February 18, 2009

Michael Aytes
USCIS
20 Massachusetts Ave. NW
Washington D.C. 20529

Dear Mr. Aytes,

We are writing to you on behalf of the National Network to End Violence Against Immigrant Women ("National Network") and ASISTA Immigration Technical Assistance to advise you of changes to USCIS handling of VAWA self-petitioning and U visa cases that have harmfully affected the quality of such adjudications. Because of these changes, individual survivors Congress intended to help, such as those described herein, cannot work legally or access public benefits and are therefore unable to gain security and safety from their abusers. In addition, the current system's apparent indifference to illegitimate decision-making is swiftly eroding the trust CIS has garnered with domestic violence survivors, advocates and attorneys through a decade of hard work and dedication.

To rectify this problem, we ask that you restore systems that were previously in place: Supervision of the VAWA/U supervisory staff by CIS VAWA/U policy personnel at headquarters, not by a CIS superstructure uneducated in domestic violence, and direct communication between Network representatives and the VAWA/U supervisors.

This letter addresses the failings of the current system from an immigration law perspective. Please also see the memorandum from Legal Momentum to Senator Leahy, attached, concerning the policy implications of this unfortunate structural shift.

Summary

Since the restructuring the CIS VAWA unit at VSC has denied VAWA self-petitions and U visas because of obvious ignorance about domestic violence and legal standards that violate the law. Because the CIS personnel who make policy can no longer communicate with the unit's supervisors who are trained in domestic violence, there is no accountability for these wrongful denials. CIS must eliminate personnel from the system who are not trained in domestic violence or who are antagonistic to this program. It must restore the direct lines of communication between CIS policy personnel and VAWA unit supervisors, and allow those supervisors to communicate directly with the field, when necessary. This is the system that worked well for ten years, but has been eviscerated by the restructuring.

The following cases illustrate the problems that have arisen because of the restructuring. Unfortunately, they are only representative, not the lone cases of wrongfully denied self-petitioners and U visa applicants.

Undermining the Any Credible Evidence Standard

As the former INS General Counsel stated: "[S]elf-petitioners are not likely to have access to the range of documents available to the ordinary visa petitioner. . . .Adjudicators should be aware of these issues and should evaluate evidence submitted in that light."[1] In the cases that follow, adjudicators and those who review their decisions (if they were reviewed by others), not only fail to heed this guidance, they use their discretion to undermine it.

The VAWA unit must return to embracing the law. To ensure quality control of decision making, unit supervisors must be allowed to communicate directly with those at CIS headquarters who make VAWA and U policy, as well as with experts on domestic violence and related crimes. Problem cases must be reviewed by supervisors trained in victims of crimes issues, and adjudicators and supervisors who are not amenable to education about domestic violence or who disagree with Congress' approach and goals should be removed from the unit. If CIS fails to correct this problem, we will work with Congress to insist that CIS assign ONLY personnel who understand domestic violence and Congressional intent to working on any aspect of VAWA self-petitions and U visas.

I. Denials Based on Ignorance of Domestic Violence

At least one self-petition adjudicator appears ignorant about domestic violence and, because of this ignorance, denies self-petitions and motions to reconsider based on errors flowing from this ignorance. In the past, we would have corrected inaccurate interpretations of the facts based on ignorance of domestic violence by communicating directly with supervisors, so they could pull the files and review with the adjudicators. Now, these cases are denied without review by a supervisor trained in domestic violence and VAWA. This does exactly what Congress hoped to stop by passing the law: eliminate the immigration system as a weapon of abuse against survivors.

A. Using Good Faith Marriage to Deny

In the attached case of Ms. G, the applicant supplied a detailed affidavit that explained how she met her husband, their dating relationship prior to their marriage, what occurred during their marriage, and why she stayed with him after the abuse started. She also supplied numerous photographs of their wedding and attendance at other events together, and affidavits of others.

[1] Virtue, Office of General Counsel, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children, Memorandum to Terrence O'Reilly, Director, Administrative Appeals Office (Oct. 16, 1990), *reprinted in* 76(4) Interpreter Releases 162 (Jan. 25, 1999).

The adjudicator (in the RFE and denial) dismisses the photos because they are undated. How is this relevant? Whether they were taken before or after the marriage, they are evidence that they had a real relationship.

The adjudicator also appears to insist on "jointly-held accounts" and "co-mingling of funds," exactly the kinds of evidence lacking in many domestic violence cases. He or she apparently dismisses love letters written by the abuser (because the victim no longer has her own letters) and affidavits of others, as well as the applicant's own affidavits, which may be the only evidence many domestic violence survivors will have of good faith marriage. This evaluation of the evidence not only reveals ignorance about the power and control of domestic violence abusers (they are not likely to give back the letters the victim wrote, for instance), it violates the guidance laid out in the Virtue memo noted above.

