

## ***Battered Immigrants and the Criminal Justice System***<sup>12</sup>

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\*\*\*\*DISCLAIMER\*\*\*\*

The information provided in this chapter is intended to serve as an introduction and provide a basic overview of how criminal matters can affect battered immigrant women. It is essential to contact an expert on immigration law and crimes before proceeding with a criminal case involving immigrants.<sup>3</sup>

Chapter 19 “The Criminal Justice System and Immigrant Victims” in “Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault” provides additional information about issues that arise when immigrant victims of sexual assault interact with the criminal justice system. This publication can be accessed and downloaded at <http://niwaplibrary.wcl.american.edu/reference/manuals/sexual-assault>.

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<sup>2</sup> 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.

<sup>3</sup> A list of references is provided at the end of this chapter.

### Introduction<sup>4</sup>

This chapter is designed to help advocates and attorneys with two main issues: how to work with victims who have criminal convictions or criminal charges pending against them, and how to work with victims whose abusers have charges pending against them. For battered immigrant women, criminal issues can have serious immigration consequences, including the following:

- A battered immigrant can be deported if she commits any of a wide variety of crimes;
- Her VAWA self-petition or application for VAWA cancellation of removal or naturalization can be denied if she cannot show good moral character because of a criminal history;
- Even if she has an approved VAWA self-petition, she may be barred from obtaining lawful permanent residence (a green card) if she falls within one of the criminal grounds of inadmissibility;
- Her application for adjustment of status (permanent residence) or VAWA cancellation of removal can be denied if immigration authorities decide not to exercise discretion in her favor because of her criminal history.

For battered immigrants whose abusers have criminal charges pending against them, the potential immigration consequences for the abuser could affect her safety and ultimately her ability or willingness to cooperate in her abuser's prosecution.

This chapter presents an overview of the immigration consequences of criminal conduct. It also presents guidelines for advocates on assisting battered immigrants within the justice system, both when they themselves have criminal histories or face charges, and when their abusers are facing criminal charges. Criminal laws are not uniform and vary in each jurisdiction, making each criminal case unique. This chapter is therefore *not* intended to be an exhaustive or comprehensive guide for assisting battered immigrant women involved in criminal cases. Instead, it provides advocates with basic information and tools to understand and address the immigrant victim's situation.

### Criminal Convictions and Immigration Status

Criminal conduct can jeopardize the immigration status of all non-citizens living in the United States. Even lawful permanent residents who have lived in the U.S. for years and have close family ties, such as U.S. citizen spouses and children, can be affected. Such consequences include deportation, permanent bars to returning to the U.S., and mandatory detention by immigration authorities, as well as difficulties in obtaining permanent residence or becoming citizens through naturalization.<sup>5</sup>

Battered immigrants, even if otherwise eligible for permanent residence through the Violence Against Women Act (VAWA), can be rendered ineligible because of a criminal conviction and subject to deportation. Advising non-citizens to plead guilty to seemingly low-level misdemeanor offenses without considering potential immigration consequences to such a criminal conviction can have disastrous consequences. To avoid these consequences, advocates and attorneys should work with defense attorneys and prosecutors to inform them of the potential immigration consequences and get criminal charges dismissed or reduced when possible.

It is not unusual for battered immigrant women themselves to be arrested on domestic violence charges. This often occurs because of language barriers. The police may speak to an abuser or his family members but not to the victim, because she does not speak English. An abuser may assault the victim, causing her to fight back in self-defense, and then call the police and claim that she assaulted him. If the victim speaks little or no

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<sup>4</sup> For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/immigration/enforcement-detention-and-criminal-justice>.

<sup>5</sup> ANN BENSON ET AL., WASHINGTON DEFENDER ASS'N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS IN WASHINGTON STATE, 1 (2001), at [http://www.defensenet.org/immigration/immig\\_main.htm](http://www.defensenet.org/immigration/immig_main.htm) (last visited Aug. 13, 2004).

English, she will not be able to explain what really happened and could be arrested herself. A conviction for domestic violence is a ground of deportability and can render a battered immigrant ineligible for certain relief under VAWA.<sup>6</sup>

It is important to understand that the relationship between criminal and immigration law is complex, and that immigration laws are constantly changing. A misunderstanding of these legal complexities can render an immigrant ineligible for permanent resident status and can possibly result in deportation. **It is therefore essential to consult an immigration attorney with knowledge of the consequences of criminal convictions before proceeding with the defense of a survivor of domestic violence who is facing criminal charges. This will enable the victim and her defense attorney to assess the potential effects of the criminal case on her immigration status when deciding how to proceed.**<sup>7</sup>

### **Effects of Criminal Convictions On Immigration Status – An Overview For Battered Immigrants**

There are numerous ways in which a criminal history can negatively affect a battered immigrant's immigration case:

- Regardless of her immigration status, criminal convictions and conduct can make an immigrant survivor subject to “removal proceedings” (formerly known as deportation proceedings) by triggering one of the crime-related legal grounds of inadmissibility or deportation.<sup>8</sup>
- Criminal convictions can trigger legal barriers that will prevent immigrant survivors from getting lawful immigration status and benefits that they would otherwise be entitled to receive. VAWA self-petitions, VAWA cancellation, U and T visa provisions, asylum and citizenship all contain legal bars relating to criminal convictions and conduct.<sup>9</sup>
- Even where a criminal conviction does not trigger a legal bar preventing the immigrant survivor from filing for immigration status or citizenship, it will constitute a negative discretionary factor in deciding her case. Immigration authorities can deny an otherwise eligible applicant if they determine that she does not deserve a “favorable exercise of discretion”.
- If the immigrant survivor has been deported and returns illegally to the U.S., she is at risk of federal criminal prosecution for illegal reentry after deportation. If she has a criminal conviction, it will increase her sentence by possibly years.<sup>10</sup>

Advocates should be aware of common issues of criminal law that affect battered immigrants. The following sections describe some possible scenarios that battered immigrants may face in the criminal justice system and the effects on their immigration cases. **This chapter is not intended to be a comprehensive guide to the immigration consequences of criminal convictions. Instead, it is meant to address some of the more common situations in which criminal matters affect the immigration status of immigrant victims of domestic violence.**

### DEFINITIONS – CONVICTIONS AND SENTENCES UNDER IMMIGRATION LAW

#### *Convictions under immigration law*

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<sup>6</sup> INA §237(a)(2)(E); 8 U.S.C. 1227 (1996); INA §240A(b)(2); 8 U.S.C. 1229b (1996).

<sup>7</sup> For information on how to obtain a client's criminal records, see Appendix 2.

<sup>8</sup> See INA §101(a)(43); §212(a)(2); §237(a)(2); 8 USC 1101(a)(43); §1181(a)(2); §1227(a)(2).

<sup>9</sup> Some of these provisions contain special “waivers” of certain criminal convictions. See INA §212(a)(2)(A)(ii)(I); INA §212(h); INA §204(c). However, many convictions cannot be “waived” and having to apply for crime-related waivers makes these cases much more difficult and susceptible to denial.

<sup>10</sup> See 8 USC 1326. The maximum possible sentence in these cases is either 10 or 20 years. Illegal reentry after deportation is now one of the most prosecuted federal crimes and accounts for over 25% of all cases in some jurisdictions.

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It is important for advocates to understand that the definition of a “conviction” in the criminal justice system differs from the legal definition of “conviction” in the immigration context. The term “criminal conviction” for immigration purposes, is defined by the Immigration and Nationality Act.<sup>11</sup> A judgment that might not be considered a conviction under the criminal law of the relevant jurisdiction may be one for immigration purposes.

