAWA self-petition lawful permanent residency are best made in the United States for a variety of reasons. Requiring travel abroad endangers victims and places the decision about lawful permanent residency in the hands of consular officials who are not trained on domestic violence and who do not have ready access to evidence of abuse that occurred in the United States. Further legislative action was needed to ensure that battered immigrant VAWA self-petitioners could attain legal immigration status while remaining under the protection of United States laws. This change was one of the primary achievements of VAWA 2000.

4. Extreme Hardship

A second significant drawback of the VAWA 1994 legislation was that as a pre-cursor to approval, VAWA self-petitioners had to prove to the INS that they would suffer extreme hardship if forced to return to their countries of origin.[214] The extreme hardship proof was one of the many evidentiary requirements that battered immigrants had to meet in order to gain approval of their VAWA self-petitions. Immigrants who benefit from family-based petitions filed by non-abusive spouses or parents can receive lawful permanent residency status without proving extreme hardship.[215] Since not all VAWA self-petitioners could meet this test, many chose to remain with their abusive citizen or lawful permanent resident spouses in the hope that they might someday file and follow through with immigrant visa petitions for their wives.

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213. *See* Lori Romeyn Sitowski, *Congress Giveth, Congress Taketh Away, Congress Fixeth Its Mistake? Assessing the Potential Impact of the Battered Immigrant Women Protection Act of 2000*, 19 LAW & INEQ. 259, 274 (2001) (describing the two-step process that abused immigrants can use to gain legal status on their own).

214. VAWA 1994 § 40701 (codified as amended in scattered sections of multiple sections of 8 U.S.C.). The extreme hardship requirement was deleted from self-petitioning by VAWA 2000. VAWA 2000 §§ 1503(b) & (c) (amending 8 U.S.C. 1154(a)(1)(A)(iii)&(iv) (Supp. II 1996) & 8 U.S.C. 1154(a)(1)(B)(ii))&(iii) (Supp. II 1996).

215. Kelly, *supra* note 199, at 686 (stating that the "extreme hardship" test of VAWA is unnecessary because it merely forces women to rely on abusive spouses when applying for residency).

Generally, a battered immigrant could meet the extreme hardship test[216] if she proved that her abuser was able to travel to her country of origin, that she would be in danger due to the loss of her United States restraining order while traveling outside the United States, or that her country of origin lacked laws or services to protect her from abuse. She might also meet the test if she proved that she would lose custody or visitation of her children by being forced to leave the United States, or if she or her children would suffer from physical or mental health problems by discontinuing the treatment they were receiving in the United States to help them cope with the effects of the abuse. She had to show that similar physical or mental health services were unavailable in her country of origin. Alternatively, she could have met the test by demonstrating that she and her children would suffer due to human rights violations or political and social turmoil present in her country of origin.[217]

Proving extreme hardship was particularly difficult for battered immigrant women who filed for VAWA immigration relief on their own without the help of a trained advocate or attorney. The extreme hardship requirement resulted in many denials of VAWA self-petitions for battered immigrants who could prove unequivocally that they had been a victim of battering or extreme cruelty, that they were of good moral character, and that they were in a valid marriage to a United States citizen or lawful permanent resident. Each time a battered immigrant who could prove the violence and a valid marriage was denied VAWA protection because she could not prove extreme hardship, the battered immigrant and her children would remain without protection from ongoing abuse, and a United States citizen or lawful permanent resident would not be held accountable in any legal forum, be it family or criminal court, for his domestic violence. The extreme hardship requirement harmed many battered immigrants. For these reasons, deleting the extreme hardship requirement from self-petitioning was an important part of the legislative improvements for battered immigrants that advocates sought from the VAWA 2000.

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216. Petition to Classify Alien as Immediate Relative of a U.S. Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061, 13,067 (INS, Mar. 26, 1996) (to be codified at 8 C.F.R. pts. 103, 204-05, 216).

217. Orloff et al., *supra* note 176, at 327 (discussing factors the court will look at, besides violence, when it renews suspension cases).

5. Public Benefits Authorized by IIRAIRA and Adverse Public Charge Determinations

Another significant problem facing the battered immigrants and their advocates was the lack of clarity concerning how public charge determinations would be made in cases of battered immigrants applying for lawful permanent residency. Under immigration laws, an applicant may be denied lawful permanent residency if he or she is determined likely to become a public charge. The INS considers many factors, and receipt of public benefits by the applicant is one of the most critical indicators of whether a person is likely to become a public charge. This fact prevented many battered immigrant women and children from applying for public benefits they desperately needed because they feared that accessing those benefits would result in being denied adjustment of status or an immigrant visa on public charge grounds. Such misperceptions were occurring despite the fact that Congress explicitly authorized access to public benefits under IIRAIRA for battered immigrants.

Although Congress in IIRAIRA recognized that battered immigrant women need access to public benefits to be able to survive economically apart from their abusers, the INS did not issue clear guidance or regulations confirming that immigrant women and children who were granted access to public benefits by IIRAIRA would be exempt from public charge determinations.[218] If battered immigrants are determined to be inadmissible on public charge grounds, this finding effectively denies them access to lawful permanent residency based on their approved VAWA self-petition. Granting legal access to the welfare safety net does not help abused self-petitioners unless they can be assured that seeking the help afforded them by Congress will not cut them off from access to lawful permanent residency through VAWA.[219] This lack of clarifying regulations resulted in widespread confusion on the part of battered immigrants, providers, community members, and state welfare

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218. The INS issued proposed rules and field guidance limiting the instances in which public charge inadmissibility would be used to deny lawful permanent residency to otherwise qualified immigrants. *See* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,685 (INS, May 26, 1999) (to be codified at 8 C.F.R. § 237.14(a)). These rules clarified that for public charge purposes, the only public benefits that would be considered were cash assistance and long term institutional care. The benefits must have been received by the individual applying for lawful permanent residency. Benefits received by a citizen or lawful permanent resident child or family member would only be considered if they were the sole source of income for the immigrant applicant's family.

219. *See* Dutton et al., *supra* note 9, at 304 (explaining that an abused woman can only receive benefits if she provides proof that she has separated from her abuser).

workers about the legal rights of battered immigrant women and their children and rendered the safety net created by Congress difficult for many to access out of fear that it could lead to their deportation.[220]

As a result, many eligible women refused to apply for welfare benefits they desperately needed because they feared that accessing those benefits would result in being denied adjustment of status to lawful permanent resident on public charge grounds. Some returned to their abusers and waited for a period of time until they could attain their lawful permanent residency under VAWA while suffering ongoing additional abuse. Other battered immigrants were forced to trade the dangers of their home with the abuser for the dangers of the streets, living in substandard housing and trying to feed, clothe, and care for their children by any means they could. Women who did access public benefits out of sheer necessity were afraid to file for adjustment of status once their VAWA applications had been approved.[221] Still others refused to apply for VAWA relief and chose instead to return to their batterers, who promised to file immigration cases and affidavits of support for them.

The group of battered immigrants that VAWA and IIRAIRA sought to protect was caught in a dangerous predicament. They could file for relief under VAWA and be granted access to the same welfare safety net that for years has saved the lives of battered women in the United States. However, if they availed themselves of these life-saving benefits, they could not be assured that use of benefits would not ultimately lead to being denied lawful permanent residency by the INS or a consular officer on public charge grounds. For years, advocates sought a regulatory answer to this conundrum.[222] When none was forthcoming, a legislative solution was the only option. Advocates for battered immigrants sought to have included in VAWA 2000 provisions that would exempt battered immigrants from the public charge grounds of inadmissibility.[223]

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220. Letter to Karen Fitzgerald, INS, from the National Network on Behalf of Battered Immigrant 9-10 (Dec. 18, 2000) (on file with author).

221. *Id.*

222. Memorandum from Leslye Orloff and Janice Kaguyutan, Public Charge Exemption for Violence Against Women Act Self-Petitioners, to Doris Meissner, Commissioner on the INS (Nov. 3, 1998) (on file with author).

223. *See* 8 U.S.C. § 1182(4)(A) (stating that any alien who is likely to become a public charge is inadmissible); *see also* Ryan Lillenthal, Note, *Old Hurdles Hamper New Options for Battered Immigrant Women*, 62 BROOK. L. REV. 1595, 1631 (1996) (advocating for change in VAWA's treatment of battered immigrant women because the "public charge ground for inadmissibility . . . promotes a system which incarcerates battered women in abusive relationships because of their poverty).

Despite the progress that had been made to protect the rights of battered immigrants by 1999 and 2000, it was clear that immigration law as it existed at the time offered an imperfect and often ineffective solution for many immigrant victims of domestic violence. Numerous problems had been identified by advocates across the country, many of whom were members of the National Network on Behalf of Battered Immigrant Women. The expiration of section 245(i) denying many battered immigrants the ability to obtain lawful permanent residency in the United States, the role extreme hardship played in cutting many needy victims off from VAWA self-petitioning protection, the uncertainty about how public charge analyses would be applied in cases of battered immigrants — taken together with other problems and concerns about the effectiveness of the immigration protections offered to immigrant victims of domestic violence — gave rise to the need for further improvements in the legislative protections offered to battered immigrants.[224]

V. VAWA 2000'S LEGISLATIVE SOLUTIONS

Although the original VAWA 1994 helped significant numbers of battered immigrants, in many respects, the legislative protections for battered immigrants remained incomplete. Immigration and welfare reform laws passed subsequent to VAWA 1994 effectively barred access to VAWA protection for many immigrants, and implementation problems continued to plague the VAWA process.[225] As a result, many immigrant domestic violence victims remained trapped in these violent relationships despite the significant gains in VAWA.[226] Further, the original VAWA 1994 did not offer any protection to several categories of battered immigrants: those abused by citizen and lawful permanent resident boyfriends; immigrant spouses and children of abusive non-immigrant visa holders or diplomats;[227] immigrant spouses, children and intimate partners abused by undocumented abusers; and non-citizen spouses and children of abusive United States government employees and military

224. *See* Dutton et al., *supra* note 9, at 304 (concluding that further law reforms are necessary to provide full VAWA relief and benefits).

225. *See* Anderson, *supra* note 201, at 1405 (listing the IMFA as authorizing the INS to increase the scrutiny of the immigrant nuptial ties).

226. *See id.* (pointing out that what Congress had intended as a tool to increase scrutiny "inadvertently increased abuser's coercive power over conditional resident spouses").

227. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(D)-(E),(H)-(J), (L) (1997) (providing visas to workers); 8 U.S.C. § 1101(a)(15)(A) (providing visas to diplomats); 8 U.S.C. § 1101(a)(15)(F) (providing visas to students).

members living abroad. In response, the battered immigrant advocacy community mounted a campaign to seek legislative responses to the problems battered immigrants still faced.

