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Memorandum

HQ 204-P

Subject	Date
Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents	APR 16 1996

To

All Regional Directors
All District Directors (Including Foreign)
All Service Center Directors
All Officers in Charge (Including Foreign)

From

Office of Programs

The Violent Crime and Control Act ("the Crime Bill"), Public Law 103-322, was signed by the President on September 13, 1994. Title IV of the Crime Bill is entitled the "Violence Against Women Act" ("the VAWA") and contains three provisions amending the Immigration and Nationality Act ("the Act"). These amendments to the Act provide benefits for certain spouses or children of abusive U.S. citizens or lawful permanent residents.

Each regional director, district director, service center director, and officer in charge must ensure that enforcement personnel under his or her jurisdiction are aware of these immigration-related provisions of the Crime Bill and take them into consideration when making enforcement decisions. Examinations staff, of course, must also be made aware of the new benefits available under the Act.

The following three immigration-related benefits are provided in the VAWA:

I. SELF-PETITIONING

Section 40701 of the Crime Bill allows certain spouses and children of abusive citizens or lawful permanent residents of the United States to self-petition for immigrant classification. An eligible spouse or child, who would have qualified for immigrant classification had the abusive spouse or parent petitioned for him or her, may be classified as an immediate relative or preference immigrant based on the relationship to the abuser without the abuser's knowledge or consent.

A self-petitioning spouse must be legally married to the abuser when the self-petition is filed, although the couple need not be living together at the time. Legal termination of the marriage (whether by divorce, death, or annulment) after the self-petition is properly filed with the Service will NOT be the basis for denial or revocation of the self-petition.

A qualified self-petitioner must meet certain additional statutory requirements, which include a demonstration of the self-petitioner's good moral character and of the extreme hardship that would be caused by his or her deportation.

SELF-PETITIONING

IMPLEMENTATION

Section 40701 of Public Law 103-322 became effective January 1, 1995. Service offices must accept properly filed applications submitted on or after that date.

An interim rule implementing the new law has been published in the Federal Register and is effective upon publication. A copy of the rule is attached. Action should now be taken on self-petitions that had been held in abeyance pending publication of the regulations.

BASIC ELIGIBILITY REQUIREMENTS

Each spouse or child petitioning for himself or herself under section 40701 of the Crime Bill must show that he or she:

(1) is now the spouse or child of an abusive U.S. citizen or lawful permanent resident;

(2) is eligible for immigrant classification based on that relationship;

(3) is now residing in the United States;

(4) has resided in the United States with the citizen or lawful permanent resident abuser in the past;

(5) has been battered by or has been the subject of extreme cruelty perpetrated by:

(a) the citizen or lawful permanent resident spouse during the marriage; or, is the parent of a child who has been battered by or has been the subject of extreme cruelty perpetrated by the citizen or lawful permanent resident spouse during the marriage; or

(b) the citizen or lawful permanent resident parent while residing with that parent;

(6) is a person of good moral character;

(7) is a person whose deportation would result in extreme hardship to himself or herself; or is a person whose deportation would result in extreme hardship to his or her child, if self-petitioning as a spouse; and

(8) if self-petitioning as a spouse, entered into the marriage to the citizen or lawful permanent resident in good faith.

the self-petition. The earlier priority date may be assigned without regard to the current validity of the relative visa petition filed by the abuser; the earlier priority date may be used even though the relative visa petition was withdrawn, denied, or the approval revoked.

ELIGIBILITY FOR ADJUSTMENT OF STATUS/IMMIGRANT VISA ISSUANCE

An approved self-petition gives the self-petitioner immediate relative or family-sponsored immigrant classification. For adjustment of status or immigrant visa issuance purposes, the self-petitioner should be regarded as any other immediate relative or family-sponsored preference alien. No provisions of section 212 or 245 have been waived, although self-petitioners are not precluded from applying for any waiver or other benefit for which they may qualify.

A self-petitioner who would not otherwise qualify for adjustment of status under section 245 of the Act because he or she entered without inspection or is included in one of the classes enumerated in section 245(c) of the Act may utilize the benefits of section 245(i) of the Act. The self-petitioner, like any other adjustment of status applicant, may file Supplement A to Form I-485 and pay the additional sum. Payment of the additional sum will be waived only if the applicant is less than 17 years of age or if the applicant is the spouse or child of a legalized alien as described in section 245(i) and the relating regulations.

(Note: A self-petitioner who is filing for adjustment of status as the spouse or child of an abusive U.S. citizen is an immediate relative. Immediate relatives are not subject to the requirements of section 245(c) of the Act, although they are still subject to the requirements of section 245(a) of the Act.)