The immigration law defines a conviction as follows:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where

- (i) a judge or jury has found the alien [noncitizen] guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.<sup>12</sup>

Many states have a variety of “deferred adjudication procedures” that allow for the criminal case to be continued at some stage of the proceedings in order to give the defendant an opportunity to comply with certain conditions. The specifics of each procedure vary, but they are generally designed to result in the dismissal of charges if the defendant complies with these conditions.<sup>13</sup> Often, the defendant agrees to the admissibility of the police report or certain facts, with the understanding that, if she violates the conditions, the judge will rely on the police report or those facts to determine the defendant’s guilt. Even if these admissions do not constitute a conviction, the admissions, particularly when they include a stipulation as to the sufficiency of the facts, can still have serious consequences for non-citizen defendants. Immigration officials may still find there is an admission to facts “sufficient to warrant a finding of guilt,” and find the non-citizen inadmissible for having admitted to committing a crime, whether or not there is a conviction.<sup>14</sup>

A conviction with a pending appeal is not final and therefore not considered a conviction under immigration law,<sup>15</sup> and juvenile dispositions are not considered convictions for immigration purposes (unless the juvenile was transferred to and convicted as an adult in adult criminal court).<sup>16</sup> Some other dispositions that are not considered convictions under criminal law, such as pretrial diversion, withholding of adjudication, or probation before judgment, may be considered convictions for immigration purposes.<sup>17</sup>

An advocate working with a battered immigrant who has been accused of a crime should consult with the victim’s defense attorney and prosecutors when possible and inform them of potential immigration consequences of a conviction. If a battered immigrant is charged with domestic violence, the advocate should assist the defense attorney in determining the circumstances of the arrest. Questions that should be asked include the following: did the police arrive and only speak with her abuser or his family members? Who speaks English? Was this a case of dual arrest? Is the abuser the predominant perpetrator of abuse in the relationship? Was the victim acting in self-defense?

If the victim was wrongly arrested, the advocate should work with the police and prosecutors to have the case dismissed. If efforts to have the case dismissed are unsuccessful, the advocate must educate the prosecutor and defense attorney about the immigration consequences of a guilty plea and deferred adjudication agreements that contain admissions that could warrant a finding of guilt. Immigrant victims should be

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<sup>11</sup> INA §101(a)(48)(A); 8 U.S.C. 1101(a)(48)(A) (1996).

<sup>12</sup> *Id.*

<sup>13</sup> See e.g. ANN BENSON, WASHINGTON DEFENDER ASS’N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, 14 (2002).

<sup>14</sup> See INA §212(a)(2)(A)(i); 8 U.S.C. 1182(a)(2)(A)(i) (1990), which states that “any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of – (I) a crime involving moral turpitude..., or (II) a violation of... any law or regulation of a State... is inadmissible.”

<sup>15</sup> See *Pino v. Landon*, 349 U.S. 901 (1955).

<sup>16</sup> *Matter of Devison*, Int. Dec. 3435 (BIA 2000); See also Daniel Levy, Under the Auspices of the National Immigration Project of the National Lawyer’s Guild, *U.S. Citizenship and Naturalization Handbook*, §7:28.

<sup>17</sup> *Id.*

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advised not to enter into any plea agreement until the victim and her defense attorney have consulted an immigration attorney for advice.

### *Criminal Sentences*

The sentence a non-citizen receives is often a critical factor in determining the immigration consequences that will result. A sentence for immigration purposes includes not only time served in jail, but any period of incarceration ordered by a court regardless of whether some or the entire sentence is suspended.<sup>18</sup> Many crimes, such as misdemeanor assault and misdemeanor theft, can have drastic immigration consequences if the non-citizen is sentenced to one year or more in prison, even if that sentence is suspended. If a battered immigrant woman is convicted of one of these crimes and receives a 365-day sentence with 364 days of it suspended, she will be considered to have a 365 day sentence for immigration purposes.

### DOMESTIC VIOLENCE CRIMES

An immigrant convicted of domestic violence, stalking, child abuse, child neglect, or child abandonment can be deported.<sup>19</sup> An immigrant can also be deported for violating a protection order.<sup>20</sup> These provisions are grounds of deportability and will apply to immigrants who have been lawfully admitted to the U.S. or who have obtained lawful permanent resident status or conditional permanent resident status.<sup>21</sup>

Domestic violence is defined as any crime of violence (as defined in 18 U.S.C. § 16) that is directed against a person by:

- A current or former spouse of the person;
- An individual with whom the person shares a child in common;
- An individual who is cohabitating with or has cohabitated with the person as a spouse;
- An individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or
- Anyone protected from the perpetrator by state domestic violence laws.<sup>22</sup>

The definition of “crime of violence” under 18 U.S.C. § 16 includes:

- An offense that has as an element of use, attempted use, or threatened use of physical force against the person or property of another; or
- Any felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

An immigrant can become deportable for violating a protection order if the court has determined that the immigrant’s conduct violated the part of the protection order that involves protection against:

- credible threats of violence;
- repeated harassment; or
- bodily injury to the person or persons protected under the order.<sup>23</sup>

Since violating a protection order is a deportable offense, immigrant victims should not agree to, and should contest the issuance of, any civil protection order against them. Abusers sometimes claim at protection order

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<sup>18</sup> INA § 101 (a)(48)(B); 8 U.S.C. 1101(a)(48)(B) (1996).

<sup>19</sup> INA § 237(a)(2)(E)(i); 8 U.S.C. 1227(a)(2)(E)(i) (1996).

<sup>20</sup> INA § 237(a)(2)(E)(ii); 8 U.S.C. 1227(a)(2)(E)(ii) (1996).

<sup>21</sup> Undocumented immigrants who entered illegally and have never received any lawful immigration status are not subject to the grounds of deportation. They will face removal under the grounds of inadmissibility at INA §212. The grounds of inadmissibility relating to crimes do NOT contain domestic violence and protection order provisions. Thus, these immigrants will only face removal for their DV and protection order convictions if they constitute crimes of moral turpitude under INA §212(a)(2)(A)(i).

<sup>22</sup> INA § 237(a)(2)(E)(i); 8 U.S.C. 1227(a)(2)(E)(i) (1996).

<sup>23</sup> INA § 237(a)(2)(E)(ii); 8 U.S.C. 1227(a)(2)(E)(ii) (1996).

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hearings that they had been abused as well, and judges may issue mutual protection orders against both parties in such cases. Such mutual protection orders violate Due Process and are unenforceable under the Full Faith and Credit Provisions of the Violence Against Women Act.<sup>24</sup> In other cases, after the victim has filed for a protection order, the abuser may file his own civil protection order against the victim to retaliate. An immigrant victim who has not committed a domestic violence offense, or who acted in self-defense, should not agree to the issuance of a protection order against her.

Aside from the protection order context, battered victims are sometimes arrested if police officers see that the abuser has a visible wound that may have been inflicted while the battered immigrant was defending herself. When this happens, a battered immigrant may be charged with domestic violence or various forms of assault.<sup>25</sup> A conviction for domestic violence or even simple assault may trigger deportation if the record demonstrates a relationship listed in the Immigration and Nationality Act.<sup>26</sup>

In the Violence Against Women Act of 2000, Congress recognized that there are instances where a battered immigrant may end up with a criminal conviction in connection to her being a victim of abuse. A battered immigrant who is not the predominant perpetrator may be eligible for a waiver of deportation for domestic violence or stalking crimes, if:

- the alien was acting [in] self-defense;
- the alien was found to have violated a protection order<sup>27</sup> intended to protect the alien; or
- the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime –
  - that did not result in serious bodily injury; and
  - where there was a connection between the crime and the alien's having been barred of subject to extreme cruelty<sup>28</sup>

It is often confusing for the police to determine which person is the predominant perpetrator and which is the victim. This confusion is heightened when a battered immigrant woman does not speak English and her abuser does. Advocates should work with the prosecutor to provide evidence of a history of abuse and explain that prosecuting a battered immigrant woman may lead to her deportation or removal, and is not in the interests of justice. If possible, advocates should demonstrate that the victim was acting in self-defense and should not be charged with any crime.