Through the bipartisan efforts of sympathetic members of Congress working collaboratively with the advocacy community, Congress passed and President Clinton signed into law the Battered Immigrant Women Protection Act of 2000 as a part of the VAWA 2000 on October 28, 2000.[228] The immigration provisions contained in VAWA 2000 were a bipartisan compromise[229] that included many, but not all, of the reforms advocates sought. VAWA 2000's immigration provisions were designed to restore and expand access to a variety of legal protections for battered immigrants by addressing residual immigration law obstacles standing in the path of battered immigrants seeking to free themselves and their children from abusive relationships.[230]

Congress clarified its intent with regard to these expanded battered immigrant protections in the following way:

> [T]he Battered Immigrant Women Protection Act of 2000 . . . 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.[231]
>
> 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.[232]

The next section provides an overview highlighting some of the many new provisions included in VAWA 2000 that grant improved

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228. VAWA 2000 § 1001.

229. *See* Ann Moline, *Bipartisan Women Made Anti-Violence Act Happen*, *available at* http://www.womensenews.com/article.cfm/dyn/aid/376/context/archive (Dec. 18, 2000) (discussing how Senator Kennedy and two women staffers, one Democrat, Esther Olavarria, and one Republican, Lee Liberman Otis, collaborated to pass legislation to help battered immigrant women).

230. 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary).

231. *Id.* at S10,192 (Joint Managers' Statement).

232. *Id.* at S10,195 (Violence Against Women Act of 2000 Section-by-Section Summary).

access to legal protection for battered immigrants.[233]

A. *Improved and Expanded Access to VAWA Immigration Protection*

The immigration protections included in VAWA 2000 were generally designed to expand access to VAWA and to remove obstacles battered immigrants faced when leaving or attempting to leave an abusive relationship.[234] The VAWA 2000 amendments remove stringent evidentiary requirements and broadened the categories of immigrants who may be eligible for VAWA protection.[235]

1. *Easing VAWA Requirements*

As part of their VAWA case, battered immigrants were required to provide extensive documentation that they would suffer extreme hardship if deported back to their home country.[236] This difficult evidentiary standard prevented many battered immigrants from receiving approvals of their VAWA cases, particularly when self-petitioners were not represented by counsel. VAWA 2000 removed this unnecessary requirement, thereby making it easier for battered immigrants to win approvals of their VAWA self-petitions.[237] Proving extreme hardship was the most difficult part of the VAWA self-petition and often required the assistance of an attorney. Deleting this requirement will make collaborations between battered women's advocates and attorneys easier and will allow advocates to collect more of the evidence in VAWA cases. Collaborating with battered women's advocates, attorneys assisting battered immigrants in VAWA self-petitioning cases can help many more battered immigrants than they could if they were handling each case without the assistance of domestic violence experts.

2. *Expanded Categories*

VAWA 2000 extends VAWA 1994 immigration protections to many

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233. Charts are appended to this Article providing a more detailed analysis of the new protections for battered immigrants and immigrant crime victims that were included in VAWA 2000.

234. 146 CONG. REC. S10,195.

235. *See* Anderson, *supra* note 201, at 1418 (discussing the high evidentiary requirement abused women must meet).

236. *See* discussion *supra* Part IV.C.4.

237. VAWA 2000 § 1503 (codified at 8 U.S.C. §§ 1101, 1154, 1430); *see also* 146 CONG. REC. S10,195 (explaining that section 1503 "allows abused spouses and children who have already demonstrated to the INS that they have been the victims of battery or extreme cruelty by their spouse or parent to file their own petition for a lawful permanent resident visa without having to show they will suffer 'extreme hardship' if forced to leave the U.S.").

battered immigrants and children of battered immigrants who previously did not qualify for VAWA, but were nonetheless subjected to battery or extreme cruelty by their United States citizen or lawful permanent resident spouse or parent. These expanded categories of persons include:

- battered spouses who unwittingly marry bigamists;[238]
- battered children and children included in their abused parent's VAWA case who turned twenty-one years of age before they could be granted lawful permanent residence;[239]
- children of battered immigrants granted VAWA cancellation of removal or VAWA suspension of deportation who could receive humanitarian parole;[240]
- battered spouses and children who file VAWA self-petitions within two years of divorce, loss of citizenship, or permanent resident status, and in the case of an abusive citizen spouse, within two years of the spouse's death;[241]
- battered immigrants living abroad who are abused by their citizen or lawful permanent resident spouses or parents who are United States government employees or who are members of the United States uniformed services (including military members);[242]
- battered immigrants currently residing abroad who have been subjected to one or more incidents of abuse that occurred in the United States perpetrated by their citizen or permanent resident spouse or parent;[243] and
- spouses and children of Cuban, Haitian and Nicaraguan abusers by allowing abused spouses and children to self-petition who are granted access to protections of Nicaraguan Adjustment and Central American Relief Act of 1997 ("NACARA") and Haitian Refugee Immigration Fairness Act of 1998 ("HRIFA").[244]

VAWA 1994 included a requirement that battered immigrants applying for VAWA self-petitions were originally required to provide evidence to the INS that their abusive citizen or lawful permanent

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238. VAWA 2000 § 1503(c)(1) (codified at 8 U.S.C. § 1154).
239. *Id.* § 1503(d) (codified at 8 U.S.C. § 1154(a)(1)(D)).
240. *Id.* § 1504 (codified at 8 U.S.C. § 1229b(b)(4)).
241. *Id.* § 1503(b)(1)(A) (codified at 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC))
242. *Id.* (codified at 8 U.S.C. § 1154(a)(1)(A)(v)).
243. *Id.* (codified at 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(dd)).
244. *Id.* §§ 1509-1511 (codified at 8 U.S.C § 1255).

resident husband had never been married before or had obtained a divorce from each of his previous wives. This requirement posed problems for two groups of battered immigrant victims of domestic violence who otherwise qualified as VAWA self-petitioners. First, it cut off VAWA protection for battered immigrants who had unknowingly married bigamists. These victims were often immigrant women who went through a marriage ceremony either in the United States or in their home country and believed they had legally married a United States citizen or lawful permanent resident who had represented that he was divorced or had never been previously married.[245] The second group of battered immigrants harmed by this requirement were immigrant victims of domestic violence who were not married to bigamists but who could not safely access the information they needed to prove their abusive citizen or lawful permanent resident husband's prior divorces.

Congress amended VAWA's self-petitioning requirements to allow unknowing spouses of bigamists to self-petition, understanding that making this change would also help battered immigrants who were not married to bigamists but who could not obtain the information they needed to prove their husband's prior divorces. If spouses of bigamists could self-petition, it was understood that it would no longer be necessary to require that all self-petitioners prove each of their spouse's prior divorces. Congress recognized that both of these groups of self-petitioners needed improvements in the self-petitioning statute to facilitate their safe access to VAWA self-petitioning. The Congressional Record stated the following:

> We would anticipate that evidence of such a battered immigrant's legal marriage to the abuser through a marriage certificate or marriage license would ordinarily suffice as proof that the immigrant is eligible to petition for classification as a spouse without the submission of divorce decrees from each of the abusive citizen's or lawful permanent resident's former marriages. For an abused spouse to obtain sufficient detailed information about the date and the place of each of the abuser's former marriages and the date and place of each divorce, as INS currently requires, can be a daunting, difficult and dangerous task, as this information is under the control of the abuser and the abuser's family members. Section 1503 should relieve the battered immigrant of that burden

245. *See* 146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary) (stating that VAWA 2000 amended the VAWA 1994 requirements and added that a victim of a batterer can file a petition as long as she believes she is the spouse of a citizen or lawful permanent resident).

in the ordinary case.[246]

Thus, with the VAWA 2000 changes in the law, battered immigrants should no longer be required to submit to the INS evidence of their abuser's prior marriages and divorces. Proof in the form of a marriage certificate, or marriage license, or other evidence about the marriage should be sufficient to prove a valid marriage. This same evidence should also be sufficient to prove, in the case of a bigamist citizen or resident spouse, that the immigrant spouse entered the marriage without knowledge of the bigamy.

As originally drafted, VAWA 1994 allowed battered immigrant self-petitioners to include any of their undocumented children in their VAWA self-petition as derivative beneficiaries. Under this scheme, the children of battered immigrants would be able to attain lawful permanent residency at the same time as their mother, based on the mother's approved VAWA self-petition. This system paralleled the relief available in all family-based immigration cases. One of the problems that arose as VAWA 1994 was implemented was that, many teenage children of VAWA self-petitioners married to lawful permanent residents aged out. The process of obtaining permanent residence took several years and teenagers reached their twenty-first birthday before they could obtain lawful permanent residency under VAWA. Under a family-based petition in a non-abusive relationship, the citizen or lawful permanent resident parent would be required to file a new petition for them, and the children would eventually attain legal permanent residency. However, in abusive relationships, the structure of the law that required a new filing if a child turned twenty-one allowed abusers to retain a weapon of power and control they could continue to use against the battered immigrant spouse. To remedy this problem, VAWA 2000:

> allows abused children or children of abused spouses whose petitions were filed when they were minors to maintain their petitions after they attain age 21, as their citizen or lawful permanent resident parent would be entitled to do on their behalf had the original petition been filed during the child's minority, treating the petition as filed on the date of the filing of the original petition for purposes of determining its priority date.[247]

Similarly, VAWA 2000 expanded protection for children of battered immigrant parents and parents of battered immigrant children who are granted VAWA cancellation of removal and

246. *Id.*

247. *Id.* at S10,195 (discussing VAWA 2000 § 1503).

suspension of deportation.[248] Under prior law, battered immigrants who received VAWA protection in deportation or removal proceedings could not receive any immigration relief in the same proceeding for their undocumented immigrant children or parents. Some battered immigrants were able to file self-petitions and have their children receive protection through the self-petition, but not all battered immigrants could exercise this option, as the category of persons eligible for VAWA cancellation or suspension could often include persons who did not qualify to self-petition. Thus, Congress included in VAWA 2000 a provision designed to provide protection to the children of battered immigrant cancellation and suspension grantees through grants of humanitarian parole. The same relief was offered to non-abusive parents of immigrant child abuse victims although in most cases, these protective parents would independently qualify for VAWA cancellation. Those living outside of the United States could avail themselves of this option particularly if it could help keep the abused child out of foster care. Congress expressed the following on this issue:

> [W]hile VAWA self-petitioners can include their children in their applications, VAWA cancellations of removal applicants cannot. Because there is a backlog for applications for minor children of lawful permanent residents, the grant of permanent residency to the applicant parent and the theoretical available of derivative status to the child at that time does not solve this problem. Although in the ordinary cancellation case, the INS would not seek to deport such child, an abusive spouse may try to bring about such result in order to exert power and control over the abused spouse. Section 1504 directs the Attorney General to parole such children, thereby enabling them to remain with the victim out of the abuser's control. This derivative should be understood to include a battered immigrant's children whether or not they currently reside in the U.S., and therefore to include the use of his or her parole power to admit them if necessary.[249]

As a result VAWA 2000 "[d]irects the Attorney General to parole children of battered immigrants granted cancellation until their adjustment of status application has been acted on, provided the battered immigrant exercises due diligence in filing such application."[250]

In order to be eligible for VAWA, the battered immigrant must be

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248. VAWA 2000 § 1504 (codified at 8 U.S.C. § 1229b(b)(4)).

