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Additional Remedies Under VAWA: Battered Spouse Waiver¹²

By Cecilia Olavarria and Moira Fisher Preda

Introduction³

In 1986, Congress added the Immigration Marriage Fraud Amendments (IMFA)⁴ to the Immigration and Nationality Act (INA). The purpose of IMFA was to deter people from entering fraudulent marriages solely for the purpose of obtaining lawful permanent resident status.⁵ One of the main changes that resulted from IMFA was the creation of “conditional residence.”⁶ Immigrant women who are married to U.S citizens or

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

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

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

⁴ Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. § 1186a.)

⁵ *Id.*

⁶ INA § 216(a)(1), 8 U.S.C. § 1186a(a)(1) (1986); INA § 216(g)(1), 8 U.S.C. § 1186a(g)(1).

Battered Immigrants and Immigration Relief

lawful permanent residents for less than two years at the time of the permanent residence interview with U.S. Citizenship and Immigration Services (CIS, formerly INS) are not automatically granted permanent residence; rather, they receive “conditional” residence for two years. Within ninety days before the end of the two-year period, both husband and wife must file a joint petition to have the condition removed, and both may be required to appear before a CIS official for a personal interview.⁷

The joint petition requirement placed battered immigrant women in a vulnerable situation because of the power that it gave to their abusers. To control their victims, abusers could refuse to jointly file the petition or cooperate in the mandated CIS personal interview. Victims had no alternative but to remain in abusive relationships or try to meet the stringent requirements for waivers under the 1986 IMFA.⁸ Otherwise, their immigration status would be jeopardized. In certain situations, the 1986 IMFA allowed waivers of the joint petition requirement.⁹ These waivers, however, did not address the circumstances of battered immigrants.¹⁰

Congress responded to this dangerous situation by enacting the 1990 Amendments to the INA (Immigration Act of 1990).¹¹ In addition to amending the existing waivers, Congress created a new type of waiver addressing specifically the dangers experienced by battered immigrants.¹² If the battered immigrant can prove certain conditions, approval of a battered spouse waiver eliminates the joint petition requirement for removal of conditional resident status and prevents her from being locked for two years in an abusive marriage.¹³ The 1990 changes provided battered immigrant women with a powerful legal tool to escape abusive relationships.

This chapter provides an overview of conditional residence and explains the process involved in attaining and removal of that status. The chapter details the different waivers to the joint petition, specifically the Battered Spouse Waiver, that were created by the Immigration Act of 1990. The chapter also provides guidance on how to spot potential Battered Spouse Waiver applicants and how to effectively prepare a Battered Spouse Waiver.

Conditional Residence

Once an immigrant’s conditional residence status is approved, she will receive formal notice of her approval, as well as a conditional residence card, which is similar to a lawful permanent resident card. This conditional residence is granted for a two-year period. The applicant, along with his or her spouse, must file a joint petition to remove the condition on the applicant’s residence 90 days before the end of the conditional two-year period. Once the conditions are removed, the applicant becomes a lawful permanent resident. Advocates should know the following key aspects of conditional residence:

- These are cases in which the citizen or lawful permanent resident’s spouse filed the papers to help the immigrant spouse gain residency status based on the marriage;
- Conditional residence ONLY applies to spouses who are married to a U.S. citizen or lawful permanent resident, AND the marriage is less than two years old at the time the couple has their interview with CIS for the immigrant spouse to adjust status to permanent residence;
- Unless a waiver applies, both the U.S. citizen or lawful permanent resident spouse and the conditional resident spouse must file a joint petition within 90 days prior to the expiration of the two-year conditional residency;

⁷ INA § 216(c)(1), 8 U.S.C. 1186a(c)(1); INA § 216(d)(2), 8 U.S.C. 1186a(d)(2); INA § 216(d)(3), 8 U.S.C. 1186a(d)(3).