### CRIMES OF MORAL TURPITUDE

A non-citizen who is convicted of a crime of moral turpitude committed within five years of admission for which a sentence of one year or longer may be imposed, or who has two or more convictions of crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, is deportable.<sup>29</sup> Crimes of moral turpitude are also a ground of inadmissibility and, thus, can render an immigrant survivor ineligible to reenter the U.S. or to obtain immigration benefits such as self-petitioning, adjustment of status, VAWA cancellation of removal, and citizenship.<sup>30</sup>

#### *Definition and Examples of Crimes Involving Moral Turpitude*

It is not always easy to determine if a conviction amounts to a crime involving moral turpitude. Courts have found that a number of different crimes involve moral turpitude, and an attorney will often have to compare

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<sup>24</sup> 18 U.S.C.A. §2265(c) (2000).

<sup>25</sup> For more information, please contact the National Clearinghouse for the Defense of Battered Women, 125 South Ninth Street, Suite 302, Philadelphia, PA 19107, T: (215) 351-0010, F: (215) 351-0779.

<sup>26</sup> INA §237(a)(2)(E)(i) (1996).

<sup>27</sup> Statutes and case law in virtually every jurisdiction that has addressed the issue, state that the protection order is between the court and the abuser. Victims cannot be convicted of violating a protection order issued to protect them. See e.g. *Ohio v. Lucas* 795 N.E.2d 642, 647 (OH 2003); *Cole v. Cole*, 556 N.Y.S.2d 217, 219 (Fam. Ct. 1990); See also Catherine E. Klein and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1114-17 (1993).

<sup>28</sup> INA § 237(a)(7)(A); 8 U.S.C. 1227(a)(7)(A) (2000).

<sup>29</sup> INA § 237(a)(2)(A); 8 U.S.C. 1227(a)(2)(A) (1996).

<sup>30</sup> INA § 212(a)(2)(A)(i)(I); 8 U.S.C. 1182(a)(2)(A)(i)(I); INA §101(f); 8 U.S.C. 1101(f).

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the exact criminal statute to the case law. Crimes such as murder, rape, voluntary manslaughter, robbery, burglary, theft, arson, aggravated assault, forgery, prostitution, and shoplifting have consistently been held to involve moral turpitude. In general, the following types of crimes have also been held to involve moral turpitude:

- Crimes that involve an intent to defraud or intent to steal;
- Crimes which have as an element an intentional or reckless infliction of harm to persons or property;
- Felonies and some misdemeanors that involve malice; and
- Sex offenses that involve some “lewd” intent.<sup>31</sup>

Crimes that do not involve the above elements have generally been held not to involve moral turpitude. These include involuntary manslaughter, simple assault, breaking and entering, criminal trespass, malicious mischief, and various weapons possession offenses.<sup>32</sup> Violations of statutes that merely license or regulate and impose criminal liability without regard to evil intent, such as parking violations, do not constitute crimes of moral turpitude.<sup>33</sup> Advocates and attorneys should be aware that the determination of whether a crime constitutes an act of moral turpitude is determined by closely examining the statute under which your client is accused and relevant court decisions, and requires expert analysis by an attorney with experience in immigration and crimes.<sup>34</sup>

There are certain crimes that are encountered more frequently in cases involving battered immigrants, and are often a result of the abuse. Advocates should work with the prosecutor to provide evidence of a history of abuse in these cases, and urge dismissal of cases where the immigrant victim acted in self-defense.

### **Examples of crimes that are often connected to abusive relationships include:**

- **Theft:** An abused woman is often left without economic means if she has left her husband or if he has refused to give her money. Desperate immigrant women may attempt to shoplift food or other supplies for themselves and their children without realizing that a criminal conviction could lead to deportation. Theft crimes are usually considered crimes of moral turpitude.
- **Fraud:** An abused woman may have been forced to be involved in fraudulent activities by her abuser. Further, an abused woman trying to support herself and her children may engage in fraud or fraud for economic reasons, such as forgery, passing bad checks, or using fraudulent documents to work if she does not have legal employment authorization.
- **Prostitution:** An abused woman may have been forced into prostitution by her abuser.

Battered immigrants who qualify for relief under VAWA may be eligible for waivers in these cases if they can establish hardship to themselves, or a U.S. citizen or permanent resident parent or child, or if they can show the crime was connected to the abuse.

### *Exceptions and Waivers*

The crime of moral turpitude ground of inadmissibility – that applies to most immigrants seeking lawful status (such as VAWA self-petitions, U and T visas and adjustment of status applicants) – provides two exceptions and a waiver. These convictions can remove a crime of moral turpitude as a legal bar to getting lawful status.

### **The Petty Offense Exception**

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<sup>31</sup> Ann BENSON, WASHINGTON DEFENDER ASS'N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, 51 (2002).

<sup>32</sup> *Id.*

<sup>33</sup> See Brian Bates, *Guerilla Lawyers II: Lessons in Basic Strategy and the Art of War*, in AM. IMMIGR. LAW. ASS'N., 2000-2001 IMMIGRATION AND NATIONALITY HANDBOOK, 284, 287 (2001-02) (citing Matter of Short, 20 I&N Dec. 136 (BIA 1989)).

<sup>34</sup> *Id.* at 287.

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The petty offense exception applies to a battered immigrant who committed only one crime, as long as the maximum penalty for the crime does not exceed one year, and the battered immigrant was not sentenced to a term of imprisonment of more than six months (including time suspended).<sup>35</sup>

### The Juvenile Exception

The juvenile exception applies if the battered immigrant committed the crime when she was under 18 years old and was released from confinement more than five years before filing for an immigration benefit or admission to the United States.<sup>36</sup>

Immigrants with convictions for crimes involving moral turpitude, prostitution, or one conviction of simple possession of 30 grams or less of marijuana (but not other drug crimes) may qualify for a waiver of inadmissibility under INA § 212(h). Normally the applicant must establish extreme hardship to a U.S. citizen or permanent resident spouse, parent, or child to qualify. Battered immigrant VAWA self-petitioners are eligible for the waiver if they can establish extreme hardship to themselves.<sup>37</sup>

When assisting battered immigrants with a criminal record, advocates and attorneys should always consult with an expert in immigration law and crimes to determine whether one of the exceptions or waivers applies to the facts of a battered immigrant client's case.

## DRUG OFFENSES

Drug convictions, as well as certain drug-related conduct, can trigger some of the most drastic consequences and legal bars under immigration law. Many of the drug-related provisions create absolute bars to obtaining immigration benefits. Advocates must give extra caution to analyzing any case where the client has a history of involvement with – or convictions for – drugs.