249. 146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (Joint Managers' Statement).

250. *Id.* at S10,195.

or have been married to the abuser or be the child of the abuser, and the abuser must be a citizen or lawful permanent resident. VAWA 2000 now allows a battered spouse whose citizen spouse died, whose spouse lost citizenship, whose spouse lost lawful permanent residency, or from whom the battered spouse was divorced to file a VAWA case. Applicants must file the self-petition within two years of divorce, the abusive citizen husband's death, or the abusive spouse's loss of citizenship or residency status.[251] If a battered immigrant is filing a VAWA self-petition within two years of divorce, the battered immigrant must demonstrate a connection between the legal termination of the marriage and the battering or extreme cruelty.[252] This connection can be demonstrated in a variety of ways, including the following: obtaining a protection order, including in the divorce complaint or answer information about the domestic violence, or providing evidence that domestic violence in the relationship predated the divorce or continued after the divorce. In addition, battered immigrants with approved VAWA self-petitions who have not yet attained lawful permanent residency status, can remarry.[253] Their remarriage will no longer prevent them from obtaining legal permanent residency based on their approved VAWA self-petition.[254]

Another category of battered immigrants who can now seek VAWA immigration protections are the abused spouses and children of members of the United States military stationed abroad.[255] Abused spouses of other United States government officials stationed abroad who work for the United States Department of State or any other United States government agency may also file VAWA self-petitions under the VAWA 2000 amendments.[256] Similarly, battered immigrants who were abused in the United States but who now find

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251. VAWA 2000 § 1507 (codified at 8 U.S.C. §§ 1154(a)(1)(A), 1154(a)(1)(B)). Additionally, if the divorce, death, or loss of citizenship or residency status occurs after the VAWA self-petition was filed, § 1507 of VAWA 2000 "clarifies that negative changes in the immigration status of abuser or divorce after abused spouse and child file petition under VAWA have no effect on status of abused spouse or child." 146 CONG. REC. S10,196 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary).

252. VAWA 2000 § 1503 (b)(1)(A) (codified at 8 U.S.C. §§ 1154(a)(1)(A)(iii)(II)(CC)(ccc), 1154(a)(1)(B)(ii)(II)(CC)(bbb)).

253. *Id.* § 1507(b) (codified at 8 U.S.C. § 1154(h)).

254. 146 CONG. REC. S10,196 (Violence Against Women Act of 2000 Section-by-Section Summary) (clarifying "that remarriage has no effect on pending VAWA immigration petition").

255. VAWA 2000 § 1503(b)(3) (codified at 8 U.S.C. §§ 1154(a)(1)(A)(v)(I)(bb), 1154(a)(1)(B)(iv)(I)(bb).

256. VAWA 2000 § 1503(b)(3) (codified at 8 U.S.C. §§ 1154(a)(1)(A)(v)(I)(aa), 1154(a)(1)(B)(iv)(I)(aa). *See also* 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary).

themselves living abroad can file self-petitions. These provisions modify VAWA 1994's requirement that in order to file a VAWA self-petition the petitioner had to be residing in the United States at the time of filing. This requirement cut off from VAWA's immigration protections many spouses and children of United States government employees and military members because they were living abroad. Additionally, the provision requiring United States residence to file a VAWA self-petition strengthened abuser's power and control. If the citizen or lawful permanent resident abuser could convince or force his abused spouse to travel outside of the United States and could abandon her there, the immigrant spouse would be precluded from filing for VAWA immigration relief, despite the fact that she suffered multiple incidents of criminal domestic violence in the United States. VAWA 2000 explicitly authorized battered immigrant spouses of United States government employees and members of the United States military stationed abroad and battered immigrants who were abused in the United States to file VAWA self-petitions while residing abroad without regard to whether any of the abuse actually occurred in the United States.[257]

Finally, the Nicaraguan and Central American Relief Act of 1997[258] ("NACARA") and the Haitian Refugee Immigration Fairness Act of 1998[259] ("HRIFA") granted access to legal immigration status for Haitians, Cubans, Nicaraguans, and El Salvadorans among others who met certain qualifications. These laws were structured, as are most immigration laws, to permit a spouse or parent who qualifies for relief to file a petition and to include any spouse or children who also need to attain legal immigration status in their petition. Ordinarily, one family member would file and include their spouses and children in that one application. However, here—as with other forms of

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257. The Committee did not draw a distinction between those abused in the U.S. or outside the U.S.

> Section 1503 also makes VAWA relief available to abused spouses and children living abroad of citizens and lawful permanent residents who are members of the uniformed services or government employees living abroad, as well as to abused spouses and children living abroad who were abused by a citizen or lawful permanent resident spouse or parent in the United States. We would expect that INS will take advantage of the expertise the Vermont Service Center has developing in deciding self-petitions and assign it responsibility for adjudicating these petitions even though they may be filed at U.S. embassies abroad

146 CONG. REC. S10,192 (Daily ed. Oct. 11, 2000) (Joint Managers' Statement).

258. Pub. L. No. 105-100, Title II., 111 Stat. 2193 (codified as amended in scattered sections of 8 U.S.C.)

259. Pub.L. 105-277, Div. A, Title IX, 112 Stat. 2681-538 (codified as amended at 8 U.S.C. §§ 1255, 1377).

family based visa petitions— abusive spouses and parents would not choose to include their spouse and children in their applications for relief under NACARA and HRIFA. These abused spouses and children remained undocumented without any recourse. Further, some of these laws had a requirement that, in order for the derivative spouse to benefit, the applicant and the spouse had to continue residing together. The structure of these immigration laws fostered abuse.

To remedy this problem, VAWA 2000 allows dependent spouses and children of many NACARA and HRIFA qualified immigrants to self-petition for NACARA or HRIFA relief. To receive the new relief under NACARA, battered spouses and children must be related to the abuser at the time the abuser was granted suspension or cancellation; filed for suspension or cancellation; registered for benefits under *American Baptist Churches v. Thornburgh*;[260] applied for TPS or asylum.[261] Current residence with the abusive spouse is not required. The HRIFA amendments allow battered immigrant spouses and children of HRIFA applicants to adjust their status.[262]

B. Improved Access to Public Benefits

Under previous immigration laws, battered immigrants who used public benefits as a means to survive economically during or following their escape from an abusive relationship could be denied lawful permanent residence due to public charge concerns. Battered immigrant women who relied on the welfare safety net were penalized and were vulnerable to deportation.[263] VAWA 2000 recognized the desperate need for battered immigrants to survive economically and clarified that a VAWA self-petitioner's use of public benefits specifically made available under the IIRAIRA did not make

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260. 760 F. Supp. 796 (N.D. Cal. 1991).

261. VAWA 2000 § 1510. *See also* 146 CONG. REC. S10,196 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary) ("Provides access to special immigration benefits under NACARA to battered spouses and children similarly to the way section 509 does with respect to Cuban Adjustment Act.").

262. VAWA 2000 § 1511. *See also* 146 CONG. REC. S10,196 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary) ("Provides access to special immigration benefits under HRIFA to battered spouses and children similarly to the way section 509 does with respect to the Cuban Adjustment Act.").

263. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1641(c)), restored the benefits that were denied to battered spouses and children as a result of the draconian measures included under section 431 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat., 2105.

the immigrant a public charge or jeopardize her eligibility to receive lawful permanent residence.[264] VAWA 2000 prohibits the INS, an immigration judge, or a consular official from considering benefits usage specifically authorized by IIRAIRA in any case of a battered immigrant applying for adjustment of status or for an immigrant visa based on an approved self-petition.

The task ahead is to ensure that INS implements the VAWA 2000 changes regarding how public charge determinations are to be handled in a manner that ensures that battered immigrants will be able to receive the protection they and their children need. The best and safest approach for battered immigrants would be for INS to decide to exempt battered immigrants from being subject to public charge. In the alternative, INS must issue regulations that specifically address how public charge determinations are to be made in cases of battered immigrants.[265]

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264. VAWA 2000 § 1505(f). Thus, use of post-August 22, 1996 public benefits cannot be considered by INS when it makes public charge determinations.

265. Those regulations should include the following components:

(1) INS regulations must confirm that any public benefits received after August 22, 1996 by VAWA self-petitioners, including cash and long-term institutional care, cannot be considered for public charge determination purposes;

(2) INS and Consular officers should not inquire as to benefits used by self-petitioners after August 22, 1996;

(3) All INS forms relating to adjustment of status or state department forms for consular processing of immigrant visas that solicit information concerning benefits usage must be amended to ask whether the applicant has an approved self-petition, and if so, the form should direct the applicant to skip any questions related to public benefits;

(4) The regulations must direct that neither the INS Nor consular officials may inquire into whether use of benefits after August 22, 1996 was connected to domestic violence, or whether the applicant was separated from her abuser as those determinations would have had to be made at the state level for benefits to have been granted, and these issues should not be re-decided by INS officers or consular officials;

(5) Self-petitioners cannot be subjected to a percentage of poverty level test in determining public charge because self-petitioners are exempt from the affidavit of support requirement. Sponsors filing affidavits of support are required to meet the 125% of poverty test, but the statute imposes no similar obligation on immigrants who are not required to file affidavits of support;

(6) Domestic violence must be taken into account in all cases as part of the totality of the circumstances test when the INS or a consular official is considering whether the applicant is likely to become a public charge whenever the INS or a consular official has received information that an applicant for lawful permanent residency has been battered or subjected to extreme cruelty; both when the applicant is a self-petitioner and when the applicant is applying for lawful permanent resident status based on any other form of visa;

(7) The regulations should require that denials of lawful permanent residency due to public charge in domestic violence cases can only be

C. *Restoration of 1994 VAWA Protections*

1. *Obtaining Permanent Residence Status in the United States*

In the period since VAWA 1994 was enacted, several changes to immigration laws occurred. One very dangerous change, the expiration of section 245(i), forced battered immigrants to leave the United States in order to obtain their lawful permanent residence.[266] Upon leaving the United States, battered immigrants were left unprotected even though they may have had protection orders against their abusers. Battered immigrants were defenseless against retaliatory attacks made by their abusers or family members once they arrived in their home country, where their U.S. issued protection order could not be enforced and U.S. criminal laws could no longer protect them.[267]

VAWA 2000 changed this requirement to allow all battered immigrant self-petitioners to access lawful permanent residence while remaining safely in the United States.[268] Under section 1503 of VAWA 2000, battered self-petitioners are allowed to adjust their status

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made after the battered immigrant applicant has had an opportunity to rebut the proposed denial and where the officer has made particularized findings with respect to the facts of domestic violence, the VAWA totality of the circumstances factors, how the domestic violence in the relationship was taken into consideration in the public charge determination, and why denying the battered immigrant applicant lawful permanent residency status based on public charge is not contrary to Congressional intent to offer stable immigration status and protection to battered immigrants;

(8) When the INS or a consular official learns that an applicant for lawful permanent residency (including but not limited to persons whose spouses have filed visa applications for them through an I-130 visa application) is a survivor of domestic violence, they should apply the same domestic violence factors in considering the "totality of circumstances" with respect to whether the applicant is likely to become a public charge.