ADJUSTMENT OF STATUS APPLICATION BASED ON RELATIVE PETITION FILED BY ABUSER

An adjustment of status applicant who states that he or she has been abused by the petitioning U.S. citizen or lawful permanent resident spouse or child may be advised of the self-petitioning option. If the spouse or child chooses to self-petition, he or she would not be required to file another adjustment of status application if:

(1) the previously filed adjustment application was still pending before the Service on the date the self-petition was properly filed with the Service; and

(2) the spouse or child qualified for adjustment of status on the date the adjustment application was properly filed with the Service.

The adjustment applicant may also choose to proceed with the adjustment application based on the visa petition filed by the abuser, provided the visa petition has not been withdrawn, denied, or revoked. If the adjustment applicant chooses to proceed based on the abuser's petition, the Service retains the option of requiring the petitioner to appear for an interview.

EMPLOYMENT AUTHORIZATION

Section 47071 of the Crime Bill does not direct the Service to provide employment authorization based solely on the filing or approval of a self-petition. A qualified self-petitioner, however, may be eligible to apply for employment authorization under the existing provisions of 8 CFR 274a.12. Requests for employment authorization or for an extension of employment authorization should be made on Form I-765, Application for Employment Authorization.

Many self-petitioners will be immediately eligible to apply for adjustment of status. These self-petitioners may qualify for employment authorization under 8 CFR 274a.12(c)(9) while the adjustment application is pending.

Most other self-petitioners will be eligible to request voluntary departure prior to or after a deportation hearing for the reasons set forth in 8 CFR 242.5(a)(2)(v), (vi), or (viii). A person who has been granted voluntary departure for one of these reasons may request employment authorization under 8 CFR 274a.12(c)(12), if the person shows an economic need to work.

A person who has been placed in deferred action status may request employment authorization under 8 CFR 274a.12(c)(14) if the person shows an economic need to work.

A self-petitioner also would not be precluded from requesting the employment authorization benefits of any other provision of 8 CFR 274a.12 under which he or she may qualify.

EVIDENCE IN GENERAL

The regulations recommend the submission of certain types of documents with the self-petition. The Service is, however, statutorily required to consider any relevant credible evidence submitted in connection with the self-petition. A self-petition cannot be denied merely because a self-petitioner has not submitted a specific type of document. A self-petition may be denied, however, if the evidence that has been submitted does not credibly establish eligibility for this benefit.

Although the burden of proof to establish eligibility lies with the self-petitioner, adjudicators should give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent. Readily available electronic records (such as CIS, CLAIMS, etc.) should be checked if the self-petitioner is unable to provide documentary evidence of the abuser's immigration or citizenship status or of the abuser's filing of a visa petition on behalf of the self-petitioner. The adjudicating officer may also choose to review other Service records to verify the claimed status or filing. Any other information provided with the self-petition may also be verified through a review of these and other Service records, at the discretion of the adjudicating officer.

There are NO other requirements for classification as a derivative child of a self-petitioning spouse. (A derivative child need not have suffered abuse and need not qualify as the abuser's child. The derivative child is not required to have ever lived in the United States and is not required to have lived with the abuser.)

There is no derivative immediate relative classification for the grandchild of a U.S. citizen abuser (the child of an immediate relative self-petitioning child). (An approved immediate relative self-petition will be automatically converted to a self-petition for family-sponsored preference classification under section 203(a) of the Act, however, if the self-petitioning child marries or reached 21 years of age before becoming a lawful permanent resident based on the self-petition. The self-petitioner's child may then become eligible for derivative benefits under section 203(d) of the Act.)

A spouse or child of a principal alien classified as a family-sponsored immigrant under section 203(a) of the Act may be accorded derivative classification under the provisions of section 203(d) of the Act.

A derivative child ceases to qualify for derivative benefits if the child marries or reaches his or her twenty-first birthday prior to approval of the child's application for adjustment of status or prior to the child's embarkation for the United States with his or her immigrant visa.

EXTREME HARDSHIP

The statute requires a self-petitioning spouse to show that he or she, or his or her child, would suffer extreme hardship if the self-petitioner were to be deported. A self-petitioning child must show that he or she would suffer extreme hardship if he or she were to be deported. Extreme hardship to other persons, such as extended family members, cannot be used to meet this requirement.

Although the burden of proof lies with the self-petitioner, the adjudicator must review the circumstances surrounding the case before reaching a decision concerning extreme hardship. This review may include evidence which may not have been specifically identified by the self-petitioner as supporting the extreme hardship claim.