⁸ Maxine Yi Hwa Lee, *A Life Preserver for Battered Immigrant Women: The 1990 Amendments to the Immigration Marriage Fraud Amendments*, 41 BUFF L. REV. 779, 788-790 (1993) [hereinafter Lee Article].

⁹ *Id.*

¹⁰ *Id.* at 790-91.

¹¹ Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

¹² *Id.* § 701(b) (codified as INA § 216(c)(4)(C)); see also Lee Article at 792.

¹³ INA § 216(c)(4)(C), 8 U.S.C. § 1186a(c)(4)(C).

Battered Immigrants and Immigration Relief

- The conditional residence status is only valid for two years. If the spouses do not file to lift the condition, the immigrant spouse's permanent resident status expires, and he or she falls out of status.

Waivers to the Joint Petition to Remove Conditions on Residence

In certain cases, conditional residents will not be able to file the joint petition to remove the conditions with their petitioning spouses. In these situations, the conditional resident will have to file the joint petition herself, requesting a waiver of the usual requirement to file jointly with the petitioning spouse. There are three types of waivers to the joint petitioning requirement, all of which require evidence of a good faith marriage.¹⁴ The applicant must prove that her marriage was entered into in good faith, and not for fraudulent immigration purposes. Additionally, an applicant must demonstrate that she fits within at least one of the following three categories:¹⁵

- The removal of the conditional resident from the United States would result in extreme hardship; OR
- The good faith marriage was legally terminated, other than by death, and the applicant was not at fault for failing to file a timely application to remove the condition; OR
- During the course of the good faith marriage, the conditional resident was *subjected to battering or extreme cruelty* by the U.S. citizen spouse and the conditional resident was not at fault for the failure to timely file to remove the condition¹⁶. In the case of a child applicant, the battering or extreme cruelty occurred at the hands of her U.S. citizen or lawful permanent resident parent.¹⁷

There are waivers in all of these cases that are separate and independent.¹⁸ A conditional resident may file for any or all three of the waivers for which she qualifies.

Confidentiality

In addition to the waivers, Congress included a confidentiality provision to ensure the safety of battered immigrants.¹⁹ Regulations require a court order or the applicant's permission before any information from the application or proceedings may be released to someone besides the applicant, the applicant's representative, a Department of Justice official, or any state or federal law enforcement agency.²⁰

Evidentiary Requirements For a Battered Spouse Waiver Application

While advocates for battered immigrants are encouraged to apply for all the waivers that may be applicable, the following section will outline the evidentiary requirements for a battered spouse waiver.²¹

Good Faith Marriage: In order to obtain a battered spouse waiver, the applicant must prove that the marriage between the survivor and the U.S. citizen or lawful permanent resident was entered into in good faith. The

¹⁴ INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The definition of battered or subjected to extreme cruelty "includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence." 8 C.F.R. § 216.5(e)(3)(i).

¹⁸ INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4); Matter of Balsillie, 20 I. & N. Dec. 486 (BIA 1992).

¹⁹ INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

²⁰ 8 C.F.R. § 216.5(e)(3)(viii).

²¹ Applicants are encouraged to apply for all waivers together, if they qualify, to avoid the risk of being barred from raising another waiver at a later proceeding or application.

Battered Immigrants and Immigration Relief

CIS has discretion in finding that a good faith marriage exists.²² The CIS will consider evidence relating to the couple's commitment to the marriage and assess whether it was a marriage made in good faith. An indication of a good faith marriage may be found by examining the intention of the parties at the time that they were married to see if they intended to establish a life together.²³ To show an applicant's good faith in entering into the marriage, the following are examples of documents that the applicant should submit:²⁴

- Birth certificate(s) of children born to the marriage;
- Lease or mortgage contracts, or affidavits of landlords and neighbors, showing joint occupancy and/or ownership of the couple's communal residence;
- Financial records showing joint ownership of assets and joint responsibility for liabilities, such as joint savings and checking accounts, joint federal and state tax returns, insurance policies that show the other spouse as the beneficiary, joint utility bills, joint installment or other loans;
- Affidavits by people who have known both spouses since the conditional residence was granted, attesting to their personal knowledge of the marital relationship, in addition to the personal knowledge of their courtship or dating;
- Photographs from the wedding, family vacations, special events, holiday celebrations.