Letter to Karen Fitzgerald, *supra* note 220.

It is extremely important that INS and the Department of State implement the new VAWA 2000 public charge provisions in a manner that recognizes that battered immigrants need to be able to receive public benefits to transition away from their abusers and achieve economic independence. Further, battered immigrants who have not used public benefits need to be assured that INS and consular officials will not apply a percent of poverty test to their cases and deny them permanent residency status due to public charge. If battered immigrant women are to be able to access the full range of protections that VAWA 1994, IIRAIRA, and VAWA 2000 provide, the final public charge regulations must provide much-needed direction and clarity to battered immigrants describing how INS and consular officials will make public charge determinations in cases of battered immigrants.

266. *See* discussion *supra* Part IV.C.1-2.

267. *See* discussion *supra* Part IV.C.2.a.

268. VAWA 2000 § 1503.

under sections 245(a) and (c) of the INA. This is the same mechanism under which "immediate relatives" (spouses, parents, and children) of United States citizens who entered the United States lawfully may adjust their status.[269] Thus by including them under 245(a) and (c) of the INA, Congress specifically sought "to enable VAWA-qualified battered spouse or child to obtain status as lawful permanent resident in the United States rather than having to go abroad to get a visa."[270]

The lead Senate sponsors of the VAWA 2000 immigration provisions discussed the central importance of the 245(a) and (c) amendments for battered immigrants; they were designed to assure that a battered immigrant self-petitioner would not have to travel abroad to obtain their lawful permanent residency status once their VAWA self-petition had been approved. Senator Kennedy stated:

> It restores and expands vital legal protections like 245(i) relief. This provision will assist battered immigrants like Donna, who have been in legal limbo since the passage of the 1996 immigration laws. Donna, a national of Ethiopia, fled to the United States in 1992 after her father, a member of a prominent political party was murdered. In 1994, Donna met Saul, a lawful permanent resident and a native of Ethiopia. They married and moved to Saul's home in Massachusetts . . . . Saul became physically and verbally abusive. The abuse escalated and Donna was forced to flee from their home. She moved in with close family friends who helped her seek counseling. She also filed a petition for permanent residence under the provisions of the Violence Against Women Act.
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> Unfortunately, with the expiration of 245(i), the only way for Donna to obtain her green card is to return to Ethiopia, the country where her father was murdered. The possibility of returning there terrifies her. This legislation will enable her to obtain her green card here, where she has the support and protection of family and access to the domestic violence counseling she needs.[271]

Senator Spencer Abraham, the lead Republican sponsor of the VAWA 2000 immigration amendments, also made clear Congress' intent to correct the harm to battered immigrants caused by forcing them to leave the United States to obtain their lawful permanent

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269. 146 CONG. REC. S10,219 (daily ed. Oct. 11, 2000) (statement of Sen. Abraham) (stating that "[s]ection 1503 of this bill gives the abused spouse that same right").

270. 146 CONG. REC. S10,196 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary).

271. 146 CONG. REC. S10,170 (daily ed. Oct. 11, 2000) (statement of Sen. Kennedy).

residence based on an approved self-petition:

> In this bill, we establish procedures under which a battered immigrant can take all steps he or she needs to take to become a lawful permanent resident without leaving this country. Right now, no such mechanism is available to a battered immigrant, who can begin the process here but must return to his or her home country to complete it.
>
> VAWA 1994 created a mechanism for the immigrant to take the first step, the filing of an application to be classified as a battered immigrant spouse or child. But it did not create a mechanism for him or her to obtain the necessary papers to get lawful permanent residency while staying in the United States. That is because at the time it was enacted, there was a general mechanism available to many to adjust here, which has since been eliminated. As a result, under current law, the battered immigrant has to go back to his or her home country, get a visa and return here in order to adjust status.
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> . . . Yaa [, a battered immigrant,] should be allowed to complete the process of becoming a lawful permanent resident here in the United States, without facing these risks. Our legislation will give her the means to do so.[272]

Additionally, the companion legislation in the House of Representatives also contained the section 245(a) and (c) fix.[273] On July 20, 2000, the House Judiciary Subcommittee on Immigration and Claims held hearings on that legislation. Testifying before the Subcommittee was Barbara Strack, Acting Executive Associate Commissioner of the Office of Policy and Planning at the Immigration and Naturalization Service, who stated that the INS supported this fix allowing all battered immigrant self-petitioners to obtain lawful permanent residency in the United States under the amended provisions of 245(a) and (c). Specifically, she said:

> One of the most important issues is how the sunset of Section 245(i) of the Immigration and Nationality Act (INA) limits the ability of battered immigrants to become lawful permanent residents. Specifically, many self-petitioners whose petitions have been approved find themselves either statutorily ineligible for adjustment of status in the United States, or forced to leave the

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272. 146 CONG. REC. S10,219 (daily ed. Oct. 11, 2000) (statement of Sen. Abraham).

273. *See* Battered Immigrant Women Protection Act of 1999, H.R. 3083, 106th Cong. § 3(a) (1999).

> country to obtain an immigrant visa after having accrued lengthy periods of "unlawful presence" in the U.S. Because of that time accrued in unlawful status, many of them will be ineligible for admission for three or ten years, under one of the provisions added to the INS by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. These battered immigrants also risk exposing themselves to the very hardship and danger documented in the self-petition. Section 2 of HR 3083 would improve this situation by ensuring that battered immigrants with approved self-petitions could remain in the U.S. to seek adjustment of status.[274]

In sum, section 1503 of VAWA 2000 restores a previously existing option to a group of needy battered immigrants who, in good faith, married citizens or lawful permanent residents only to suffer domestic violence at their hands of their loved-ones.

2. *Waiver for Crimes of Domestic Violence*

Another post-1994 change to immigration laws included making domestic violence a deportable crime.[275] While the goal of this law was to strengthen the hand of victims of domestic abuse, its practical effect included deporting battered women who were wrongly subjected to dual arrest, arrested when they acted in self-defense, or arrested for a crime that was connected to their being a victim of or attempting to escape domestic violence. Further, many battered immigrants who find themselves facing arrest or conviction lack sufficient knowledge to navigate the criminal justice system. As a result, battered immigrants often accept plea agreements that can ultimately lead to their deportation.[276] To resolve this problem,

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274. *See Hearings*, *supra* note 123. It is important to note that in discussing the battered immigrants who needed to be able to adjust their status under section 245(a) and (c), Acting Executive Associate Commissioner Strack recognized that there were self-petitioners who needed this legislative change so that they would not be subject to the three and ten year bars to reentry. Since all battered immigrant VAWA self-petitioners who had entered the U.S. before April 1, 1997 are exempt from the three and ten year bars, the battered immigrants whom she referred to as accuring unlawful presence included some battered immigrants: who violated terms of their immigration visas after April 1, 1997, who qualify and have received an approved VAWA self-petition but who cannot demonstrate a substantial connection between their unlawful presence and the domestic violence.

275. *See supra* text accompanying notes 194-95 (discussing provisions codified at 8 U.S.C. § 1227(a)(2)(E)).

276. *See* 146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (Joint Managers' Statement).

> A battered immigrant may well not be in sufficient control of his or her life to seek sufficient counsel before accepting a plea agreement that carries little or no jail time without understanding the immigration consequences. The abusive spouse, on the other hand, may understand those consequences well and may proceed to turn the abuse victim in to the INS.

Id.

section 1505(b) of VAWA 2000 gives the INS and immigration judges the discretion to waive this ground of deportation for many victims after considering the entire history of domestic violence in the relationship.[277] To qualify under 1505(b), the battered immigrant must demonstrate that she was not the primary perpetrator of abuse in the relationship, and the crime that she committed must not have resulted in serious bodily injury.

3. Filing Motions to Reopen

A significant victory in VAWA 2000, though not as far-reaching as advocates would have wanted, is that battered immigrants are now eligible to file motions to re-open their closed cancellation of removal cases with some limitations.[278] Pursuant to section 1506(c) of VAWA 2000, battered immigrants can file a motion to reopen up to one year after the final adjudication of their deportation case. This one-year time limitation can be waived by the INS or an immigration judge upon a showing of extraordinary circumstances or of extreme hardship to children. Congress gave the Attorney General broad authority to find extraordinary circumstances or extreme hardship to children and described examples as follows:

> [S]ection 1506 of this legislation . . . allows the Attorney General to waive the one year deadline on the basis of extraordinary circumstances of hardship to the alien's child. Such extraordinary circumstances may include but not be limited to an atmosphere of deception, violence, and fear that make it difficult for a victim of violence to learn of or take steps to defend against or reopen an order of removal in the first instance. They also include failure to defend against removal or file a motion to reopen within the deadline on account of a child's lack of capacity due to age. Extraordinary circumstances may also include violence or cruelty of such a nature that, when the circumstances surrounding the domestic violence and the consequences of the abuse are considered, not allowing the battered immigrant to reopen the deportation or removal proceeding would thwart justice or be contrary to the humanitarian purposes of this legislation. Finally, they include the battered immigrants being made eligible by this legislation for relief from removal not available to the immigrant before that time.[279]

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277. *See* VAWA 2000 § 1505(b) (codified at 8 U.S.C. § 1227(a)).

278. VAWA 2000 § 1506(c) (codified at 8 U.S.C. § 1229a(c)(6)(C)(iv)) (amending INA § 240(c)(6)(C)).

279. 146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (Joint Mangers' Statement).

D. Access to Funding Programs

VAWA 2000 guarantees equal access to all VAWA funding streams (STOP,[280] Arrest,[281] Rural,[282] Campus,[283] and Civil Legal Assistance[284]) for programs serving battered immigrants.[285] Programs can seek and receive funding to provide a broad range of services to battered immigrants including shelter, outreach advocacy, legal representation, and assistance to battered immigrants in protection order, family law, VAWA, and other immigration-related matters. This change was needed to assure that all forms of funding offered to domestic violence programs through the Violence Against Women Office of the Department of Justice could be used to provide any battered immigrant any of the services she needed. It was particularly important that this legislation clarified that all STOP, Arrest, Rural, Campus, Civil Legal Assistance and Legal Assistance for Victims grantees could, among the services they provided to victims of domestic violence or sexual assault, provide assistance to battered immigrants in immigration matters.[286] This would include assistance from advocates and attorneys, depending on the grant program, helping battered immigrants with self-petitions, VAWA cancellation, VAWA suspension, U-visa, T-visa, gender-based asylum cases, battered spouse waivers, and any other form of immigration relief for which the battered immigrant may qualify.[287]

However, since many legal services programs also receive funding from the Legal Services Corporation ("LSC"), it is important to note the LSC-funded programs are restricted in the groups of battered

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280. Grants to Combat Violent Crimes Against Women ("STOP Grants"), 42 U.S.C. § 3796gg(b) (2000).

281. Grants to Encourage Arrest Policies and Enforcement of Protection Orders,("Arrest Grants"), 42 U.S.C. § 3796hh(b) (2000).