The phrase "extreme hardship" is not defined in the Act, and sections 40701 and 40703 of the Crime Bill provide no additional guidelines for the interpretation of this requirement. The phrase "extreme hardship" has acquired a settled judicial and administrative meaning, however, largely in the context of suspension of deportation cases under section 244 of the Act.

It has been found that the personal deprivation contemplated in a situation characterized by "extreme hardship" within the meaning of section 244 of the Act is not a definable term of fixed and inflexible content or meaning; it necessarily depends upon the facts and

(2) the impact of the loss of access to the U.S. courts and criminal justice system (including, but not limited to, the ability to obtain and enforce: orders of protection; criminal investigations and prosecutions; and family law proceedings or court orders regarding child support, maintenance, child custody and visitation);

(3) the self-petitioner's and/or the self-petitioner's child's need for social, medical, mental health, or other supportive services which would not be available or reasonably accessible in the foreign country;

(4) the existence of laws, social practices, or customs in the foreign country that would penalize or ostracize the self-petitioner or the self-petitioner's child for having been the victim of abuse, for leaving the abusive situation, or for actions taken to stop the abuse;

(5) the abuser's ability to travel to the foreign country and the ability and willingness of foreign authorities to protect the self-petitioner and/or the self-petitioner's child from future abuse; and

(6) the likelihood that the abuser's family, friends, or others acting on behalf of the abuser in the foreign country would physically or psychologically harm the self-petitioner and/or the self-petitioner's child.

Further interpretive guidance concerning the extreme hardship determination in self-petitioning cases will be provided as the Service acquires experience in processing these cases and self-petitioning case law becomes established.

BATTERY OR EXTREME CRUELTY

The self-petitioner or the self-petitioning spouse's child must have been a victim of the battery or extreme cruelty. The qualifying abuse must also have been committed by the abusive U.S. citizen or lawful permanent resident spouse or parent. In addition, the battery or extreme cruelty must have been committed during the marriage between the self-petitioning spouse and the abuser, or must have been committed while the self-petitioning child was living with the abuser.

The qualifying abuse must further rise to the level of "battery or extreme cruelty." There is no exhaustive list of acts that constitute "battery or extreme cruelty." The interim rule provides a flexible regulatory definition of the phrase "was battered by or subjected to extreme cruelty," which is similar to the regulatory definition of this phrase provided for "battered spouse or child" waivers in 8 CFR 216.

A self-petitioner who has suffered no physical abuse may also be eligible for this benefit. The regulatory definition of "battery or extreme cruelty" should be applied to claims of extreme mental cruelty as well as to claims of physical abuse.

prostitution under duress but had no prostitution convictions was not excludable as a prostitute under section 212(a)(12) of the Act (currently section 212(a)(2)(D) of the Act) because she was involuntarily reduced to such a state of mind that she was actually prevented from exercising free will through the use of wrongful, oppressive threats, or unlawful means. Matter of M-, 7 I&N Dec. 251 (BIA 1956). A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable, therefore, would not be precluded from being found to be a person of good moral character if the person has not been convicted for the commission of the offense or offenses in a court of law.

A self-petitioner may also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she: (1) willfully failed or refused to support dependents; or (2) committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character.

DENIALS

The self-petitioner must be notified of the Service's intent to deny a self-petition. He or she must be allowed an opportunity to respond to that notice before a final decision is issued concerning a properly filed self-petition.

Field offices need not obtain HQBEN concurrence prior to denying a self-petition. Until further notice, however, field offices must forward a copy of each final denial notice issued during the month with the monthly report discussed below.

REPORTING REQUIREMENTS

A monthly report has been developed to allow HQBEN to gather statistical information to respond to Congressional and public inquiries regarding the implementation of this provision. A copy of the report is attached. Field offices must submit the report to the regional offices (ROADN) for consolidation, no later than the fifth day of each month. The first report will be due no later than May 5, 1995.

Offices using CLAIMS to process these applications are also being asked to submit these reports until CLAIMS is modified to provide HQBEN with the information electronically.

Offices will be notified when the need for the manual report has ended.

CLASS OF ADMISSION AND ADJUSTMENT CODES

Distinct class of admission and adjustment codes have been established for self-petitioners and their derivative family members, as follows:

HQBEN CONTACTS

Field officers are encouraged to consult HQBEN concerning any aspect of the self-petitioning process that is unclear or to suggest areas in which additional guidance or training would be helpful. The HQBEN contacts, Rita Arthur and Ramonia Law-Hill, may be reached at:

(202) 514-5014 (voice)

(202) 514-0198 (fax)