Perhaps this problem flows from assigning adjudicators whose primary background is in identifying marriage fraud. Evidence of this is the statement that "the self-petitioner must credibly show that they have entered into a marriage with the intention of building a life together, rather than circumventing the immigration law." Does this adjudicator approach these cases assuming victims are entering these marriages to obtain status? If CIS is assigning fraud investigators to this unit, it is especially important that such adjudicators be trained in how their normal assumptions do NOT apply in the domestic violence context. Ms. G's denial demonstrates how the assumption of marriage fraud undermines the purpose of the law.

Denials based on inappropriate marriage fraud assumptions are particularly insidious; such claims are a primary weapon abusers use to manipulate the legal system against their victims.

B. Using Negative Credibility Determinations to Deny

Over the years, we have repeatedly discussed with VAWA supervisors the framework and factors for evaluating credibility in VAWA self-petitions. Several times, we have supplied an updated legal analysis of the statutory foundation, INS/CIS memos and relevant case law on credibility. Because neither we nor the CIS HQ VAWA policy personnel can communicate with supervisors now, we have not been able to provide this analysis for the cases noted below. Whoever reviews these credibility denials, if anyone does, appears unfamiliar with this legal background. While we understand that adjudicators and supervisors may not be lawyers, they are still bound by the relevant statute, agency guidance and case law governing credibility.

As the attached cases illustrate, negative credibility findings are often based on ignorance about domestic violence. Compounding this problem, adjudicators seem to seize on the discretionary aspect of the "any credible evidence" standard to justify negative credibility findings based on such ignorance. It is true

that determinations about the credibility of evidence is "one that must be made by the adjudicating officer on a case-by-case basis," as noted in the denial of Ms. F's motion to reconsider. When officers abuse the "any credible evidence" standard to deny meritorious applications, however, they should be removed from the VAWA unit, not affirmed in thwarting the will of Congressional.

Ms. L's Case

Ms. L provided a detailed affidavit concerning regular marital rape, battery, isolation, and degradation/humiliation. Her sister and a neighbor provided statements not only about what she had told them, but about what they had seen themselves. A school counselor and a social worker also corroborated that Ms. L described the abuse to them. Nevertheless, the adjudicator cited immaterial "discrepancies" and "inconsistencies" in these corroborating affidavits and in her own affidavit to find these documents lacked credibility. Despite the abundant evidence of abuse, the adjudicator denied for failure to demonstrate battery/extreme cruelty.

Some of the alleged inconsistencies are completely unrelated to whether Ms. L suffered battery/extreme cruelty and seem, instead, designed to serve as an excuse for denying the application. Others are misstatements of the evidence supplied, or demonstrate ignorance about how domestic violence survivors reveal or fail to reveal what they've experience to others. In addition, this adjudicator applied the "witness" standard for corroborating declarations which, as noted below, violates the any credible evidence standard and is an issue we have rectified many times with VAWA unit supervisors. In this case, moreover, some of those providing corroboration had witnessed acts of domestic violence.

Ms. L's Motion to Reconsider the Denial amply refutes these conclusions but, since we cannot ensure that it is reviewed by a supervisor trained in domestic violence, we expect Ms. L to be wrongly denied status.

Ms. F's Case

The abuse in Ms. F's case included hitting and attempted rape, degradation/humiliation, economic control and manipulation, threats over the phone and threatened abuse of the immigration system. The adjudicator initially denied the case due to immaterial inconsistencies in dates and timelines, failure to consider all evidence submitted, and insistence on the kind of primary evidence Congress said was not available to many domestic violence survivors, such as joint leases and bank accounts.

The applicant had provided other credible documentation to support the eligibility requirements, including her own affidavit and affidavits by a counselor and a friend familiar with the relationship. The counselor explained in her declaration why Ms. F failed to reveal to the police the specifics of the abuse she suffered when they responded to her call.

In the denial of Ms. F's motion to reopen, the adjudicator makes several statements that show lack of understanding of domestic violence and the any credible evidence standard. The adjudicator finds that two of the corroborating affidavits lack credibility because the primary source of the information in these affidavits is the applicant. The adjudicator also seems to insist that only those who actually "witnessed" the underlying activity are credible.

Most self-petition corroborating affidavits cannot meet this standard because abusers do not generally perform their acts of abuse in front of others. Moreover, this standard for corroborating affidavits is derived from the primary or secondary evidence standard. In the self-petitioning context, it eviscerates the any credible evidence standard.