A battered immigrant who is found to be a drug abuser or addict, or who has a conviction or admits to violating any controlled substance law, is inadmissible and generally ineligible for immigration relief, such as permanent residence and VAWA cancellation of removal.<sup>38</sup> A conviction or admission of a controlled substance offense will also prevent an immigrant victim from demonstrating that she is a person of good moral character. The only type of drug offense for which a waiver is available is for a single offense of simple possession of 30 grams or less of marijuana for one's own use.<sup>39</sup>

A related ground of inadmissibility is where the immigration officer “knows or has reason to believe” that a battered immigrant is a drug trafficker, or the spouse or child of a drug trafficker who has received any financial or other benefit from the illicit activity and knew the benefit was the product of such illicit activity.<sup>40</sup> Similarly, involvement with drug trafficking prevents a showing of good moral character.<sup>41</sup> Advocates should determine whether a battered immigrant client actually benefited from drug trafficking activity her abuser might be involved in, or if she was forced to engage in such activity or receive benefits from such activity as part of the pattern of abuse.

Drug convictions can also trigger deportation as both a controlled substance violation and as an aggravated felony.<sup>42</sup>

## AGGRAVATED FELONIES

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<sup>35</sup> INA § 212(a)(2)(A)(ii)(II); 8 U.S.C. 1182(a)(2)(A)(ii)(II) (1990).

<sup>36</sup> INA § 212(a)(2)(A)(ii)(I); 8 U.S.C. 1182(a)(2)(A)(ii)(I) (1990).

<sup>37</sup> No waivers are available for the crimes of murder or torture, INA §212(h); 8 U.S.C. 1182(h) (2000).

<sup>38</sup> INA § 212(a)(1)(A)(iv); 8 U.S.C. 1182(a)(1)(A)(iv) (1990) (stating drug abuser or addict is inadmissible); INA §212(a)(2)(A)(i)(II); 8 U.S.C. 1182(a)(2)(A)(i)(II) (1990) (stating alien convicted for controlled substance offense is inadmissible).

<sup>39</sup> INA §101(f)(3); 8 U.S.C. 1101(f)(3) (1990), INA § 212(h); 8 U.S.C. 1182(h) (2000).

<sup>40</sup> INA § 212(a)(2)(C); 8 USC § 1182(a)(2)(C) (2000).

<sup>41</sup> INA § 101(f)(3); 8 USC § 1101(f)(3) (1990).

<sup>42</sup> INA §237(a)(B)(i) and §237(a)(2)(A)(iii); 8 USC 1227(a)(2)(B)(i) and 1227(a)(2)(A)(iii) (1996).



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A battered immigrant woman convicted of an aggravated felony at any time is deportable.<sup>43</sup> The aggravated felony provision is defined by immigration law, not state criminal law, and includes 21 provisions that encompass hundreds of offenses.<sup>44</sup> Some examples include: murder, rape, child sexual abuse, trafficking in controlled substances, firearms offenses, child pornography, obstruction of justice or perjury with a sentence of one year or more, fraud or deceit if the loss exceeds \$10,000, crimes of violence with a sentence of one year or more, and theft or burglary offenses (including receipt of stolen property) with a sentence of one year or more.<sup>45</sup>

Any offense that falls within the aggravated felony definition triggers drastic immigration consequences. A battered immigrant woman convicted of an aggravated felony will not be eligible for VAWA self-petition or cancellation of removal because she will be barred from establishing good moral character. She will generally be subject to deportation, despite many years' residence in the U.S. or what family ties she might have here.<sup>46</sup> She also will be ineligible for most forms of relief from deportation.<sup>47</sup> If she returns to the U.S. unlawfully and is prosecuted for illegal reentry after deportation, she faces severely enhanced penalties - up to 20 years in prison.<sup>48</sup>

### *Examples of Aggravated Felonies*

- **Drug offenses:** In addition to rendering an immigrant inadmissible generally without a waiver, many drug offenses are also considered drug trafficking offenses and thus aggravated felonies.<sup>49</sup> Battered immigrant women may be implicated and arrested for drug offenses because their abusers are involved with drugs.
- **Crimes of violence:** A conviction for a crime of violence with a sentence of one year or more is an aggravated felony.<sup>50</sup> If a battered immigrant is convicted of domestic violence or any crime where the use, attempted use, or threatened use of force is an element and if she is sentenced to one year or more, even if all or part of her sentence is suspended, her conviction will be treated as an aggravated felony under immigration law.
- **Theft offenses:** A conviction for theft, including possession or receipt of stolen property, with a sentence of one year or more, even if all or part of her sentence is suspended, will be considered an aggravated felony.<sup>51</sup>

## **Law Enforcement Response: What is the Likelihood That Battered Immigrants Who Call the Police for Help Will Be Reported to Immigration Authorities?**

Battered immigrants face multiple barriers when trying to access services to aid their escape from violent relationships, or to stop the abuse.<sup>52</sup> A battered immigrant's experience with the police, either in their

<sup>43</sup> INA § 237(a)(2)(A)(iii); 8 U.S.C. 1227(a)(2)(A)(iii) (1996).

<sup>44</sup> INA § 101(a)(43); 8 U.S.C. 1101(a)(43) (1996).

<sup>45</sup> *Id.*

<sup>46</sup> If she is a lawful permanent resident, or was admitted as a refugee, she will be entitled to a hearing before an immigration judge, but otherwise, she can be subject to an administrative order of removal with virtually no right to appeal.

<sup>47</sup> Katherine Brady & Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility Related to Crimes*, (2003), at [http://www.fd.org/pdf\\_lib/GroundsofDeport\\_Inadmiss.pdf](http://www.fd.org/pdf_lib/GroundsofDeport_Inadmiss.pdf).

<sup>48</sup> ANN BENSON, WASHINGTON DEFENDER ASS'N, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, 51 (2002).

<sup>49</sup> Katherine Brady & Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility Related to Crimes*, 95 (2003), at [http://www.fd.org/pdf\\_lib/GroundsofDeport\\_Inadmiss.pdf](http://www.fd.org/pdf_lib/GroundsofDeport_Inadmiss.pdf).

<sup>50</sup> A crime of violence includes any offense that has the use, attempted use, or threatened use of force as an element of the offense, as well as any felony that by its nature presents a substantial risk that force will be used against a person or property in the commission of the offense. 18 U.S.C. § 16.

<sup>51</sup> INA § 101(a)(43)(G); 8 U.S.C. 1101(a)(43)(G) (1996); Katherine Brady & Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility Related to Crimes*, 97 (2003), at [http://www.fd.org/pdf\\_lib/GroundsofDeport\\_Inadmiss.pdf](http://www.fd.org/pdf_lib/GroundsofDeport_Inadmiss.pdf).

<sup>52</sup> See generally Sandra D. Pressman, *The Legal Issues Confronting Conditional Resident Aliens Who are Victims of Domestic Violence: Past, Present, and Future Perspectives*, 6 MD. J. CONTEMP. LEGAL ISSUES 129 (1995); Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 249-253 (2000); Leslye E. Orloff and Dave Nomi, *Identifying*

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homeland or in the U.S., could influence her trust in calling the authorities for help. Battered immigrants are often afraid to call the police due to many reasons: fear of deportation, fear of retribution from their abusers, fear of themselves being arrested, fear of being separated from their children, and fear of future economic, social, or employment-related repercussions, and negative experiences with the police back in her homeland.<sup>53</sup> These barriers preclude many battered immigrants from requesting the help they need to escape the domestic violence. The barriers become even more pronounced when the batterer is a U.S. citizen or resident, and the victim does not have permanent immigration status.<sup>54</sup>

In many cases, the most difficult hurdle for battered immigrants is the fear of being reported to immigration officials by police.<sup>55</sup> According to a survey of 230 battered immigrant Latinas in Washington, D.C., battered immigrants with stable permanent immigration status were significantly more likely to call the police for help in a domestic violence incident than any other battered immigrant women (43.1%).<sup>56</sup> This reporting rate dropped to 20.8% for battered immigrants who were in the United States legally but whose status was temporary, and fell to 18.8% for battered immigrants who were undocumented.<sup>57</sup> These reporting rates are significantly lower than reporting rates of battered women generally in the U.S., which range between 53% and 58%.<sup>58</sup>

Addressing immigrants' fears about calling the police is essential to the safety of victims, their children and our communities. Battered immigrants and advocates may be concerned that if the police is called, the victim's immigration status will be asked, thus taking the focus away from prosecuting the abuser. Ultimately, an abuser who is not held accountable is likely to continue abusing the victim, as well as harm family members and future intimate partners. Furthermore, when an immigrant who calls the police for help is turned in to the immigration authorities, word spreads quickly in that immigrant community.<sup>59</sup> As a result, immigrant victims of crimes are silenced and will be afraid to call the police and report crimes.