282. Rural Domestic Violence and Child Abuse Enforcement Assistance ("Rural Grants"), 42 U.S.C. § 13971(a)(2) (2000).

283. Grants to Combat Violent Crimes Against Women on Campuses, 20 U.S.C. 1152 (2000).

284. Legal Assistance for Victims Grants, VAWA 2000 § 1201 (codified at 42 U.S.C. 3796gg) (including legal assistance for domestic, violence, stalking and sexual assault in immigration matters and proceedings).

285. VAWA 2000 §§ 1512, 1201(b)(2).

286. 146 CONG. REC. S10,196 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary).

287. The Committee said that making Stop Grants available to battered immigrants was particularly important. *See id.* (noting that section 1512 "allows local battered women's advocacy organizations, law enforcement or other eligible Stop grants applicants to apply for Stop funding to train INS officers and immigration judges as well as other law enforcement officers on the special needs of battered immigrants.").

immigrants they can assist even when the grant money they receive comes from a source other than the Legal Services Corporation.[288] LSC-funded programs can use non-LSC dollars they receive only to provide legal representation to battered immigrants who are abused by their spouses or parents. Further legislation is needed to amend laws governing LSC-funded programs so that they can apply for and receive VAWA funds and can use those funds to represent any battered woman without regard to her immigration status and without regard to who her abuser is.

E. Removal of Procedural Barriers

1. Changes to Immigration Status

If the batterer becomes a naturalized citizen, the immigrant spouse or child's self-petition will be upgraded so that it can be processed more quickly in the same manner as spouses or children of United States citizens.[289] This provision allows battered immigrant spouses or children of lawful permanent resident abusers to benefit if the abusive spouse or parent becomes a naturalized citizen. Instead of having to continue to wait in line for their immigrant visa, a wait that can be a long as seven years, they are upon the abuser's naturalization immediately eligible to obtain lawful permanent residency under VAWA. Their previously filed self-petition is to be automatically upgraded to a self-petition filed by a spouse or child of an abusive U.S. citizen. Additionally, once the VAWA self-petition has been filed, no change in the abuser's citizenship or immigration status will adversely affect her self-petition. If the abuser loses his lawful permanent residency status, is deported, or relinquishes citizenship, these events will not undermine either the victim's self-petition or her ability to obtain lawful permanent residency based on that self-petition.[290]

2. Waivers

In 1996, IIRAIRA changed immigration laws imposing a broad range of bars that preclude many immigrants from ever attaining lawful permanent residence.[291] These changes cut many needy immigrant victims of domestic abuse off from VAWA relief. VAWA

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288. *See supra* discussion Part IV.B.

289. 8 U.S.C. § 1154(a)(1)(B)(v)(II).

290. 8 U.S.C. §§ 1154(a)(1)(A)(vi), 1154(a)(1)(B)(v)(I).

291. *See supra* discussion Part IV.A.-A.1.

2000 created special waivers for some of these bars for battered immigrants. Without these waivers, many VAWA-eligible applicants would be denied lawful permanent residence. New VAWA 2000 waivers available to battered immigrants include: waiver of certain impediments to good moral character determinations in VAWA self-petition,[292] cancellation of removal, and suspension of deportation cases;[293] waiver of deportation for having committed a domestic violence-related offense for battered immigrants who are not the primary perpetrator of abuse in the relationship;[294] waiver of inadmissibility for re-entry after unlawful presence, multiple illegal re-entries, and re-entry after issuance of a removal or deportation order;[295] waiver of 90/180 day continuous presence requirement in VAWA cancellation of removal and suspension of deportation cases;[296]

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292. VAWA 2000 § 1503(d)(2) (codified at 8 U.S.C. 1154(a)(1)).

293. *See* VAWA 2000 § 1504(a). *See also* 146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (Joint Managers' Statement). In establishing the waiver, Congress provided:

> In determining whether such a waiver is warranted, the Attorney General is to consider the full history of domestic violence in the case, the effect of the domestic violence on any children, and the crimes that were being committed against the battered immigrant. Similarly, the Attorney General is to take the same types of evidence into account in determining under sections 1503(d) and 1504(a) whether a battered immigrant has proven that he or she is a person of good moral character or whether otherwise disqualifying conduct should not operate as a bar to that finding because it is connected to the domestic violence, including the need to escape an abusive relationship.

Id.

294. VAWA 2000 § 1505(b) (codified at 8 U.S.C. § 1227(a)(7)). *See also* 146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (Joint Managers' Statement). In establishing the waiver, Congress recognized the unintended consequences of the previous law which subjected the battered immigrant to deportation because of such practices as dual arrests in domestic violence cases where both the batterer and the battered victim are arrested rather than arresting only the primary perpetrator. *See* discussion *supra* Part V.C.2. The waiver now

> provides the Attorney General with discretion to grant a waiver of deportability to a person with a conviction for a crime of domestic violence or stalking that did not result in serious bodily injury and that was connected to abuse suffered by a battered immigrant who was not the primary perpetrator of abuse in a relationship. In determining whether such waiver is warranted, the Attorney General is to consider the full history of domestic violence in the case, the effect of the domestic violence on any children, and the crimes that were being committed against the battered immigrant.

Id.

295. VAWA 2000 § 1505(a) (codified at 8 U.S.C. § 1182(a)(9)(C)(ii)). Specifically, VAWA 2000 allows the Attorney General to waive certain prohibitions to admissibility or grounds of deportability with respect to battered spouse and children "for unlawful presence after a prior immigration violation if there is a connection between the abuser and the alien's removal, departure, reentry, or attempted reentry." 146 CONG. REC. S10,196 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary).

296. VAWA 2000 § 1504(a) (codified at 8 U.S.C. § 1229b(b)(2)(B)). Specifically, this provision:

waivers of inadmissibility for misrepresentations to INS for battered immigrant spouses of United States citizens and lawful permanent residents;[297] waiver of inadmissibility for battered immigrants infected with the HIV virus;[298] and discretionary 212(h) waivers to VAWA-eligible battered immigrants who commit certain crimes including crimes of moral turpitude and multiple offenses, and offenses that are more than fifteen years old.[299]

F. Creation of an Immigrant Crime Victim Visa

1. Protection for Certain Crime Victims

VAWA 2000 created a new nonimmigrant visa for certain battered noncitizens and other crime victims not protected by the original VAWA 1994.[300] The goal of this legislation is to offer 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 a judge certifies that the victim has been helpful, is being helpful, or is likely to be helpful in investigating or prosecuting the crime.[301]

> [c]larifies that with respect to battered immigrants, [IIRAIRA's]rule, enacted in 1996, that provides that with respect to any applicant for cancellation of removal, any absence that exceeds 90 days, or any series of absences that exceed 180 days, interrupts continuous physical presence, does not apply to any absence or potion of absence connected to the abuse. Makes this change retroactive to date of enactment of [IIRAIRA].

146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary).

297. VAWA 2000 § 1505(c). Specifically, section 1505 grants the Attorney General the ability to waive certain prohibitions to admissibility or grounds of deportability with respect to battered spouses and children "for misrepresentations connected with seeking an immigration benefit in the cases of extreme hardship to the alien (Paralleling the AG's waiver authority for spouses and children petitioned for by their citizen or lawful permanent resident spouse or parent in cases of extreme hardship to the spouse or parent)" 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary).

298. VAWA 2000 § 1505(d) (codified at 8 U.S.C. § 1182(g)(1)). Specifically, section 1505 provides the Attorney General with the authority to waive certain prohibitions to admissibility or grounds of deportability with respect to battered spouses and children "for health related grounds of inadmissibility (also paralleling the AG's waiver authority for spouses and children petitioned for by their spouse or parent)." 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary).

299. VAWA 2000 § 1505(e).

300. *Id.* § 1513(codified at 8 U.S.C. § 1101(a)(15)(U)). The law went into effect on October 28, 2000.

301. 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (Violence Against Women Act of 2000 Section-by-Section Summary).

These new U-visa protections offered much-needed help for immigrant victims of crime including a broad range of gender-based crimes.

The U-visa is designed for noncitizen crime victims who have suffered substantial physical or mental abuse flowing from criminal activity and who have mustered the courage to cooperate with government officials investigating or prosecuting such criminal activity.[302] Congress recognized with the U-visa that it is virtually impossible for state and federal law enforcement, other government enforcement agency officials, and the justice system in general to punish and hold perpetrators of crimes against noncitizens accountable if abusers and other criminals can avoid prosecution by having their victims deported.[303] Few noncitizen crime victims are willing to assist in prosecutions without some form of immigration status that protects them from such retaliation.[304]

Victims of a broad range of criminal activity listed in the legislation may qualify for U-visas.[305] Many of these victims will be women and children. This new U-visa for the first time will offer access to legal immigration status for some battered immigrants who had been left out of VAWA's protections. Battered immigrants who can benefit include those abused by their citizen or lawful permanent resident boyfriends, wives and children of diplomats, work-visa holders, and students. Other victims and other employees who can receive this protection include: but not limited to, nannies subjected to abuse and crimes committed against them by their employers, nannies held hostage by diplomats, victims of trafficking or forced prostitution, victims of FGM committed in the United States, non-citizens subject

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302. VAWA 2000 § 1513 (a)(2)(a) (recognizing the dual goals of the new nonimmigrant visa classification to strengthen the ability of law enforcement agencies to prosecute crimes against immigrants and to protect the victims of such crimes).

303. *Id.* § 1513(a)(1)(B) (finding that all immigrant victims, women and children alike, must be able to report the crimes committed against them in the United States and to participate fully in the subsequent investigation and prosecution).

304. *Id.* § 1513(a)(2)(A),(B) (identifying the facilitation of crime reporting as the purpose behind the U-visas. These visas "will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.").

305. *Id.* § 1513(b)(3) (listing the types of crimes that qualify victims for U-visa protection, including: rape; 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 or any state or federal crime similar to the ones included on this list and attempt; conspiracy; or solicitation to commit any of these crimes).

to slave labor, victims of rape and sexual assault including incidents that occur in the workplace, immigrant victims of child abuse who were abused by someone other than a citizen or lawful permanent resident parent, and victims of other listed violent crimes.

a. Criminal Activity

Victims qualify for a U-visa only if they have been a victim of a crime covered by the Section 1513(b)(3), INA section 101(a)(15)(U)(iii).[306]

The law targets "criminal activity" as opposed to "crimes" because prosecutors and other criminal investigators must be able to obtain witness help and cooperation at every stage of a criminal investigation.[307] The law is available to those who are "helpful" regardless of whether they serve as witnesses, regardless of whether the case is ultimately prosecuted or regardless of whether the investigation or prosecution results in a conviction.[308] The language also encompasses situations where crime victims may be better served by remedies other than those provided by the criminal justice system. For instance, in some cases, a victim of workplace rape may accomplish more through an enforcement action filed by the Equal Employment Opportunity Commission ("EEOC") than through a criminal complaint filed with a local police force that may fail to respond appropriately to rape complaints. The U-visa allows the non-citizen to assist the EEOC investigation into the criminal activity without fear of deportation. The law, in turn, would give the EEOC leverage to sanction criminal activity against noncitizens whether or not the rape is investigated by local law enforcement. A second example would be a child abuse case in which child protective services chooses to initiate a family court child abuse case rather than bring a criminal action against the child abuser.

b. Who Qualifies

In order for an applicant to be eligible for a U-visa she must first meet the following five conditions:

(1) she must have suffered substantial physical or mental abuse as a

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306. 8 U.S.C. § 1101(a)(15)(U)(iii).