Instead of smugly citing adjudicator discretion, whoever reviewed the motion should have been disturbed by the adjudicator's apparent insistence on witnesses to show corroboration. In the past, a supervisor could have ensured that this adjudicator received more education about domestic violence and the Congressional purpose underlying the law. According to practitioners who have spoken to the officer on the VAWA hotline, supervisors no longer review motions to reopen or reconsider. There is no quality control over abuse of discretion by individual self-petition adjudicators.

Instead, wrongfully denied self-petitioners must now appeal to the AAO, which has not assigned officers trained in domestic violence or VAWA to handle such claims. Moreover, those who do appeal to the AAO wait many years for any decision. During this period, these appellants languish without work authorization or access to public benefits. Such a system discourages domestic violence survivors from accessing the security and safety Congress intended.

C. U Denials Based on Inaccurate Substantial Evidence Standard

One of the two U adjudicators seems to be using a standard for meeting the "substantial abuse" requirement that violates the regulations, the any credible evidence standard and Congressional intent. This seems to be based on ignorance about domestic violence and inadequate attention to evidence submitted.

In the first example provided in the attached document, the adjudicator asked for "additional evidence" from a victim of domestic violence, some of which the survivor had supplied in the initial application. The denial itself describes evidence that should have met the standard:

> "You reported being depressed, stressed, and stated you did not want to live '. . in this situation anymore'. . . .You reported having difficulty falling and staying asleep. . .The attending physician's impression was that you had an adjustment disorder, with a noted depressed and anxious mood.

As a result, you were observed in the emergency room and referred to social services and for psychotherapy."

Despite this evidence, the adjudicator parrots the regulation's list of factors and says the evidence does not meet it.

In the second denial, of another domestic violence victim, the adjudicator noted that the applicant supplied a hospital report documenting leg, neck, cardiovascular, visual, and gastrointestinal/neurological pain as a result of an assault. The adjudicator acknowledged that this shows the applicant sustained injury and bruises, but asserts this is not sufficiently "substantial."

In the third case, as articulated by the denial, the applicant submitted medical evidence of a contusion to the applicant's eye socket, the consequence of being kicked by the abuser. The adjudicator determined that, because the applicant did not sustain injury to "essential organs" and could be discharged without risk, the harm she suffered was not substantial.

What, exactly, would meet the standard for this adjudicator? The harm enumerated in these cases is exactly what law enforcement and victim advocates say are the kinds of substantial harm many crime victims suffer.

VAWA supervisors and the CIS policy personnel charged with implementing the U visa must review these denials. If they agree that this evidence meets the standard, then this U adjudicator should be trained by experts on the subject about the kinds of harm suffered by victims and how they cope,.

If CIS agrees that this evidence is insufficient, then we will contact Congress to discuss whether this is an accurate interpretation of their intent. We doubt that Congress will be pleased that CIS is denying status to crime victims who have proven they are helpful to the criminal justice system and have sustained the kinds of injury described in these denials.

II. Correcting Incorrect Legal Standards

In the past, CIS policy personnel and Network liaisons have worked with VAWA supervisors to correct inaccurate legal interpretations before they became systemic problems. Because of the restructuring, this ability to quickly fix incorrect legal standards has been lost. No useful purpose is served by forcing applicants to use the cumbersome appellate process to prove individual adjudicators are using the wrong standards, when a single email to a supervisor could fix the problem. Moreover, without this quality control, aberrant adjudicators may be denying cases to many more applicants who never appeal.

How many eligible domestic violence survivors have been discouraged because of this? Is this what Congress intended?

A. Prima Facie Good Moral Character Standard

Congress said that VAWA self-petitioners who make a prima facie showing of eligibility are "qualified aliens" for purposes of receiving public benefits. Up until this past year, the VAWA unit told us that this meant "a statement of facts that, if supported, would lead to approval." Now, some adjudicators are requiring police clearance letters for a prima facie showing of good moral character. This is the standard for granting self-petitions, not for finding prima facie eligibility.

Obtaining police clearances can take a long time. Applicants must obtain clearances for every place they have lived for six months or more in the past three years, and some jurisdictions simply refuse to provide police clearance letters. In those latter cases, to receive self-petition approval, applicants must demonstrate good moral character in other ways. Requiring that applicants provide all of this evidence to meet the prima facie standard makes that standard irrelevant and denies quick access to the benefits victims need to escape the economic control of their abusers.