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Police officers are not required to inquire into or report the immigration status of crime victims who call for help. However, IIRAIRA does allow the Attorney General to enter into agreements with state or local law enforcement to delegate police officers the authority to enforce federal immigration laws.<sup>60</sup> As of the date of publication of this chapter, only a limited number of police officers in Florida and Alabama are authorized to enforce immigration law through such agreements.<sup>61</sup> Additionally, the Anti-Terrorism and Effective Death Penalty

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*Barriers: Survey of Immigrant Women and Domestic Violence in the DC Metropolitan Area*, POVERTY AND RACE 9-10 (Jul/Aug 1997); Mary Ann Dutton and Giselle Aguilar Hass, *Use of Expert Testimony Concerning Battering and Its Effects on Immigrant Women*, in DOMESTIC VIOLENCE AND IMMIGRATION: APPLYING THE IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT: A TRAINING MANUAL FOR ATTORNEYS AND ADVOCATES, Appendix C (2000); Leslye E. Orloff and Rachel Little, *SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN*, A 'HOW TO' MANUAL FOR BATTERED WOMEN'S ADVOCATES AND SERVICE PROVIDERS 279 (May 1999); Leti Volp, *WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE 16-20* (1995); Catherine Klein and Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1019 (1993).

<sup>53</sup> Leslye E. Orloff, et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 55 (2003).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; See also, Mary Ann Dutton, et al., *Characteristics of Help-Seeking Behaviors, Resources, and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 251-56 (2000).

<sup>56</sup> Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 60 (2003) (citing the Ayuda Inc. research project).

<sup>57</sup> *Id.*

<sup>58</sup> Martha L. Coulter & Kathryn Kuehnle, *Police Reporting Behavior and Victim-Police Interactions as Reported by Women in a Domestic Violence Shelter*, 14 J. INTERPERSONAL VIOLENCE 1290 (1999) (reporting rates for the general population of battered women in the U.S. at 53%); CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, *INTIMATE PARTNER VIOLENCE 7* (2000) (reporting rates for battered women at 58%).

<sup>59</sup> Mary Ann Dutton, et al., *Characteristics of Help- Seeking Behaviors, Resources, and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 251-6 (2000).

<sup>60</sup> INA § 287(g), 8 U.S.C. § 1357(g) (1996). Section 287(g)(10) further states that this section does not require states or municipalities to seek a similar agreement to allow their employees to report undocumented immigrants or otherwise cooperate with the immigration authorities.

<sup>61</sup> Florida Memorandum of Understanding, at

[http://www.fdle.state.fl.us/osi/domesticsecurity/domestic\\_security\\_orig/ds\\_5/INS\\_FDLE\\_MOU.pdf](http://www.fdle.state.fl.us/osi/domesticsecurity/domestic_security_orig/ds_5/INS_FDLE_MOU.pdf); April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Law since 9/11*, 55 ALA. L. REV. 1149, 1158-9 (2004).

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Act of 1996 provides state and local police, if authorized by state law, with limited authority to arrest non-citizens in the U.S. when the non-citizen is present illegally and has previously been convicted of a felony and was deported or left the U.S. after such a conviction.<sup>62</sup>

Some police officers, prosecutors, and judges have misinterpreted these sections to justify their decisions to inquire into the immigration status of crime victims and have reported victims to immigration authorities.<sup>63</sup> When this occurs, it can become very difficult to bring criminals to justice, because victims of crime will be afraid to come forward out of fear of deportation. Furthermore, when police officers inquire into the immigration status of crime victims, the police may also inadvertently affect the community relations between police departments and immigrant communities.

To properly address the fears of battered immigrants, advocates and attorneys should develop good working relationships with the police, prosecutors, and judges in their communities. They should work with the justice system personnel on protections established for immigrant victims. Furthermore, advocates and attorneys should work with the police, prosecutors and judges to hold perpetrators accountable for their criminal conduct without considering the immigration status of the victim.

### **Assisting Battered Immigrants with Pending Criminal Cases**

Advocates should work with the battered immigrant and her defense attorney to ensure that the defense attorney consults with an immigration expert on immigration law and crimes. A list of references is provided at the end of this chapter. Advocates should also work with the local prosecutor's office to try to convince the prosecutor to drop or reduce charges where appropriate. **The advocate should provide the following type of information and evidence:**

- **For assault or domestic violence cases:** Provide the prosecutor with information about the relationship, including documented evidence of abuse (medical records, witness statements, protection orders) to establish the history of domestic violence in the relationship. This will help demonstrate that the victim did not commit any domestic violence offense, was acting in self-defense, or is not the predominate perpetrator and should not be charged.
- **For other crimes:** Advocates should provide evidence of a history of abuse demonstrating that a battered immigrant's crimes were at the behest of the abuser, related to efforts to escape abuse, or otherwise connected to the abuse. Such evidence may convince a prosecutor that prosecuting a battered immigrant for crimes connected to the abuse she has suffered may not be in the interests of justice.

If the prosecutor does not agree to drop the charges, the defense attorney and advocate should try to convince him/her to continue the criminal case for a specific period of time without any finding or admission. If there are no new criminal acts by your client after that time period has passed, request the prosecutor dismiss the case.

If none of the above suggestions are effective, work with the battered immigrant client to convince her defense attorney to take the case to trial rather than enter a plea.<sup>64</sup> **A defense attorney who is not aware of the immigration consequences of entering a plea may advise the client that this is the best option for her because she may avoid going to jail by doing so. In many cases, however a guilty or no-contest plea may make the battered immigrant deportable or otherwise have negative ramifications in her VAWA**

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<sup>62</sup> The police officer must obtain confirmation from immigration officials of the status of such an individual and may keep the individual in custody only as long as necessary for immigration officials to take the person into federal custody for removal. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 § 439 8 U.S.C. § 1252(c) (1996).

<sup>63</sup> Leslye E. Orloff, et al., *Battered Immigrant Women's Willingness to call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 88 (2003).

<sup>64</sup> However, it is important to note that for some undocumented immigrants, staying out of jail may be the most paramount concern, as this is where they are most likely to risk apprehension by immigration authorities. Thus, this factor should be taken into account if trial is likely to result in jail time.

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**case.** It is important that the defense attorney understand the immigration consequences before advising a battered immigrant to enter a plea.

The defense attorney may still decide that going to trial is not a good option due to the circumstances of the case and that the immigrant should enter a plea. If a plea agreement is the best option the defense attorney should consult an attorney with expertise in immigration law and crimes for assistance in deciding on a plea to a charge that will not have immigration consequences, or to a charge for which an immigration waiver is available, if these alternatives are possible.