307. VAWA 2000 § 1513(a)(2)(B) (noting how the formulation of the new visa classfication provies law enforcemtn with the ools to regularize immigrants' cooperation in investigations of criminal activity).

308. *Id.* § 1513(c) (codiefied at 8 U.S.C. § 1184) (explaining that for certification of an immigrant's U-visa petition all that is required to be stated is that the immigrant has been, is being, or is likely to be helpful in a criminal investigation or prosecution).

result of having been a victim of one or more of the criminal activities described above and listed in section 1513(b)(3) of the VAWA 2000, INA section 101(a)(15)(U);[309]

(2) she must possess information concerning the criminal activity;

(3) she must be helpful, have been helpful, or be likely to be helpful to a federal, state, or local investigation or prosecution of a form of listed criminal activity;

(4) she must obtain certification from a law enforcement official, prosecutor, judge, INS official, or other federal or state authorities investigating or prosecuting any of the criminal activities defined in Section 1513(b)(3); and

(5) the criminal activity described must have violated the laws of the United States or occurred in the United States or the territories and possessions of the United States.

c. Who May Certify

To obtain the visa, a police officer, prosecutor, judge, or other state or federal government official must certify that the immigrant visa applicant "has been helpful, is being helpful or is likely to be helpful" to the investigation or prosecution of criminal activity.[310] Other government officials who may certify include but are not limited to the officers of the Equal Opportunity Employment Commission ("EEOC"), state child abuse workers, an INS officer, or an FBI agent.

d. Some Family Members of the Crime Victim May Be Protected

Spouses, children and parents of children under the age of sixteen who are U-visa eligible noncitizens can also receive U-visas if: (1) they can demonstrate that receipt of the visa is necessary to avoid extreme hardship; or (2) a government official certifies that investigation or prosecution would suffer without the assistance of the spouse, child, or parent of non-immigrant child.[311] There is no cap on the number of U-visas that can be issued to the spouses, children or parents of U-visa recipients.

2. Procedures

The maximum number of U-visas in any one year is 10,000 for the

309. *Id.*

310. VAWA 2000 § 1513(c)(1) (codified at 8 U.S.C. § 1184) (describing the certification required for classification as a humanitarian or material witness nonimmigrant).

311. VAWA 2000 § 1513(b)(3)(ii) (codified at 8 U.S.C. § 1101).

primary applicants.[312] There is no limit on the number of visas available for qualifying spouses, children or parents of U-visa applicants.

If a nonimmigrant is identified as a possible victim of any of the criminal activities defined in Section 1513(b)(3), she must be given the opportunity to avail herself of the VAWA 2000 U-visa provisions.[313] Immigration and Naturalization Service ("INS") personnel have been instructed to use mechanisms such as parole, deferred action, and stays of removal in order to avoid the removal of those who have been identified as possible victims of these crimes.[314] INS personnel are also instructed to broadly interpret guidelines that would allow possible victims to temporally remain in the country until there is a determination of whether a potential applicant has been a victim of one of the listed crimes.

3. Work Authorization, Confidentiality and Credible Evidence Standard

Crime victims receiving U-visas and those receiving parole, deferred action, and stays of removal while their U-visa application is pending can receive legal work authorization from INS.[315] U-visa recipients, however, do not qualify for public benefits.[316]

In addition as with cases under the VAWA 2000, INS and the Department of Justice are required to keep all information about U-visa applications confidential.[317] They cannot release any information about the existence of a case to any person who is not authorized to access that information for a legitimate law enforcement purpose. Further, if the abuser of the person who perpetrated the crime against the U-visa victim or any of his family members tries to supply INS adverse information about the crime victim, INS cannot rely solely on that information to make any adverse decision in the victim's U-visa case.[318]

In deciding applications submitted by immigrant crime victims for U-visas and for discretionary adjustment of status under the U-visa provision, the INS is required by statute to apply the credible evidence standard.[319] This approach prohibits INS from requiring

312. VAWA 2000 § 1513(c)(2)(A) (codified at 8 U.S.C. § 1184).
313. 8 U.S.C. § 1101(a)(15)(U)(ii).
314. VAWA 2000 § 107(e) (codified at 8 U.S.C. § 1101(a)(15)(T)-(U)).
315. VAWA 2000 § 1513(c)(3)(B) (codified at 8 U.S.C. § 1101(n)(2)).
316. VAWA 2000 § 1513(c)(5).
317. IIRAIRA § 387(a), *as amended by* VAWA 2000 § 1513(d).
318. VAWA 2000 § 1513(d).
319. VAWA 2000 § 1513(c)(4).

any particular piece of evidence in support of the U-visa applicant's visa or adjustment application.[320] Instead, applicants are allowed to submit any credible evidence to support each element of proof that they are required to show to be granted the U-visa. By including the credible evidence standard of proof in U-visa cases, Congress was recognizing the difficulty battered immigrants and immigrant crime victims may have in proving that they have been victims of a crime and obtaining the other forms of proof they may need to win their immigration case. This credible evidence standard was first incorporated as part of the VAWA 2000 to curb INS practices that imposed evidentiary barriers that effectively precluded many battered immigrants from receiving approvals of battered spouse waivers.[321]

4. Discretionary Adjustment to Permanent Resident Status

In the Attorney General's discretion, a U-visa holder who has been physically present in the United States for three years may adjust their status to that of a permanent resident when such adjustment is justified on humanitarian grounds, is made to ensure family unity or is otherwise in the public interest. U-visa holders who have unreasonably refused to cooperate in an investigation or prosecution of criminal activity will not be able to adjust their status. INS has the burden of proving by affirmative evidence that the U-visa holder's unwillingness to cooperate the investigation or prosecution was unreasonable. The Attorney General also has the discretion to waive virtually all grounds of inadmissibility (except Nazis) in granting adjustment to a U-visa recipient. Generally, inadmissibility issues should be addressed at the time the immigrant crime victim seeks the U-visa. At adjustment the Attorney General would only consider any new inadmissibility issues that arose since the U-visa was issued. The Attorney General also has the discretion to issue a visa to or adjust the status of the spouse, child or parent of a child if necessary to avoid extreme hardship.

U-visa recipients, both the original crime victim and any relatives granted U-visas, who have been continuously present in the United

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> This legislation also clarifies that the VAWA evidentiary standard under which battered immigrants in self-petition and cancellation proceedings may use any credible evidence to prove abuse continues to apply to all aspects of self-petitions and VAWA cancellation as well as to the various domestic violence discretionary waivers in this legislation and to determinations concerning U-visas.

Violence Against Women Act of 2000, 146 CONG. REC. S10,192.

320. VAWA 2000 § 1513(c)(5).

321. VAWA 2000 § 1504(a)(2)(A)(i)(i) (codified at 8 U.S.C. § 1229b(b)(2)).

States for three years can apply for lawful permanent residency.[322] The Attorney General, using his discretion, may grant lawful permanent residency to U-visa recipients who can prove that their continued presence is justified on humanitarian grounds, to ensure family unity or because it is otherwise in the public interest. U-visa recipients whom INS can prove based on affirmative evidence have unreasonably refused to provide assistance in a criminal investigation or prosecution may be denied lawful permanent residence.

Spouses, children and parents of children under the age of sixteen may be adjusted along with the principal U-visa applicant even if they were not granted a U-Visa in order to avoid extreme hardship.[323]

VI. FUTURE LEGISLATIVE EFFORTS ON BEHALF OF BATTERED IMMIGRANTS[324]

Between 1990 and 2000, there were significant advancements in protections for immigrant victims of domestic violence. During that decade, battered immigrants and their children benefited from changes in immigration laws that allowed them to file their own immigration cases. Battered immigrants were also provided access to public benefits and access to legal services. Without regard to immigration status, they were also guaranteed access to and assistance from shelters, domestic violence programs and other community-based services that were deemed necessary to protection life and safety. Much has been achieved, but these legislative improvements have been gained incrementally. There remain needy victims who have been left out of the current web of protections available under the law and immigrant victims do not have access to the full range of public benefits that they need to transition away from their abusers.

The Women Immigrants Safe Harbor Act[325] (H.R. 2258), introduced in the 107th Congress on June 20, 2001, would vastly improve battered immigrant access to public benefits. It will give immigrant victims of domestic violence who are qualified immigrants direct access to SSI and Food Stamps.[326] Immigrant domestic violence victims who entered the United States after August 22, 1996 who are qualified immigrants would not be subject to the five-year bar and

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322. VAWA 2000 § 1507(a)(2)(A)(ii).

323. Table 2 appended to this Article illustrates the differences between VAWA 2000 and U-visa options.

324. This Part provides an overview of many, but not all, of the future legislative changes that will be needed.

325. Women Immigrants Safe Harbor Act of 2001, H.R. 2258, 107th Cong. (2001).

326. *Id.* § 2(a).

would be able to access TANF, Medicaid, SCHIP and Social Service Block Grant Funds.[327] Battered immigrants and other crime victims who receive U-visas would become qualified immigrants able to access public benefits.[328] Finally, the legislation would clarify that battered immigrants who are qualified immigrants are exempt from public charge determinations.[329]

In addition to improved access to benefits, there remain—despite the vast improvements made by VAWA 2000—some groups of battered immigrants who still have no access to immigration relief and who therefore remain under the control of their abusers. These include: battered immigrants who entered on fiancé visas and married a citizen or lawful permanent resident abuser who is not the person who brought them to the country on a fiancé visa; immigrant victims of elder abuse; immigrant young adults, particularly incest victims, who were abused as children under the age of twenty-one but who failed to file their VAWA self-petition before turning twenty-one years of age; and battered immigrant spouses and children of lawful permanent residents who self-petition within two years of the abusive lawful permanent resident spouse's death.

Finally, further reforms are needed to ensure that immigration status does not keep battered immigrants from being able to receive assistance for expert domestic violence attorneys who work for Legal Services Corporation ("LSC") funded programs. Amendments are needed for federal laws governing LSC funds that will allow LSC-funded programs to use non-LSC funds to represent battered immigrant women in any legal matter connected to the abuse in any case in which the relationship between the victim and the abuser is covered by state domestic violence laws. It would also be important to allow LSC-funded programs to use federal LSC funding to assist battered immigrants in VAWA immigration cases.