B. Corroborating Affidavit Standard Violating Any Credible Evidence Standard

This is a problem we have corrected numerous times in the past by communicating directly with VSC VAWA unit supervisors and the VAWA policy personnel at CIS Headquarters. Some adjudicators require first-hand knowledge--in the attached example the phrase is "personal knowledge"---of domestic violence to give credit to affidavits from those who know about the abuse. Not only does this violate the any credible evidence standard, it exhibits profound ignorance about the dynamics of domestic violence. In the past, CIS has agreed that, as long as the corroborating affidavit was credible about the source and details of the domestic violence (or other eligibility requirements), that satisfied the any credible evidence standard.

Domestic Violence 101: Abusers don't generally perform acts of battery or extreme cruelty in front of witnesses. This is why Congress created the "any credible evidence" standard, and until now CIS seemed committed to following Congress' lead. Requiring "personal knowledge" will eliminate corroborating affidavits in most cases, except from the victim, and some adjudicators don't credit the applicant's affidavit unless it's corroborated. Both of these approaches to evidence are contrary to Congressional intent and undermine the law.

D. Motion to Reconsider Standard

The attached motion to reconsider denial cites the standards for motions to reopen and reconsider, and then denies a motion to reconsider based on the motion to reopen standard (failure to supply new facts). The motion was based on the adjudicator's inaccurate interpretation of the law, not on lack of adequate facts. We could swiftly have fixed this obvious legal flaw had the old communication system been in place.

This is another example of how the self-petitioning and U appellate structure functions poorly without scrutiny by CIS policy personnel, who receive regular communications from the field concerning problems they encounter. As a result, domestic violence survivors are denied status for reasons that violate the law. Those who issue such wrongful decisions are never held to account.

III. Restore the Old Communication Structure

For over a decade, representatives of the National Network to End Violence Against Immigrant Women were able to communicate directly with CIS (or with former INS) policy personnel and with the VAWA unit supervisors. CIS policy personnel, in turn, worked, trained, and communicated frequently with VAWA supervisors. The system is now failing because CIS has dismantled these direct links.

The Network/CIS Link

The Network, founded in 1992, worked with Congress to create the VAWA and U laws and, because of the special relationship with CIS policy personnel and the VAWA unit, helped craft solutions to emerging implementation issues as they arose. The Network is a broad-based coalition of more than five hundred organizations and individuals that advocate, provide services, and offer assistance to immigrant victims of domestic violence, sexual assault, and trafficking. It is co-chaired by the Family Violence Prevention Fund, the Immigrant Women Program of Legal Momentum, and ASISTA Immigration Technical Assistance. All of these organizations are funded by DOJ's Office on Violence Against Women, are the acknowledged experts in this field, and collect and provide useful information to DHS and to Congress on how the laws are working. In turn, we communicate to the field practice pointers and suggestions supplied by the VAWA unit supervisors. This system no longer functions because of the CIS restructuring.

Historically, the feedback system between the National Network, CIS VAWA/U policy personnel and VAWA unit supervisors ensured a well-functioning system of communication between adjudications and attorneys/advocates. This took several forms, including:

- Question and answer sessions with CIS staff at annual National Network and AILA conferences
- Sending information, fact sheets, and updates from CIS directly to the field through a special VAWA listserv that includes over 1000 subscribers
- Direct access to CIS headquarters staff and VSC supervisory adjudicators to flag urgent or emerging issues

These many modes of communication were helpful to CIS VAWA unit supervisors because they could swiftly identify and fix problems in individual adjudicator practice. Now, however, there appears to be no quality control system at all, and ignorant or antipathetic adjudicators go unchecked.

The CIS Policy/VAWA Unit Link
Although our inability to continue the productive relationship with the CIS VAWA unit is harmful to all involved, the prohibition on direct communication between CIS VAWA/U policy personnel and VAWA unit supervisors is blatantly nonsensical. It seems designed to circumvent and undermine the laws, and the system established over a decade of collaboration that made the laws work has ceased to function. Those wrongfully denied status are returned to a life of fear, offenders use the system as a weapon against them, and the adjudicators responsible for these consequences are never held to account. No bureaucratic or efficiency objective justifies this result. In this area, accuracy of adjudication must always trump efficiency and bureaucracy. Lives are at stake when it does not.

Conclusion
Please immediately restore the prior direct communication system described above. To ensure the problem is resolved as swiftly as possible, w are sharing this memo with key legislators and with other interested parties in CIS and DHS,

Thank you for your attention to this important problem,

On behalf of the National Network to End Violence Against Immigrant Women
Gail Pendleton, Co-Director, ASISTA Immigration Assistance

Cc: Senators Kennedy & Leahy; Congresswoman Lofgren