Advocates who are assisting battered immigrants with VAWA self-petitions should refer victims with previous criminal convictions to an attorney with expertise in immigration law and crimes.

An advocate should recognize that they are the battered immigrant's most important allies during any criminal prosecution. It is important for the immigrant victim to stay in close contact with her defense attorney, victim-witness advocate, and the prosecutor handling her case. Provide her with support by accompanying her to all hearings if possible. It is not easy to protect a battered immigrant from the immigration consequences of a criminal charge, but the likelihood of deportation is minimized when knowledgeable and sympathetic advocates and attorneys become involved.

### **Assisting Battered Immigrants Whose Abusers Have Pending Criminal Cases**

In most states, prosecutors have adopted "no-drop" policies for domestic violence in criminal cases. This allows prosecutors to proceed with a criminal case regardless of the wishes of the victim. The no-drop policy is intended to prevent perpetrators from bullying women out of pressing charges. Some prosecutors may even subpoena the battered immigrant to testify as a witness for the prosecution, although the practice of subpoenaing domestic violence victims in criminal cases is not favored. While the "no-drop" policy is intended to protect battered women, it poses difficult safety planning problems for battered immigrants whose abusers are non-citizens, since criminal convictions for domestic violence and other crimes can lead to an abuser's deportation.

For some battered immigrants, deporting her abuser may enhance her safety. For others, however, the deportation may increase the danger to her or her family members. Many battered immigrants are afraid to cooperate in the criminal prosecution of their abusers because of concerns about their own immigration status and economic survival, cultural or religious factors, or the potential increase in danger to themselves or their family members in the U.S. and/or abroad. It is important for advocates, domestic violence civil attorneys, prosecutors and defenders to understand how each of these factors affect the safety of an immigrant victim when considering asking them to cooperate in the criminal prosecution of the abuser.

Victims should be provided with assistance from advocates with training in safety planning and knowledge about the legal rights of immigrant victims. Knowledgeable advocates can work with the victim to answer questions, to dispel misperceptions the victim may have about her legal rights and to provide the victim with the critical support she will need as the criminal prosecution moves forward.

Advocates should carefully interview the immigrant victim to determine what her needs, fears, and concerns are with respect to participating in the prosecution. They should also assess whether her abuser's prosecution and subsequent deportation will enhance her safety or increase the danger to her. This information should also be discussed with prosecutors to help them decide how to proceed in a manner that will hold the abuser accountable and protect the victim's safety. The role of advocates is especially important in this process, as defense attorneys for abusive spouses may try to convince your client not to cooperate. An advocate may be the only independent source of support and information for an immigrant victim in determining how best to protect herself and her children.

When immigrant victims are provided full information about their legal options and when they obtain the support and representation they need, many choose to cooperate in the abuser's prosecution. In the limited number of cases in which the abuser's deportation poses a real danger to the victim, advocates should urge

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prosecutors to enhance victim safety by pursuing measures such as pretrial diversion that will hold the perpetrator accountable without leading to his deportation.

### ASSESSING THE SAFETY OF IMMIGRANT VICTIM COOPERATION IN THE CRIMINAL PROSECUTIONS OF THEIR ABUSERS:

#### **General safety planning tips for battered immigrants whose abusers have pending criminal cases:**

- Encourage her to obtain a civil protection order and ensure that it at least has the following provisions. (See Chapter 7 for more information on protection orders)
  - ❑ Stay away
  - ❑ No contact or communication either directly or through third parties
  - ❑ Abuser's eviction for any shared home
  - ❑ Custody of children
  - ❑ Child support

*If the victim continues residing with her abuser, she should obtain a protection order that prohibits future abuse, orders the abuser into treatment, and orders him not to communicate with her about the criminal case.*

- Help the battered immigrant client develop a safety plan to protect her and her children. If she is still living with her batterer, make sure that she has a safe place to flee during the prosecution if necessary. If she is in immediate danger, encourage her to go to a shelter or safe home.
- If necessary, try to have the police patrol the neighborhood where she lives and make sure that the batterer is ordered to turn over any weapons in his possession. Inform her that the police will be watching over her if you feel that it will enhance her sense of safety.

### ADDRESSING CONCERNS ABOUT THE VICTIM'S IMMIGRATION STATUS

The immigration status of a battered immigrant may be tied to her abuser's citizenship or immigration status. Advocates should work with the battered immigrant to explore options she may have for attaining legal immigration status independent of her abuser. Many battered immigrants are terrified of any involvement in the criminal justice system because they believe their immigration status is fully dependent on the abuser's status and that she will be deported along with him if he is convicted of a crime. When an immigrant woman learns that she may be able to obtain legal immigration status and work authorization without the abuser's cooperation or knowledge, a significant barrier to her involvement in the prosecution is removed. Key safety planning steps advocates should take to enable victims to obtain immigration status include:

- She should be referred to an immigration attorney to assess her eligibility for immigration relief, including relief under VAWA. If she does not qualify for immigration status under VAWA, she may qualify for a U visa as a victim of violent crime if she is willing to cooperate in the abuser's investigation or prosecution. If she qualifies for immigration relief, start preparing her immigration case immediately.<sup>65</sup>
- Make sure that she knows what information she needs for her immigration case. Consider using the protection order as a tool to require the abuser to provide the battered immigrant with the information she needs for her immigration case, such as proof of his U.S. citizenship or permanent resident status.
- Even when your battered immigrant client is undocumented and cannot at this time attain lawful immigration status, she should still be able to cooperate in the criminal prosecution of her abuser. Advocates should work closely with law enforcement, prosecutors, and judges to ensure that they

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<sup>65</sup> See Chapter 3 for more information.

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will not inquire into the immigration status of crime victims or report them to immigration authorities.

- If an immigrant victim fears that the abuser will try to report her to immigration authorities in retaliation for her testimony, ask the prosecutor to include in the abuser's pretrial release order an instruction prohibiting the defendant, or any of his agents from contacting immigration authorities. If his attorney contacts immigration authorities on the abuser's behalf, urge the prosecutor to file a case against the defense attorney for witness-tampering and consider filing an ethical complaint against the attorney with the appropriate bar authorities.

### ECONOMIC CONCERNS

Some battered immigrants are hesitant to cooperate in their abuser's prosecution out of economic concerns. Advocates should discuss options available to battered immigrants so they can support themselves and their children and safely cooperate in the prosecution. The following issues should be addressed:

- Does she currently receive financial help from the abuser, or is there a realistic possibility of such help in the future? Help her determine the extent to which she really depends on her abuser for financial support. Has she actually received child support from her abuser or is she only hoping to receive it in the future? Does she receive child support payments directly from the abuser through a court order, or through the abuser's wages being garnished? Has her receipt of support been regular or sporadic? How would her ability to work legally mitigate her need for support from her abuser? If the abuser has not actually provided child support, childcare, or other financial support, and there is little realistic expectation that he will do so in the future, the economic costs of his deportation may be negligible.
- Help her assess her resources and think about how she can survive without the abuser's support. A battered immigrant who files a VAWA self-petition and receives a prima facie determination of VAWA eligibility may be eligible for public benefits. Any U.S. citizen children she has are eligible to receive public benefits. Once her case is approved, she can obtain work authorization. U visa applicants who receive interim relief receive work authorization. Advocates should brainstorm with a battered immigrant client about other options for supporting herself and her children without the abuser's assistance. These might include:
  - Full or part time employment
  - Self-employment that builds upon her existing skills and contacts
  - Public benefits for her children
  - Public benefits for herself
  - Court-ordered child support paid through wage withholding
  - Temporary support from friends or family members
  - Finding a roommate to share household expenses
  - Seeking first and last month rent on a new apartment from the Red Cross or a faith based program

### CULTURAL AND RELIGIOUS FACTORS

For some immigrant victims, cultural or religious factors may affect her willingness to cooperate in her abuser's prosecution. She may be blamed for her abuser's deportation; stigmatized or ostracized by her family, friends, or community; blamed for breaking up the family or bringing shame upon her family; or held responsible for any reduction in financial support that was being sent to family members residing in her home country. Advocates should help immigrant victim's access culturally competent services and support that may help to counter the effects of cultural or religious disapproval.