VII. CONCLUSION

Legal protections for battered immigrant women and children have expanded significantly since 1990. VAWA 1994 and VAWA 2000 have effectively raised awareness about domestic violence in immigrant communities and are offering protection to many immigrant victims of domestic violence. Legislative protections have helped battered immigrant women escape abuse, survive

327. *Id.* § 2(b).
328. *Id.* § 2(e).
329. *Id.* § 2(g).

economically, and bring their abusers to justice while at the same time reducing domestic violence in their communities. Moreover, this critical history of legislative reforms ensures that the children of immigrant parents have the same opportunity to live lives free of domestic violence – something VAWA sought to provide to all domestic violence victims. Increased numbers of abused immigrants are coming forward acknowledging that domestic violence is a crime that will no longer be tolerated. While advocates continue spreading the word, policy makers and national domestic violence organizations are making sure that addressing the needs of battered immigrants is an important part of the national agenda.

This important work is ongoing. With the passage of VAWA 2000 with its enhanced immigration protections, the challenge for the immediate future will be to monitor how these new laws are implemented to ensure that the immigrant domestic violence and crime victims that Congress has repeatedly sought to help can actually receive that help that was provided to them as a matter of law. The National Network on Behalf of Battered Immigrant Women has assumed leadership in this national effort to inform immigrant victims and service providers about battered immigrant victims' legal rights, to monitor implementation of laws passed and to advocate for further changes that may be needed.[330]

330. Persons interested in joining the National Network on Behalf of Battered Immigrant Women should contact the Immigrant Women Program of NOW Legal Defense and Education Fund at (202) 326-4404 or iwp@nowldef.org.

APPENDIX 1: LEGISLATIVE CHANGES CONTAINED IN VAWA 2000

The following table provides a summary of all legislative changes that were accomplished to help battered immigrants and immigrant crime victims in the Violence Against Women Act of 2000.

Conference Report on Victims of Trafficking and Violence Protection Act of 2000
Division B – Violence Against Women Act of 2000
Title V – Battered Immigrant Women

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Provision	§ Number & INA § Amended	Description
Improved Underserved Population Definition Effective: 10/27/00	1103(b)(3)	Includes alienage status as one of the categories of underserved populations of battered women. This change clarifies that battered immigrants are among the underserved populations that domestic violence programs funded by the Violence Against Women Office of the Department of Justice are to place a priority on serving. This change will help battered immigrants access assistance and services from the justice system and domestic violence service providers who have been trained on battered immigrants legal right s and special needs
Intended Spouse Defined Effective: 10/27/00	1503(a) 101(a)(50)	Defines the term "intended spouse" as a person who went through a formal marriage ceremony either in the U.S. or abroad with either a citizen or a permanent resident but whose marriage is illegitimate solely because of the bigamy of such citizen or permanent resident.
Self-petitioning Spouses of Citizens Delete U.S. Residency Requirement	1503(b) 204(a)(1) (A)(iii)-(iv)	Provides battered immigrants living abroad access to VAWA self-petitions. The battered immigrant must be abused by their citizen or permanent resident spouses or parents: (1) who are United States government employees; or

Effective: 10/27/00	204(a)(1) (B)(ii)-(iii)	(2) who are members of the United States uniformed services (including military members); or (3) and one or more of the incidents of battering or extreme cruelty occurred in the United States.
Delete Extreme Hardship Requirement Effective: 10/27/00	1503(b) 204(a)(1) (A)(iii)-(iv) 204(a)(1) (B)(ii)-(iii)	Deletes the extreme hardship requirement in VAWA self-petitioning cases.
Extend VAWA Self-Petitions to Spouses of Bigamists Effective: 10/27/00	1503(b) 204(a)(1) (A)(iii)-(iv) 204(a)(1) (B)(ii)-(iii)	Allows battered immigrants who unknowingly marry bigamists to file VAWA self-petitions if the battered immigrant went through a formal marriage ceremony either in the U.S. or abroad and believed in good faith that she had married the U.S. citizen or permanent resident, and the marriage was not legitimate solely because of the bigamy of such citizen or permanent resident.
Filing within 2 Years of Divorce from, Death of, or Loss of Citizenship of a Citizen Effective: 10/27/00	1503(b)(1) 204(a)(1) (A)(iii)-(iv)	Permits battered immigrants to file VAWA self-petitions within two years of the divorce, death (only in the case of a citizen abuser), loss of immigration status, or denaturalization of the abuser. Battered immigrants whose spouse lost or renounced immigration or citizenship status within the past two years must demonstrate that the loss of status is related to an incident of domestic violence. Within two years of divorce, battered immigrants must demonstrate a connection between the legal termination of the marriage and the battery or extreme cruelty.
Self-Petitioning Children of Citizens Effective: 10/27/00	1503(b)(2) 204(a)(1) (A)(iv)	Protections for abused children of citizens offer the same relief described in Secs. 1503(b).
Filing VAWA Self-Petitions Abroad	1503(b)(3)	Outlines procedures that allow victims living abroad to file self-petitions, which may be filed abroad at a U.S. consulate or directly with INS in Vermont and will be there

Effective: 10/27/00	204(a)(1) (A)(v)	processed at the INS Service Center by a team of expert VAWA adjudicators in the same manner that all self-petitions are processed when filed within the U.S.
Self-Petitioning Spouses of Lawful Permanent Residents Effective: 10/27/00	1503(c)(1) 204(a)(1) (B)(ii)	Protections for abused spouses of lawful permanent residents offer the same relief described in § 1503(b).
Filing within 2 Years of Divorce from or Loss of Legal Immigration Status by a Spouse or Parent Effective: 10/27/00	1503(c)(1) 204(a)(1) (B)(ii)-(iii)	Please see §1503(b)(3) for an explanation of this provision.
Self-Petitioning Children of Lawful Permanent Residents Effective: 10/27/00	1503(c)(2) 204(a)(1) (B)(iii)	Protections for abused children of lawful permanent residents offer the same relief described in § 1503(b).
Filing of VAWA Self-Petitions Abroad by Spouses of Permanent Residents Effective: 10/27/00	1503(c)(3) 204(a)(1) (B)(iv)	Please see §1503(b)(3) for an explanation of this provision.
Good Moral Character Determinations For Self-Petitioners Effective: 10/27/00	1503(d)(2) 204(a)(1) (C)	Provides the Attorney General with the discretion to waive the bar to issuing a finding of good moral character as long as the act or conviction was connected to the battery or extreme cruelty. This waiver will be limited to crimes for which waivers are already available for reasons of inadmissibility under § 212(a), and deportability under § 237(a). Including new waivers created for battered immigrants by secs. 1505(a)-(e). The Attorney General will be required to accept any credible evidence.

Derivative Children Attaining 21 years of Age Effective: 10/27/00	1503(d)(2) 204(a)(1)(D)	Allows derivative children who are under 21 when the self-petition is filed to maintain derivative status under their parent's self-petition, even when they are no longer under 21. Also allows child self-petitioners to include their own children in their self-petitions.
Access to Naturalization of Divorced Victims Effective: 10/27/00	1503(e) 319(a)(1)-(2)	Expands the provision which permits naturalization after three years of permanent residence for the spouse of a citizen to include a divorced person and a person no longer living with her spouse in marital union, who became a permanent resident by reason of his or her status as the spouse or child of a citizen, and who was subjected to battery or extreme cruelty by that citizen abuser.
Extends VAWA Cancellation to Immigrant Victims Whose Citizen or Permanent Resident Spouses Are Bigamists § 304 IIRAIRA (P.L. 104-208; 110 Stat. 587), AEDPA Effective: 04/04/96	1504(a) 240A(b)(2)(A)(i)(III)	Provides abused spouses of bigamists with access to VAWA cancellation of removal. See § 1503(a) for an explanation of a parallel provision.
3-Year Tolling Provisions under Cancellation of Removal § 304 IIRAIRA (P.L. 104-208; 110 Stat. 587), AEDPA Effective: 04/04/96	1504(a) 240A(b)(2)(A)(ii)	Exempts battered immigrants who apply for VAWA cancellation of removal from the provision that terminates continuous physical presence when the noncitizen is served with a notice to appear or an order to show cause.
Waiver for 90/180 Days Continuous Presence in VAWA Cancellation &	1504(a) 240(A)(b)	Creates a waiver when there is a connection between the battered immigrant's absence from the U.S., or a portion thereof, and the abuse. The Attorney General will be allowed to waive certain breaks in continuous presence when there is a

Suspension Cases § 309 IIRAIRA (P.L. 104-208, 110 Stat. 3009) Effective: 04/01/97	(2)(B)	connection between the absence(s), or part of the absence(s), and the abuse. If the absence(s), or a portion of the absence(s), are deemed connected to the abuse, even if the total number of days absent 90 days for on absence or 180 days cumulatively, the battered immigrant will not be considered to have broken the continuous presence requirement. The extra days will simply be added on to the three-year presence requirement. For example, if the battered immigrant is absent for a total of 190 days, she will be allowed to file for VAWA cancellation after she has been in the country for three years and ten days.
Discretionary Waiver for Good Moral Character Determinations for VAWA Cancellation and Suspension Applicants § 309 IIRAIRA (P.L. 104-208, 110 Stat. 3009) Effective: 04/01/97	1504(a) 240(A)(b)(2)(C)	Provides the Attorney General with the discretion to waive the bar to issuing a finding of good moral character as long as the act or conviction was connected to the battery or extreme cruelty. The Attorney General will be required to accept any credible evidence.
Grant Parole to Children and Parent (in the Case of an Abused Child) of Applicants Granted VAWA Cancellation or Suspension § 309 IIRAIRA (P.L. 104-208, 110 Stat. 3009) Effective: 04/01/97 For Suspension, VAWA Effective: 9/13/94	1504(b) 240A(b)(4)	Provides parole status to the children and parents (in the case of an abused child) of battered immigrants who have been granted VAWA suspension or cancellation from the time the abused parent or child is granted cancellation or suspension until they receive lawful permanent residence through a family-based relative petition. The abused immigrant granted cancellation or suspension must exercise due diligence in filing the family-based relative petition. This protection is available even if the parental rights of the citizen or permanent resident abusive parent have been terminated.

VAWA Waiver of Inadmissibility For Re-Entry after Unlawful Presence, Multiple Illegal Re-Entries and for Re-Entry after Removal/ Deportation Order Effective: 10/27/00	1505(a) 212(a)(9)(C)(ii)	Creates a waiver for battered immigrants in § 212(a)(9)(C) which provides for a mandatory ten-year bar to re-entry for immigrants who have re-entered, or attempted to re-enter, the U.S. after being unlawfully present for one year as a result of unlawful entry or after previously being ordered removed from the U.S. The applicant must show that there is a connection between the abuse and the battered immigrant's removal or departure from the U.S. and any re-entry(ies) or attempted re-entry(ies) into the U.S.
Waiver of Deportation Grounds for VAWA Applicants with Domestic Violence Arrests or Convictions Effective: 10/27/00	1505(b) 237(a)(7)	Allows the Attorney General to waive the domestic violence ground of deportation in appropriate cases where the applicant is otherwise qualified for VAWA. Battered immigrants who were subject to dual arrest when they acted in self-defense, were convicted of violating their own protection order, or committed other crimes connected to the domestic violence that did not result in serious bodily injury is eligible for this waiver. The waiver is only available to the person who is not the primary perpetrator of abuse in the relationship. In considering waiver requests under this section, the Attorney General shall accept any credible evidence.
Misrepresentation Waivers for Battered Spouses of U.S. Citizens & Permanent Residents Effective: 10/27/00	1505(c) 212(i)(1) 237(a)(1)(H)	Includes battered immigrants within the scope of a 212(i) waiver of inadmissibility based on a misrepresentation when the immigrant can show that the failure to grant the waiver would result in extreme hardship to the immigrant's citizen or permanent resident spouse. Self-petitioners can obtain this waiver if they can show extreme hardship to self, child, or in the case of a child, their parent rather than their abusive spouse or parent. Also includes a misrepresentation waiver under 237(a)(1)(H).
Battered Immigrant Waiver: HIV Waiver Effective: 10/27/00	1505(d) 212(g)(1)	Allows battered immigrants who otherwise qualify under VAWA to file for waivers of inadmissibility based on a communicable disease of public health significance, including HIV or TB.