Battery or Extreme Cruelty: An applicant must prove that she has been subjected to battery or extreme cruelty. An applicant for the waiver may be separated or divorced from her husband, or may still be living with her abuser.²⁵ Additionally, the battered spouse waiver, unlike the other two waivers, is available to women who have been ordered removed and deported from the United States, or who have failed to depart after their conditional resident status terminated.²⁶ If an applicant can prove that she has been subjected to battering or extreme cruelty, the evidence of abuse stands as a justifiable reason for the applicant's inability to join with the abuser to remove the conditions on her residence. To prove her case, the applicant should try to submit as many of the following documents as possible:²⁷

- Copy of reports or official records documenting the abuse or the effects of the abuse on the battered immigrant or her child issued by school officials and representatives of social service agencies;
- Medical records documenting the frequency and extent of any injuries;
- Police records of calls or complaints (e.g. police reports and 911 call tapes);
- Court records documenting arrests, convictions, or the issuance of protection orders;
- Affidavits from police, judges, medical personnel, school officials, battered women's advocates or shelter workers, mental health professionals treating the victim or her children, social services agency personnel, and witnesses to the domestic violence incidents documenting the emotional abuse or injuries that resulted from the abuse;
- Affidavit from the applicant;

²² INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

²³ See *Bark v. INS*, 511 F.2d 1200 (1975).

²⁴ See General Filing Instructions to INS Form I-751.

²⁵ 8 C.F.R. § 216.5(e)(3)(ii); Lee Article at 794.

²⁶ 8 C.F.R. § 216.5(e)(3)(ii).

²⁷ See General Filing Instructions for INS Form I-751.

Battered Immigrants and Immigration Relief

- An original evaluation by a professional such as a licensed social worker, psychologist, or psychiatrist to show extreme mental cruelty could be helpful but is not required;²⁸
- Copy of divorce decree if marriage was terminated by divorce on grounds of physical abuse or mental cruelty;
- Copy of the custody order if the decision to grant custody was based on a finding of domestic violence.

Affidavit from Applicant: The applicant's affidavit plays a very important role. Her affidavit should address specifically the waiver that she hopes to pursue. She should discuss her intention of marrying in good faith and not solely for immigration purposes. She should also include the following in her affidavit:

- How she and her batterer first met, the nature of their relationship and dating history, living arrangements and children (if applicable);
- When they began living together, or when they got married. A timeline of the relationship will make it easier for CIS officials to understand the entire picture and nature of the relationship;
- The first act of domestic violence and a history of the violence to date, including as many specific incidents as she can accurately recall and a summary of the frequency of incidents of abuse. She should also address what factors make or made it difficult for her to leave the abuser;
- A detailed description of each incident of violence or extreme cruelty, including her protests and attempts to seek help, her feelings of how the abuse affected her and any children; a description of physical injuries, verbal abuse, and threats, and the help she sought and problems she encountered in finding help;
- A list of all address where she and her batterer resided, including names and places of employment or both;
- The batterer's relationship with the survivor's children, parents and siblings;
- The survivor's relationship with her abuser's family members;
- The role of the batterer's parents, if they pressured her not to report the incident to the authorities, or any other person who pressured her not to report. Include her relationship to this person (e.g., neighbor, priest, other relatives, etc.);
- Her own feelings of fear for her safety and the safety of her children. These feelings may include the fear that her abuser will use her immigration status to exert power over her.²⁹ If an applicant is dependent upon her batterer to obtain immigration status, the batterer may use that control to make immigration-related threats to manipulate and abuse her. Some common manifestations of this abuse could be threatening deportation, threatening removal of her LPR status, not filing papers, or threatening not to sign the joint petition.³⁰ The impact of immigration threats in an abusive relationship is quite pervasive, because they can make it hard for an applicant to separate herself from an abusive relationship.