There are growing numbers of immigrant women's community based groups. These organizations provide woman-to-woman, culturally competent support and build the immigrant victim's self-esteem. Immigrant women groups can play a key role in connecting immigrant victims to service providers who help battered

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women. They can also help victims involved in cases before the justice system by providing support that respects the victim's culture rather than pressuring her to abandon it.

### DANGER TO THE VICTIM AND HER FAMILY IF HER ABUSER IS DEPORTED

For some immigrant victims, the abuser's deportation may increase danger to the victim, her children, or her family or friends in the United States or her home country. Advocates should conduct a lethality assessment to help an immigrant victim determine whether cooperating in the prosecution is safe for her and her family. Factors to consider include:

- Whether the abuser has a history of stalking, or is likely to stalk the victim or her children;
- Whether the victim has children or other family members in her home country whom the abuser has threatened to or is likely to harm if he is deported;
- The likelihood that the abuser will lie in wait for the victim abroad, so that she can never safely return to see family members;
- The likelihood that the abuser will kidnap her children in the U.S. or take them abroad;
- The likelihood that the abuser will return to the U.S. after deportation and retaliate against the victim.

The victim's safety needs should be paramount in any decision made by advocates and prosecutors about how to proceed in a criminal case to hold abusers accountable. If it is determined that the abuser's deportation would increase the danger to the victim or her family members, prosecutors need not dismiss the criminal case against the abuser. In these cases, the justice system can employ measures to hold the abuser accountable while monitoring his behavior with the goal of curbing future abuse. Prosecutors can request continuances and charge abusers with non-deportable crimes. Judges can place abusers on probation and compel them to enter a treatment program. First time offenders are generally treated more leniently than repeat offenders. If an abuser continues to perpetuate acts of domestic violence after being treated more leniently, he should be prosecuted and sentenced without regard to the immigration consequences.

Prosecutors should not turn the abuser over to immigration authorities. If the abuser is convicted, immigration authorities can deport the abuser after he serves his full criminal sentence. Individuals who reenter the U.S. after being deported can be criminally prosecuted, and the penalties are enhanced for reentry after deportation for a criminal offense.<sup>66</sup> When abusers are removed by immigration authorities instead of standing trial for their crimes, they are very likely to return to the U.S. emboldened by their success at having avoided prosecution.<sup>67</sup>

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<sup>66</sup> INA § 276(b); 8 U.S.C. 1326 (1994).

<sup>67</sup> Karen Saunders, Department of Homeland Security, Domestic Violence Immigration and Law Enforcement, power point presentation at Seven State Capacity Building Summit, Miami Florida, May, 2004 (Deportations provide false sense of security for victims of domestic violence; Most removals are administrative procedures; Perpetrators are likely to return illegally).

## Resources

### PUBLICATIONS

Maria Baldini-Potermin, Defending Non-Citizens in Minnesota Courts: A Summary of Immigration Law and Client Scenarios. (Distributed by the Minnesota Bar Association (612) 333-1183)

Ann Benson, Immigration Consequences of Criminal Convictions: An Overview for Criminal Defenders, Judges and Prosecutors in Washington State, Washington Defender Association's Immigration Project, (2002). Available at [www.defensenet.org](http://www.defensenet.org) or by calling 206-726-3332.

Katherine Brady, with Norton Tooby & Michael Mehr, California Criminal Law and Immigration, Immigrant Legal Resource Center (2004). Available at [www.ilrc.org](http://www.ilrc.org) or by calling (415) 255-9499.

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Converse, K. "Criminal Law Reforms: Defending Immigrants in Peril", The Champion, August 1997 (National Association of Criminal Defense Lawyers). Websites: [www.criminaljustice.org](http://www.criminaljustice.org) or [www.nacdl.org](http://www.nacdl.org)

Ignatius, S. "Overview on Effects of Criminal Convictions for Immigrant Victims of Domestic Violence", (Political Asylum/ Immigration Representation Project). Call (617) 742-9296.

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Kesselbrenner & Rosenberg, Immigration Law and Crimes (West Group, 1999). Call (800) 221-9428.

Maynard, W. "Deportation: An Immigration Law Primer for the Criminal Defense Lawyer", The Champion, June 1999 (National Association of Criminal Defense Lawyers). Websites: [www.criminaljustice.org](http://www.criminaljustice.org) or [www.nacdl.org](http://www.nacdl.org)

Norton Tooby and Katherine Brady, Criminal Defense of Immigrant. (Distributed by The Law Offices of Norton Tooby, 516 52<sup>nd</sup> Street, Oakland, CA 94604/ (510) 601-1300) or [www.criminalandimmigrationlaw.com](http://www.criminalandimmigrationlaw.com) .

Manuel Vargas, Representing the Noncitizen Criminal Defendant (NY State Defender's Association, Criminal Defense Immigration Project, 1998). Call (212) 998-6476.

### INTERNET RESOURCES

Board of Immigration Appeals Precedent decisions <http://www.usdoj.gov/roit/efoia/bia/biaindx.htm>

Immigrant Legal Resource Center <http://www.ilrc.org>

Law Offices of Norton Tooby. <http://www.criminalimmigrationlaw.com>

NACDL Immigration Articles  
<http://www.criminaljustice.org/public.nsf/freeform/Immigration?OpenDocument>

National Lawyers Guild/ National Immigration Project <http://www.nationalimmigrationproject.org>



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### MORE RESOURCES

For immigration questions regarding criminal convictions, contact Dan Kesselbrenner, National Immigration Project/ NLG- (617) 227-9727.

For immigration questions relating to battered immigrants and referrals to experts on immigration and crimes, contact:

- The National Immigrant Women's Advocacy Project (NIWAP); 202-274-4457; [info@niwap.org](mailto:info@niwap.org); <http://wcl.american.edu/niwap>
- Advances Special Immigrant Survivors Technical Assistance (ASISTA); 515-244-2469; [questions@asistahelp.org](mailto:questions@asistahelp.org); [www.asistahelp.org](http://www.asistahelp.org)
- Futures Without Violence; 415-679-5500; [info@futureswithoutviolence.org](mailto:info@futureswithoutviolence.org); [www.futureswithoutviolence.org](http://www.futureswithoutviolence.org)

To get a directory of nonprofit agencies that assist persons in immigration matters, contact the National Immigration Law Center at (213) 938-6452.

To get a list of local immigration attorneys, contact the American Immigration Lawyer's Association, National Office, 1400 Eye Street, N.W., Suite 1200, Washington, D.C. 20005 (202) 216-2400.

In California, contact the Immigrant Legal Resource Center (415) 255-9499

In Florida, contact the Florida Immigrant Advocacy Center (305) 573-1106

In Washington State, Ann Benson, Directing Attorney for the Washington Defender Association's Immigration Project at 206-726-3332 or email: [defendimmigrants@aol.com](mailto:defendimmigrants@aol.com) .