Extension of Existing 212(h) Waiver for Limited Minor Criminal Offenses to VAWA Battered Immigrants Effective: 10/27/00	1505(e) 212(h)(1)(C)	Extends discretionary waivers to VAWA-eligible battered immigrants who commit certain crimes including crimes of moral turpitude and multiple offenses, and offenses that are more than 15 years old. This provision is the counterpart to the good moral character waiver contained in Secs. 1503(d)(2) and 1504(a)(iii) of this legislation. Battered immigrants need not show extreme hardship to their abusive citizen or permanent resident spouse in order to qualify for the waiver.
Public Benefits and Public Charge Clarification Effective: 10/27/00	1505(f) 212(P)	Bars the INS, consular officials, and immigration judges from considering public benefits authorized under IIRAIRA § 501 when making public charge determinations in VAWA cases.
INS Report to Congress Effective: 10/27/00	1505(g)	Requires the INS to report to Congress on the manner in which they process requests by eligible VAWA cancellation and suspension applicants who seek to be placed in removal proceedings. The report will provide information on a district-by-district basis and incentives for the INS to develop and implement, at the INS district level, a system allowing battered immigrants to apply for VAWA cancellation. The report will also include information on the time it takes after a battered woman asks to be placed in proceedings before she appears before an immigration judge at a master calendar hearing where she can file her VAWA case and request a prima facie determination.
Remove Barriers to Adjustment of Status for Victims of Domestic Violence Effective: 10/27/00 Applies to adjustment applications pending on or filed after 01/14/98	1506(a) 245(a) & (c)	Permits a person who has not been inspected and admitted or paroled into the U.S to adjust his or her status to that of a lawful permanent resident if he or she has an approved petition for a preference classification as a battered immigrant VAWA self-petitioner. Also exempts battered immigrants from being considered ineligible for adjustment because of engaging in unauthorized employment in the U.S. or because of any of the other bars listed in 245(c).

3-Year Tolling Provisions under Cancellation of Removal and Suspension of Deportation § 309 of IIRAIRA (P.L. 104-208, 110 Stat. 3009) 4/1/97. For Suspension, Effective VAWA 9/13/94	1506(b) 240A(d)(1) 309(c)(5)(C) of IRAIRA	Exempts battered immigrants who apply for VAWA cancellation of removal And suspension of deportation from the provision that terminates continuous physical presence when the noncitizen is served with a notice to appear or an order to show cause. See § 1504(a) for a similar provision.
Eliminating Motion to Reopen Time Limits Effective: § 309 of IIRAIRA (P.L. 104-208, 110 Stat. 3009) 04/01/97	1506(c) 240(c)(6)(C) 242(B)(c)(3) pre-IRAIRA	Provides VAWA eligible women with ability to file motions to re-open up to one year after the final adjudication of their removal case, if their motion is accompanied by evidence of qualification for VAWA self-petition or cancellation. This one-year time limitation can be waived by the INS or the Immigration Judge upon a showing of extraordinary circumstances or of extreme hardship to children. Extraordinary circumstances may include, but are not limited to domestic violence related to or interferences with her participation in the removal case, or violence or cruelty of such a nature that not allowing the case to be reopened would thwart justice or be contrary to VAWA's humanitarian purpose. Battered immigrants with pre-IIRAIRA deportation cases are eligible to file a motion to reopen, if their motion is accompanied by evidence of qualification for VAWA self-petition or VAWA suspension. There is no deadline to file motions to reopen for these cases.

Effect of Changes in Abuser's Immigration Status Effective: 10/27/00	1507(a) 204(a)(1)(A)(vi) 204(a)(1)(B)(v) 201(b)(2)(A)(i)	Provides that changes to the abuser's immigration status after filing a self-petition under VAWA shall not adversely affect the approval of the petition. In the case of an approved petition, a change in the abuser's status shall not preclude classification of the self-petitioning person as an immediate relative (e.g. naturalization of the abuser) or affect the person's ability to adjust status to that of a lawful permanent resident. If the abusive U.S. citizen spouse or parent loses immigration status, divorces the battered immigrant, dies (only in the case of an abusive citizen), renounces citizenship, or is deported after the battered immigrant has filed her self-petition, the self-petition remains valid.
Allowing Remarriage of Battered Immigrants Effective: 10/27/00	1507(b) 204(h)	Clarifies that a battered immigrant's remarriage is not a basis for revoking approval of an applicant's self-petition and explicitly allows remarriage before the victim receives her green card based on an approved VAWA self-petition.
Technical Correction in IIRAIRA Regarding Qualified Alien Definition for Battered Immigrants Effective: 10/27/00	1508 431(c)(1)(B)(iii)	Corrects two technical errors contained in IIRAIRA regarding eligibility for certain welfare benefits for immigrants battered by citizen or permanent resident spouses or parents. First, the language granting welfare access to VAWA suspension of deportation applicants did not cite the proper code section for the VAWA suspension provisions. Second, VAWA suspension applicants were allowed access to public benefits, but the section omitted reference to VAWA cancellation of removal applicants
Access to Cuban Adjustment for Battered Immigrant Spouses Effective: VAWA Enactment 9/13/94	1509(a) Pub. L. 89-732	Allows battered immigrant spouses and children of Cuban Adjustment applicants to adjust their status without demonstrating that she is residing with the Cuban spouse or parent

Access to NACARA for Battered Immigrant Spouses and Children Effective: NACARA Enactment 10/19/97	1510 NACARA 202(d) 309(c)(5) (C) of IRAIRA	Allows battered spouses and children of NACARA-eligible abusive spouses and parents to file for NACARA relief. Battered spouses and children must be related to the abuser at the time the abuser: was granted suspension or cancellation; filed for suspension or cancellation; registered for benefits under ABC v. Thornburgh; applied for TPS; or asylum. Current residence with the abusive spouse is not required.
Access to the Haitian Refugee Fairness Act of 1998 for Battered Spouses and Children Effective: HRIFA Enactment 10/21/98	1511 HRIFA 902(d)(1) (B)	Allows battered immigrant spouses and children of Haitian Refugee Immigration Fairness Act applicants to adjust their status
Access to Services and Legal Representation for Battered Immigrants Effective: 10/27/00	1512 42 U.S.C. 3796hh(b) (5) 42 U.S.C. 13971(a) (2) 42 U.S.C. 3796gg(b) Higher Ed. Amend. of 1998 826(b)(5)	Clarifies that funds from all VAWA grant programs administered by the Violence Against Women Office of the Department of Justice may be used to provide a broad range of legal and social services for battered immigrant women, including assistance in VAWA immigration matters. The grant programs addressed are: STOP, Grants to Encourage Arrest, Rural VAWA Grants, Civil Legal Assistance, and Campus Grants. Further, the prohibition against using civil legal assistance funds for representation in immigration cases including VAWA self-petitions was specifically eliminated. This section also allows programs serving battered immigrants, prosecutors, or police to apply for STOP grant funding for a project that would train INS officers and/or immigration judges on the dynamics of domestic violence in immigrant families and the legal rights of battered immigrants.

		Adds new INA Section 101(a)(15)(U) which creates a non-immigrant visa for a limited group of immigrant crime victims who have suffered substantial physical or emotional injury as a resulted of being subjected to specific crimes committed against them in the U.S. law enforcement official must certify that the immigrant visa applicant has been helpful, is being helpful or is likely to be helpful to an the investigation or prosecution of criminal activity. If the Attorney General considers it necessary to avoid extreme hardship the child, spouse or in the case of an immigrant child a parent may also get a visa. The maximum number of U visa's for primary visa applicants in any one-year is 10,000. There is no limit on derivative visas and the visas are not taken from any other visa category.
Protection for Certain Crime Victims Effective: 10/27/00	1513 101(a)(15)(U)	Crimes covered include: rape, 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; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. Confidentiality: U visa petitioners are provided the same confidentiality protections as afforded battered immigrants under the Violence Against Women Act immigration provisions. Waiver of Inadmissibility Grounds: Since these visas are only available to cooperating witnessing in investigations or prosecutions of criminal activity, most grounds of inadmissibility are waivable by the Attorney General, except for

		participants in genocide, if the Attorney General considers the waiver to be in the public or national interest. Discretionary Adjustment to Permanent Resident Status: In the Attorney General's discretion a U-visa holder who has been physically present in the United States for three years may adjust their status to that of a permanent resident when such adjustment is justified on humanitarian grounds, to ensure family unity or when it is otherwise in the public interest unless the immigrant has unreasonably refused to cooperate in an investigation or prosecution of criminal activity. The Attorney General also has the discretion to issue a visa to or adjust the status of the spouse, child or parent of a child if necessary to avoid extreme hardship.

Prepared by Janice Kaguyutan, NOW Legal Defense and Education Fund, October 23, 2000.

Filing a U-visa is appropriate when:	• The abuser/criminal is not a U.S. citizen or lawful permanent resident; • The abuse/criminal is not a spouse or parent; • The violence is another form of violence that would not be considered domestic violence, but is a crime or form of sexual violence covered by the U-visa.
A U-visa may also help battered immigrants who may have difficulty qualifying under VAWA:	• The battered immigrant was divorced from her citizen or lawful permanent resident spouse more than two years ago. • Broader range of criminal offenses are waivable. • Helps battered immigrants with approved self-petitions who may have problems proving that they are admissible. Waivers of inadmissibility are broader for U-visa cases than for VAWA cases.
A VAWA case may be more advantageous for battered immigrants who can qualify because:	• Currently there are no regulations for the U-Visa. • U-Visa applicants have a three-year continuous presence requirement before they can apply for lawful permanent residency. • U-visa recipients can only obtain lawful permanent residency if they can prove humanitarian need, family unity or public interest. VAWA self-petitioners can obtain lawful permanent residency once a visa becomes available • U-Visa applicants have to rely on a prosecutor/government official to write a "certification." VAWA applicants may self-petition and prove their entitlement to the remedy without any mandatory cooperation from law enforcement or any government official. • Spouses, children and parents of children under the age of sixteen who apply for a U-Visa under a principle applicant are required to show extreme hardship. VAWA applicants can automatically include any children they have who are under the age of twenty-one in their self-petition.