²⁸ CIS is prohibited from requiring the recommendation of a mental health professional or any other specific form of evidence to support a Form I-751 waiver based upon abuse or extreme mental cruelty. Aleinikoff, Executive Associate Commissioner, Office of Programs, INS Memorandum HQ 204-P, at ii (April 16, 1996).

²⁹ Leslye E. Orloff & Rachel Little, *Somewhere to Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women*, at 6 (AYUDA, Inc., May 1999).

³⁰ *Id.* at 6-7.

Battered Immigrants and Immigration Relief

The applicant's affidavit should detail as much as possible, but focus upon the specific hardships encountered as a result of the abuse. If a client is unable or not comfortable with writing, advocates and attorneys should gather stories and details for her affidavit. An advocate should know that an applicant may not feel comfortable discussing her abuse, or the discussion may be painful for her. Advocates should be sensitive to these feelings and help the survivor through the application process so that she can obtain the waiver and retain legal permanent residence.

In addition to the Battered Immigrant Waiver discussed above, there are two other waivers that an immigrant can apply for if she is unable to file the joint petition with her spouse: the extreme hardship waiver, and the good faith/good cause waiver. An applicant should be encouraged to apply for all three waivers at the same time if she qualifies for all three waivers.³¹ Below is a brief discussion of the two other waivers.

Extreme Hardship Waiver

In order to qualify for an extreme hardship waiver, an applicant must convince the CIS adjudicator that she would be subject to "extreme hardship" if she were forced to return to her home country.³² "Extreme hardship" does not have a fixed and inflexible meaning, but, rather, is dependent upon the facts and circumstances of each case. The traditional extreme hardship factors that have been used include: (1) age of the person; (2) age and number of the person's children, the children's ability to speak the native language of the foreign country, and the children's ability to adjust to life there; (3) serious illness of the person or her child that necessitates medical attention not adequately available in the foreign country; (4) a person's inability to obtain adequate employment abroad; (5) the person and her children's length of residence in the U.S.; (6) the existence of other family members residing legally in the U.S.; (7) irreparable harm arising from a disruption of educational opportunities; and (8) the adverse psychological impact of removal.³³ Applicants may provide evidence on the extreme hardship factors listed above in non-domestic violence cases, but wherever possible in domestic violence situations, the applicant should emphasize the nexus between the factor and the violence, the consequences of the violence, and the victim's inability to recover from the violence. If at all possible, the affidavit should emphasize hardship factors other than, or in addition to, economic factors. VAWA 2013 extended the battered spouse waiver protection that has been available to battered spouses filing self-petitions and applications for cancellation of removal to battered spouse waiver applicants. This was accomplished by adding a new "hardship waiver" which allows battered immigrant spouses of U.S. citizens who received conditional residence, who "unknowingly" married bigamist U.S. citizen spouses and who had a formal marriage ceremony, to apply for a battered spouse waiver. The immigrant spouse is required to demonstrate that following the marriage ceremony they were battered or subjected to extreme cruelty by the immigrant's intended spouse. These waivers like all other hardship waivers are granted at the discretion of Department of Homeland Security. They allow the battered spouse to bypass the two-year waiting period that the spouse of a US citizen or lawful permanent resident must traditionally undergo before applying for lawful permanent residency status.³⁴

Good Faith/Good Cause Waiver

The good faith/good cause Waiver is used for immigrants who are unable to file the joint petition because they are no longer married to their spouses, even though the marriage was entered into in good faith.³⁵ In

³¹ Sarah B. Ignatius & Elizabeth S. Stickney, *Immigration Law and the Family* § 5.06[2], note 3,1 (West Group, current through Release #6/June 2001).

³² INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

³³ See *Matter of Pilch*, 21 I. & N. Dec. 627 (BIA 1996), *Matter of Anderson*, 16 I. & N. Dec. 596 (BIA 1978), *Matter of Chumpitazi*, 16 I. & N. Dec. 629 (BIA 1978), *Matter of Kim*, 15 I. & N. Dec. 88 (BIA 1974), *Matter of Sangster*, 11 I. & N. Dec. 309 (BIA 1965).

³⁴ See VAWA § 806(a) & (b) and INA § 216(c)(4) 8 U.S.C. 1186a(c)(4) which vests the Secretary of Homeland Security with discretion to remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements for of timely petition and interview for removal of condition if the alien demonstrates that the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by his or her spouse or citizen or permanent resident parent and the alien was not at fault in failing to meet the requirements of paragraph

³⁵ INA § 216(c)(4)(B), 8 U.S.C. § 1186a(c)(4)(B).

Battered Immigrants and Immigration Relief

order to qualify for a good faith/good cause waiver, an applicant needs to prove that she entered into the marriage in good faith, and that the marriage was legally terminated through divorce or annulment during the two-year conditional residence period. If domestic violence was a factor in an applicant's separation from her spouse, it will be helpful to include that in the petition. The applicant's affidavit should include as many of the domestic violence elements described above as are relevant to the applicant's case.

Procedure For Waiver Application

For a conditional resident to remove the conditions on her permanent residence, both the conditional resident and the U.S. citizen or lawful permanent resident spouse must file a joint petition during the 90 days immediately before the 2-year anniversary of the granting of conditional residency. The CIS form for this joint petition is the I-751, Petition to Remove the Conditions on Residence.³⁶ If joint filing is not possible, the applicant must check off the box on the I-751 referring to the waivers of the joint filing requirement that we have discussed in this chapter. In addition to the I-751, the conditional resident must also submit the required fee and any supporting documentation. The required supporting documentation would include the applicant's affidavit, and other documentation to prove the good faith marriage, the battery or extreme cruelty, and extreme hardship (if the applicant is applying for this waiver).

For a conditional resident who hopes to obtain a waiver, the conditional resident must apply for the waiver while simultaneously applying for the condition to be removed. For those who apply after the 2-year period, the applicant must show good cause for the untimely application, and the CIS has discretion to accept or deny the application.³⁷ Those conditional residents applying for the battered spouse waiver, however, may file for this waiver even after their conditional residence has expired without a showing of good cause.³⁸

Conclusion

Any immigrant spouse who has been married less than two years when the CIS adjusts her status to permanent resident (or when she enters the United States on an immigrant visa) will be granted a conditional residence status for a two-year period. In order to remove the conditional status and retain lawful permanent residence, she and her U.S. citizen or lawful permanent resident spouse must file a joint petition within ninety days before the end of her two-year conditional residence period.

If an immigrant spouse encounters problems filing the joint petition, she may qualify for one of three waivers. If a waiver is granted, the approval allows the immigrant spouse to file on her own behalf and bypass the requirement of a joint petition. Two of the waivers do not require proof of domestic violence, while the third waiver, the battered spouse waiver, is designed specifically for domestic violence victims. By creating these waivers, Congress has taken a positive step forward in protecting immigrant spouses from abusive relationships. Advocates for survivors of domestic violence should become familiar with these waivers so they can be used to help survivors achieve stable status in the United States.

National Immigrant Women's Advocacy Project (NIWAP, pronounced *new-app*)
American University, Washington College of Law
4910 Massachusetts Avenue NW · Suite 16, Lower Level · Washington, DC 20016
(o) 202.274.4457 · (f) 202.274.4226 · niwap@wcl.american.edu · wcl.american.edu/niwap

³⁶ The I-751 Form must be filed along with a filing fee with the DHS Service Center having jurisdiction over the applicant. Please check U.S. CIS's website prior to filing the waiver application for up to date information on filing locations and filing fees.

³⁷ INA § 216(d)(2)(B), 8 U.S.C. § 1186a(d)(2)(B).

³⁸ 8 C.F.R. § 216.5(e)(3)(ii).