## **APPENDIX 1**

### **Intake Questionnaire: Important Questions for Battered Immigrants Involved in a Criminal Case**

Immigration cases are most successful when advocates develop a trusting relationship with a victim that allows them to collect full and complete information about sensitive issues as early in the case as possible. It is essential, when an immigrant victim has a criminal history, to obtain information about that criminal history as soon as possible. In order to personalize an immigration and criminal strategy for an individual battered immigrant, advocates and attorneys must be aware of the victim's history. Obtaining this information may not be easy, as the victim may be afraid to divulge her immigration status and possible criminal history. Advocates should develop a trusting relationship with the victim by explaining that factual information is necessary to protect her. Advocates should demonstrate that they are there to help the victim, not harm her.

Domestic violence advocates can play a critical role in highlighting problem areas and quickly introducing battered immigrants to qualified criminal defenders and immigration attorneys. In order to coordinate these relationships, it is essential that advocates obtain basic information regarding the victim's immigration status. The next section will present a number of questions that should become routine in any consultation. They are specifically designed to red-flag and highlight areas of concern for an immigration attorney and present a basic blueprint for further consultation. These questions can also help immigration practitioners to focus in on the nature of criminal conduct in the immigrant's history.

Advocates should always ask the following information, which will be helpful when they speak with an immigration attorney.<sup>68</sup>

1. What is the criminal charge that the client has received? What are any possible offenses that she might plea-bargain to?
2. What is the client's criminal history?
3. When did the client first enter the U.S.?
4. What is her visa type? Is her status still valid?
5. Any significant departures from the U.S.?
6. Is the client a lawful permanent resident?
  - a. If so, when did she obtain her green card?
7. If not an LPR, what other special immigration status might the client have?
8. Did anyone ever file a visa petition for the client; if so, get the details of name and visa number; what kind of visa; date filed; and whether it was granted.
9. Has the client ever been deported or gone before an Immigration Judge?
10. Does the client have an Immigration Court date pending? If so, why, and what is the date?
11. Has the client ever before received a waiver of deportability [§ 212(c) relief or cancellation of removal] or suspension of deportation?
12. Where were the client born? Does the client have any relatives who are U.S. citizens? Does the client have a lawful permanent resident spouse or parent?
13. Would the client's employer help her immigrate?
14. For purposes of possible unknown U.S. citizenship, was the client or the client's parent or grandparent born in the U.S. or granted U.S. citizenship? Or, was the client a permanent resident under the age of 18 when a parent naturalized to U.S. citizenship?
15. Has the client been abused by her spouse or parents?
16. Where was the client born? Would the client have any fear about returning, and if so, why?

Following are some explanations of why some of these questions are important.

#### **1) WHAT IS YOUR IMMIGRATION STATUS IN THE UNITED STATES?**

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<sup>68</sup> List adapted from ANN BENSON, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS, PROSECUTORS AND JUDGES IN WASHINGTON STATE 39 - 40 (2001).

## Battered Immigrants and The Criminal Justice System

This question is **important** because there are different rules for different categories of immigrants and waivers for criminal conduct and convictions may be available to one category of immigrants and not to others. For example, a naturalized U.S citizen has greater legal protections and is not subject to deportation or removal for crimes. The exception for naturalized citizens is that their citizenship can be revoked for conduct or crimes which occurred prior to their naturalization and which should have legally barred them from being naturalized. This occurs because the crime was either not revealed to the INS, or it managed to escape their scrutiny. Crimes that a citizen commits after naturalization will not affect their status.

Advocates may not be able to directly ask this question, as battered immigrants may be afraid to admit their immigration status. While this question needs to be asked, advocates need to phrase their questions carefully so that victims are not weary of utilizing services. In addition, many battered immigrants may not have accurate information on their status, as abusers may have given them incorrect information regarding their immigration status.

This question should not be asked of any person unless they are considering applying for immigration benefits for which they might qualify. However, a battered immigrant obtaining benefits for her citizen children should not be asked of her own immigration status. It is generally safe to ask this question of a woman who is married to and abused by her U.S. citizen or lawful permanent resident spouse.

This question is particularly important for battered immigrants accused of crimes. The remedy they will need may be dependent on their specific immigration status. There are different rules for different categories of immigrants and waivers of criminal conduct or convictions may be available to one category of immigrants and not to others.

### **2) IF YOU HAVE LAWFUL PERMANENT RESIDENT STATUS, WHEN AND HOW DID YOU GET IT?**

It is important to know how an immigrant obtained their status because some lawful permanent residents are subject to different rules for crimes committed within five years of being granted lawful permanent residence. In addition, the length of time that a person has been a lawful permanent resident may be considered by immigration judges when using their discretion to rule in favor of a battered immigrant despite the existence of criminal convictions (e.g., through a waiver). Many immigrants with lawful permanent residence status obtained that status through family members or employers who got them visas. In the case of a battered immigrant, it is important to understand how her abusive relationship affected her immigration process as well as find out if she obtained lawful permanent residency through VAWA or a political asylum case.

### **3) WHEN DID YOU FIRST ARRIVE IN THE UNITED STATES AND HOW MANY TIMES HAVE YOU LEFT AND RETURNED SINCE THEN?**

New immigration laws are being applied retroactively. Therefore immigrants who may have committed crimes in the past that were not then disqualifying crimes may now face immigration restrictions and possible deportation. Leaving and reentering the United States may trigger bars to reentry and may trigger the application of new and more severe definitions of disqualifying crimes. In addition, the number of illegal entries made by an immigrant may be a factor in the type of charges brought by immigration authorities, and, depending on the circumstances, may itself constitute a crime. It is also important for immigration attorneys to know the length of absences because it may affect those immigrants attempting to claim relief by way of cancellation of removal, in which case they must demonstrate a continuous physical presence for 10 years, (or 7 years for those still eligible for suspension of deportation), and 3 years for battered immigrants claiming VAWA suspension of deportation. The length of absences can also affect a legal resident's application of naturalization.

**4) CRIMINAL HISTORY: INCLUDING CURRENT CHARGES, ALL ARRESTS, AND DISPOSITIONS (Include Dates or at Least the Year for Each Category)**

This is VERY important for advocates assisting battered immigrants with a criminal convictions, and essential for any immigrant filing for immigration relief. A complete criminal history can assist an immigration attorney in deciding if a particular crime will have harmful immigration ramifications, if the rule against multiple convictions will have any bearing, and if waivers exist. (For more information on waivers, refer to ‘waiver’ section in this chapter) In a wide range of cases, immigration authorities require that applicants submit fingerprints (e.g. attaining lawful permanent residence, filing a VAWA self petition). Attorneys should learn about the criminal history of VAWA-qualified battered immigrants as soon as possible. This allows the immigration attorney assisting in the victim’s VAWA case to address criminal history and seek waivers as early as possible in the application process, as well as develop case strategy that takes any criminal history into account. If the battered immigrant fails to provide the advocate or attorney accurate information about her criminal history, the INS could discover it by scanning her fingerprints. This could be detrimental for the immigrant who may have had an opportunity to get a waiver, or could have possibly convinced the INS to use its discretion in her favor.

**5) LIST FAMILY MEMBERS (Spouse, Parent or Child) WHO ARE U.S. CITIZENS OR PERMANENT RESIDENTS.**

This background is important for advocates and attorneys attempting to get a complete picture of the battered immigrant’s history. In addition, in the context of suspension or cancellation proceedings, the applicant will be required to establish hardship of legal resident or U.S. citizen family members.

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